PROTECTING CITIZENS AND THEIR SPEECH: BALANCING NATIONAL SECURITY AND FREE SPEECH WHEN PROSECUTING THE MATERIAL SUPPORT OF TERRORISM

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I. INTRODUCTION

Federal law criminalizes a variety of terrorist activities, including the use of violence and certain weaponry, such as chemical or biological weapons.[1] Yet, federal law does not sufficiently empower law enforcement to go after the supporters of those committing acts of terrorism.[2] Although the Material Support of Terrorism[3] criminal statutes provide a useful tool in prosecuting terrorism, they raise significant First Amendment questions. In *Holder v. Humanitarian Law Project*,[4] the United States Supreme Court addressed the First Amendment rights of individuals and groups to advocate on behalf of a designated foreign terrorist organization in relation to the criminal prohibition of providing material support. However, in doing so, the Court's opinion avoided an analysis of the traditional categories of free speech protections and levels of scrutiny.

This article looks to the First Amendment analysis of various

1. *See* 18 U.S.C. §§ 2331-2339D (2006 & Supp. III 2009).

2. STEPHEN DYCUS, ARTHUR L. BERNEY, WILLICAN C. BANKS, AND PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 988 (5th ed. 2011).

3. *See* 18 U.S.C. §§ 2331-2339D (prohibiting the provision of material support of acts of terrorism by a State Department-designated Foreign Terrorist Organization, including the provision of money, training, materials, personnel, and a variety of other forms of support).

4. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2739-41 (2010).

campaign finance law challenges, which provide a comparable framework for addressing freedom of speech concerns in the context of national security. The nature of law and policy in the post 9/11 world implicates fundamental questions about strategy, tactics, criminal justice, and the ontological nature of the war on terror.[5] Due in part to these challenges, Congress criminalized the act of providing material support to a designated foreign terrorist organization.[6] Resulting laws and regulations have led to restrictions and limits on the freedom of speech.[7] Borrowing from campaign finance law provides assistance in addressing obstacles faced by prosecutors, defense attorneys, and practitioners seeking to advise clients on their potential criminal liability.

Part II of the article introduces the key statute criminalizing the support of terrorism. Part III discusses a recent Supreme Court decision addressing this statute. Part IV turns to campaign finance law as an alternative model in addressing the free speech issues presented by the current material support legal framework. Finally, Parts V and VI provide advice to prosecutors and defense attorneys for moving forward as this issue continues to develop in the legal system.

II. THE MATERIAL SUPPORT OFFENSE: CRIMINALIZING THE FINANCIAL AND LOGISTICAL SUPPORT OF TERRORISM

Congress implemented two statutory provisions, 18 U.S.C. § 2339A and 18 U.S.C. § 2339B, that make it a crime to provide material support to designated foreign terrorist organizations.[8] The first provision criminalizes the providing of material support or resources "knowing or intending that they are to be used in preparation for, or in carrying out" various terrorist crimes.[9] This

5. CONFRONTING TERROR (Dean Reuter and John Yoo eds., 2011) (providing a series of essays from leading policy makers and legal scholars on the breadth of national security law related issues in the post-9/11 world, including the ontological question of whether the war on terror is traditional warfare or the enforcement of criminal law, the use of controversial tactics, defining success, and the overall strategy. The various authors discuss the old security paradigms, the need for a unified defense against terrorism, intelligence reform, balancing security and liberty, torture, confronting ideology, detainees, and the role of courts.).

6. See 18 U.S.C. §§ 2339A-2339B (2011).

7. See *infra* Part III.

8. 18 U.S.C. §§ 2339A-2339B.

9. *Id.* § 2339A(a).

statute creates an offense for the provision of material support with the intent of furthering the terrorist act.[10] Conviction under this provision can result in a fifteen-year prison sentence and fines, or a much longer sentence if someone is killed as a result of the terrorist act supported by the defendant.[11]

The second provision, which codifies the criminal prohibition of providing material support, is more broadly written. It punishes "whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so."[12] If convicted under this provision, a defendant can be sentenced to fifteen years in prison and fined, or can receive life term if someone dies as a result of the terrorist act promulgated.[13] Congress established this broader crime in an attempt to "fill the perceived gap" left by § 2339A, which does not reach those who gave money to terrorist organizations for proposed humanitarian efforts and not to further some terrorist act.[14] Congress feared that terrorist organizations could use the fungible nature of money to their advantage by diverting funds donated to provide, for example, food to the poor for the use of funding acts of violence.[15] Specifically, Congress made an official finding that the humanitarian efforts of foreign terrorist groups are tainted by their criminal acts, and that any contribution can support terrorist activity.[16]

The requisite *mens rea* also differs between the two sections of the statute. Section 2339A requires the knowledge or intent that the material support provided would further the commission of an illegal terrorist act.[17] However, § 2339B only requires knowledge that one is providing material support to a known foreign terrorist organization.[18] The second provision, as a result,

10. *See generally* Tom Stacy, *The "Material Support" Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J.L. & PUB. POL'Y 461 (2005).

11. 18 U.S.C. § 2339A(a) (2011) (establishing the punishment for providing material support).

12. *Id.* § 2339B(a)(1).

13. *Id.*

14. Stacy, *supra* note 10, at 462-63 (citing H.R. REP. NO. 104-383, at 43-45 n. 17 (1995)).

15. *Id.*

16. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (codified at 8 U.S.C. § 1189 and 18 U.S.C. § 2339).

17. *See* 18 U.S.C. § 2339A (2011).

18. *See id.* § 2339B.

is much more flexible from the prosecutor's perspective because it eliminates the need to prove that the defendant knew his general provision of support would be used in the commission of a specific offense or attack. Additionally, § 2339B contains a less demanding standard by penalizing a defendant for providing material support to an organization the defendant knows, or should know, is a foreign terrorist organization.[19]

The statute defines "material support" as:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation, except medicine or religious materials.[20]

The term "expert advice or assistance" was added to the material support definition in 2001, as part of the PATRIOT Act.[21] This expansion of the material support provision gave prosecutors a new weapon against terrorists.

Since the establishment of the material support provision and its expansion to include "expert advice or assistance," federal prosecutors have used the law as a key tool in combating terrorism.[22] Recent data indicates that, as of 2010, the statute concerning material support offenses was the statute most frequently used by prosecutors in the war on terror.[23] Such prevalent use has resulted in the development of a new body of

19. 18 U.S.C. § 2339B (2011); *see* United States v. Khan, 309 F. Supp 2d 789 (E.D. Va. 2004) (holding that evidence that the organization the defendant was supporting was engaged in conspiracy to commit crimes of violence and property damage in a nation with whom the United States was at peace is sufficient to show defendant was offering support to a foreign terrorist organization); Goldberg v. UBS AG 660 F. Supp 2d 410 (E.D.N.Y 2009) (defendant-bank was culpable for providing support to a third party that it knew, or should have known, the support was received by a foreign terrorist organization and the bank did not report it).

20. 18 U.S.C. § 2339A(b)(1) (2011).

21. *Id.* § 2339A(b)(3); United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, 107 Pub. L. No. 56, 115 Stat. 272 (2001).

22. DYCUS, BERNEY, BANKS, & RAVEN-HANSEN, *supra* note 2, at 1004.

23. *Id.* (citing CTR. ON LAW & SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001-SEPTEMBER 11, 2010, at 12-13 (2010), *available at* http://www.lawandsecurity.org/Portals/0/documents/01_TTRC2010Final1.pdf).

case law governing the application of the statute. The statute has been used to prosecute those who have volunteered to fight in a foreign army against the United States,[24] those who have traveled to and participated in terrorist group training camps,[25] and those who have transferred funds to a designated foreign terrorist organization.[26] It is often charged alongside a federal conspiracy charge.[27]

Congress eventually amended the definition of "training" to include "instruction or teaching designed to impart a specific skill, as opposed to general knowledge."[28] The amendment, which was part of the Intelligence Reform and Terrorist Protection Act of 2004 (IRTPA), was a response to judicial decisions interpreting the term "material support" in differing ways.[29] The Ninth Circuit had held that these amendments cured § 2339B's vagueness issues as to the terms "personnel" and "expert advice and assistance," but not as to the terms "training" and "service."[30] The material support statute, after the IRPTA amendments, has become a key component of the nation's counterterrorism efforts, but, like many laws dealing with national security, there are civil liberty concerns. The Supreme Court recently addressed some of these concerns.

III. *HOLDER V. HUMANITARIAN LAW PROJECT*

A. THE COURT'S ANALYSIS

In addressing the limits of humanitarian aid as applied to designated foreign terrorist organizations, the Supreme Court, in *Holder v. Humanitarian Law Project* (the *HLP* case), set forth

24. United States v. Lindh, 212 F. Supp. 2d 541, 545-47 (E.D. Va. 2002).

25. United States v. Goba, 220 F. Supp. 2d 182, 183-84 (W.D.N.Y. 2002).

26. United States v. Afshari, 446 F.3d 915, 915-16 (9th Cir. 2006).

27. *See, e.g.,* Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenges of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007) (explaining the differences and similarities to standard charges of contempt and conspiracy).

28. 18 U.S.C. § 2339A (b)(2) (2012).

29. *See Lindh*, 212 F. Supp. 2d at 569 n.67 and Humanitarian Law Project v. Reno, 205 F.3d 1130, 1132-33 (9th Cir. 2000) for pre-IRTPA decisions on the meaning of "material support."

30. Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1133-39 (9th Cir. 2007). *Cf.* United States v. Warsame, 537 F. Supp. 2d 1005, 1016-19 (Minn. 2008) (holding that the terms "personnel" and "training" are unconstitutionally vague insofar as they criminalize the teaching of English in an Al Qaeda clinic without any other connection to terrorism).

limits on what is allowable under the material support statute.[31] The case involved free speech and free association challenges, as well as a Fifth Amendment due process challenge.[32] The plaintiffs (represented by the Humanitarian Law Project) were comprised of humanitarian aid groups.

> The Humanitarian Law Project (HLP group) sought to train and advise the Kurdistan Workers Party (PKK) on the use of international human rights law to resolve disputes peacefully.[33] The HLP group wanted to work with the PKK and the Liberation Tigers of Tamil Eelam (LTTE),[34] despite the fact that both groups are designated foreign terrorist organizations who have engaged in terrorist and non-terrorist activities.[35] Also, the HLP group sought to engage in(1) "train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes"; (2) "engag[ing] in political advocacy on behalf of Kurds who live in Turkey"; and (3) "teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief."[36]

Lawyers for the Humanitarian Law Project argued that § 2339B was unconstitutional insofar as it prevented the HLP group from providing the types of training and assistance listed above.[37]

1. INTENT

The HLP group first sought to have the Court avoid the constitutional issues by interpreting the statute to require proof of a defendant's intent to knowingly support the designated foreign terrorist organization's illegal activities when the support

31. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2741 (2010).

32. *Id.*

33. *Id.*

34. *See* Somini Sengupta & Seth Mydans, *Rebels Routed in Sri Lanka After 25 Years*, N.Y. TIMES, May 18, 2009, at A1. The LTTE was mostly defeated by the Sri Lankan government, thus mooting many of the plaintiffs' claims except those concerning pure speech and association.

35. *See* Opening Brief for Humanitarian Law Project, et al. at 3, 11-12, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89) [hereinafter Humanitarian Law Project Brief] (acknowledging that the PKK and LTTE engage in a variety of legal and illegal, violent, and nonviolent activities).

36. *Holder*, 130 S. Ct. at 2716 (citing Humanitarian Law Project v. Mukasey, 552 F.3d 916, 921 n.1 (9th Cir. 2009)).

37. *Id.*

could be categorized as speech.[38] However, the Court rejected this argument and held that the material support statute was constitutional as applied to the particular forms of support that the HLP group sought to provide, including those activities which would constitute speech.[39] Chief Justice Roberts, in the majority opinion, asserted that the HLP group's proposed activities with the PKK and LTTE are "inconsistent with the text of the statute" and "untenable in light of the sections immediately surrounding" the statute.[40] Moreover, Justice Roberts reasoned that Congress's amendments plainly described the mental state required for criminal culpability, that is, to "knowingly" provide material support.[41] Roberts relied on the additional sections surrounding § 2339B, where he described congress as speaking plainly as to the "mental state for a violation" of the statute.[42] These sections contain language of specific intent that was included in § 2339B during the several amendments made to the statute.[43] To support the holding, the majority opinion distinguished the case from *Scales v. United States*, the case on which the HLP group relied.[44] The majority reasoned that the *HLP* case[45] was distinguishable from *Scales*, which involved the prohibition on mere membership in such violent organizations, pointing out that § 2339B does not prohibit membership, but does prohibit the providing of material support.[46]

2. VAGUENESS CHALLENGE

The HLP group also unsuccessfully argued that § 2339B is unconstitutionally vague under the due process clause of the Fifth Amendment.[47] According to the majority, the Ninth Circuit

38. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2717 (2010).

39. *Id.* at 2721.

40. *Id.* at 2717.

41. *Id.*; 18 U.S.C. § 2339B(a)(1) (2012) (defining the statute further by stating that "to violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism").

42 . *Holder*, 130 S. Ct. at 2717.

43. *Id.* at 2717-18.

44. *See* Scales v. United States, 367 U.S. 203, 205-06 (1961) (holding that the Smith Act, which prohibited membership in groups promoting the violent overthrow of government did not require specific intent).

45. *Holder*, 130 S. Ct. 2705.

46. *Id.* at 2718.

47. *Id.* at 2718-19. *See* U.S. CONST. amend. V.

improperly merged the HLP group's vagueness challenge with their First Amendment claims.[48] The Ninth Circuit held that "training," "service," and a portion of "expert advice or assistance" were impermissibly vague "because they applied to protected speech—regardless of whether those applications were clear" to potential defendants engaging in such speech activties.[49] The applicable standard for determining if a statute is unconstitutionally vague is found in *United States v. Williams*,[50] where the Court held that a statute is unconstitutionally vague if "a person of ordinary intelligence" is not provided with "fair notice" of what conduct is prohibited.[51] The Supreme Court in the *HLP* case held that a person of ordinary intelligence could easily understand that instructing a foreign terrorist organization on how to use international law to resolve disputes and on how to petition the United Nations would constitute "training" and "expert advice or assistance."[52]

Applying the *Williams* standard to the HLP group's proposed conduct, the Court found that the statute was sufficiently written so that a person of ordinary intelligence would understand that the HLP group's proposed conduct was prohibited.[53] The Court reasoned that, "although the statute may not be clear in every application, the dispositive point is that its terms are clear in their application to plaintiffs' proposed conduct."[54] Notably, the Court criticized the Ninth Circuit's use of a hypothetical in determining that the statute is unconstitutionally vague as confusing elements of the doctrines of overbreadth and vagueness.[55] The Ninth Circuit used the Government's statements from oral arguments indicating that the statute could prohibit the filing of an amicus brief on behalf of a designated foreign terrorist organization as a basis of its finding,[56] but a majority of the Supreme Court concluded that such an analysis

48. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2719 (2010).

49. *Id.*

50. United States v. Williams, 553 U.S. 285, 304 (2008).

51. *Holder*, 130 S. Ct. at 2718 (citing *Williams*, 553 U.S. at 304).

52. *Id.* at 2720-21.

53. *Id.*

54. *Id.* at 2709.

55. *Id.* at 2719.

56. *Id.* (citing Humanitarian Law Project v. Mukasey, 552 F.3d 916, 930 (9th Cir. Cal. 2009)). The Ninth Circuit held that, "[b]ecause the 'other specialized knowledge' portion of the ban on providing 'expert advice or assistance' continues to cover constitutionally protected advocacy, we hold that it is void for vagueness").

improperly incorporated elements of the overbreadth doctrine[57] in an effort to find the statute unconstitutionally vague.[58] The Court reasoned that a party whose conduct was clearly prohibited cannot then raise a vagueness claim for lack of notice.[59] However, the Court did not rule out an overbreadth argument; it simply left that question open for another case.[60] Chief Justice Roberts concluded

> under a proper analysis, plaintiffs' claims of vagueness lack merit. Plaintiffs do not argue that the material support statute grants too much enforcement discretion to the Government. We therefore address only whether the statute "provide[s] a person of ordinary intelligence fair notice of what is prohibited."[61]

As a result, the majority found the statute passed the vagueness test, as applied to the conduct of the HLP group, and was not unconstitutionally vague.[62]

3. FREE SPEECH AND INDEPENDENT ADVOCACY

The Court also rejected the HLP group's assertions that the material support statute violated the First Amendment insofar as it criminalized the instruction of the PKK and LTTE in how to use international law and organizations to achieve their own goals.[63] The Court refined the issue to determine whether the Government could prohibit material support to the PKK and the LTTE in the form of the speech offered by the HLP group.

57. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2718 (2010) (citing United States v. Williams, 553 U.S. 285, 304 (2008)). The overbreadth doctrine can, at times, be used to invalidate a statute or speech restriction for violating the rights of those not before the court. In doing so, the court can invalidate the statute in its entirety, even as applied to the challenger whose conduct may lawfully be restricted under the statute. *See* Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 483-84 (1989); R.A.V. v. City of St. Paul, 505 U.S. 377, 411 (1992). Here, however, the parties had not raised the overbreadth doctrine, but the vagueness doctrine. *Holder*, 130 S. Ct. at 2719-20.

58. *Holder,* 130 S. Ct. at 2719.

59. *Id.*

60. *Id.* (stating, in dicta, that other plaintiffs "may have an overbreadth claim under the First Amendment, but [the Court's] precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression").

61. *Id.* at 2719-20 (internal citations omitted).

62. *Id.*

63. *Id.* at 2724-25.

Several courts had already considered free speech rights in this context. The Ninth Circuit held that the prohibition of monetary donations to a designated foreign terrorist organization did not violate an individual's First Amendment free speech rights because there is no First Amendment right to facilitate terrorism by providing material support.[64]

In adopting the reasoning from this line of cases, the *HLP* majority rejected claims that money and support could be given only to the charitable side of a foreign terrorist organization.[65] The Court expressed concern with "how terrorist groups systematically conceal their activities behind charitable, social, and political fronts."[66] The old adage, "money is fungible," was central to how the Court viewed the provision of both money and training.[67] According to the Court, which deferred to legislative and executive branch analysis, such training could further terrorism in several ways.[68] Specifically, the Court expressed concern that such support could bring legitimacy to these two deadly organizations, provide means to attract and recruit personnel to carry out terrorist acts, and to support the families of those who supported the criminal terrorists.[69] This concern has been shared by humanitarian aid advocates for some time.[70] Additionally, the Court relied heavily on the Executive branch's assertion that separating support for a terrorist organization's terrorist and humanitarian activities is impractical.[71]

Finally, the majority rejected the dissent's claim that there is no stopping point.[72] The Court stated that "Congress has settled

64. United States v. Afshari, 412 F.3d 1071, 1079-80 (9th Cir. 2005).

65. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2725-26 (2010) (referring to those actions taken by a foreign terrorist organization that involve charitable work such as education, food distribution, and the like).

66. *Id.* at 2725.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See* FIONA TERRY, CONDEMNED TO REPEAT?: THE PARADOX OF HUMANITARIAN ACTION 15-16 (2002) (discussing the effect of terrorist organizations on refugee camps receiving humanitarian aid).

71. *Holder*, 130 S. Ct. at 2727.

72. *Id.* at 2726 (Breyer, J., dissenting) (arguing:

> this "legitimacy" justification cannot by itself warrant suppression of political speech, advocacy, and association. Speech, association, and related activities on behalf of a group will often, perhaps always, help to legitimate that group. Thus, were the law to accept a "legitimating" effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First

on just such a natural stopping place: The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization."[73] Independent advocacy, even advocacy that supported the legitimacy of the terrorist organization, was not prohibited under the statute.[74] Additionally, the Court noted that there may be future applications of the statute that would not pass First Amendment scrutiny.[75] In particular, the Court asserted that it "in no way suggest[s] that a regulation of independent speech would pass constitutional muster, even if . . . such speech benefits foreign terrorist organizations."[76]

The standard of review applied by the majority was unclear. Application of intermediate scrutiny under *O'Brien*,[77] as advocated by the Government, was rejected by the Court,[78] which reasoned that if the regulation in question is focused on expression, then "we are outside of *O'Brien's* test" and a level of scrutiny higher than the traditional intermediate scrutiny applied.[79] Yet, clear application of the strict scrutiny test is noticeably absent from the opinion. There is no discussion of the least restrictive means analysis. However, the Court did refer to combating terrorism as an undisputed compelling governmental interest—describing it as "an urgent objective of the highest order."[80] Additionally, the Court asserted that the statute itself was narrowly tailored.[81] Further, the Court acknowledged that the term "personnel" did not include an individual who independently advocates for the terrorist organization, without

> Amendment battle would be lost in untold instances where it should be won. Once one accepts this argument, there is no natural stopping place. The argument applies as strongly to "independent" as to "coordinated" advocacy.).

Id. at 2736.

73. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2726 (2010).

74. *Id.*

75. *Id.* at 2730.

76. *Id.*

77. United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (rejecting a First Amendment challenge to conviction under a generally applicable law which prohibited the destruction of a draft card and establishing the intermediate scrutiny test).

78. *Holder*, 130 S. Ct. at 2723-24 (holding that, because the statute reached political speech, *O'Brien's* intermediate scrutiny analysis was insufficient).

79. *Id.* at 2724.

80. *Id.*

81. *Id.* at 2717.

coordination with the organization.[82] The Court also noted how Congress had amended the statutory definition of "material support" in response to concerns from the lower courts, and required that the defendant know that the foreign terrorist organization has been designated by the Secretary of State or that it engages in terrorist activity.[83]

In the *HLP* case, the Court employed a balancing test similar to the one used in *Buckley v. Valeo*,[84] a case where a law restricting the freedom of speech by limiting funds given to a candidate, but not direct expenditures made independently on behalf of a candidate, was challenged. Similarly, in *HLP*, the Court reasoned that, by leaving open the alternative means of independent advocacy, it was not infringing on the free speech rights of humanitarian aid groups. Only communication or support provided under the direction of or coordinated with the foreign terrorist organization was prohibited.

B. THE IMPACT ON HUMANITARIAN AID ORGANIZATIONS—ENFORCEMENT AND CONFUSION

Opponents of the Court's ruling argue that the result of *Humanitarian Law Project* will be a chilling effect on private humanitarian aid organizations in the United States.[85] One opponent of the decision, the Charity and Security Network, took a stance in opposition to the Court's findings.[86] This group of aid workers, lawyers, and scholars is a key actor in advocating for changing the material support statute, and they believe the assertion that humanitarian aid to such organizations is no longer allowed. This article argues that this stance is mistaken.[87] While the Charity and Security Network, for example, argue that

82. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2721 (2010).

83. *See* 18 U.S.C § 2339B(a)(1) (2012).

84. *See* Buckley v. Valeo, 424 U.S. 1, 65 n.77 (1976) (per curiam) (invalidating independent expenditure limitations of the Federal Election Campaign Finance Act of 1971 by applying a balancing test weighing the governmental interest in the prevention of some harm with free speech rights).

85. Stephen I. Vladeck, *National Security's Distortion Effects*, 32 W. NEW ENG. L. REV. 285, 290 (2010).

86. *About Us*, CHARITY AND SEC. NETWORK, http://www.charityandsecurity.org/about (last visited Apr. 4, 2013).

87. Denise Furnell, *Aid Experts Discuss Challenges Working in Conflict Zones with Terrorist Groups*, CHARITY AND SEC. NETWORK, http://www.charityandsecurity.org/news/Aid_Experts_Discuss_Challenges_Working_Terrorist_Groups (last fisted Apr. 22, 2013).

current law prohibits any contact or provision of aid to the people of Somalia due to the likelihood of contact with Al-Shabaab,[88] the United States has set new guidelines that allow aid groups to provide assistance in Somalia without fear of violating laws or sanctions.[89] Arguably, however, it is not the United States government, but rather Somali Islamists, who pose a greater threat to humanitarian aid; Somali Islamist organizations have banned western aid groups from working within its borders, including several United Nations organizations.[90]

Various legal enforcement concerns stem from the material support statute and the 1977 Congressional amendment to the Trading with the Enemy Act, titled the International Emergency Economic Powers Act (IEEPA).[91] IEEPA gives power to the President to combat an unusual or extraordinary threat by taking control of the monetary assets of suspected enemy groups after declaring an emergency.[92] The statute served as a basis for President George W. Bush's Executive Order 13224, directing the Department of the Treasury, the Secretary of State, and the Attorney General to designate organizations that support terrorist groups and freeze their assets.[93] As a result, since the 9/11 terrorist attacks, the Treasury Department has stopped several charitable organizations with financial ties to terrorist organizations from operating within the United States.[94]

88. *See Legal Roadblocks for U.S. Famine Relief to Somalia Creating Humanitarian Crisis*, CHARITY AND SEC. NETWORK, (Jan. 27, 2010), http://www.charityandsecurity.org/analysis/Legal_Roadblocks_Relief_Somalia_Humanitarian_Crisis%20 (noting that Al-Shabaab is a designated foreign terrorist organization that has largely controlled the southern part of the nation since the U.S.-backed Kenyan military offensive in Somalia).

89. Kirit Radia, *US Tells Aid Groups They Can Provide Aid to Somalia Without Fearing Sanctions on Shabaab,* ABC NEWS, Aug. 2, 2011, http://abcnews.go.com/blogs/politics/2011/08/us-tells-aid-groups-they-can-provide-aid-to-somalia-without-fearing-sanctions-on-shabaab/.

90. Mike Pflanz, *Somali Islamists Ban Aid Groups, Renewing Famine Concerns*, CHRISTIAN SCI. MONITOR (Nov. 30, 2011).

91. *See* 50 U.S.C. §§ 1701-07 (2012).

92. *Id.*

93. Exec. Order No. 13,244, 66 Fed. Reg. 49,079 (Sept. 23, 2001). *See also* R. Colegate Selden, *The Executive Protection: Freezing The Financial Assets of Alleged Terrorists, the Constitution, and Foreign Participation in U.S. Financial Markets,* 8 FORDHAM J. CORP. & FIN. L. 491, 493 (2003).

94. *See Protecting Charitable Organizations*, RESOURCES CTR., DEP'T OF THE TREASURY, http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-charities_execorder_13224-a.aspx (listing organizations who have been prohibited from operating).

Still, misunderstanding as to the application of the material support statute is common. Professor Cole, from Georgetown University, and counsel for the HLP group, recently suggested that former United States Attorney General Michael Mukasey, former Mayor Rudolph Giuliani, and former Homeland Security Secretary Frances Townsend may have violated the material support statute by arguing against the designation of the Mujahedeedn Khalq in Iran as a foreign terrorist organization.[95] A response from the accused asserted that their independent advocacy was not subject to prosecution.[96] Attorney General Mukasey and his allies also responded that they "felt quite secure, thank you, in relying on the protection Congress placed in the statute, backed up by the First Amendment."[97] This exchange among highly knowledgeable experts reveals the extent of confusion about the law in society as a whole, and thus also in the international humanitarian aid community.

IV. USING CAMPAIGN FINANCE LAW AS A STARTING POINT FOR INTERPRETING PROSECUTIONS UNDER THE MATERIAL SUPPORT OF TERRORISM STATUTE CONSISTENT WITH THE FIRST AMENDMENT

Looking to other areas of law provides alternative frameworks for understanding the material support statutes. National security law, with its varied interactions with terrorism, is known for its complicated and opaque nature.[98] There are few black and white answers, and the resulting shades of gray leave judges, prosecutors, and civilians with little clarity. Michael Chertoff described the impact of the September 11th attacks as causing an "upheaval in the doctrine and legal architecture that govern our national security strategy."[99] The doctrinal upheaval Chertoff referred to also impacts the way in which practitioners

95. David Cole, *Chewing Gum for Terrorists,* N.Y. TIMES, Jan. 3, 2011, at A21.

96. Michael B. Mukasey, Tom Ridge, Rudolph Giuliani, & Frances Fragos Townsend, *MEK is Not a Terrorist Group*, NAT'L REVIEW ONLINE (Jan. 1, 2011), http://www.nationalreview.com/articles/print/256689.

97. *Id.*

98. *See* CONFRONTING TERROR, *supra* note 5, at 1 (discussing the uncertain future and unanswered questions of legal and policy issues and the strategies and tactics of counterterrorism); JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY x-xi (W. W. Norton & Co., Inc. 2012) (discussing the uncertain role of our traditional checks-and-balances constitutional framework in a post-9/11 world); DYCUS, *supra* note 2, at 1132-33 (discussing the function of courts in investigating and prosecution threats to national security).

99. CONFRONTING TERROR, *supra* note 5, at 51.

think about the material support of terrorism statutes. This article suggests that the Court's decision in *Humanitarian Law Project* provides a possible alternative framework for understanding what speech is protected and what speech is prohibited. *Buckley v. Valeo*,[100] a landmark campaign finance law decision concerning individual expenditures and coordinated spending, provides a useful starting point.

A. THE *BUCKLEY* FRAMEWORK

The *Buckley* decision involved a challenge to the Federal Election Campaign Act (FECA) and related provisions within the Internal Revenue Code.[101] The 1971 act, as amended in 1974, criminalized the independent expenditure of more than $1,000 on behalf of any individual candidate.[102] FECA contained four basic types of regulations: disclosure regulations, limits on the size of campaign contributions, limits on independent expenditures, and regulations concerning the public financing of campaigns.[103] The central holding of *Buckley* was that the First Amendment permits government-imposed restrictions on campaign finance activities in order to prevent corruption and the appearance of corruption.[104] At the same time, the holding provided that independent expenditures—those not coordinated with candidates and made on behalf of a candidate by an independent third party—cannot be limited because they do not risk the same corruption or appearance of corruption associated with contributions made directly to candidates running for office.[105]

Specifically, the Court upheld limitations on the size of contributions, while striking down similar limits on independent expenditures.[106] Expenditure limits, the Court reasoned, involve only a "marginal restriction" on the protected free speech rights of a potential contributor.[107] Contributions only convey general

100. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976).

101. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

102. 18 U.S.C. § 608 (e) (1970 Supp. IV).

103. *See* 18 U.S.C. §§ 2331-2339(D) (2006 & Supp. III 2009).

104. Richard Briffault, *The 527 Problem . . . and the Buckley Problem,* 73 GEO. WASH. L. REV. 949, 981-90 (2005).

105. *Buckley,* 424 U.S. at 22.

106. *Id.* at 80-81.

107. *Id.* at 19-20 (concluding that limits on campaign spending implicated first amendment rights, in part, because "virtually every means of communicating ideas in today's mass society requires the expenditure of money"). Thus, limits on

support for a candidate, not a particular political message or communication, and, thus, involve a lesser restriction on the freedom of speech.[108] Limits on independent expenditures related to a particular candidate, on the other hand, represent a "substantial" restraint on political speech.[109] Such a limit prevents average citizens from engaging in "the most effective modes of communication."[110] The Court reasoned that this limit was much more antithetical to political speech rights.[111]

The Court also noted that the independent expenditure limit would place a higher burden on the freedom of association than does the contribution limit.[112] First, the Court reaffirmed that making a contribution is similar to joining a political party, and enables individuals to "pool their resources in furtherance of common political goals."[113] Contribution limits would still allow associations and candidates to aggregate large sums of money for the purpose of furthering effective political advocacy.[114] Independent expenditure limits, however, would prevent organizations or associations from aggregating funds in such a manner.[115] As a result, the Court reasoned that independent expenditure limits pose a much greater infringement on speech rights, while simple contribution limits impose only a marginal restriction on political speech rights.[116]

B. SYNTHESIZING TERRORISM PROSECUTIONS AND CAMPAIGN FINANCE RESTRICTIONS TO FIND A FIRST AMENDMENT PRINCIPLE

The laws challenged in both *Buckley* and *Humanitarian Law Project* invoke similar frameworks when analyzing the constitutionality of restrictions on speech. The material support statutes prohibit the provision of material support, including

expenditures and contributions implicate core political free speech rights of the citizenry.

108. Buckley v. Valeo, 424 U.S. 1, 21 (1976).
109. *Id.* at 19-20.
110. *Id.*
111. *Id.*
112. *Id.* at 22.
113. *Id.*
114. *Buckley*, 424 U.S. at 22.
115. *Id.*
116. *Id.* at 23.

money, to a designated foreign terrorist organization.[117] In this context, material support can also include providing training, expert opinion, or advice.[118] Similarly, the *Buckley* decision upholds the limits on contributions to political candidates. The exception for independent advocacy from the *Humanitarian Law Project* decision is akin to the protection of independent expenditures in *Buckley*. Upholding the material support statute as applied to financial support that is coordinated with or directed by the foreign terrorist organization correlates with the decision to uphold contribution limits to particular campaigns or candidates. The two cases have several similarities that, when combined, create a workable framework for understanding the Court's First Amendment jurisprudence in the context of the material support statute and counterterrorism efforts.

First, neither case involves pure speech rights; rather, they implicate speech rights in a more nuanced manner. The *Buckley* opinion reaffirmed that the First Amendment provides protection for political association and expression, and that such expression and advocacy is enhanced by group association.[119] Restrictions on contributions that an individual or group can make on a particular expression of political speech "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[120] Nevertheless, the decisions in both cases implicate core First Amendment speech rights. In the area of campaign finance law, monetary contributions to political organizations were protected as association and expression.[121] Though limitations on political contributions were held to be constitutional, the *Buckley* decision also implies that a complete prohibition would likely be struck down as unconstitutional.[122]

117. *See* 18 U.S.C. §§ 2339(A)-2339(D) (2006 & Supp. III 2009).

118. *Id.* § 2339A(b).

119. Buckley v. Valeo, 424 U.S. 1, 15 (1976) (citing NAACP v. Alabama, 357 U.S. 449, 460 (1958)).

120. *Id.* at 20-21.

121. *Id.* at 65-55. *See also* Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley, 454 U.S. 290, 300 (1981) (holding that monetary contributions are a "collective expression" protected by the First Amendment right of association).

122. *Buckley*, 424 U.S. at 16, 19, 20-21 (1976) (the court explains that political speech often requires monetary expenditures and the restriction on the amount of money an individual or group can spend necessarily reduces the quantity of expression allowed). *See also* Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953 (2011).

Money facilitates speech; thus, a limit on expenditures and spending directly restricts speech.[123] Giving money to someone else also facilitates speech, but only the speech of the person to whom it is given.

In the context of terrorism prevention, the Court suggested that both the HLP group and the government took "extreme positions."[124] The Supreme Court in *Humanitarian Law Project* did not directly address whether donating money to a terrorist organization implicated the First Amendment, but both parties assumed that Congress would have the power to restrict such donations.[125] The HLP group argued that the material support statute restricted pure political speech, while the Government asserted that the regulation only addressed conduct.[126] Therefore, the HLP group argued that because pure political speech was implicated, the statute failed to meet even the intermediate scrutiny test from *O'Brien*.[127] The plaintiffs in *Humanitarian Law Project* originally argued that *Buckley* served as a basis for providing support to foreign terrorist organizations who were also engaged in political expression (presumably acts of terror were considered expression by the plaintiffs) because doing so was a form of political expression.[128] The Government asserted that the material support statute subjected conduct, not speech, to criminal liability, and, to the extent any speech was restricted, such speech should be wholly unprotected and ought to be treated like speech constituting a crime of conspiracy.[129] The Court disagreed, determining that speech rights were implicated and that the restriction was content based.[130]

As a result, the Court found the First Amendment question narrowed to "whether the government may prohibit what plaintiffs want to do—provide material support to the PKK and

123. Buckley v. Valeo, 424 U.S. 1, 16 (1976).

124. Humanitarian Law Project v. Holder, 130 S. Ct. 2705, 2722 (2010).

125. *Id.* at 2722-26, 2735.

126. *Id.* at 2723.

127. *Id.*; Brief for Plaintiffs at 2, 24-55, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89).

128. Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134-35 (9th Cir. 2000).

129. *Id.*; Brief for Government at 46, 130 S. Ct. 2705 (2011) (Nos. 08-1498, 09-89); Reply Brief for Government at 31-32 & n.8, 130 S. Ct. 2705 (2011) (Nos. 08-1498, 09-89).

130. *Holder*, 130 S. Ct. at 2723-24.

LTTE in the form of speech."[131] In dismissing the claim that pure political speech is implicated, Chief Justice Roberts pointed out that "material support" is prohibited, not "pure political speech," and such support may not even take the form of speech at all.[132] According to Roberts, the Government was wrong to assert that no speech was implicated.[133] Instead, he explained that "[t]he law here may be described as directed at conduct . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message."[134] This view of the statute does implicate First Amendment rights.

Both cases implicate a similar balancing test, finding First Amendment rights to be strongest when one speaks for themselves and not others.[135] The test applied by the Court appears to weigh the government interest against the freedom of speech.[136] Both decisions also take into account whether independent action allows for the expression to take place outside the restriction.[137] Perhaps the only consensus generally held concerning the *Humanitarian Law Project* decision is the lack of a defined balancing test and confusion about which level of scrutiny was applied.[138] What is clear is that the Court weighed the government's interest in fighting terrorism against the freedom of speech. Similarly, the *Buckley* decision involves balancing the government's interest in combating political corruption against the freedom of speech. Both decisions invoke levels of scrutiny

131. Humanitarian Law Project v. Holder, 130 S. Ct. 2705, 2724 (2010).

132. *Id.* at 2723.

133. *Id.*

134. *Id.* at 2724.

135. *See supra* Part III–IV.

136. *See supra* Part III.A.3, III.B., IV.A.

137. *See supra* Part III.A.3, III.B., IV.A.

138. *See* Katherine R. Zerwas, *No Strict Scrutiny-The Court's Deferential Position on Material Support to Terrorism in* Holder v. Humanitarian Law Project, 37 WM. MITCHELL L. REV. 5337 (2011) (arguing that the court applied strict scrutiny but disagreeing with the conclusion); Peter Margulies, *Accountable Altruism: The Impact of the Federal Material Support Statute on Humanitarian Aid*, 34 SUFFOLK TRANSNAT'L L. REV. 539 (2011); Amanda Shanor, *Beyond Humanitarian Law Project: Promoting Human Rights in a Post-9/11 World*, 34 SUFFOLK TRANSNAT'L L. REV. 519 (2011) (asserting that the strict scrutiny was applied, but that this is questioned by many); Eugene Volokh, *Humanitarian Law Project and Strict Scrutiny,* THE VOLOKH CONSPIRACY (June 21, 2010), http://volokh.com/2010/06/21/humanitarian-law-project-and-strict-scrutiny/; Eugene Volokh, *Speech that Aids Foreign Terrorist Organizations, and Strict Scrutiny,* THE VOLOKH CONSPIRACY (June 21, 2010), http://volokh.com/2010/06/21/speech-that-aids-foreign-terrorist-organizations-and-strict-scrutiny/.

that are not readily identifiable. Combined, the decisions tend to center on a principle of weighing the governmental interests against the right to engage in potentially harmful speech coordinated between the speaker and a third party.

The holding in *Buckley*, as previously discussed, allows the government to restrict the spending of money on behalf of a candidate if such actions are coordinated with the candidate's campaign.[139] At the same time, the government is not allowed to restrict expenditures made independently from the campaign.[140] Individuals can purchase advertisements supporting one candidate over another, but run afoul of federal law and would be subject to the relevant contribution restrictions if they did so in coordination with the official campaign. The Court's rationale for allowing this separation rested in part on the distinct harm Congress was trying to prevent. Congress was concerned that a lack of restrictions would result in bribery or corruption.[141] The Court reasoned that coordinated expenditures or contributions were more likely to illicit bribes or undue influence.[142] Conversely, independent expenditures avoided the appearance of impropriety, while still leaving open the opportunity to independently advocate for or against a candidate. This decision allowed the restriction on protected speech because of the compelling government interest in preventing corruption, as well as the existence of an alternative means of communicating the message—independent expenditures not coordinated with the campaign. Similarly, the *Humanitarian Law Project* decision upheld the criminal prohibition of providing material support to designated foreign terrorist organizations in the form of speech.[143] The analysis in this decision focused on the compelling government interest in fighting terrorism.[144] The Court reasoned that money truly is fungible, and that providing material support to terrorist organizations had the effect of both legitimizing the terrorist organization and allowing it to free up its own resources for unlawful or violent activities.[145] Again, the Court emphasized the existence of an exception for independent advocacy that is

139. *See generally* Buckley v. Valeo, 424 U.S. 1, 46 (1976).
140. *Id.* at 45.
141. *Id.*
142. *Id.* at 47.
143. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2725-26, 2735 (2010).
144. *Id.* at 2724.
145. *Id.* at 2725.

conducted independently from the terrorist organization by being neither coordinated with or directed by the terrorist organization.[146] In other words, one could write a news article, lobby Congress, or engage in a variety of independent forms of advocacy so long as the activities are not coordinated with the terrorist organization itself. These similarities suggest that the Court's treatment of speech in *Buckley* may reveal a workable framework for dealing with speech in the context of terrorism prosecutions. *Buckley*'s progeny suggest that the similarities go even further.

C. SUBSEQUENT CASES

Subsequent cases further reveal that the material support statute shares a number of parallels with the *Buckley* line of cases. From the campaign finance law line of cases, the most significant recent development has been *Citizens United v. Federal Election Commission*,[147] but the cases since *Buckley* tell a broader story. Only two years after the *Buckley* decision, the Court again struck down a statute that prohibited contributions and independent expenditures by corporations in affecting referendum votes unless the referendum directly impacted the corporation's property or business.[148] The Court extended their *Buckley* decision, finding that it applied to the state regulations governing state candidate elections by applying the dual approach to expenditures and contributions.[149] In *Citizens United*, the Court again affirmed the *Buckley* framework regarding the importance of independent advocacy and allowed corporations to make unlimited independent expenditures for candidates running for federal office.[150] Setting aside the

146. Humanitarian Law Project v. Holder, 130 S. Ct. 2705, 2726 (2010).

147. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (ruling that a ban on free speech through limitations on independent communications by corporations, associations, and unions was unconstitutional).

148. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (striking down the Massachusetts criminal statute in part because of the significant importance political speech plays in American culture).

149. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387 (2000) (affirming the reasoning behind *Buckley* as to why contribution and expenditure limits are treated differently).

150. *See generally Citizens United*, 558 U.S. 310 (determining that the *Bellotti* analysis applied directly to the portion of the Bipartisan Campaign Reform Act that prohibited corporations from making independent expenditures). In doing so, the Court overruled Austin v. Mi. Chamber of Commerce, 494 U.S. 652 (1990), and parts of McConnell v. FEC, 540 U.S. 913 (2003), both of which had doubt cast upon them

controversy surrounding corporations and First Amendment rights,[151] the emphasis and protection placed upon independent advocacy is clear. This line of cases consistently protects independent expenditures and independent advocacy.

The material support cases also tend to follow this framework. Before the *Humanitarian Law Project* decision, courts had already started making distinctions regarding the First Amendment rights of those who had provided support to designated foreign terrorist organizations. The D.C. Circuit addressed the First Amendment rights of a group seeking to challenge the designation of the Moajahedin Organization of Iran as a foreign terrorist organization.[152] There, the court ruled that § 2339B "is not aimed at interfering with the expressive component of [the organization's] conduct but at stopping aid to terrorist groups."[153] The Ninth Circuit has determined that defendants charged with material support under § 2339B had no First Amendment right to provide bombs or money to a terrorist organization, but were "entitled to publish articles" explaining why the organization had been mischaracterized as a terrorist organization.[154]

The trend of distinguishing between independent advocacy and coordinating with or being under direction from the terrorist organization is not new. In *United States v. Khan*, the district court determined that there was no First Amendment concern involving a charge of providing material support in the form of personnel, because the personnel in question would be working under the direction of the terrorist organization—recruiting, purchasing supplies, and performing other similar activities.[155]

After *Humanitarian Law Project*, the Second Circuit Court of Appeals reasoned that the material support provision was

by various justices.

151. Scholars have disagreed on whether or not corporations should possess constitutional rights. *See*, *e.g.*, Michael S. Kang, *The End of Campaign Finance Law as We Know it*, 98 VA. L. REV. 1 (2012) (arguing that *Citizens United* saw much public outcry over alleged corporate electioneering and points out broader deregulation).

152. People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238 (D.C. Cir. 2003).

153. *Id.* at 1244 (citing Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000)).

154. United States v. Afshari, 426 F.3d 1150, 1161 (9th Cir. 2005).

155. United States v. Khan, 309 F. Supp. 2d 789, 822 (E.D. Va. 2004).

narrowly drawn to cover only a small category of speech—that which is in coordination with, or under direction of, a foreign terrorist organization.[156] In doing so, they acknowledged that independent advocacy exempts a defendant from criminal liability.[157] In an unpublished opinion, the Second Circuit reasoned that a person of average intelligence would know that maintaining a website that posted training manuals and propaganda for a designated foreign terrorist organization is prohibited, and that the statute is not unconstitutionally vague.[158] This decision was issued in response to a vagueness challenge like the one seen in *Humanitarian Law Project*. The court reasoned that the challenged conduct of managing the website for the terrorist organization obviously fit into the definition of material support.[159] Though the court was dealing with a slightly different challenge here, it still assumed potential First Amendment implications and dismissed the challenge only because the communication at issue was "the core" of what the statute was designed to criminalize: the provision of support as defined in the statute.[160]

Analyzing these cases together reveals a potentially consistent framework on which courts may interpret the material support statute's First Amendment implications in the future. Independent advocacy will continue to be a key factor in weighing the national security concerns against the free speech rights of those charged with providing material support. Courts will likely continue to uphold limits on coordinated actions or actions under the direction of a terrorist organization—when treated as lesser infringements upon the First Amendment, national security concerns and the desire to combat terrorism will likely outweigh the potential loss of speech in these cases.

156. United States v. Farhane, 634 F.3d 127 (2nd Cir. 2011), *cert denied*, Sabir v. United States, 132 S. Ct. 833 (Dec. 5, 2011).

157. *Id.* at 136.

158. United States v. Mustafa, 406 Fed. Appx. 526, 530 (2d Cir. 2011).

159. *Id.* at 526 (citing Trial Tr. At 930) (noting that the defendant provided training in how to conduct violent jihad; that Kassir represented to them that he intended to train people in "'[w]arfare, shooting and tracking'"). There was also evidence that the defendant's website provided terrorist training manuals which could not be found elsewhere. The court cited Humanitarian Law Project on this standard, affirming applicability on this case.

160. *Id.* at 530.

D. DEFERRING TO THE POLITICAL BRANCHES WHEN STRIKING A BALANCE

It is worth noting that both *Humanitarian Law Project* and *Buckley* give a significant level of deference to the political branches. The reason for this is likely that the restrictions in question "operate within the core of the First Amendment, and the governmental interests at stake are within the core of the democratic process."[161] Most scholars agree that *Buckley* is characterized by a "fluctuating deference to congressional determinations."[162] At the same time, *Humanitarian Law Project* gave deference to both Congressional and Executive findings on a key fact—Chief Justice Roberts' majority asserted that the Court should give deference to Congress's assessment of the effect of material support in advancing terrorist activities "given the sensitive national security and foreign relations interests at stake."[163] The Executive branch's assessment of factual questions about the activities of terrorist groups was also deserving of a certain amount of deference.[164] Both lines of cases give a great deal of deference to the coordinate political branches, suggesting that the Court was willing to find workable solutions that do not necessarily fit into the normal constitutional jurisprudence that might otherwise apply.

V. HOW TO PROSECUTE AND HOW TO ADVISE CLIENTS

National security law and foreign policy law tend to be extremely complex on the easiest of legal questions. Therefore, practitioners deserve not just an academic analysis but a practical approach to the more difficult problems. This section seeks to analyze how to address complex factual situations presented when prosecuting the material support of terrorism or advising clients on potential criminal liability. There are two primary types of violations of the statute: those involving the provision of tangible support, and those that provide intangible support in the form of advice, training, or other forms of advocacy.[165] Applying the *Humanitarian Law Project/Buckley*

161. DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, & DANILE P. TOKAJI, ELECTION LAW: CASES AND MATERIALS 698 (4th ed. 2008).

162. *See* Arnold Nicholson, Buckley v. Valeo: *The Constitutionality of the Federal Elections Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 325 (1977).

163. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2711-12 (2010).

164. *Id.* at 2727.

165. *See* 18 U.S.C. §§ 2331-2339D (2006 & Supp. III 2009).

framework provides a clearer understanding as to the constitutionality of prosecuting these types of cases.

A. EXCEPTIONS FOR HUMAN RIGHTS MONITORING AND MEDICINE

To start, there are some exceptions to the material support statute that apply before even considering the constitutionality of the statute's application. The statute enumerates two exceptions for the provision of "medicine or religious materials."[166] In 1996, Congress replaced the phrase "but does not include humanitarian assistance to persons not directly involved in such violations" with "expert medicine or religious materials."[167] The religious material exception is straightforward, and, as of yet, unchallenged in the courts, but the medical exception is more complicated. A hypothetical situation involves an American doctor for a humanitarian aid organization working in a region where a designated foreign terrorist organization operates. In the course of some sort of attack, a member of the terrorist organization is injured and transported to the doctor's clinic. The doctor knows there is a high likelihood that her new patient is a member of a foreign terrorist organization based upon information provided by others, but perhaps the fog of war has made it too difficult to determine whether her patient is a member of a foreign terrorist organization.

A concern of many aid groups is that the medical exception is too narrowly drawn and may not prevent a doctor in this situation from being held criminally liable. Some courts have limited the exception to a few instances of the provision of actual pharmaceuticals.[168] The court in *Shah* noted that Congress had intended to draw the exception very narrowly, and § 2339B's rejection of the *mens rea* requirement found in § 2339A implies that the exception under § 2339B is limited to the provision of pharmaceuticals and does not include providing medical services.[169] However, the same court reasoned that a doctor who treats a terrorist by random chance would not be criminally

166. 18 U.S.C. § 2339A(b)(1) (2012).

167. Pub. L. No. 104-132, Title III, § 323, 110 Stat. 1214, 1255.

168. United States v. Farhane, 634 F.3d 127, 141 (2d Cir. 2011); United States v. Shah, 474 F. Supp. 2d. 492, 497 (S.D.N.Y. 2007).

169. United States v. Shah, 474 F. Supp. 2d. 492, 497 (S.D.N.Y. 2007) (citing Dolan v. United States Postal Serv., 546 U.S. 481 (2006)). *See also* United States v. Paracha, No. 03 CR(SHS), 2006 WL 12768, at *28 (S.D.N.Y. Jan. 3, 2006).

liable, nor would doctors working for groups like Doctors Without Borders be subject to prosecution under the government's view of § 2339B.[170] The court reasoned that doctors acting in these situations are not under the direction or control of a terrorist organization, but are acting independently; thus, the state would be unable to prove essential elements of the crime.[171]

The government has expressed hesitation to prosecute in these situations. Assistant United States Attorney Karl Metzer stated that the government would not prosecute these sorts of cases because the inability to prove that the individual was acting under the direction or control of the designated foreign terrorist organization would exclude these doctors from criminal liability.[172] In contrast, a doctor who worked as an on-call physician for a designated foreign terrorist organization, and under the direction of the terrorist organization, was properly convicted of providing material support of terrorism.[173] The Second Circuit reasoned that only doctors who acted in coordination with designated foreign terrorist organizations to provide something beyond "substances qualifying as medicines" would be criminally liable.[174] The difference drawn by the court is between a doctor who, by happenstance, assists an injured member of a terrorist organization and one who is essentially employed by or on retainer for a designated foreign terrorist organization.

The *Humanitarian Law/Buckley* framework applies to this hypothetical situation. The independent nature of aid groups like Doctors Without Borders, whom act independently and not under the direction or control of a foreign terrorist organization, precludes criminal liability under the material support statute. These stand in stark contrast to independent acts and coordinated acts, resulting in substantive legal differences in

170. United States v. Shah, 474 F. Supp. 2d. 492, 498 (S.D.N.Y. 2007)

171. *Id.* at 499.

172. *Id.* (agreeing with the AUSA's statement:

> [T]he concern about Doctors Without Borders and all that is ill-founded because of the definition of personnel. The government is required to prove that Dr. Sabir worked or agreed to work under the terrorist organization's direction or control before he can be convicted under this statute. That eliminates the nongovernmental organizations and others who provide assistance on their own.).

Id.

173. United States v. Farhane, 634 F3d 127, 132 (2d Cir. 2011).

174. *Id.* at 143.

criminal liability. Admittedly, a few court opinions and the policy statement of a single prosecutor do not provide legal assurances for those doctors in the field now, but these decisions lay the foundation for expanding the framework. Moreover, prudential considerations by prosecutors would caution against attempting to prosecute doctors who have inadvertently provided medical services to a terrorist. Such cases would not quickly find juries willing to convict.

B. PROVIDING TANGIBLE MATERIAL SUPPORT

The simplest hypothetical of providing material support is one where an individual or group provides direct tangible material support to a designated foreign terrorist organization. For example, an individual may give weapons, vehicles, computers, or the like, to a foreign terrorist organization with whom the individual identifies. Another example could involve an individual wanting to provide aid to an impoverished village abroad that happens to be in a region controlled by a designated foreign terrorist organization. The donor provides money to the foreign terrorist organization, but, because money is fungible, the terrorist organization can use it for illegal purposes. The donor has clearly violated the material support of terrorism statute.

An even easier hypothetical might consist of an American citizen who goes abroad to train members of a designated foreign terrorist organization on how to build suicide bombs or improvised explosive devices. These are easy cases where prosecutors have little trouble convicting defendants, and lawyers have little trouble in advising clients to avoid such activities. The defendants in these cases have provided direct, tangible material support to designated foreign terrorist organizations.

A more difficult case presents itself where individuals have provided *incidental* material support. Some scholars have argued that aid groups face serious legal criminal liability if they allow any of their aid to fall into the hands of a designated foreign terrorist organization.[175] The hypothetical here involves, for instance, an aid group that has an agreement with a designated foreign terrorist organization to provide aid to a war-torn area. There is no agreement to make payments to the terrorist organization, but the aid group knows some of its aid will fall into

175. *See* Margulies, *supra* note 138, at 545, 557.

the hands of the terrorist organization nonetheless. In this situation, the aid group would likely be required to take a variety of steps to insulate itself from liability.[176]

Meanwhile, the government would have to prove that the aid group knew its aid was providing support to a designated foreign terrorist organization. The material support statute was not designed to apply to natural persons alone; rather, it can also be applied against organizations such as aid groups or banks that have a significant presence in the United States.[177] Congress defined the mental state required under the statute as having knowledge about the organization's connection to terrorism, not specific intent to advance the terrorist activities of the organization.[178] It is tempting for the prosecutor to end the inquisition there and assume that the case is easily won.

However, the law relating to tacit provision of tangible material support is not as clear-cut. Professor Peter Margulies points out that aid groups who fail to take due diligence by not setting up appropriate institutional controls could subject themselves to criminal liability.[179] Nevertheless, his hypothetical is predicated on the existence of an aid group that wantonly ignores all signs of corruption in their arrangement and refuses to take precautions, alert authorities, stop providing aid, adjust tactics, or take any action at all.[180] Liability would also rest upon the aid being directly diverted. One could hardly find criminal liability where an aid group is consistently robbed by a foreign terrorist organization. Having internal checks in place can rebut the government's otherwise strong case against an aid group.[181]

This is consistent with the framework found in *Buckley* and *Humanitarian Law Project*. Here, the actor who engages in these sort of internal checks does not provide support willingly; in fact, actions are taken to actively rebut any chance of providing support. In the campaign finance law area, the *Buckley* decision recognized that the lack of coordination with the candidate decreases the threat of corruption the law was seeking to

176. Margulies, *supra* note 138, at 557-58.

177. Goldberg v. UBS AG, 660 F. Supp. 2d. 410, 413-16 (E.D.N.Y. 2010).

178. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2722 (2010); United States v. Abdi, 498 F. Supp. 2d 1048, 1064 (S.D. Oh. 2007).

179. Margulies, *supra* note 138, at 557-58.

180. *Id.* at 557.

181. *Id.* at 558.

prevent.[182] A comparable hypothetical would be a candidate stealing money from a donor. Likewise, a complete lack of coordination with the designated foreign terrorist organization would likely undermine the government's case against the aid group.

C. ADVOCACY, EXPERT OPINION, AND ADVICE

1. LEGAL REPRESENTATION

Legal representation of a foreign terrorist organization or those charged with material support is a complicated matter. A common hypothetical involves a federal criminal defense attorney who represents a client charged with the material support of terrorism. Defendants can include individual persons, or those acting on behalf of an organization or corporation.[183] A common defendant could be an individual who gave money to a designated foreign terrorist organization,[184] an individual who provided money and ammunition,[185] or even an aid organization that wants to provide legal training.[186]

Defendants charged with providing material support to terrorist organizations have a right to an attorney in their criminal prosecution.[187] Thus, an attorney who represents a designated foreign terrorist organization or a member or supporter of such an organization in a criminal prosecution likely

182. Buckley v. Valeo, 424 U.S. 1, 47 (1976) (reasoning that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate"). *See also* Margulies, *supra* note 138, at 555.

183. Margulies, *supra* note 138, at 555. *See* Almog v. Arab Bank PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (holding that a bank could violate § 2339A, et seq.); Goldberg v. UBS AG, 660 F. Supp. 2d. 410 (E.D.N.Y. 2010) (holding that the material support statute was not intended to be limited to natural persons only).

184. *See, e.g.,* Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685 (7th Cir. 2008), *cert denied*, 130 S. Ct. 458 (2009) (noting that the defendants provided financial assistance to Hamas).

185. *See, e.g.,* United States v. Afshari, 446 F.3d 915, 916 (9th Cir. 2006) (stating that the defendant made monetary contributions to the People's Mojahedin Organization for Iran between 1997 and 2001, and later provided ammunition).

186. *See, e.g.,* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

187. *See* U.S. CONST. amend. VI. *See also* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment requires defendants who are unable to afford counsel be provided counsel unless that right is unequivocally waived by the defendant); Powell v. Alabama, 287 U.S. 45 (1932) (holding that, in capital cases where defendants were unable to hire counsel, one would be provided by the court).

has no criminal liability. As a result, it is highly unlikely a court would allow the government to charge or convict a criminal defense attorney representing a foreign terrorist organization member in a criminal trial.

Nevertheless, criminal defense attorneys should still be cautious in the scope of their representation. Legal representation of a designated foreign terrorist organization exposes the attorney to criminal liability under the material support statute in other contexts. The definition of material support includes the provision of "expert advice or assistance," defined as "scientific, technical, or other specialized knowledge."[188] This definition includes the provision of legal services and representation.[189] Those who represent high security prisoners may therefore risk liability if they pass messages from their clients to the foreign terrorist organization concerning plans to advance other terrorist plots.[190] In *United States v. Stewart*,[191] the Second Circuit upheld the conviction of Lynn Stewart, who had helped her client, Sheikh Omar Abdel-Rahman,[192] pass secret communications to his followers that involved planning a terror attack.[193] The court reasoned that her actions constituted providing material support in the form of personnel, and her conviction was upheld.[194] The warning to other criminal defense attorneys is to be cautious in representing high security clients, and to avoid performing acts that go beyond providing a defense or risk criminal liability. The prosecution of Lynn Stewart is consistent with the established framework. Her actions as a defense attorney were perfectly lawful in representing her client. It was when she began providing services to her client's followers in the terrorist organization that

188. 18 U.S.C. § 2339A(b)(3) (2012).

189. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2720 (2010) (holding that providing legal advice and training fits into the definition of "expert advice").

190. United States v. Stewart, 590 F.3d 93 (2d Cir. 2009), *cert denied*, Sattar v. United States, 130 S. Ct. 1924 (2010) (stating that a lawyer was convicted and imprisoned for conspiring with her client to aid in attacks on U.S. military installations).

191. *Id.*

192. EVAN KOHLMANN, AL-QAIDA'S JIHAD IN EUROPE (2004). Sheikh Omar Abdel-Rahman is an Egyptian Cleric convicted of planning terror attacks, and was a leader of Gama'a'a al'Islamiyya, a designated foreign terrorist organization. He is also known as "the blind Sheikh," and helped plot the 1993 World Trade Center bombing. His legal defense was funded by Osama Bin Laden.

193. *Stewart,* 590 F.3d. at 99.

194. *Id.* at 114.

she subjected herself to criminal liability. In doing so, she crossed over from independent advocacy to coordination with a designated foreign terrorist organization.

2. INDEPENDENT ADVOCACY

The First Amendment protects the freedom of speech of those seeking to individually advocate for a designated foreign terrorist organization.[195] Individuals can publish articles in support of a terrorist organization's goals,[196] and it is likely they could also write an opinion piece in a newspaper, lobby Congress on behalf of the foreign terrorist organization, and a variety of other acts. The only limit is that the actions taken are entirely independent of the terrorist organization, meaning they are not coordinated with or directed and controlled by the terrorist organization.[197]

One clear point of law arising out of *Humanitarian Law Project* is the statute's inapplicability to independent advocacy. The material support statute itself precludes its application to independent advocacy. Independent advocacy is specifically excluded from the definition of "personnel," providing that an individual who acts "entirely independent of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction or control."[198] Additionally, "service" was defined as referring to "concerted activity, not independent advocacy."[199] Again, when addressing the First Amendment claims, the Court affirmed the government's argument, finding that "the statute does not prohibit independent advocacy or expression of any kind."[200] The Court also reasoned that Congress intended for the statute to criminalize only material

195. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2722-23 (2010). *See also* Mukasey et al., *supra* note 96.

196. United States v. Afshari, 426 F.3d 1150, 1161 (9th Cir. 2005) (affirming that defendants were entitled to publish articles on behalf of the terrorist organization arguing against its designation, but could not provide bombs or weapons).

197. *Holder*, 130 S. Ct. at 2721.

198. 18 U.S.C. § 2339B(h) (2012).

199. *Holder*, 130 S. Ct. at 2711-12 (citing Webster's Third New International Dictionary 2075 (1993)) (holding that this definition of service not only precludes criminal liability for independent advocates, but it is also not unconstitutionally vague; rather, a person of ordinary intelligence would be able to understand what conduct or "service" was prohibited by § 2339B).

200. *Id.* at 2723.

support that is coordinated with or under the direction of the terrorist organization.[201] It again affirmed that "[i]ndependent advocacy that might be viewed as promoting the group's legitimacy is not covered."[202]

This exception is consistent with the *Buckley* framework, where limits on independent expenditures were struck down as violations of the First Amendment, but contribution limits were upheld.[203] The potential harms Congress sought to prevent—political corruption—were implicated differently depending on whether the money was in the form of a contribution or an independent expenditure.[204] Like acts coordinated with a terrorist organization, contributions to a campaign carry a higher risk of harm, and warrant a greater intrusion upon the freedom of speech. Conversely, actions taken independent from a terrorist organization, like independent expenditures on behalf of a candidate, have a much lower risk of harm and do not warrant restrictions on the freedom of speech. As a result, the *HLP* decision held that any independent advocacy that parties wish to engage in does not trigger criminal liability under § 2339B.[205]

3. COORDINATED ADVOCACY

Applying the *Humanitarian Law Project/Buckley* framework, the restrictions on coordinated advocacy are properly defined and are consistent with the First Amendment. A popular hypothetical advanced by various judges and lawyers[206] involved with the *Humanitarian Law Project* litigation involves the filing of an amicus brief. The filing of an amicus brief in a court of

201. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2726 (2010).

202. *Id.* (asserting that the training proposed by the plaintiffs in this case could not be diverted to terrorist activities, whereas money, weapons, or other tangible support could; however, the majority gave deference to the political branches on this point).

203. Buckley v. Valeo, 424 U.S. 1, 51 (1976).

204. *Id.*

205. *Holder*, 130 S. Ct. at 2722.

206. *See e.g.*, *Holder*, 130 S. Ct. at 2736 (J. Breyer dissenting) (referring to an exchange at oral arguments discussing this hypothetical); Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More*, 59 AM. U.L. REV. 1499, 1513-14 (2010) (discussing attorney advice and amicus advocacy in the context of material support of terrorism cases); Timothy Zick, *The First Amendment in Transborder Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 942 (2011) (discussing the ability to file an amicus brief as potentially banned by the *Holder* decision).

appeals typically requires some minimum level of coordination with the parties. Questions as to which issues the amici wish to address, which facts or issues they should provide supplemental information for, and a variety of other factors go into the decision to file an amicus brief. Moreover, the filing of an amicus brief has the purpose of advancing the cause of a particular party. The difficult question is whether a party may file an amicus brief on behalf of a designated foreign terrorist organization.

The government, specifically Supreme Court Justice Elena Kagan, former Solicitor General, argued that material support statutes prohibit the provision of advice and even the filing of an amicus curiae brief on behalf of a terrorist organization.[207] Several Amici Curiae argued against this specific point, asserting that "the Government was incorrect in arguing below that submitting an amicus brief on a [designated foreign terrorist organization's] behalf would be prohibited as 'expert advice or assistance.'"[208] This argument rested, in part, on 31 C.F.R. § 597.505(a), a federal regulation that appears to allow attorneys to offer advice to a foreign terrorist organization on how to comply with United States law, specifically the Office of Foreign Assets Control regulations.[209] Some have argued that the licensing scheme established in the federal regulations is content neutral[210] and allows for the representation, the provision of expert opinion and advice, and the filing of an amicus brief on behalf of a designated foreign terrorist organization.[211] This approach, if

207. Humanitarian Law Project v. Mukasey, 552 F.3d 916, 930 (9th Cir. 2009) (arguing that the material support statute bars the filing of an amicus brief on behalf of the terrorist organization, but admitting that "to the extent there is any constitutional claim that they would be entitled to representation, . . . the government believes that the statute should be read so as not to include that"). Transcript of Oral Argument at 46–47, 51, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89).

208. *See, e.g.*, Brief of Amicus Curiae Scholars, Attorneys, and Former Public Officials with Experience in Terrorism Related Issues In Support of Petitioners at 26-27, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 5070069.

209. *See* 31 C.F.R. § 597.505(a) (2010); Jill M. Troxel, *Note, Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Relationship*, 24 REV. LITIG. 637 (2009) (discussing the difficult ethics questions attorneys face in representing clients with potential terrorist ties, but nonetheless arguing that compliance with the federal law is ultimately compatible, however difficult, with attorney ethics).

210. Brief of Amicus Curiae Scholars, Attorneys, and Former Public Officials, *supra* note 208, at 26-27.

211. *Id.* at 26 n.9 (citing Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543-49

adopted by the courts, is consistent with the framework established, and it properly separates the First Amendment considerations along the lines of coordinated activity and independent advocacy. Amici could file their supplemental briefs without acting under the direction of the terrorist organization, and thus avoid liability.

VI. POTENTIAL CHALLENGES TO FUTURE PROSECUTIONS CAN BE RESOLVED BY THE *HUMANITARIAN LAW PROJECT/BUCKLEY* FRAMEWORK

Practitioners should be aware that the *HLP* decision did not preclude future overbreadth challenges to the constitutionality of the material support statute. Rather, future applications of the statute to speech or advocacy may not satisfy challenges based on the First Amendment.[212] A unique aspect of the *HLP* litigation, as previously discussed, is how, according to the Supreme Court, the Ninth Circuit improperly combined the overbreadth and vagueness doctrines in its own analysis.[213] As a result, the Court did not rule on the potential overbreadth of § 2339B, but only found that the statute was not unconstitutionally vague as applied to the conduct proposed by the HLP group.[214] In fact, Chief Justice Roberts specifically stated that a plaintiff may have a valid overbreadth claim.[215]

Similarly, the *Buckley* decision addressed an overbreadth claim involving the level of the contribution limit.[216] Challengers to the limit argued that the statutorily imposed $1,000 limit on contributions was unrealistically low considering that the amount of money required to run for different offices fluctuates.[217] The

(2001) (striking down content-based restriction on assistance provided by government-funded attorneys); NAACP v. Button, 371 U.S. 415, 428-29 (1963) (noting the First Amendment interest in provision of legal assistance in civil rights matters)).

212. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730 (2010).

213. *Id.* at 2719 (citing Humanitarian Law Project v. Mukasey, 552 F.3d 929, 929-30 (9th Cir. 2009)) (noting that the Ninth Circuit improperly incorporated elements of the First Amendment overbreadth doctrine into its analysis of the vagueness question, rejecting the Ninth Circuit decision that held that § 2339B was unconstitutionally vague because it "could be read to encompass speech and advocacy protected by the First Amendment").

214. *Id.*

215. *Id.*

216. Buckley v. Valeo, 424 U.S. 1, 29 (1976).

217. *Id.* at 29-30.

Court, however, asserted that it lacked a scalpel to probe whether, say, a theoretical $2,000 ceiling might not serve as well as a $1,000.[218] Nevertheless, subsequent cases following the *Buckley* analysis would take up such a scalpel. The Eighth Circuit, in *Carver v. Nixon*, held that Missouri's campaign contributions limit of $100 for state elections was not narrowly tailored enough to achieve the compelling government interest.[219] The Supreme Court made a similar decision in *Randall v. Sorrell*, finding that a contribution limit was so low as to no longer be narrowly tailored and thus in violation of the First Amendment rights of contributors.[220] The *HLP* case is not a classic overbreadth challenge, but the principles are similar. Here, the Court's decision turned on whether the restrictions on speech had gone too far by restricting the dollar amount limit to an unconstitutionally low level.

Thus, practitioners should not be surprised if courts begin to find that certain applications of the material support statute violate the First Amendment on overbreadth grounds. The *Randall v. Sorrell* decision, combined with Chief Justice Robert's opinion in *HLP*, indicates that, though the Supreme Court may allow restrictions on the freedom of speech in certain circumstances, their willingness to do so is limited. It also suggests that, in the future, the Court could find a line that defines when the application of the material support statute goes too far. A good candidate for such a line could arise in a case involving the provision of medical services, advice, or training. The current case law does not define the medical exception. An American doctor working for Doctors Without Borders may be able to effectively challenge a court's decision to restrict her First Amendment rights by prohibiting her from training others how to dress wounds, perform CPR, or provide other basic medical services. The important note is that courts may draw lines as to how far the restrictions in *Humanitarian Law Project* can go toward limiting First Amendment rights, and they will likely follow the *Buckley* line of cases in making such determinations.

218. Buckley v. Valeo, 424 U.S. 1, 30 (1976) (noting that the Court did not rule on this matter, but neither did it preclude future involvement with similar challenges).

219. Carver v. Nixon, 72 F.3d 633, 634-35 (8th Cir. 1995), *cert denied*, 518 U.S. 1033 (1996).

220. Randall v. Sorrell, 548 U.S. 230, 236-37 (2006) (holding that "the low maximum levels and other restrictions . . . fail to satisfy the First Amendment's requirement of careful tailoring").

VII. CONCLUSION

As the United States' fight against global terrorism continues, the Material Support of Terrorism statute becomes increasingly important. Though the actual number of cases filed each year is low, the frequency with which this statute is used in the fight against terrorism is significant.[221] The present lack of judicial guidance in this field will inevitably lead to confusion in lower courts. Prosecutors, aid groups, defense attorneys, and others will need the courts, or Congress, to articulate clearer guidelines. In doing so, looking to how the courts have handled the complexities of First Amendment jurisprudence in the campaign finance area can provide guidance on how the courts may interpret the statute, apply it to particular defendants, or consider future constitutional challenges.

221. DYCUS, BERNEY, & BANKS, *supra* note 2, at 1004.