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Prohibiting Indirect Assistance to International Terrorists: Closing the Gap in United States Law

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Abstract

This Note analyzes the legislative history and case law construing the applicable statutes to determine if a court could extend these statutes to cover indirect involvement of United States citizens and resident aliens in international terrorist acts. The Note will demonstrate that current statutes do not adequately prohibit indirect involvement with international terrorists and will propose new legislation.

PROHIBITING INDIRECT ASSISTANCE TO INTERNATIONAL TERRORISTS: CLOSING THE GAP IN UNITED STATES LAW

INTRODUCTION

The recent prosecution of Edwin Wilson and Frank Terpil, two ex-CIA agents who delivered technical and other forms of assistance to Colonel Qaddafi of Libya,¹ has revealed a gap in

1. Edwin P. Wilson, Francis E. Terpil and Douglas M. Schlachter, Sr. were indicted in the District of Columbia for violations of federal law, including: (1) acting as an agent of a foreign government without notice; (2) conspiring to transport explosives in foreign commerce with intent to use unlawfully; (3) violating the Arms Export Control Act of 1976; (4) unlawfully transporting hazardous materials in foreign commerce; (5) transporting hazardous materials in foreign commerce with intent to use unlawfully; (6) unlawfully exporting defense articles on the United States Munitions List and (7) aiding and abetting. They were also indicted for violations of the law of the District of Columbia. These violations include: (1) conspiring to commit murder; (2) soliciting to commit murder; and (3) aiding and abetting. Indictment at 1, *United States v. Wilson*, No. 80-00,200 (D.D.C. Aug. 7, 1981) [hereinafter cited as Indictment].

The third count of the indictment charged the defendants with conspiring to export explosive materials and devices, a violation of the United States criminal code, 18 U.S.C. §§ 371, 844(d) (1976). Indictment, *supra*, at 2. The defendants' involvement in a terrorist training program was included in count three because the defendants were allegedly instructing Libyan terrorists in the use of explosive devices and materials. *Id.* at 4. The indictment stated that the object of the conspiracy "was to supply covertly and for a profit the Government of Libya with personnel, explosives, explosive materials, and other goods necessary to make explosive devices and to teach others how to make explosive devices in a terrorist training project." *Id.* The means allegedly used by the defendants to further the conspiracy consisted of obtaining thousands of delay devices to construct bombs for use in their terrorist training project. *Id.* at 5. The defendants were indicted for recruiting other men to travel to Libya to manufacture explosive devices and to teach Libyan soldiers how to manufacture explosive devices in a terrorist training project. *Id.* at 5-12.

Edwin Wilson is currently a defendant in three other actions. In *United States v. Wilson*, Cr. No. 82-139 (S.D. Tex. Feb. 5, 1983), *appeal docketed*, No. 83-2125 (5th Cir. Mar. 7, 1983), he is appealing his conviction for exporting plastic explosives and other defense articles from the United States to Libya. In *United States v. Wilson*, Cr. No. 82-00,212A (E.D. Va. Nov. 17, 1982), *aff'd*, N.Y. Times, Nov. 8, 1983, at A18, col. 6 (4th Cir. Nov. 7, 1983), Mr. Wilson is appealing his conviction for illegal transportation of fire arms. In *United States v. Wilson*, 83 Cr. 0069 (S.D.N.Y. Oct. 20, 1983), Mr. Wilson was convicted of attempting to kill witnesses and attorneys involved in these federal trials. N.Y. Times, Oct. 22, 1983, at 28, col. 1.

Colonel Muammar el-Qaddafi, the President of Libya, "boasts of supporting terrorism in the Middle East, Europe and Africa." Hersh, *The Qaddafi Connection*, N.Y. Times, June 14, 1981, § 6 (Magazine), at 52. Qaddafi hired Wilson and Terpil, whose "accumulated years of American intelligence agency contacts, experience and expertise" were "a product that could not be purchased on the open market." *Id.* See also Taubman, *Beyond the Wilson Case*, N.Y. Times, Sept. 14, 1981, at A1, col. 3.

United States law.² Current United States statutes do not prohibit indirect involvement³ in activities such as the training of terrorists in guerilla tactics, use of explosives and other warfare, or the recruiting of United States citizens abroad for participation in terrorist activities.⁴ Although individuals indirectly supporting international terrorism may not actually participate in terrorist attacks, their indirect support increases the efficacy of the terrorist arsenal.⁵

2. The Senate reacted to several newspaper articles reporting on the inadequacy of laws prohibiting terrorist activities of Americans in Libya. 127 CONG. REC. S11,926-29 (daily ed. Oct. 22, 1981) (statement of Sen. Glenn). See also *Libya's Role in Sub-Saharan Africa and the Near East: Hearings Before the Subcomm. on African Affairs of the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 14 (1981) (statement of Frank H. Perez). The subcommittee chairman, Senator Kassebaum, alluded to the fact that current laws do not prohibit certain terrorist activities. *Id.* at 14-15; UNITED STATES DEPARTMENT OF STATE, REPORT TO THE SENATE COMM. ON FOREIGN RELATIONS 2 (1982) [hereinafter cited as STATE DEPARTMENT REPORT] (copy on file at the *Fordham International Law Journal*).

A State Department report concluded:

[T]he Department of Justice believes that while existing laws are workable, there are some gaps which should be closed in order to facilitate a better federal investigative and prosecutive response to the problems caused by international terrorism.

In addition, legislation closely regulating the involvement of United States citizens and permanent resident aliens in the providing of training and support services for foreign military and intelligence agencies would be helpful.

Id. at 8.

Pursuant to the International Security and Development Cooperation Act, Pub. L. No. 97-113, § 719(b), 95 Stat. 1519, 1550 (1981), the President was required to submit this report which was to include:

(1) a description of all legislation, currently in force, and of all administrative remedies, presently available, which can be employed to prevent the involvement, service, or participation by United States citizens in activities in support of international terrorism or terrorist leaders; (2) an assessment of the adequacy of such legislation and remedies, and of the enforcement resources available to carry out such measures, to prevent the involvement, service, or participation by United States citizens in activities in support of international terrorism or terrorist leaders; and (3) a description of available legislative and administrative alternatives, together with an assessment of their potential impact and effectiveness, which could be enacted or employed to put an end to the participation by United States citizens in activities in support of international terrorism or terrorist leaders.

Id.

3. The State Department defines involvement, service or participation in activities in support of international terrorism as: "(1) Involvement in actual terrorist attacks; (2) Involvement in a conspiracy to commit such attacks; (3) Providing weapons, training, or other technical assistance with the likelihood that such assistance will be used in a terrorist attack." STATE DEPARTMENT REPORT, *supra* note 2, at 2.

4. See *infra* notes 21-63 and accompanying text.

5. Federal authorities have accepted the accuracy of testimony that Wilson's and Terpil's sale of expertise to Qaddafi assisted him in the "support of such terrorist groups as the

Two existing statutes, the Arms Export Control Act,⁶ which regulates the sale of arms, and one of the Neutrality Laws,⁷ which prohibits military expeditions against a friendly nation, could proscribe some forms of involvement by United States citizens and resident aliens in international terrorist activities, but their scope is limited.⁸

This Note analyzes the legislative history and case law construing the applicable statutes to determine if a court could extend these statutes to cover indirect involvement of United States citizens and resident aliens in international terrorist acts. The Note will demonstrate that current statutes do not adequately prohibit indirect involvement with international terrorists and will propose new legislation.

I. THE APPLICABLE STATUTES

Several statutes prohibit separate aspects of assistance to international terrorists. The Export Administration Act regulates the export of certain technology to terrorist-supporting countries.⁹ The

Palestine Liberation Organization, the Red Brigades of Italy, the Red Army of Japan, the Baader-Meinhof gang in Germany and the Irish Republican Army." Hersh, *supra* note 1, at 53.

6. 22 U.S.C. §§ 2751-2794 (1976 & Supp. II 1978).

7. 18 U.S.C. § 960 (1976).

8. See *infra* notes 21-63 and accompanying text.

9. 50 U.S.C. app. § 2402 (Supp. III 1979). The Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2420 (1976 & Supp. III 1979), evolved out of the Export Control Act of 1949, ch. 11, § 1, 63 Stat. 7 (1949) (renewed). See H.R. REP. NO. 524, 91st Cong., 1st Sess. 3 (1969), reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2705-06. The Act was intended to affect foreign policy through the use of export controls. *Id.* at 2706. In 1977, an amendment to the Act curtailed exports to terrorist-supporting nations. 50 U.S.C. app. § 2402(8) (Supp. I 1977). The export controls were

to encourage other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to those persons involved in directing, supporting, or participating in acts of international terrorism. To achieve this objective, the President shall make every reasonable effort to secure the removal or reduction of such assistance to international terrorists through international cooperation and agreement before resorting to the imposition of export controls.

Id.

Many critics of the export controls argued that the controls endangered United States economic leverage with foreign countries. See, e.g., Note, *Export Controls and the U.S. Effort to Combat International Terrorism*, 13 LAW & POL'Y IN INT'L BUS. 521, 559 (1981) [hereinafter cited as Note, *Export Controls*]. One of the criticisms was that those "countries

Logan Act¹⁰ proscribes correspondence by United States citizens with foreign governments about controversies with the United States.¹¹ The export of arms and munitions of war and "other

who were denied certain U.S. exports often could obtain similar goods from other developed nations who either did not share U.S. foreign policy goals or were unwilling to sacrifice their economic interests to achieve those goals." *Id.* Thus in 1979, when the Export Administration Act of 1969 was up for renewal, there was strong opposition in Congress to the use of export controls. See Note, *Reconciliation of Conflicting Goals in the Export Administration Act of 1979—A Delicate Balance*, 12 LAW & POL'Y IN INT'L BUS. 415, 440, 443 (1980). The Export Administration Act of 1979 sought to balance Congress' interest in deterring international terrorism with "expanding exports by limiting foreign policy controls on exports." Note, *Export Controls*, *supra*, at 565. The act mandates an elaborate process for approving the use of the export controls. The President has broad powers to invoke the controls but the act lists criteria which he must consider before imposing the export controls. 50 U.S.C. app. § 2405(b) (Supp. III 1979). The Department of Commerce determines which items are subject to the licensing regulations of the statute, *id.* §§ 2404(c), 2405(k), and the State Department determines which countries are considered terrorist-supporting. *Id.* § 2405 (i)(1).

Training of terrorists or other forms of indirect support have never been considered items subject to the export controls under the various Export Administration Acts. STATE DEPARTMENT REPORT, *supra* note 2, at 6. Although it may be argued that transferring technical assistance to international terrorists is an export under the regulations of the Export Administration Act, the Act has never been imposed to affect indirect assistance. *Id.* The statute does not fill the gap in the law because the export controls are only in effect against countries designated by the State Department as terrorist-supporting. 50 U.S.C. app. § 2405(i)(1). Should a court extend the statute to prohibit indirect assistance to international terrorists, it could only prohibit assistance to those designated as terrorist-supporting nations. *Id.*

The changes incorporated in the Export Administration Act of 1979 may not have curtailed exports to terrorist-supporting nations. See H.R. REP. NO. 54, 97th Cong., 1st Sess. 3 (1981), *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 2788. The Subcommittee on International Economic Policy and Trade held hearings on the threat to United States national security by the illegal exports of goods and technology. *Id.* The subcommittee "reviewed the means employed to circumvent U.S. export controls, such as illegal exports and reexports, technology smuggling, industrial espionage, exchange programs and conferences, and foreign exchange programs and conferences, and foreign acquisition of U.S. high technology companies, and assessed the adequacy of U.S. resources and efforts to enforce the export control laws." *Id.* The testimony evidenced that goods and technology were still leaving the country illegally, despite the use of export controls. *Id.*

10. 18 U.S.C. § 953 (1976).

11. *Id.* The Logan Act was enacted in 1799, Stat. 613 (1799), and since then has rarely been invoked. *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 89 n.30 (S.D.N.Y. 1964). The statute reads:

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, . . . in relation to any disputes or controversies with the United States . . . shall be fined . . . or imprisoned . . . or both

18 U.S.C. § 953 (1976). The debates in Congress revealed a concern that the power of the Executive was being usurped and that legislation prohibiting "an interference of individual

articles" in violation of other laws is also prohibited.¹² The Neutrality Laws prohibit American citizens from enlisting in the service of

citizens in the negotiations of our Executive with foreign Governments" was necessary. 5 ANNALS OF CONG. 2489 (1798) (statement of Mr. Griswold). Several Congressmen were concerned that the Constitution's provisions prohibiting treason were too narrow in scope. *Id.* at 2496-98 (statement of Mr. Gallatin). One Congressman criticized the Logan Act on the ground that "it [was] drawn in the loosest possible manner; and wants that precision and correctness which ought always to characterize a penal law." *Id.* at 2638 (statement of Mr. Gallatin). See also *Waldron v. British Petroleum Co.*, 231 F. Supp 72, 89 (S.D.N.Y. 1964) (terms such as "defeat" and "measures" are particularly vague).

It is conceivable that the Logan Act has rarely been invoked because of its vague language. See *id.* The most recent reference to the Logan Act occurred in the case of Philip Agee, whose passport was revoked by the State Department in 1980. *Agee v. Muskie*, 629 F.2d 80, 112 (D.C. Cir. 1980), *rev'd sub nom. Haig v. Agee*, 453 U.S. 280 (1981), discussed in Note, *Passport Revocation: A Critical Analysis of Haig v. Agee and the Policy Test*, 5 FORDHAM INT'L L.J. 185 (1981). The State Department alleged that Mr. Agee had violated the Logan Act by communicating with Iranian militants during the hostage crisis. 629 F.2d at 112-13. He purportedly suggested to the Iranians that "they should compel the United States to 'exchange . . . the C.I.A.'s files on its operations in Iran since 1950 for the captive Americans.'" *Id.* It is interesting to note that the Supreme Court's decision in *Haig v. Agee*, 453 U.S. 280 (1981), did not discuss the Logan Act violation.

It may be argued that the Logan Act prohibits indirect support of international terrorism by United States citizens because such actions "defeat measures" of the United States. Measures may be defeated when terrorist acts are inflicted against United States allies. The Logan Act, however, cannot fill the gap in the law because it can only be invoked when a United States citizen interferes with a dispute or controversy that directly involves the United States. 18 U.S.C. § 953 (1976). Indirect involvement with international terrorists usually does not include a dispute or controversy directly involving the United States. See *supra* note 1.

12. 22 U.S.C. § 401 (1976). This statute controls the illegal export of war materials. *Id.* Its violation is often coupled with a violation of the Export Administration Act, 50 U.S.C. app. §§ 2401-2420 (1976 & Supp. III 1979), or the Arms Export Control Act, 22 U.S.C. §§ 2751-2794 (1976 & Supp. II 1978). See *United States v. Marti*, 321 F. Supp. 59, 63-64 (E.D.N.Y. 1970). Section 401 grants duly appointed persons the power to seize and detain munitions, war materials or other items which are exported in violation of an existing law. 22 U.S.C. § 401 (1976). However, in *Marti* the statute's application has been limited. 321 F. Supp. at 59. The defendant in *Marti* was charged with transporting a stolen necklace in interstate commerce, and with a violation of the Export Control Act. *Id.* at 61. The court stated that "section 401 was primarily directed to limiting the export of war materials in protection of American neutrality and foreign policy, [though] it has been consistently applied to other classes of goods." *Id.* at 63. Other classes of goods have included gold, automobiles, platinum, jewelry, and watches. *United States v. Ajlouny*, 629 F.2d 830, 835 n.6 (2d Cir. 1980) (stolen telecommunications equipment), *cert. denied*, 449 U.S. 1111 (1981). Under these interpretations of the statute, indirect assistance in the form of an export would not appear to be included as an 'other article' or class of goods as those terms are used in the statute. Cf. *id.* (indirect assistance exported to international terrorists not similar to exporting other classes of goods). It is difficult to imagine how one would seize indirect assistance since it is often intangible. In addition, because indirect assistance to international terrorists is not a violation of any current law, providing indirect assistance is not a violation of 22 U.S.C. § 401 (1976).

a foreign government,¹³ accepting a commission to serve a foreign government,¹⁴ and acting as an agent of a foreign government within the United States.¹⁵ In addition, the Espionage and Censorship statute¹⁶ prohibits United States citizens from transmitting information related to the national defense of the United States.¹⁷

13. Three sections of the United States criminal code, 18 U.S.C. §§ 951, 958-959 (1976), encompassed in the general category of Neutrality Laws, prohibit certain mercenary activities. Section 959 states:

Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined . . . or imprisoned . . .

Id. § 959(a). Indirect involvement is not the equivalent of serving as a soldier, marine or seaman. Therefore, this statute does not proscribe indirect involvement. It is arguable that in some instances indirect involvement confers a soldier's status on the individual; however, it has been held that the word " 'soldier' must be taken in its ordinary sense, as one enlisted to serve on land in a land army." *United States v. Kazinski*, 26 F. Cas. 682, 683 (D. Mass. 1855) (No. 15,508). This section is inapplicable to Wilson's and Terpil's activity because they did not participate as uniformed members of the Libyan army.

14. 18 U.S.C. § 958 (1976). Section 958 of the Neutrality Laws states: "Any citizen of the United States who, within the jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people . . . with whom the United States is at peace, shall be fined . . . or imprisoned . . ." *Id.* This statute does not apply to indirect involvement with terrorists abroad because of the jurisdictional requirement that some overt act occur in the United States. *Id.* The statute also requires that the activity be directed against a "foreign prince, state, colony, district, or people, in war." *Id.* In many situations, indirect involvement may occur when a foreign country is not at war. *Id.*

15. *Id.* § 951. Section 951 of the Neutrality Laws states: "Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined . . . or imprisoned . . ." *Id.* Here again there is a jurisdictional requirement that the act proscribed occur in the United States. In many situations, however, the indirect involvement occurs outside the United States. *Id.*

16. 18 U.S.C. § 794 (1976).

17. *Id.* Transmitting information related to United States national defense is a crime under § 794. That statute provides:

Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States . . . any . . . information relating to the national defense, shall be punished by death or by imprisonment . . .

Id.

This statute does not require that the United States be at war but that the information be advantageous to any foreign country. *Id.* If the material communicated were considered a war secret then the individual communicating would be guilty under this statute. *See United*

Two statutes, however, are the most applicable in proscribing direct or indirect assistance: the Arms Export Control Act¹⁸ and one of the Neutrality Laws¹⁹ which proscribes military expeditions against friendly nations.²⁰

A. *The Arms Export Control Act*

The United States is the world's largest exporter of arms²¹ and the Arms Export Control Act embodies a policy of controlling sales in furtherance of world peace.²² The statute authorizes the President

to control the import and export of defense articles and defense services and . . . to designate those items which shall be considered as defense services . . . and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.²³

The regulations promulgated under this statute require a license for importing or exporting an item on the United States Munitions List.²⁴ One of the items on the list is technical data.²⁵ The

States v. Rosenberg, 109 F. Supp. 108 (S.D.N.Y.), *aff'd*, 204 F.2d 688 (2d Cir. 1953). However, the transmittal of public information is not prohibited by statute. United States v. Heine, 151 F.2d 813, 816 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946). This statute would also not prohibit the transmittal of unclassified military information.

18. 22 U.S.C. §§ 2751-2794 (1976 & Supp. II 1978).

19. 18 U.S.C. § 960 (1976).

20. See *infra* text accompanying notes 48-63.

21. *Foreign Assistance Authorization: Hearings on S. 795, S. 854, S. 1816, S. 2662, and S. Con. Res. 21 Before Subcomm. of the Sen. Comm. on Foreign Relations*, 94th Cong., 1st Sess. 12 (1976).

22. 22 U.S.C. § 2751. The statute states:

As declared by the Congress in the Arms Control and Disarmament Act, an ultimate goal of the United States continues to be a world which is free from the scourge of war and the dangers and burdens of armaments; in which the use of force has been subordinated to the rule of law; and in which international adjustments to a changing world are achieved peacefully. In furtherance of that goal, it remains the policy of the United States to encourage regional arms control and disarmament agreements and to discourage arms races.

Id.

23. *Id.* § 2778(a)(1). The Munitions List appears at 22 C.F.R. § 121.01 (1982).

24. 22 C.F.R. § 121.01 (1982). The Munitions List is divided into categories. They include: (1) firearms; (2) artillery and projectors; (3) ammunitions; (4) launch vehicles, guided missiles, rockets, torpedoes, bombs, and mines; (5) propellants, explosives, and incendiary agents; (6) vessels of war and special naval equipment; (7) tanks and military vehicles; (8) aircraft, spacecraft, and associated equipment; (9) military training equipment; (10)

term "technical data" could encompass the provision of various forms of technical assistance to international terrorists.²⁶ If this were the case, transmission of all types of technical assistance without a license would violate the statute. Thus a definition of technical data would determine which types of technical assistance must be licensed for export.

In 1976, the Sixth Circuit Court of Appeals, in *United States v. Van Hee*,²⁷ broadly interpreted technical data to include exportation of general knowledge about engineering.²⁸ One commentator criticized this decision as interfering with the general interest in the free flow of information.²⁹ Scientists in the United States voiced strong objections because communication of scientific data to their peers overseas is crucial to their profession.³⁰ They argued that if technical data were subject to stringent export controls, American firms and scientists would be hindered in their research and development.³¹

At the time of the *Van Hee* conspiracy,³² the regulation defined technical data as "any professional, scientific, or technical information relating to arms, ammunition, and implements of war . . . which could enable the recipient to use, produce, or operate . . . an article on the Munitions List."³³ Based on this definition,

military and space electronics; (11) fire control, range finder, and optical and guidance and control equipment; (12) nuclear weapons design and test equipment; (13) classified articles; (14) submersible vessels, oceanographic and associated equipment; and (15) miscellaneous articles. *Id.* Miscellaneous articles include "[a]ny article and technical data relating thereto not enumerated herein having significant military applicability." *Id.*

25. Technical data is defined in 22 C.F.R. § 125.01 (1982). See *infra* text accompanying note 35.

26. 22 C.F.R. § 125.01 (1982).

27. 531 F.2d 352 (6th Cir. 1976).

28. *Id.* at 357. In this case, the defendants were convicted of exporting blueprints of an American designed tank and exporting their engineering experience which they used to rebuild the tank in Portugal. *Id.* The defendants used their knowledge of engineering techniques to ascertain its design and sold that design to the Portuguese government. *Id.* The court held that the common engineering technique used to discover the tank's design was considered technical data because it was useful in illegally reconstructing an item on the Munitions List. *Id.* at 356.

29. See Note, *Arms Control—State Department Regulation of Exports of Technical Data Relating to Munitions Held to Encompass General Knowledge and Experience*, 9 N.Y.U.J. INT'L L. & POL. 91 (1976).

30. *Id.* at 105-07.

31. *Id.*

32. 531 F.2d at 354. The conspiracy transpired in 1965. *Id.*

33. 22 C.F.R. § 125.01 (1966).

the *Van Hee* court concluded that any information about an item on the Munitions List was technical data.³⁴

In 1977, technical data was redefined in the regulations. Technical data now encompasses:

(a) Any unclassified information that can be used, or be adapted for use, in the design, production, manufacture, repair, overhaul, processing, engineering, development, operation, maintenance, or reconstruction of arms, ammunition, and implements of war on the U.S. Munitions List; or (b) any technology which advances the state-of-the-art or establishes a new art in an area of significant military applicability in the United States; or (c) classified information as defined in § 125.02.³⁵

Despite the redefinition of technical data, the courts were again asked to determine the scope of that term. In 1978, the United States Court of Appeals for the Ninth Circuit, in *United States v. Edler Industries, Inc.*,³⁶ held that technical data must relate significantly to some item on the Munitions List.³⁷ The court held that "Congress intended that the technical data subject to control would be directly relevant to the production of a specified article on the Munitions List, not simply vaguely useful for the manufacture of arms."³⁸ The court acknowledged that these limitations were necessary to protect the flow of scientific information.³⁹

34. 531 F.2d at 356. *Van Hee* argued that engineering experience and know-how were exempt from the licensing requirements because this type of experience and know-how was not encompassed by the statute's definition of technical data. *Id.* The court stated that one must apply for an exemption prior to exporting the data and that "[e]ven if the exemption had been claimed, . . . [it] refers only to unclassified technical data in published form." *Id.* at 357. "[T]he contributions of these individuals . . . consisted of knowledge in the form of experience and 'know-how' as well as familiarity with widely distributed technical publications." *Id.* *Van Hee's* knowledge and experience were considered by the court to be technical data because they enabled the Portuguese to use an article on the Munitions List. *Id.* at 356.

35. 22 C.F.R. § 125.01 (1982).

36. 579 F.2d 516 (9th Cir. 1978).

37. *Id.* at 521. *Edler Industries* developed certain materials that had "important applications for rocket and missile components, particularly in nozzles." *Id.* at 518. Although these techniques did not comprise classified information, *Edler's* application for export licenses was denied because "exportation of this particular technical knowledge contravened United States policy." *Id.* *Edler* ignored the license denials and implemented a technical assistance program with a French company. *Id.* at 518-19. It should be noted that the court in *Van Hee* stated that any information on the Munitions List must be licensed for export. 531 F.2d at 356. In contrast, the *Edler* court said that the information must relate significantly to an item on the Munitions List. 579 F.2d at 521.

38. *Edler*, 579 F.2d at 521.

39. *Id.*

The Ninth Circuit's definition of technical data would seem to prohibit indirect involvement such as instruction of a terrorist in the use of a weapon on the Munitions List by a United States citizen or resident alien.⁴⁰ Based on the Ninth Circuit decision, indirect involvement, such as recruiting of other United States citizens for participation in terrorists attacks, or providing general organizational assistance or training in guerilla tactics to a terrorist group, does not significantly or directly relate to any item on the Munitions List.⁴¹ Therefore, a court is precluded from finding a violation of the statute in these activities.

The statute has another definitional weakness that would hinder a court's ability to prohibit export of other assistance. The statute authorizes the President to designate items which shall be considered "defense articles" or "defense services."⁴² Those articles and services comprise the Munitions List.⁴³ Thus any service item on the list is considered a defense service, but the term "defense service"⁴⁴ is never defined by the statute or the regulations.⁴⁵

If the term "defense service" were defined to include activities that are associated with instructing and preparing an individual or group for combat, those forms of indirect involvement that assist in the preparation for combat would be prohibited by the statute. However, not all forms of indirect involvement are defense related.⁴⁶

In conclusion, the section concerning the export of technical data⁴⁷ is the only part of the statute that could possibly be extended to prohibit indirect involvement. In addition, the effect of an amendment to the regulation defining "defense service" would be limited because the data must refer to acts which are defense re-

40. *See id.*

41. *See id.*

42. 22 U.S.C. § 2778(a)(1) (1976).

43. 22 C.F.R. § 121.01 (1982).

44. 22 U.S.C. § 2778(a)(1) (1976); 22 C.F.R. § 121.01 (1982).

45. *See supra* note 44.

46. Pursuant to the Arms Export Control Act, 22 U.S.C. § 2751-2794 (1976 & Supp. II 1978), the State Department promulgated the International Traffic in Arms Regulations, 22 C.F.R. § 121.01 (1982) (ITAR), which encompasses the Munitions List. A revision of ITAR is expected whereby "defense services" will be defined. "The Department of State is now considering whether the definition should be broadened to encompass the training of foreign military forces and the participation of U.S. nationals in foreign military activities generally." STATE DEPARTMENT REPORT, *supra* note 2, at 4.

47. 22 U.S.C. § 2778(a)(1) (1976).

lated. These weaknesses will exist in any statute focusing on arms or defense.

B. Expedition Against a Friendly Nation—The Neutrality Law

One of the sections of the Neutrality Laws,⁴⁸ the Expedition Against a Friendly Nation Act,⁴⁹ makes it a criminal offense for an individual who, while in the United States, "knowingly begins or sets foot or provides or prepares a means . . . for, or takes part in, any military or naval expedition . . . to be carried on from thence against the territory or dominion of any foreign prince or state . . . or people with whom the United States is at peace."⁵⁰ One court has construed this statute to create two offenses.⁵¹ One is "the . . . setting on foot, within the United States, [of] a military expedition."⁵² The other offense is providing a means for the expedition.⁵³ The Supreme Court has held that combining and organizing men and ideas to make war on a foreign government also offends the statute.⁵⁴

The statute may proscribe United States citizens and resident aliens from indirectly assisting international terrorists when they make inquiries or participate in sessions in which plans for aiding international terrorists are initiated in the United States. These activities could be interpreted as "set[ting] on foot . . . [a] military . . . expedition"⁵⁵ by furthering a terrorist attack. This statute, however, still does not fill the gap in the law because there is a jurisdictional limitation: the prohibited act must occur within the

48. 18 U.S.C. §§ 951-970 (1976). The Neutrality Laws proscribe armed attacks which originate in the United States and are launched against other countries. STATE DEPARTMENT REPORT, *supra* note 2, at 7.

49. 18 U.S.C. § 960 (1976).

50. *Id.*

51. *United States v. Hart*, 78 F. 868, 869 (E.D. Pa. 1897). In *Hart*, defendant chartered a boat that was used to transport men and arms to the island of Navassa, with an intent to invade Cuba. *Id.* at 872.

52. *Id.* at 869.

53. *Id.*

54. *Wiborg v. United States*, 163 U.S. 632 (1896). Wiborg was convicted of initiating and preparing the means for a military expedition against Cuba. His activities consisted of sailing out of Philadelphia, anchoring three or four miles from shore and accepting men and supplies from another boat, all of which were to be used in an attempt to overthrow the Cuban government. *Id.* at 634-35.

55. 18 U.S.C. § 960 (1976).

United States.⁵⁶ If the indirect furthering of terrorist activity occurs completely outside the United States, it would not be proscribed by this statute.⁵⁷ In addition, this statute and the cases construing it, most of which were decided in the late 1800's, do not encompass the modern concept of terrorism.⁵⁸

C. *The Inadequacy of the Statutes*

The Arms Export Control Act prohibits direct support of international terrorism by forbidding the illegal export of arms and technical assistance⁵⁹ in the use of those arms. The law prohibiting military expeditions against friendly governments forbids preparations from within the United States for setting on foot a military expedition against a foreign government.⁶⁰ The statutes are too rigid to preclude indirect involvement by United States citizens and resident aliens with international terrorists. Indirect involvement consists of such activities as training terrorists in guerilla tactics, recruiting new members or advisors for the terrorist group, organizing terrorist training camps or lending organizational skills to international terrorist groups. These activities are not proscribed by the Arms Export Control Act because they are not sufficiently related to an item on the Munitions List,⁶¹ nor by the Neutrality Law because the activities do not always constitute expeditions or mercenary activity originating from within the United States.⁶² Amending these statutes would change the original purposes for which they were enacted.⁶³

56. *Id.*

57. *Id.*

58. All cases construing the statute require that acts of setting on foot a military expedition occur in the United States. *See Jacobsen v. United States*, 272 F. 399, 400 (7th Cir. 1920) (defendant convicted of inducing resident aliens to join in a plot to initiate a revolt in India); *United States v. Ram Chandra*, 254 F. 635, 636-37 (N.D. Cal. 1917) (holding that a single individual may set on foot a military expedition); *United States v. Nunez*, 82 F. 599 (C.C.S.D.N.Y. 1896) (defendant convicted for setting on foot a military enterprise against Spain by fitting a ship for sail from New York in aid of Cuban insurgents); *United States v. Ybanez*, 53 F. 536, 537 (C.C.W.D. Tex. 1892) (defendant unlawfully began a military expedition originating in the United States and carried out against Mexico).

59. 22 U.S.C. § 2778(a)(1) (1976); 22 C.F.R. § 121.01 (1982). *See supra* text accompanying notes 21-46:

60. 18 U.S.C. § 960 (1976). *See supra* text accompanying notes 48-58.

61. *See supra* text accompanying notes 21-46.

62. *See supra* text accompanying notes 48-63.

63. Section 960 of the Neutrality Laws, 18 U.S.C. § 960 (1976), prohibiting an expedition against a friendly nation, originated in 1793 when George Washington proclaimed

II. A PROPOSAL FOR LEGISLATION

Due to the spread of international terrorism⁶⁴ and because current law does not proscribe indirect support of international terrorism,⁶⁵ Congress should pass legislation proscribing assistance to international terrorists. The following is a proposal which prohibits indirect forms of involvement with international terrorists by a United States citizen or resident alien.

A. Proposed Anti-terrorism Statute

Any United States citizen,⁶⁶ business entity,⁶⁷ or resident alien⁶⁸ within or without the United States, or any alien⁶⁹ within the United States, who participates directly or indirectly with the intention of furthering acts of international terrorism shall

United States neutrality in the war between Austria, Prussia, Sardinia, Great Britain, the United Netherlands and France. 3 ANNALS OF CONG. 1285-86 (1793).

The purpose of the Arms Export Control Act, 22 U.S.C. §§ 2751-2794 (1976 & Supp. II 1978), was geared specifically at tightening the policies and improving Congressional oversight with respect to arms sales. *Foreign Assistance Authorization: Hearings on S. 795, S. 854, S. 1816, S. 2662, and S. Con. Res. 21 Before the Subcomm. of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 53 (1976) (statement of Hon. Gaylord Nelson).

64. For a chronological listing of more than 3000 transnational terrorist events since 1968, see E. MICKOLUS, *TRANSNATIONAL TERRORISM* (1980). One commentator stated:

It is unlikely that international terrorism is a passing and transitory phenomenon. The trend toward the weakening of central authority in governments, the rise in ethnic and subnational sentiments, and the increasing fractionalization of the global political process point toward its growth as a form of political protest and persuasion.

Pierre, *The Politics of International Terrorism*, in *CONTEMPORARY TERRORISM* 37 (1978).

65. See *supra* text accompanying notes 21-63.

66. Citizen shall include "any individual owing allegiance to the United States, any partnership, company, or association composed in whole or in part of such individuals, and any corporation organized under the laws of the United States, any territory or insular possession of the United States, any State, or the District of Columbia." H.R. 5211, 97th Cong., 2d Sess. § 3(a) (1981) (proposed codification at 18 U.S.C. § 971(e)(1)).

67. Business entity is defined as "any partnership company, or association composed in whole or in part of citizens of the United States or any corporation organized under the laws of the United States, any territory or insular possession of the United States, any State, or the District of Columbia." *Id.* § 3(a) (proposed codification at 18 U.S.C. § 971(b)(2)(B)).

68. A resident alien is an individual "lawfully admitted for permanent residence," [which] means [he has] the status of having been lawfully accorded the privileges of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." Immigration and Nationality Act, 8 U.S.C. § 1101(a)(20) (1976).

69. The term "alien" means any person not a citizen or national of the United States." *Id.* § 1101(a)(3).

be guilty of a felony and is subject to fine or imprisonment or both. Participation in acts furthering international terrorism includes but is not limited to:

(1) conspiring, attempting, soliciting, or recruiting any person or entity to further acts of international terrorism;

(2) conspiring, attempting, soliciting or recruiting any person or entity to conduct or conducting research projects, manufacturing projects or construction projects to further acts of international terrorism;⁷⁰

(3) conspiring, attempting, soliciting or recruiting any person or entity to participate or participating in any form of combat that furthers acts of international terrorism;

(4) conspiring, attempting, soliciting or recruiting to transmit⁷¹ or transmitting any information that aids, abets, assists, instructs or directs any individual, group or government in furthering acts of international terrorism.

Affirmative Defenses

It shall be an affirmative defense that any one of these acts:

(1) was in the form of administering medical or surgical assistance for humanitarian reasons, or⁷²

(2) was performed in an official capacity authorized by the United States government.⁷³

The proposal includes the necessary jurisdictional and definitional considerations. The jurisdictional element of the proposal is based on two principles of international jurisdiction.⁷⁴ When a

70. This section is similar to S. 2255, 97th Cong., 2d Sess. § 3(a) (1982) (proposed codification at 18 U.S.C. § 971(a)(D), (2)(C)), and H.R. 5311, 97th Cong., 1st Sess. § 3(a) (1981) (proposed codification at 18 U.S.C. § 971(a)(5)).

71. Transmit shall be defined as "something received or obtained through informing; knowledge communicated by others or obtained from investigation, study or instruction." WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 2429 (4th ed. 1976).

72. This section is similar to S. 2255, 97th Cong., 2d Sess. § 3(a) (1982) (proposed codification at 18 U.S.C. § 971(a)(j)).

73. This affirmative defense is available to those involved in training foreign soldiers because such training may involve United States foreign policy.

[E]xceptions to this do not invalidate the definition [of international terrorism], they simply compel us to recognize that soldiers may sometimes be terrorists. Indeed, a number of bombing campaigns undertaken by both sides during World War II and in subsequent wars—for example, the bombing of targets that in themselves had little military value to the enemy but were struck primarily to punish, to shock, to cause alarm, and to create disorder among the population of the enemy state.

B. JENKINS, INTERNATIONAL TERRORISM: A NEW MODE OF CONFLICT 9 (1975).

74. See *infra* notes 75-78 and accompanying text.

United States citizen, while outside the United States, indirectly supports international terrorism, jurisdiction may be based on the theory of nationality.⁷⁵ The Supreme Court has stated that "[t]he jurisdiction of the United States over its absent citizen . . . is a jurisdiction *in personam*, as he is personally bound to take notice of the laws that are applicable to him and obey them."⁷⁶

If an alien indirectly supports international terrorism from within the United States, jurisdiction may be based on the subjective territorial principle.⁷⁷ This principle "establishes the jurisdiction of the State to prosecute and punish for crime commenced within the State but completed or consummated abroad."⁷⁸

An important feature of the proposal is the definition of international terrorism.⁷⁹ No generally accepted definition is now available. Different individuals might regard the same conduct as an act of terrorism or patriotism.⁸⁰ Terrorism also has different meanings in different corners of the world, in part because of historical and political differences distinguishing Western countries from developing countries.⁸¹ It has been said that "terrorism can only be defined tautologically as terror and barbarity, or in the words of some,

75. See RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 comments b, c (Tent. Draft No. 2, 1981) [hereinafter cited as DRAFT RESTATEMENT].

The case law supports the principle that the United States can proscribe the conduct of its citizens outside its borders. In *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), the Court said that "Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States." *Id.* at 282. In *Skiriotes v. Florida*, 313 U.S. 69 (1941), the Court held that international law does not prohibit a United States court from proscribing conduct of its citizens "upon the high seas or even in foreign countries." *Id.* at 73.

76. *Blackmer v. United States*, 284 U.S. 421, 438 (1932), cited in DRAFT RESTATEMENT, *supra* note 75, § 402 reporters' note 1.

77. Draft Convention on Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. 435, 484 (Supp. 1935).

78. *Id.* If an alien committed an act of terrorism in a foreign country, a United States court would have jurisdiction only if terrorism were deemed a violation of international law. See Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236, 238-42 (1982).

79. For a discussion of the definition of terrorism, see I M. BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 491 (1973).

80. Wanek, *Symposium Summary*, in INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD 3 (M. Livingston ed. 1978).

81. See R. CRELINSTEIN, D. LABERGE-ALTMEJD & D. SZABO, TERRORISM AND CRIMINAL JUSTICE 5 (1978).

fright intimidation.”⁸² The difficulty is also due to the fact that “terrorism” is a generic term, comprising violence and terror.⁸³ Thus, criminologists have yet to agree on a universally acceptable definition.⁸⁴

The proposal uses the definition that appears in the Intelligence and Surveillance Act.⁸⁵ This definition states:

“International terrorism” means activities that (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of the government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.⁸⁶

This definition encompasses the fundamental concepts that constitute⁸⁷ terrorist activity. A feature of most definitions of terrorism includes use of violence to intimidate civilians or a government in order to affect demands made of that government.⁸⁸ The definition also requires that the acts “transcend national boundaries.”⁸⁹

82. 1 M. BASSIOUNI & V. NANDA, *supra* note 79, at 491.

83. *Id.*

84. *See id.*

85. 50 U.S.C. § 1801(c) (Supp. III 1979).

86. *Id.*

87. *See* 1 M. BASSIOUNI & V. NANDA, *supra* note 79, at 491, E. MICKOLUS, TRENDS IN TRANSNATIONAL TERRORISM IN THE CONTEMPORARY WORLD 45 (1978); SINGH, TERRORISM: INTERDISCIPLINARY PERSPECTIVES 7-10 (1978).

88. *See* Schultz, *Conceptualizing Political Terrorism: A Typology*, in INTERNATIONAL TERRORISM 9-11 (1980).

89. 50 U.S.C. § 1801(c) (Supp. III 1979).

B. Analysis of Congressional Bills

During the 97th Congress, two bills⁹⁰ were proposed to amend the United States criminal code.⁹¹ Congress recessed before the bills could be enacted. Although the Senate and House of Representatives bills were aimed at prohibiting direct and indirect involvement of United States citizens, entities and resident aliens with international terrorists, the language of the two bills differed.⁹² The Senate bill forbade a United States citizen, entity or resident alien from willfully performing or attempting to "serve in, or [be] in concert with, the armed forces of any intelligence agency of the Libyan Government or of any other foreign government, faction, or terrorist group."⁹³ The House of Representatives bill was broader because it prohibited a United States citizen, entity or resident alien from serving "in the armed forces of any intelligence agency of, or in any other military or intelligence capacity for, any such government, faction, or group."⁹⁴ The Senate bill defined intelligence agency as "any entity which engages in collection, analyzation, and dissemination of information by, including but not limited to, covert means."⁹⁵ The Senate bill, unlike the House bill, only prohibited participation in the "armed forces . . . [of] any intelligence agency"⁹⁶ and did not prohibit participation in other armed forces.⁹⁷ The Senate bill explicitly provided for extraterritorial jurisdiction for acts that violated the statute.⁹⁸ The Senate bill listed

90. Both bills are called the Antiterrorism and Foreign Mercenary Act. S. 2255, 97th Cong., 2d Sess., 128 CONG. REC. S2544-45 (daily ed. Mar. 22, 1982); H.R. 5211, 97th Cong., 1st Sess. (1981).

91. 18 U.S.C. §§ 1-60005 (1976).

92. See S. 2255, 97th Cong., 2d Sess., 128 CONG. REC. S2544-45 (daily ed. Mar. 22, 1982); H.R. 5211, 97th Cong., 1st Sess. (1981).

93. S. 2255, 97th Cong., 2d Sess. § 3(a) (proposed codification at 18 U.S.C. § 971(a)(1)(A)), 128 CONG. REC. S2544 (daily ed. Mar. 22, 1982).

94. H.R. 5211, 97th Cong., 1st Sess. § 3(a) (1981) (proposed codification at 18 U.S.C. § 971(e)(5)).

95. S. 2255, 97th Cong., 2d Sess. § 3(a) (proposed codification at 18 U.S.C. § 971(e)(5)), 128 CONG. REC. S2545 (daily ed. Mar. 22, 1982).

96. *Id.* § 3(a)(1)(A), 128 CONG. REC. S2544 (daily ed. Mar. 22, 1982).

97. H.R. 5211, 97th Cong., 1st Sess. § 4(b) (1981).

98. S. 2255, 97th Cong., 2d Sess. § 3(a) (proposed codification at 18 U.S.C. § 971(g)), 128 CONG. REC. S2545 (daily ed. Mar. 22, 1982).

several affirmative defenses⁹⁹ and the House bill did not.¹⁰⁰ The bills differed in some of their definitions as well.¹⁰¹

Both statutes proposed methods of identifying which groups may not receive assistance from United States citizens, entities or resident aliens.¹⁰² The bills granted the President authority to decide which foreign governments, factions or terrorist groups would be proscribed.¹⁰³ In effect, if a United States citizen, entity or resident alien were aiding or supporting a terrorist group which was not banned by the President, these persons would not be violating the statute. Another weakness in relying on a list of forbidden groups or governments is the ease with which such a list could be circumvented. Assistance could be given to a group that is not on the list with an intent to re-export to a group that is on the list.

C. Comparison of Congressional Bills with Proposal

The statute proposed in this Note prohibits any act which furthers international terrorism as defined by the Intelligence and

99. *Id.* (proposed codification at 18 U.S.C. § 971(h)).

100. H.R. 5211, 97th Cong., 1st Sess. § 3 (1981).

101. For example, the Senate bill defined the term "armed forces" to include "any regular, irregular, paramilitary, guerrilla, or police force." S. 2255, 97th Cong., 2d Sess. § 3(a) (proposed codification at 18 U.S.C. § 971(e)(2)), 128 CONG. REC. S2544-45 (daily ed. Mar. 22, 1982). The House of Representatives bill defined the term "armed forces" as "any military entity which is controlled by any foreign government, faction, or international terrorist group named in a proclamation in effect under subsection (c) of this section including any regular, irregular, paramilitary, guerrilla or police force." H.R. 5211, 97th Cong., 1st Sess. § 3(a) (1981) (proposed codification at 18 U.S.C. § 971(e)(4)). In comparison, the Senate bill defined "intelligence agency" as "any entity which engages in collection, analysis, and dissemination of information by, including but not limited to, covert means." S. 2255, 97th Cong., 2d Sess. § 3(a) (proposed codification at 18 U.S.C. § 971(e)(5)), 128 CONG. REC. S2244-45 (daily ed. Mar. 22, 1982). The House of Representatives bill defined the term "intelligence agency" as "any entity which is controlled by any foreign government, faction, or international terrorist group named in a proclamation in effect under such subsection and performs any intelligence function." H.R. 5211, 97th Cong., 1st Sess. § 3(a) (1981) (proposed codification at 18 U.S.C. § 971(e)(5)).

102. S. 2255, 97th Cong., 2d Sess. § 3(a) (proposed codification at 18 U.S.C. § 971(c)(1)), 128 CONG. REC. S2545 (daily ed. Mar. 22, 1982); H.R. 5211, 97th Cong., 1st Sess. § 3(a) (1981) (proposed codification at 18 U.S.C. § 971(c)(1)).

103. S. 2255, 97th Cong., 2d Sess. § 3(a) (proposed codification at 18 U.S.C. § 971(c)(1)), 128 CONG. REC. S2544 (daily ed. Mar. 22, 1982); H.R. 5211, 97th Cong., 1st Sess. § 3(d) (1981) (proposed codification at 18 U.S.C. § 971(c)(1)).

Surveillance Act.¹⁰⁴ Unlike the Congressional bills, this proposal does not depend on the government's accuracy in listing international terrorist groups that pose a danger to the United States national security or commerce. Under the Congressional proposals, several terrorist attacks could occur before the President identified which terrorist group was responsible. Thus, any United States citizen, entity or resident alien involved in acts of international terrorism would not be acting illegally if the President had yet to proclaim the responsible terrorist group as a danger to United States national security or commerce.

The proposal recognizes a need to support certain legitimate activities abroad that may resemble acts of terrorism. If any person is involved in an officially sanctioned act that resembles international terrorism, that person has an affirmative defense. Two problems created by use of this affirmative defense are the endangering of national security and interference with the conduct of foreign policy through in court revelation of sensitive United States operations. However, the need to combat acts of terrorism outweighs the need to give absolute protection to United States support of acts that resemble terrorism.¹⁰⁵

The last section of the proposal prohibits use of information to directly or indirectly aid, abet, assist, instruct or direct acts that further international terrorism. The Congressional bills did not have such a "catch all" section. This section is helpful because it gives the statute flexibility and prohibits assistance that is not as tangible as recruiting pilots to fly for a terrorist group or training terrorists in guerilla warfare. It also guards against forms of assistance that have yet to evolve.

III. COUNTERVAILING ARGUMENTS

By proscribing indirect support of international terrorism, the proposal limits the right to transmit information from one country to another. Such a limitation may conflict both with international agreements that encourage the exchange of scientific data and with the first amendment rights of free speech and association. The

104. 50 U.S.C. § 1801(c) (Supp. III 1979).

105. For example, the United States has been accused of financing groups fighting to overthrow the Sandinista Government of Nicaragua. *N.Y. Times*, Apr. 12, 1983, at A12, col. 1.

following sections address the problems posed by international and constitutional law in enacting the proposal.

A. *International Law*

International law does not at this time prohibit indirect support of international terrorism.¹⁰⁶ International law encourages the flow of scientific and technical data when it is used in a peaceful manner.¹⁰⁷ At the Helsinki Summit,¹⁰⁸ thirty-three countries were party to an agreement that encourages "making information more widely available to scientists and research workers."¹⁰⁹ The summit also promoted a free flow of "oral information in the form of lectures and printed information in the form of newspapers and other publications, and in the forms of broadcast."¹¹⁰ The United States has also entered into bilateral treaties with many nations that encourage nationals of either country "to gather and to transmit material for dissemination to the public abroad."¹¹¹

Some forms of terrorism are addressed by multilateral treaties outlawing "acts of terrorism taking the forms of crimes that are of international significance."¹¹² Under other international agreements, including the Convention for Suppression of Unlawful Seizure of Aircraft¹¹³ and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons,¹¹⁴ the

106. See *infra* text accompanying notes 107-16.

107. See generally Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. I, para. 2, 4 U.S.T. 2063, 2066, T.I.A.S. No. 2863 [hereinafter cited as Japan Treaty]. A provision in this treaty providing for the free flow of information between the two countries is similar to provisions in the other 46 friendship, commerce and navigation treaties entered into between the United States and other nations. See *Commercial Treaty Index*, A.B.A. SEC. INT'L L. (Supp. 1976).

108. Conference on Security and Co-operation in Europe, Aug. 1, 1975, 14 I.L.M. 1292 (1975).

109. *Id.*

110. *Id.*

111. Japan Treaty, *supra* note 107, art. 1, para. 2(d).

112. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Internationally Protected Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413, 10 I.L.M. 255 (1971). See generally Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons and Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 13 I.L.M. 41 (1974) [hereinafter cited as Convention on Protected Persons].

113. Convention For Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105.

114. Convention on Protected Persons, *supra* note 112.

United States extends jurisdiction when the offender is found in the United States.¹¹⁵ This is done in a spirit of international cooperation with a hope of deterring international terrorist activities.¹¹⁶ Although these agreements proscribe terrorist activity, they do not address the transnational flow of information that contributes to acts of international terrorism.

There may be a consensus that indirect support of terrorism in the form of transmitting assistance is a violation of international law if the recipients are considered international bandits or pirates.¹¹⁷ However, this problem has not been specifically addressed in an international agreement. Crimes of international terrorism have not been defined or proscribed on the basis of indirect support of terrorist groups but rather emphasize direct terrorist attacks.¹¹⁸

International law mirrors the concern of United States laws for the free flow of information.¹¹⁹ The flow of scientific or technical information is important to the friendship and cooperation of nations, and is encouraged by many treaties.¹²⁰ Several multilateral treaties, however, also proscribe acts of terrorism. A balance must, therefore, be reached between the obligation to counter international terrorism and the need to foster the international exchange of scientific information. The statute proposed in this Note meets this requirement in that it only forbids the exchange of information which demonstrably furthers international terrorism.

B. Constitutional Issues

Regardless of the purposes for which information is transmitted domestically or internationally, the first amendment¹²¹ protection of speech must be considered. Opponents of the proposal may argue that it impinges on the right of a United States citizen or resident alien to freedom of speech¹²² and freedom of association.¹²³

115. See *supra* notes 113-14.

116. See Convention on Protected Persons, *supra* note 112, preamble.

117. See DRAFT RESTATEMENT, *supra* note 75, § 404.

118. See B. JENKINS, INTERNATIONAL TERRORISM: A NEW MODE OF CONFLICT 10 (1975).

119. See *supra* text accompanying notes 27-39.

120. *Id.*

121. U.S. CONST. amend. I.

122. *Id.*

123. *Id.*

Despite the absolute language of the first amendment, situations arise when freedom of speech and freedom of association are not protected.¹²⁴ For example, copyright laws¹²⁵ impinge on freedom of speech because the first amendment does not include the right to appropriate the speech of others.¹²⁶ The limits of the first amendment's absolute protection of freedom of speech were not significantly tested until *Schenck v. United States*.¹²⁷ According to Justice Holmes, the test to be used when attempting to proscribe speech is "whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."¹²⁸ Prohibiting speech and association which will in all likelihood result in violence would be considered one of the evils against which Congress may legislate.¹²⁹ Since *Schenck*, the "clear and present danger" test has been reshaped by the Supreme Court.¹³⁰ Two tests are used by the Supreme Court¹³¹ to determine whether speech which advocates criminal conduct is not constitutionally protected by the first amendment. In *Brandenburg v. Ohio*,¹³² the Court enunciated one of two standards for determining

124. Strong, *Fifty Years of "Clear and Present Danger: From Schenck to Brandenburg and Beyond*, in *FREE SPEECH AND ASSOCIATION* 302 (P. Kurland ed. 1975).

125. United States Copyright Laws, 17 U.S.C. §§ 1-1810 (1976).

126. One commentator stated that:

[T]he most important objective that underlies freedom of speech [is] the maintenance of the democratic dialogue . . . also known as the market place of ideas. . . . It is important that we have free access to . . . [many] ideas, . . . [but exposure to different ideas] does not require the freedom to reproduce those ideas without permission. . . . To reproduce [another person's] ideas may add flavor, but little substance [to the market place of ideas]. Such minimal substance, . . . is far out balanced by the public benefit that accrues through copyright encouragement of creativity.

1 M. NIMMER, *COPYRIGHT* §1.10(B) (1982).

127. 249 U.S. 47 (1919). The defendant was convicted of causing insubordination in the United States armed forces by distributing a document that encouraged the insubordination. *Id.* at 49.

128. *Id.* at 52.

129. *See id.*

130. *Id.*

131. *See* Strong, *supra* note 124, at 302.

132. 395 U.S. 444 (1969). The defendant was acquitted from charges that he advocated "the duty necessity and propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." *Id.* at 444-45. The defendant's actions consisted of participating in a Ku Klux Klan rally with 11 other members on a farm in Ohio. A group of newsmen recorded the event and it was established that the defendant had disparaged Blacks and Jews. *Id.* at 445-46.

which types of speech are not constitutionally protected. Under *Brandenburg*, the speech must incite a crowd with intent to produce violence; there must be a likelihood of violence ensuing and the likelihood must be imminent.¹³³ The other test was set forth in *Dennis v. United States*.¹³⁴ A broad test was introduced by Judge Learned Hand in the Second Circuit opinion and, in the same case, it was adopted by the Supreme Court.¹³⁵ This test is whether the "gravity of the evil, discounted by the improbability, justifies such invasion of free speech as is necessary to avoid the danger."¹³⁶ This statement was clarified in *Yates v. United States*¹³⁷ where the Court interpreted *Dennis* to require that the government establish not mere "advocacy of abstract doctrine," but "advocacy directed at promoting unlawful action."¹³⁸ Thus, if teaching and advocating violence to a group of people would reasonably incur a threat of violence, this teaching and advocating would not be constitutionally protected.¹³⁹

Although some commentators consider the *Brandenburg* test more proper,¹⁴⁰ in 1977 the Supreme Court used the "gravity of the evil" test in *Nebraska Press Association v. Stuart*.¹⁴¹ The case involved an order issued by a Nebraska state court judge enjoining the press from reporting about the suspect in a celebrated murder case.¹⁴² The order was a form of prior restraint, "the most serious and least tolerable infringement on First Amendment Rights."¹⁴³

133. *Id.* at 447.

134. 341 U.S. 494 (1951) (defendant convicted for conspiring to advocate a violent overthrow of the United States government and to organize a Communist party to teach necessity of such action).

135. 183 F.2d 201, 212 (2d Cir. 1950).

136. 341 U.S. at 515.

137. 354 U.S. 298 (1957) (14 defendants tried for conspiring to advocate a violent overthrow of the United States government and to organize a Communist party to teach necessity of such action).

138. *Id.* at 318.

139. *Id.* at 321. For a discussion of the cases and principles involved in the "clear and present danger" test after *Dennis*, see Antieau, *Dennis v. United States—Precedent, Principle or Perversion?*, 5 VAND. L. REV. 141 (1952); Gorfinkel & Mack, *Dennis v. United States and the Clear and Present Danger Rule*, 39 CALIF. L. REV. 475 (1951); Lusk, *The Present Status of the "Clear and Present Danger Test"—A Brief History and Some Observations*, 45 KY. L.J. 576 (1957); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952).

140. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 740 (1978).

141. 427 U.S. 539 (1977).

142. *Id.* at 542-44.

143. *Id.* at 559.

The Court did not use the *Brandenburg* test because the restraint did not involve speech tending to incite imminent lawless action.¹⁴⁴

A statute providing subsequent punishment to those individuals indirectly assisting and supporting international terrorists does not involve speech intended to incite individuals to imminent lawless action. Rather this conduct advances the likelihood of violence through, for example, the instruction of terrorists in guerilla warfare, the assistance to terrorists in building arms factories, or the provision to terrorists of sophisticated weapons systems.¹⁴⁵

To determine whether this activity is considered an evil that outweighs the grant of first amendment protections, the term "evil" must be given some parameters. In both *Dennis*¹⁴⁶ and *Yates*,¹⁴⁷ the the "evil" conduct consisted of individuals carrying out a plan to overthrow the United States government. In *Nebraska Press Association*,¹⁴⁸ the evil which the court order sought to avoid was the damaging effect of newspaper accounts on a murder suspect's opportunity to receive a fair trial.¹⁴⁹ Although indirect assistance to international terrorists does not necessarily present a danger to United States security or threaten an individual's opportunity to a fair trial,¹⁵⁰ it encourages international violence and instability. Under international treaties, the United States has an obligation to combat international terrorism.¹⁵¹ Furthermore, United States citizens and United States property are often the targets of international terrorists.¹⁵² Because the United States government has an obligation and an interest in protecting its citizens and property, those individuals who indirectly assist international terrorists should not be granted first amendment protections. The fact that not all acts of international terrorism target United States interests

144. See *id.* at 542-44.

145. See *supra* note 1 and accompanying text.

146. 341 U.S. 494 (1951).

147. 354 U.S. 298 (1957).

148. 427 U.S. 539 (1977).

149. *Id.* at 542-44.

150. The issue in both *Dennis* and *Yates* was first amendment freedom of speech. In *Nebraska Press Ass'n*, the conflict between the first amendment right of free speech and the sixth amendment right to a fair trial was at issue. 427 U.S. 539 (1977).

151. See *supra* notes 107-13 and accompanying text.

152. A recent example is the terrorist bombing of the United States Embassy in Beirut, Lebanon. N.Y. Times, Apr. 20, 1983, at A1, col. 4.

is inconsequential because international instability engendered by international terrorism may affect United States interests indirectly.

Of the two tests, the *Dennis* test is more applicable. This test would not protect indirect assistance to international terrorists because this conduct is evil and the likelihood of violence ensuing is great.¹⁵³ The *Brandenburg* test is not applicable here because the speech is not intended to incite a group to imminent lawless action.¹⁵⁴ As stated by commentators of constitutional law:

[T]he Court has yet to face the most troublesome question under this [Brandenburg] test. Should the Court confront a situation where a speaker advocates violence through the use of . . . speech which does not literally advocate action, . . . the majority might be urged to look for proximity to violence rather than to the literal words of incitement.¹⁵⁵

Since the Court has not been called upon to decide whether speech that is a catalyst to international terrorism and violence should be granted first amendment protection, *Dennis* provides the most useful test for determining whether such activity should be constitutionally protected. Indirect assistance to international terrorists increases the likelihood of violence under the *Dennis* test and its proximity to violence has been demonstrated by the *Wilson* case.¹⁵⁶

CONCLUSION

Presently, it is not illegal to train someone in methods of killing.¹⁵⁷ It is illegal, however, to export weapons without a license¹⁵⁸ or to "set on foot a military expedition against a friendly nation."¹⁵⁹ The gray area of indirect assistance to international terrorists, however, is not prohibited by any United States statute. Opponents of legislation criminalizing the transmission of informa-

153. See *supra* note 5 and accompanying text.

154. The *Brandenburg* test has been applied to "regulatory schemes that determine eligibility for public employment and moral fitness justifying disbarment." *Communist Party v. Whitcomb*, 414 U.S. 441, 447 (1974). See J. BARRON & C. DIENES, *HANDBOOK OF FREE SPEECH AND FREE PRESS* 24-31 (1979).

155. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 140, at 740.

156. See *supra* note 1 and accompanying text.

157. For example, learning to shoot a gun or training in martial arts is not illegal when there is no intent to kill or hurt a specific person.

158. 22 U.S.C. § 2778 (1976 & Supp. II 1978); 22 C.F.R. § 121.01 (1982).

159. 18 U.S.C. § 960 (1976).

tion for use by international terrorists might argue that these acts are not criminal because there is no intent to use the information to hurt or kill a specific individual or group.¹⁶⁰ Although terrorism eludes a universally accepted definition,¹⁶¹ the methods and goals of many terrorist groups are similar. The essence of all forms of terrorism is the use of violence and intimidation.¹⁶² It should be irrelevant that the individual transmitting assistance to terrorists does not do so with an intent to injure or murder a specific individual or group. Rendering assistance to terrorists should not go unpunished merely because the ultimate victims are not identifiable. There being no international or constitutional roadblocks to a new statute, indirect assistance to international terrorists warrants prohibition.

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160. See STATE DEPARTMENT REPORT, *supra* note 2.

161. See *supra* notes 79-84 and accompanying text.

162. *Id.*