Prosecuting Terrorism: The Material Support Statute and Muslim Charities

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Introduction

A. The Prosecutor and the Donor

A hypothetical federal prosecutor receives alarming news. A local computer scientist who has previously donated money to religious organizations in Pakistan has recently been sharing his expert knowledge of technology upgrades on websites known to be frequented by terrorist organizations. The prosecutor believes that the computer scientist is helping foreign terrorists improve their technological capabilities for future attacks, and he considers pressing charges for providing material support to terrorists.

A hypothetical surgeon and his family prepare to visit their mosque for an annual holiday. Like most residents of his affluent neighborhood, the surgeon and his family donate generously to the local schools, athletic teams, and several non-profit organizations. The surgeon also makes a monetary contribution to his local mosque's charity each year. This year, he has not only written a check but has also collected several boxes of old clothes and textbooks from his children's closets. On the drive to the mosque, his son half-jokingly reminds him of news reports that Muslim Americans making similar charitable donations have recently been accused of providing material support to terrorists.

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B. The Material Support Law

Unfortunately, neither the prosecutor nor surgeon can make a properly informed decision regarding how best to proceed in light of the law prohibiting material support to terrorists. Though important and frequently used, the law has been controversial throughout its history and therefore frequently amended as the response to terrorism has evolved. Rather than clarify the law and its application, however, these amendments have prolonged the controversy and have caused further debate and legal challenges.

The most prominent legal challenge, which lasted over a decade, culminated in June 2010 when the United States Supreme Court upheld the material support law as applied to particular plaintiffs who claimed it violated their First and Fifth Amendment rights. In keeping with the history of the law and the litigation surrounding it, however, the Court's decision raised at least as many issues as it resolved. The Court noted that more difficult constitutional issues may likely arise regarding the law's application. The Court also broached the difficult issue of monetary donations to charitable organizations tied to terrorist groups. That particular issue is the subject of this Note.

C. Muslim Charities and the Need for Reform

The issue of charitable donations highlights the controversy around the material support law and its application. This controversy persists despite the Supreme Court's recent decision. The issue's complexity shows the limitations of the material support law in the legal fight against terrorism. These limitations apply equally to the prosecutor and the donor. The law's problems not only hinder Muslim Americans' religious practices, but also legitimate government efforts to prosecute offenses related to terrorism. The case of the Holy Land Foundation, a prominent Muslim charity, shows the difficulty that prosecutors have faced in using the law. It also shows the negative repercussions the law has had on the government's relations with Muslim Americans. This raises not only constitutional concerns, but also represents a missed opportunity to strengthen anti-terrorist efforts. This Note focuses on the Holy Land Foundation to argue that, despite having been upheld as applied to particular plaintiffs, both the law and its application must still be reformed. Solving the constitutional debate does not solve the problematic fact that the law, as it currently stands, does not adequately serve the needs of either the prosecutor or the donor. Its

importance in the legal fight against terrorism and the longstanding controversies with which it is associated also mandate reform for practical reasons.

D. Structure

This Note comprises four parts. Part One introduces the material support law and discusses the political and constitutional debates that have long surrounded it. Part Two presents the case of the Humanitarian Law Project, the decade-long legal challenge to the law that resulted in the Supreme Court upholding its constitutionality. Part Three delves into the issue of Muslim charities, which the Supreme Court's opinion touches on, and analyzes the case of the Holy Land Foundation, a prominent Muslim charity that was the subject of an equally controversial civil action and criminal prosecution. In light of the problems raised by this analysis, Part Four concludes with suggestions for reforming the material support statute in order to reform what remains a problematic law.

I. The Material Support Law

The material support law's current form reflects its controversial roots and its history of amendments. From its inception, the statute was at once the subject of heated debate and an important legal tool in the response to terrorism. As a result, the statute has been amended several times. It nonetheless remains controversial in its current form and application. This unsteady legal framework requires reform.

A. The Current Statute

Three related statutory provisions supply the basis for prosecuting material support: 18 U.S.C. §§ 2339A, 2339B, and 2339C. Section 2339A prohibits "[p]roviding material support to terrorists;"[1] § 2339B prohibits "[p]roviding material support or resources to designated foreign terrorist organizations;"[2] and § 2339C prohibits "the financing of terrorism."[3] Both § 2339B[4] and § 2339C[5]

1. 18 U.S.C. § 2339A (2006).
2. 18 U.S.C. § 2339B (2006).
3. 18 U.S.C. § 2339C (2006).
4. 18 U.S.C. § 2339B(g)(4).
5. 18 U.S.C. § 2339C(e)(13).

incorporate the definition of "material support or resources" provided by § 2339A:

> 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 (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[6]

As defined by § 2339A, "the term 'training' means instruction or teaching designed to impart a specific skill, as opposed to general knowledge"[7] and "the term 'expert advice or assistance' means advice or assistance derived from scientific, technical or other specialized knowledge."[8]

B. The Antiterrorism and Effective Death Penalty Act's (AEDPA) Origins

The history of these three sections is deeply rooted in the evolving legal approaches to terrorism over the last three decades. Indeed, in the words of one commentator, the material support statutes and related debates "seemed to evolve in conjunction with the changing nature of terrorism itself."[9] The material support law forms a part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[10] AEDPA is often considered a direct response to the two most prominent terrorist attacks of the 1990s: the bombing of the Oklahoma City federal building in 1995 and the bombing of the World Trade Center in 1993.[11] The roots of the provisions enshrined in the material support law, however, date back to the first half of the

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6. 18 U.S.C. § 2339A(b)(1).

7. 18 U.S.C. § 2339A(b)(2).

8. 18 U.S.C. § 2339A(b)(3).

9. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 21 (2005).

10. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 [hereinafter AEDPA] (codified as amended in scattered sections of 8, 18, 19, 21, 22, 28, 42, 49, and 50 U.S.C.).

11. *See, e.g.*, DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 126 (rev. ed., The New Press 2006) (1999) (describing AEDPA as "an effort to do something in response to these two crimes.").

1980s, "when the Reagan Administration sent Congress a bill to make it a crime to 'support' terrorism."[12] Likewise, much of the debate in the years before AEDPA's passage centered on the same issues that continue to dominate the debate.[13] For example, early critics contended that "the guilt by association concept could be redirected at any time for the foreign policy or internal political purposes of the government."[14]

C. The Patriot Act Amendments

The material support law was transformed five years after its enactment as the legal fight against terrorism evolved in the aftermath of the September 11, 2001, terrorist attacks.

In response to those attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("Patriot Act") on October 26, 2001.[15] The Patriot Act "amended AEDPA's definition of 'material support or resources' to include the prohibition against providing 'expert advice or assistance' to a designated foreign terrorist organization."[16]

D. The Intelligence Reform and Terrorism Prevention Act Amendments

Congress amended AEDPA again when it enacted the Intelligence Reform and Terrorism Prevention Act ("IRTPA") on December 17, 2004.[17] IRTPA comprised several changes, as reflected in the current statutory language. IRTPA (1) added a knowledge requirement to section 2339B;[18] (2) expanded the definition of

12. *Id.* at 127.

13. *See id.* at 128–32 (recounting Congressional hearings).

14. *Id.* at 131–32.

15. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter Patriot Act] (codified as amended in FED. R. CRIM. P. 41(a) and scattered sections of 8, 12, 15, 18, 21, 22, 28, 31, 47, and 50 U.S.C.).

16. Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1128 (9th Cir. 2007) [hereinafter *HLP III*] (citing 18 U.S.C. §§ 2339A(b), 2339B(g)(4)), *amended on denial of reh'g and reh'g en banc*, 552 F.3d 916 (9th Cir. 2009). Where applicable, this Note cites the various opinions and orders in this litigation according to the abbreviations adopted by the Ninth Circuit. *See HLP III*, 509 F.3d at 1126–30.

17. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of 5, 6, 18, 18 app., 28, 40, 49, and 50 U.S.C.).

18. 18 U.S.C. § 2339B(a)(1).

"material support or resources" to include "service," "training, expert advice or assistance," and "personnel;"[19] (3) defined "training" and "expert advice or assistance;"[20] (4) narrowed the definition of "personnel;"[21] and (5) granted the Secretary of State and Attorney General authority to "approve[]" the provision of "'personnel,' 'training,' or 'expert advice or assistance.'"[22]

The law has long been at the center of the legal response to terrorism. Amidst the repeated amendments, for example, prosecutors "made extensive use" of the material support laws, charging several dozen individuals under the statute within four years of the September 11, 2001, terrorist attacks.[23] Just as the material support law has remained a controversial but nonetheless important legal tool, so too has it been the subject of much debate and litigation.

E. Debates over the Law

The debates surrounding the material support law from its inception have persisted throughout its evolution. The law has engendered considerable political debate, featuring perspectives from across the spectrum. It has also spawned an equally diverse range of perspectives regarding its constitutionality.

1. The Political Debate

The political debate over the material support law replicates one of the central debates resulting from the September 11, 2001, terrorist attacks—the balance between national security and civil liberties. In the view of those who focus on national security goals, the domestic legal system was not fully prepared for dealing with the terrorist challenge because it was "by and large . . . reactive and traditional in its use of criminal law prior to 9/11, aiming for the capture and prosecution of those who already had committed harmful acts or those who could be prosecuted on traditional inchoate crime grounds."[24] The material support law was part of this traditional legal framework, but also proved ripe for amendment and novel applications to deal with the new challenges of prosecuting

19. 18 U.S.C. § 2339A(b).

20. 18 U.S.C. § 2339A(b)(2)–(3).

21. 18 U.S.C. § 2339B(h).

22. 18 U.S.C. §2339B(j). *See also HLP III*, 509 F.3d at 1128–29 (discussing each of these amendments).

23. Chesney, *supra* note 9, at 19.

24. *Id.* at 88.

terrorism.[25] Such an approach, however, remains largely reactive, causing even its supporters to question "whether the support-law framework truly suffices to address the ever-evolving nature of the terrorist threat."[26]

Such an approach has also alarmed civil libertarians. For example, critics view the amendments to the material support law and its frequent use as unfortunate examples of increased "executive actions in the name of prevention and national security" in a "perpetual war."[27] According to that view, "to the degree that the present policies fail to prevent future attacks, further incursions on civil liberties in the name of national security will undoubtedly gain momentum from the resulting national apprehension and fear."[28]

2. *The Constitutional Debate*

The material support law has also yielded widespread criticism regarding its constitutionality, particularly with respect to the First and Fifth Amendments. Even those who consider the law a valuable legal tool nonetheless recognize the need to "wonder[] if the material support law unduly infringes constitutional rights."[29] Stronger critics have argued against the material support approach to responding to the terrorist challenge, and for an approach in which "we should focus on perpetrators of crime . . . , avoid indulging in guilt by association, maintain procedures designed to identify the guilty and exonerate the innocent . . . ."[30] Fierce as the political and theoretical debates are, many of the same key themes have been addressed more instructively in court. The next section thus analyzes the constitutionality of the material support law in greater detail by analyzing the key legal challenge to the law.

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25. *Id.* at 89 (arguing that "the Justice Department found that capacity not in new legislation but in the already-existing laws designed to embargo foreign terrorist organizations. Through creative readings of terms such as 'personnel' and 'training,' prosecutors provided policymakers with an alternative to the all-too-tempting military detention option. The material support law . . . thus came to play a central role in the post-9/11 sleeper cases as well as in the broad run of terrorism related cases.").

26. *Id.* at 47.

27. George C. Harris, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 36 CORNELL INT'L L.J. 135, 149 (2003) (book review).

28. *Id.*

29. Chesney, *supra* note 9, at 21.

30. COLE & DEMPSEY, *supra* note 11, at x. *See also* Harris, *supra* note 27, at 135 (reviewing Cole and Dempsey's critique).

II. The *Holder v. Humanitarian Law Project* Case

A. The Case's Origins

The Humanitarian Law Foundation, the named plaintiff, is a self-described "non-profit organization founded in 1985, dedicated to protecting human rights and promoting the peaceful resolution of conflict by using established international human rights laws and humanitarian law."[31] The other plaintiffs include five Tamil[32] organizations and two United States citizens, including Ralph Fertig, a former United States Administrative Judge.[33] The plaintiffs sought "to provide support to the humanitarian and political activities of" two foreign organizations:[34] (1) the Liberation Tigers of Tamil Elam ("LTTE"), or the Tamil Tigers;[35] and (2) the Partiya Karkeran Kurdistan ("PKK"), or the Kurdistan Workers' Party.[36] The

31. *Humanitarian Law Project*, http://hlp.home.igc.org.

32. The Tamils are an indigenous people of the Indian subcontinent and Sri Lanka. *See* JAMES MINAHAN, ENCYCLOPEDIA OF THE STATELESS NATIONS: ETHNIC AND NATIONAL GROUPS AROUND THE WORLD, VOL. IV S-Z, 1844 (2002). Their "campaign for independence [in Sri Lanka] became one of the world's most violent and long-lasting separatist wars, and seemingly one of the most intractable." *Id.* at 1849.

33. Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1205, 1207–08 (C.D. Cal. 1998) [hereinafter DC-HLP I]; *see also* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2708 (2010).

34. *DC-HLP I*, 9 F. Supp. 2d at 1207.

35. *Id.* at 1209 ("The LTTE was formed in 1976 with the goal of achieving self-determination for the Tamil residents of Tamil Eelam, the Northern and Eastern provinces of Sri Lanka. . . . [The LTTE] engages in: (1) political organizing and advocacy; (2) diplomatic activity; (3) the provision of social services and economic development through the establishment of a quasi-governmental structure in Tamil Eelam; (4) humanitarian aid to Tamil refugees fleeing from the Sri Lankan armed forces; and (5) defense of the Tamil people from human rights abuses. The LTTE also administers a chain of orphanages in Tamil Eelam, including the Chensoilai and Kantharupan Orphanages. Through the Tamil Eelam Economic Development Organization, the LTTE supports the development of Tamil Eelam's economy, from agriculture to transportation. It also regularly issues publications regarding the political situation in Sri Lanka. It administers a civil police force that maintains public safety in areas under LTTE control. Finally, the LTTE administers the Tamil Eelam Education Secretariat that oversees children's educational services.").

36. *Id.* at 1207–08 ("The PKK was formed approximately 20 years ago with the goal of achieving self-determination for the Kurds in Southeastern Turkey. It is comprised primarily of Turkish Kurds. The PKK is the leading political organization representing the interests of the Kurds in Turkey. . . . The PKK's efforts on behalf of the Kurds include political organizing and advocacy and diplomatic activity around the world. It organizes political forums, international conferences, and cultural festivals outside Turkey to bring attention to the plight of the Kurds there. It publishes and distributes newspapers and pamphlets championing the Kurds' cause and denouncing human right violations. It provides social services and humanitarian aid to Kurds in exile, has established a quasi-

Secretary of State of the United States designated both groups as "foreign terrorist organizations" pursuant to AEDPA on October 8, 1997.[37]

Prior to this designation, the Humanitarian Law Foundation and Judge Fertig had been working with the PKK for several years. As a result of the designation, they "fear[ed] criminal sanctions" and "criminal investigation, prosecution, and conviction" for providing support to a designated foreign terrorist organization.[38] The support that the Humanitarian Law Project and Judge Fertig wished to provide the PKK included the following: (1) financial contributions for legal and humanitarian work; (2) international advocacy; (3) training in legal and political strategy; as well as (4) other forms of advocacy, support, and cooperation.[39]

Likewise, the other plaintiffs were "deterred" from continuing to provide the forms of support they had long contributed to the Tamils in Sri Lanka because of fear of criminal prosecution under AEDPA.[40] The support these groups had previously provided included: financial contributions for education and humanitarian assistance; food and clothing; funds for legal fee and political efforts; and advocacy.[41]

The challenge of striking a balance between such seemingly innocuous forms of support and the demands of national security is attested to by the decade-long, and still unsettled, course taken by this litigation.

B. The Path to the Supreme Court

In its initial order, the district court reached two conclusions regarding AEDPA's material support provisions. First, the court held that the plaintiffs had not shown that AEDPA impermissibly imposed "guilt by association," and therefore denied the plaintiffs' request for "a preliminary injunction on this claim."[42] In the court's view, AEDPA only limited the potential ways in which the plaintiffs could associate with the PKK or LTTE; it did not prohibit association

governmental structure in areas of Turkey under its control, and defends the Kurds from alleged Turkish human rights abuses.").

37. 62 Fed. Reg. 52,649–51 (Oct. 8, 1997). *See also DC-HLP I*, 9 F. Supp. 2d at 1207.

38. *DC-HLP I*, 9 F. Supp. 2d at 1209.

39. *Id.*

40. *Id.* at 1210–11.

41. *Id.*

42. *Id.* at 1211–12.

altogether.[43] Applying "an intermediate scrutiny level of review," the court found that AEDPA (1) was within the government's power; (2) "further[ed] the government's substantial interest in national security and foreign relations," which was (3) not related to suppressing the plaintiffs' right to speech and advocacy; and (4) did not restrict the plaintiff's "right to political association and expression . . . more than is essential to further [the government's] compelling interest in national security and foreign policy."[44] Second, the court "conclude[d] that the terms 'personnel' and 'training' are impermissibly vague" because the statute contained no "limitation" on the terms and "thus . . . criminalizes some of the activities in which [the] [p]laintiffs have engaged and would like to engage."[45] The court therefore granted the plaintiffs' request for a preliminary injunction with respect to the provision of personnel and training.[46]

The United States Court of Appeals for the Ninth Circuit affirmed the district court's holding on both grounds in March 2000.[47] As the appellate court described it, "the issue . . . is the right of Americans to express their association with foreign political groups through donations."[48]

The district court then considered each party's motion for summary judgment. The government argued that the plaintiffs' claims were moot because "amendments to the *United States*

43. *Id.* at 1212.

44. *Id.* (citing United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (explaining, in a case concerning the burning of Selective Service registration certificates, that the United States Supreme "Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.") (internal citations omitted)).

45. *DC-HLP I*, 9 F. Supp. 2d at 1213–15.

46. *Id.* at 1215 (citing Elrod v. Burns, 427 U.S. 347, 373 (1976) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")).

47. Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000) [hereinafter HLP I].

48. *Id.* at 1134 n.1.

Attorneys' Manual render[ed] the case non-justiciable."[49] In June 2001, the Department of Justice had amended the United States Attorneys' Manual to define more narrowly "personnel" and "training."[50] The Manual thus "define[d] 'personnel' as individuals who 'work under the foreign entity's direction or control,' such as 'those acting as full-time or part-time employees or otherwise taking orders from the entity, are under its direction or control. . . . Individuals who act independently of the designated foreign terrorist organization to advance its goals and objectives are not working under its direction or control.'"[51] Likewise, the definition of "training" was amended "to cover 'knowingly provid[ing] instruction to the organization designed to impart one or more specific skills,' rather than 'general knowledge (e.g., one can receive training in how to drive a car, but a lecture on the history of the automobile would not normally be thought of as 'training').'"[52] The court, however, rejected this argument based on its determination that the manual "is non-binding, unenforceable, and can be amended at any time."[53]

Turning to the merits of the claims regarding "personnel" and "training," the court granted the plaintiffs' motion for summary judgment and denied the defendants' motion for partial summary judgment based on its reasoning that "[b]ecause neither courts nor United States Attorneys are bound by these narrower definitions, the statutory language remains impermissibly vague."[54]

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49. Humanitarian Law Project v. Reno, No. CV 98-1971, 2001 WL 36105333 at *10 (C.D. Cal. Oct. 2, 2001).

50. *Id.* at *2.

51. *Id.* (quoting United States Attorneys' Manual § 9-91.100 (2001)) (internal citations omitted).

52. *Id.* (alteration in original).

53. *Id.* at *11 (citing United States Attorneys' Manual § 1.1-100 (1997) ("The *Manual* provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal"); United States v. Montoya, 45 F.3d 1286, 1294 (9th Cir. 1995) ("failure to strictly comply with the *United States Attorneys' Manual* creates no enforceable rights"); United States v. Wilson, 614 F.2d 1224, 1227 (9th Cir. 1980) (holding that United States Attorneys' Manual guidelines do not have the force and effect of law)).

54. *Humanitarian Law Project*, 2001 WL 36105333 at *12. Interestingly, the United States Supreme Court recently rejected a similar argument in United States v. Stevens, 130 S. Ct. 1577, 1591 (2010) (citation omitted). Although the government argued that a statute was not overbroad because the Executive Branch construed it more narrowly than it was written, the Court "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.*

After the Patriot Act added "expert advice and assistance" to the prohibitions on material support, the plaintiffs filed a new complaint for a preliminary and permanent injunction on the grounds that the prohibition "is impermissibly vague and substantially overbroad, fails to provide adequate notice of prohibited activity, gives government officials unfettered discretion in enforcement, and causes individuals to avoid protected First Amendment activity . . . ."[55] As before, the court rejected the government's argument that the plaintiffs lacked standing; the court determined that the plaintiffs had "sufficiently demonstrated a threat of prosecution" under the material support law as amended by the Patriot Act.[56] The court granted the plaintiffs injunctive relief based on its holding that, like "training" and "personnel," "the term 'expert advice or assistance' is impermissibly vague."[57] The court, however, rejected the plaintiffs' argument that the term "is substantially overbroad because it prohibits a substantial amount of speech activity which is clearly protected by the First Amendment, such as training in human rights advocacy, giving advice on how to improve medical care and education, and distributing human rights literature."[58]

The Ninth Circuit then reaffirmed its previous holding that the prohibition on "training" and "personnel" is "impermissibly overbroad, and thus void for vagueness under the First and Fifth Amendments."[59] The court reasoned "that serious due process concerns would be raised were we to accept the argument that a person who acts without knowledge of critical information about a designated organization presumably acts consistently with the intent and conduct of that designated organization."[60] In light of this concern as well as "the Court's longstanding principles interpreting the word 'knowingly' to indicate Congress' intent to include a *mens rea* requirement," the court "read [section] 2339B to require proof of knowledge, either of an organization's designation or of the unlawful activities that caused it to be so designated" and held that "to sustain a conviction under [section] 2339B, the government must prove

55. Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1192–93 (C.D. Cal. 2004).

56. *Id.* at 1197.

57. *Id.* at 1201.

58. *Id.*

59. Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 385 (9th Cir. 2003), *vacated*, 393 F.3d 902 (9th Cir. 2004) [hereinafter HLP II].

60. *Id.* at 396.

beyond a reasonable doubt that the donor had knowledge that the organization was designated . . . as a foreign terrorist organization or that the donor had knowledge of the organization's unlawful activities that caused it to be so designated."[61] The court also rejected the government's argument regarding the United States Attorneys' Manual, "[b]ecause the United States Attorneys' Manual's expanded definition is neither accessible to the public nor clear from the statute."[62]

Following the enactment of the Intelligence Reform and Terrorism Prevention Act and its amendment of the material support law, the Ninth Circuit vacated this judgment "regarding the terms 'personnel' and 'training.'"[63] The Ninth Circuit also remanded the case concerning the "expert advice or assistance" prohibition to the district court for the two cases to be heard together.[64]

On remand, the parties each raised three issues in their respective motions for summary judgment. The plaintiffs argued that (1) the absence of a specific intent requirement was a violation of due process under the Fifth Amendment; (2) IRTPA's amendments of the definitions of "training," "expert advice or assistance," "personnel," and "service" remained "impermissibly vague under the Fifth Amendment;" and (3) the provision allowing the Secretary of State to exempt prosecution for support to approved organizations "is an unconstitutional licensing scheme under the First Amendment."[65] In response, the government argued that (1) the IRTPA amendments contained a "constitutionally sufficient" mens rea requirement; (2) "the terms 'training,' 'expert advice or assistance,' 'personnel,' and 'service' are neither vague nor overbroad under the First and Fifth Amendments in relation to [the] [p]laintiffs' own conduct;" and (3) "the IRTPA amendments do not grant the government unconstitutional licensing authority."[66] The district court held that (1) the lack of a specific intent requirement is not a due process violation; (2) "the terms 'training,' 'expert advice or assistance,' and 'service' are impermissibly vague" but "the term 'personnel' is not

61. Id. at 402–03.

62. Id. at 405.

63. Humanitarian Law Project v. U.S. Dep't of Justice, 393 F.3d 902, 903 (9th Cir. 2004).

64. Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1139 (C.D. Cal. 2005) [hereinafter DC-HLP III]; see also HLP III, 509 F.3d at 1129.

65. DC-HLP III, 380 F. Supp. 2d at 1141–42.

66. Id. at 1142.

impermissibly vague;" (3) none of the terms are overbroad; and (4) the exemption provision "is not an unconstitutional licensing scheme under the First Amendment."[67]

The parties then appealed once more to the Ninth Circuit, which affirmed the judgment of the district court. Following the Ninth Circuit's final decision, the United States Supreme Court granted the government's petition for a writ of certiorari and heard oral argument in early 2010.[68]

C. The Supreme Court's Ruling

After over a decade of litigation,[69] the case was ultimately decided by the United States Supreme Court, which upheld the material support law as applied to the plaintiffs and the activities in which they wished to engage.[70] Importantly, the Court declined to "address the resolution of more difficult cases that may arise under the statute in the future."[71]

The Court rejected the plaintiffs' claim that the statute is impermissibly vague for purposes of the Fifth Amendment's Due Process Clause.[72] As the Court noted, "'[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'"[73] "[A] more stringent vagueness test" applies, however, when a statute allegedly interferes with free speech.[74] According to the Court, the Ninth Circuit had improperly "merged plaintiffs' vagueness challenge with their First Amendment claims."[75] In fact, a Fifth Amendment vagueness challenge does not turn on any First Amendment claim that a plaintiff

67. *Id.*

68. *See* Humanitarian Law Project v. Holder, 130 S. Ct. 48 (2009).

69. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712–16 (2010) [hereinafter HLP] (summarizing case's procedural history).

70. *Id.* at 2708.

71. *Id.* at 2712.

72. *Id.* at 2719–20.

73. *Id.* at 2718 (citing United States v. Williams, 553 U.S. 285, 304 (2008)).

74. *Id.* at 2719 (citing Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)).

75. *Id.* at 2719.

may also bring.[76] Analyzing the statute under the Fifth Amendment alone, the Court rejected the vagueness challenge because it determined that the statute's terms "are quite different from the sorts of terms that we have previously declared to be vague."[77] Unlike those terms, the material support statute's terms "do[] not require . . . untethered, subjective judgments."[78] In support of this reasoning, the Court noted that Congress had carefully "add[ed] narrowing definitions to the material-support statute over time. These definitions increased the clarity of the statute's terms."[79] Nonetheless, the Court reiterated that "the scope of the material-support statute may not be clear in every application."[80]

Turning to the First Amendment issue, the Court rejected the plaintiffs' argument that "their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism."[81] The Court noted Congress's finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any *contribution* to such an organization facilitates that conduct."[82] Following this view, the Court reasoned that this "support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorists groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks."[83] Such reasoning was based not only on Congress's findings, but also academic studies of terrorist organizations such as Hamas.[84] The Court rejected the dissent's contention that "there is 'no natural stopping place'" for such logic, arguing instead that "Congress has settled on just such a stopping place: The statute reaches only material support coordinated with or under the direction of a

76. *Id.* at 2719 (citing *Williams*, 553 U.S. at 304 and *Hoffman Estates*, 455 U.S. at 494–95, 497).

77. *Id.*, at 2720.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 2724 (citing Brief for Plaintiffs, 51–52).

82. *Id.* at 2735 (quoting AEDPA, §§ 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. §§ 2339B (Findings and Purpose)) (bracketing and emphasis in original).

83. *Id.*

84. *Id.* at 2725 (citing M. Levitt, Hamas: Politics, Charity, and Terrorism in the Service of Jihad 2–3 (2006)).

designated foreign terrorist organization."[85] Further acknowledging what it deemed Congress's "careful balancing of interests," the Court noted that limited exceptions to the material-support prohibition exist, such as for "medicine and religious materials."[86]

While the Court thus acknowledged that future constitutional concerns may likely arise, it dismissed potential concerns regarding charitable donations. It did so, moreover, with a relatively broad generalization about the relationship between terrorist organizations as charity. As the next part of this Note argues, this issue is complex and the lack of understanding has not only raised constitutional concerns but hampered efforts to successfully prosecute terrorism related offenses under the material support law.

III. Muslim Charities and the Material Support Law

A. Charity and the War on Terror

Speaking in Cairo in June 2009, President Barack Obama acknowledged that the United States' "rules on charitable giving have made it harder for Muslims to fulfill their religious obligation" and explained that he is "committed to working with American Muslims to ensure that they can fulfill *zakat*."[87] In doing so, he addressed a key problem in the war on terror.

Over the last decade, the United States government has attempted to fight terrorism in part by fighting the financing that makes it possible. Its legal approach has led to undeniable successes against terrorist financing, but has been problematic when viewed in the broader context of the war on terror. Success against the direct target of financing has often come at the expense of the larger goals. For example, the 9/11 Commission Report emphasizes the importance of gathering intelligence about terrorist financing in order to better understand how terrorist networks work.[88] Because the legal approach has lacked a clear strategy, it has alienated Muslim Americans and left them critical of the government, as the President

85. *Id.* at 2726.

86. *Id.* at 2728 (citing § 2339A(b)(1)).

87. President Barack Obama, *The President's Speech in Cairo: A New Beginning* (June 4, 2009).

88. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 382 (2004).

recognized.[89] They are reluctant to engage with the government even though they could provide helpful information. More directly, the legal approach to terrorist financing has undercut its own goals because many Muslim Americans are so wary of the government that they now donate exclusively in cash,[90] which complicates government efforts to track the flow of funds. Although these effects are not so problematic as to condemn the government's approach, they nonetheless illustrate how the fight against terrorist financing has at times made the broader war on terrorism more difficult.

An improved legal strategy would allow the government to more effectively fight terrorist financing in tandem with the war on terror's broader goals. Fulfilling the President's commitment would not merely appease Muslim Americans. It would also allow the government to cooperate with Muslim Americans, which would make possible the better understanding of terrorist financing and terrorist networks recommended by the 9/11 Commission Report. The starting point for such a strategy is an analysis of the legal approach the government has taken thus far that identifies which aspects of the approach most effectively achieve the related goals of fighting terrorist financing while allowing Muslim Americans to satisfy their religious obligations.

Understanding the importance of charity in Islam and the important role Muslim charities play in the United States helps show why the legal approach has been problematic. Charitable giving is a key religious duty for Muslims. The charitable organizations that collect and distribute Muslim charitable giving in the United States, however, have a complex, dual nature. They perform a legitimate religious task, but they also have ties to terrorist organizations in certain instances.

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89. Various commentary and reports show that Muslim Americans feel they are being unfairly persecuted, denied religious freedoms, and falsely associated with terrorists. *See, e.g.*, Salam Al-Marayati, *Indict Individuals, Not Charities*, N.Y. TIMES, Oct. 11, 2002 ("[t]he government's policy has inflicted considerable harm. By effectively shutting down these charities, it has given Americans the false impression that American Muslims are supporting terrorists. It has also given the Muslim world a similarly false impression that America is intolerant of a religious minority."); *see also* AMERICAN CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE 'WAR ON TERRORISM FINANCING' 7 (2009) (describing "a pattern of conduct that violated the fundamental rights of American Muslim charities and has chilled American Muslims' charitable giving in accordance with their faith, seriously undermining American values of due process and commitment to First Amendment freedoms.").

90. *See, e.g.*, AMERICAN CIVIL LIBERTIES UNION, *supra* note 89, at 16.

A successful legal strategy against terrorist financing must account for this complexity. Certain legal causes of action that may be appropriate against terrorist entities have proven more problematic when applied to Muslim charities. Likewise, while criminal laws against terrorism have been used successfully against charities, their use has often engendered considerable controversy. A better legal approach to terrorist financing must be based on a strategy that takes into account the necessarily related goals of stopping terrorist financing and allowing Muslim Americans to fulfill their charitable obligations.

B. *Zakat*

A legal strategy that effectively fights terrorist financing and allows the government to respect Muslim Americans, and possibly work with them to gather information, must begin by considering the importance and complexities of Muslim charity in the United States.

1. *What is* Zakat*?*

Exploring the deep roots of charity in Islam illustrates why Muslim Americans have felt so negatively impacted by the government's approach over the last decade. Such an exploration must begin with the concept President Obama highlighted in his Cairo speech, *zakat.*

Zakat, one of Islam's five pillars,[91] is a requirement for charitable giving. The *Concise Encyclopedia of Islam* defines it as an "alms-tax" and explains that the Qur'an stresses "the practice of benevolence as one of the chief virtues of the true believer."[92] Muslims who can afford to do so are required to donate two and a half percent of their total assets annually as *zakat.* According to the *Oxford Dictionary of Islam*:

> To practicing Muslims, *zakah*[93] connotes the path to purity, comprehension of material responsibility, and an enhanced sense of spirituality. *Zakah* is used for the needy, for propagation of the faith, to free slaves, to relieve debtors, to help travelers, and for the administration of *zakah*, as well as

91. *See generally* MALISE RUTHVEN, ISLAM: A VERY SHORT INTRODUCTION, 147–50 (1997). Islam's four other pillars are *Shahada:* declaration of faith ("there is no god but God. Muhammad is the Messenger of God"); *Salat*: worship or prayer; *Sawm*: the fast during Ramadan; and *Hajj*: pilgrimage to Mecca.

92. H.A.R. GIBB & J.H. KRAMERS, CONCISE ENCYCLOPEDIA OF ISLAM, 654 (2001).

93. *Zakah* is a variation in the transliteration of the term from Arabic to English.

> other efforts approved by religious authorities. The primary forms of wealth subject to *zakah* include gold, silver, livestock, agricultural produce, articles of trade, currency, shares and bonds, and other liquid assets.[94]

The word *zakat* derives from the Arabic root *zaka*, meaning "to be pure," which itself derives from the Aramaic *zakut*, meaning virtue, giving, and pious gift.[95] The Hebrew term *sadaka* has an almost identical meaning in Judaism.[96] The Qur'an distinguishes between *zakat* and *sadaqa*, however. *Sadaqa* is used for voluntary giving akin to charity, while *zakat* is used for the obligatory alms required by Islam.[97]

The distinction turns in part on Islam's growth into a political state. According to one scholar, the voluntary *sadaqa* was practiced from the beginning of Islam in Mecca, whereas the obligatory *zakat* developed in Medina where Islam first took on the trappings of a political state.[98] According to H.A.R. Gibb, a leading Western scholar of Islam, throughout the life of Muhammad, Islam's prophet and founder, there was an organized system for receiving and distributing gifts. This system not only supported the needy, but also supported Islam's early military and political achievements.[99] Under Muhammad's successor, Abu Bakr, *zakat* became a permanent system tied to the state treasury, and "contributed greatly to the expansion of Muslim power."[100]

2. *The Evolution of Charitable Organizations*

Far from simply a historic concept, *zakat* has remained a vital aspect of Muslims' experience in the modern era. For much of Islam's history, Muslim governments collected and distributed *zakat* according to what Malise Ruthven, an expert on Islam, calls "pre-established patterns." In the present era, however, it is "left to the believer's conscience."[101]

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94. THE OXFORD DICTIONARY OF ISLAM 345 (John L. Esposito ed., 2003).

95. GIBB & KRAMERS, *supra* note 92, at 654.

96. *Id.*

97. NU'MAN IBN MUHAMMAD, ABU HANIFAH, DA 'A' IM AL-ISLAM OF AL-QADI AL-NU'MAN: THE PILLARS OF ISLAM 299 n.1 (Asaf A. A. Fyzee trans., Ismail Kurban Husein Poonawala revised and annotated, 2002).

98. *Id.*

99. GIBB & KRAMERS, *supra* note 91, at 654.

100. *Id.* at 655.

101. RUTHVEN, *supra* note 91, at 147–48.

According to the *Encyclopedia of Islam in the United States*, Muslim Americans have "traditionally satisfied the requirement of *zakat* and coordinated voluntary charitable activities through their local mosques," whose programs range from "simple collection boxes to more elaborate community service programs."[102] To broaden the scale and reach of charitable programs, Muslim Americans began establishing "national charities independently of mosques and local community centers in the 1980s."[103]

3. Ties to Terrorism

The growth of these large-scale charities, however, has occasionally led to problematic ties to terrorist organizations for several reasons. The skills that have made national and international Muslim charities successful—raising large amounts of money and distributing funds throughout the world—are skills upon which terrorist organizations also rely. Likewise, Muslim charities often focus their efforts on parts of the world where terrorist groups are active. Finally, terrorist organizations themselves often have social or charitable wings to raise or receive charity.

The Haramain Foundation is a good example of the dual purpose such organizations often serve. The Haramain Foundation is an international Muslim charity headquartered in Riyadh, Saudi Arabia, that, at its peak, raised fifty million dollars annually through nearly fifty branches worldwide.[104] At least ten of these branches, however, provided financing and arms to terrorist groups, according to the United States. In particular, the Haramain Foundation was linked to the 1998 terrorist bombings of U.S. embassies in Kenya and Tanzania as well as the 2002 Kenya hotel bombing.[105]

Thus, while *zakat* remains a core requirement of Islam, Muslim charities that coordinate *zakat* in the United States often have a problematic dual nature. The principal challenge in fashioning an effective legal approach to terrorist financing, then, is to understand this dual purpose in order to effectively balance the need to fight terrorism with the need to allow Muslims to fulfill their foundational religious duties. The experience of the Holy Land Foundation for Relief and Development, the most prominent Muslim charity in the

102. ENCYCLOPEDIA OF ISLAM IN THE UNITED STATES 130 (Jocelyne Cesari ed. 2007).

103. *Id.*

104. *Id.* at 131.

105. *Id.*

United States, shows several of the problems of this approach. First, civil actions by private individuals are the least effective tactic because they are based on a weak legal argument whose application to Muslim charities has failed to achieve tangible results. Second, even when criminal prosecutions of Muslim charities have been successful, this success is hard-won because of difficulties in proving liability and because of controversies regarding the underlying law. The experience of the Holy Land Foundation thus shows that the government's legal approach to terrorist financing over the last decade has not achieved the broader goals of the war on terrorism as effectively as possible, and that a legal strategy centered around executive action is the best way to achieve these goals.

C. The Holy Land Foundation and Hamas

The Holy Land Foundation ("HLF") is the best example of a Muslim charity in the United States because it at once exemplifies the prominence and successes achieved by Muslim charities as well as the ties such charities often have to terrorists

1. HLF's Origins

In 1988, a group of Palestinians with ties to Hamas formed a non-profit, tax exempt, charitable organization in California to assist the needy in the West Bank and Gaza. The group was called the Occupied Land Fund. In 1992, it relocated to Richardson, Texas, where it incorporated as the HLF.[106]

By 2001, HLF was the largest Muslim charity in the United States.[107] According to the *New York Times*, the group was "a modern and prosperous philanthropic machine, thriving in the mainstream" that:

> employed all the tools of modern fund-raising, setting up automatic bank withdrawals for donors and matching gift programs with corporations like American Express and Home Depot. Donors could give online, or by shopping at popular

106. Indictment at 10, United States v. Holy Land Foundation, No. 304-CR-240G (N.D. Texas July 26, 2004). The President, Secretary, and Chief Executive Officer was Shukri abu Baker. *Id.* at 11. The Chairman of the Board for the first decade was Muhammad el-Mezain. *Id.* at 12. El-Mezain became the Director of Endowments in approximately 1999. *Id.* The original treasurer was Ghassan Elashi. *Id.* at 13. Elashi replaced el-Mezain as Chairman of the Board in approximately 1999. *Id.*

107. David Firestone, *After a Long, Slow Climb to Respectability, a Muslim Charity Experiences a Rapid Fall*, N.Y. TIMES, Dec. 10, 2001.

> Web sites like Amazon.com that have charitable affiliation programs. Like many Christian charities, it allowed contributors to sponsor a Palestinian orphan for a set monthly amount, then regularly receive photographs and letters from the child, often with a political edge.[108]

In 2000, HLF raised more than $13 million.[109] In the same year, it gave away $5 million: half to Palestinians in the West Bank and Gaza, and the other half to refugees in Chechnya, Kosovo, Jordan, and Lebanon as well as to Turkish earthquake victims.[110] HLF also performed charity within the United States. It opened a food pantry in Paterson, New Jersey, in 1999, established hospitals, schools, and a charitable program, and organized donations of money and blood to victims of the Oklahoma City bombing.[111]

2. *HLF's Ties to Hamas*

At the same time, however, HLF had ties to the terrorist group Hamas.[112] Such ties highlight the complicated dual purpose of Muslim charities discussed in the previous section.

Hamas itself has dual purposes. In addition to its military wing, Hamas also has a social wing that administers social services to Palestinians throughout the West Bank and Gaza.[113] It administers these social services in part through *zakat* committees that raise and distribute Muslim charity.[114] In fact, the majority of Hamas's annual

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108. *Id.*

109. *Id.*

110. Laurie Goodstein, *Mideast Flare-Up: Muslims; 8 Groups in U.S. Protest Bush Move Against Foundation*, N.Y. TIMES, Dec. 5, 2001.

111. Angela Starita, *On The Map: Following Muslim Charity and Dietary Laws, Food for the Needy*, N.Y. TIMES, Mar. 21, 1999.

112. Hamas was founded in 1987. Indictment, *supra* note 105, at 1. Its name derives from an acronym based on its full name, Harakat al-Muqawamah al-Islamiyya, which means the Islamic Resistance Movement. *Id.* President Clinton designated Hamas a specially designated global terrorist organization in 1995. *Id.* at 8. The Secretary of State designated Hamas a foreign terrorist organization in 1997. *Id.* at 9. The Clinton administration designated Hamas's then-Political Bureau Chief Mousa Abu Marzook a specially designated global terrorist on August 29, 1995, and the Bush Administration designated the current Political Bureau Chief a specially designated global terrorist on August 22, 2003. *Id.* at 8. The indictment is referred to throughout because it provides a clear and concise account of the relevant aspects of Hamas' origins and structure. Several books provide further detail and analysis. *E.g.*, PAUL MCGEOUGH, KILL KHALID: THE FAILED MOSSAD ASSASSINATION OF KHALID MISHAL AND THE RISE OF HAMAS (2009).

113. Indictment, *supra* note 106, at 2.

114. *Id.* at 4.

operating budget, which ranges from $20 million to $70 million, goes to this legitimate charitable work.[115]

Much of Hamas's work is illegitimate, however. Aside from the fact that the rest of the budget goes to the militant wing for terrorist attacks, even some of the charitable funds are indirectly tied to terrorism. According to U.S. authorities, Hamas's charitable work also served as a recruiting tool for the organization's militant goals.[116] For example, a Hamas leader estimated that the group spent between $2 million to $3 million a month on payments to the families of victims of Israeli violence.[117] It likewise made payments to the families of suicide bombers.[118]

HLF had financial ties to Hamas from the start. In its first years of existence, HLF sent hundreds of thousands of dollars to Hamas.[119] Likewise, two HLF leaders attended a meeting with Hamas leaders in Philadelphia in October 1993 that the FBI monitored via electronic surveillance.[120] The meeting's "attendees acknowledged the need to avoid scrutiny by law enforcement officials in the United States by masquerading their operations under the cloak of charitable exercise."[121] An FBI memorandum later described how the HLF attendees "mentioned that the United States provided them with a secure, legal base from which to operate."[122]

HLF recognized the problem posed by these ties to Hamas. It employed public relations advisers and was represented by the prominent Arab-American attorney George Salem, a partner at Akin Gump and the liaison to Arab Americans for George W. Bush's presidential campaign.[123]

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115. MCGEOUGH, *supra* note 112, at 300.

116. *Id.* at 300 (citing Press Release, U.S. Dep't of the Treasury, *U.S. Designates Five Charities Funding Hamas and Six Senior Hamas Leaders as Terrorist Entities* (Aug. 22, 2003)).

117. MCGEOUGH, *supra* note 112, at 300 (citing Lee Hockstader, *Palestinians Find Heroes in Hamas; Popularity Surges for Once-Marginal Sponsor of Suicide-Bombings*, WASHINGTON POST, Aug. 11, 2001).

118. Judith Miller, *U.S. Contends Muslim Charity Is Tied to Hamas*, N.Y. TIMES, Aug. 25, 2000.

119. Indictment, *supra* note 106, at 18. Before incorporating in 1988, HLF sent approximately $100,000 to Abu Marzook. *Id.* Between April 1989 and October 1989, HLF sent another $725,000 to a Gaza account established and used by Hamas's spiritual founder, Ahmed Yassin. *Id.*

120. Indictment, *supra* note 106, at 20; Firestone, *supra* note107.

121. Indictment, *supra* note 106, at 20.

122. Firestone, *supra* note 107.

123. *Id.*

As a result of these ties to Hamas, the United States government was suspicious of HLF before September 11, 2001. In August 2000, for example, the State Department asked the United States Agency for International Development to withdraw HLF's registration as a charitable organization based on concerns over its payments to the families of Palestinian suicide bombers.[124] Similarly, in June 2000, New York state authorities began an investigation into HLF's possible ties to Hamas.[125]

It was not until the terrorist attacks of September 11, 2001, however, that HLF became a key government target in the newly launched war on terror and terrorist financing.

D. The Civil Action against HLF

The first legal mechanism used against HLF was a civil action premised on HLF's causal link to a Hamas terrorist attack. The civil action against HLF reveals several problems with using this tool to fight terrorist financing. The primary problem is that the legal basis for extending the causal chain to charities such as HLF is weak. As a result, to prove liability, private parties must base their individual claims on criminal statutes, whose enforcement is better left to the government. Lastly, as a practical matter it is difficult for individuals to successfully collect from charities like HLF. Rather, any victories are primarily symbolic. Therefore, the civil action against HLF shows that this problematic tool is largely ineffective and should not comprise a part of the government's legal strategy against terrorist financing.

1. The Boims' Civil Action

Joyce and Stanley Boim, U.S. citizens, brought a civil action against HLF in the United States after a Hamas gunman murdered their teenage son David, a U.S. and Israeli citizen, in Jerusalem in 1996. They based their claim on a novel interpretation of the material support statute.[126] The difficulty they faced in prevailing against HLF on that claim highlights the problems in fighting terrorist financing through civil actions.

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124. Miller, *supra* note 118.

125. Susan Saulny, *Spitzer Seeks to Force Fund-Raising Data From An Islamic Charity*, N.Y. TIMES, June 1, 2001.

126. 18 U.S.C. §§ 2331-38.

The Boims' claim rested on a 1992 law that allowed for civil actions against individuals and organizations by victims of acts of international terrorism.[127] The law was enacted in response to the killing of Leon Klinghoffer by Palestinian militants aboard the *Achille Lauro* in the 1980s.[128] It allows for "the imposition of liability at any point along the causal chain of terrorism [that] would interrupt, or at least imperil, the flow of money."[129] It was intended to "deter terrorist groups from maintaining assets in the United States, from benefitting from investments in the United States, and from soliciting funds from within the United States."[130]

Before the Boims, although Americans had won civil actions against Hamas and state sponsors of terrorism, none had ever been able to actually collect damages from foreign terrorist organizations or states. Two families of American victims of Hamas attacks had been awarded a combined $330 million in damages by United States courts, but they lacked a way to enforce these default judgments.[131] Likewise, a New Jersey family whose daughter died in a 1995 bombing in Gaza had won a $247.5 million verdict against the government of Iran but had no way to collect from a foreign government.[132]

The Boim case is unique because the Boims did not target just Hamas, but rather attempted to stretch the chain of causation to impose liability on HLF as well. The Boims were frustrated that U.S. authorities would not pursue a criminal case against the Hamas gunmen whom Palestinian police had arrested, so they turned to attorney Nathan Lewin.[133] In the words of Paul McGeough, "Lewin ventured legally where others had not dared, cherry-picking statute and precedent law to build a case of far greater consequence than nailing a couple of lowly Hamas killers on the West Bank."[134]

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127. *Id.*

128. Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1428 (2004); see also MCGEOUGH, *supra* note 112, at 296.

129. 18 U.S.C. §§ 2331-38.

130. Crimm, *supra* note 128, at 1428.

131. MCGEOUGH, *supra* note 112, at 296.

132. *Id.*

133. *Id.* at 297.

134. *Id.* at 296–299. Lewin was inspired by the example of Morris Dees, who won a $37.8 million verdict against the Christian Knights of the Ku Klux Klan for a 1995 church burning in South Carolina.

Lewin and the Boims filed suit in federal court in Chicago in 2000. In addition to the two killers already in custody, they named HLF as a defendant, along with another private organization, the Quranic Literacy Institute ("QLI").[135] The Boims claimed that HLF and QLI had illegally provided material support and resources to Hamas and that they laundered charitable contributions from the United States to Hamas to finance terrorist attacks.[136] They sought $100 million in compensatory damages and $100 million in punitive damages, along with attorneys' fees and treble damages as authorized by the statute.[137]

2. The Trial and Appeals

Before trial, HLF appealed to the Seventh Circuit on the grounds that the Boims could not show a direct connection between HLF and David Boim's killing.[138] By the time the Seventh Circuit heard the appeal, the September 11 attacks had occurred and the war on terror had begun. As McGeough writes, "[i]n as long as it took for four hijacked airplanes to crash into the Twin Towers in Manhattan, the Pentagon in Washington, and a field in Pennsylvania, the import of the Boim case shifted from a single shooting at a bus stop in Jerusalem to the rights of the families of the thousands who had died in the 9/11 attacks."[139] The court thus sought the opinion of the Department of Justice, which supported the Boims' novel legal theory and argued that the statute was intended to allow a suit against anyone in the causal chain of a terrorist act.[140] The Seventh Circuit allowed the Boims' action to proceed, but nonetheless pointed out several problems with their legal argument. In part based on the government's brief, the court recognized that "the statute is clearly meant to reach beyond those persons who themselves commit the violent act that directly causes the injury."[141] However, it also reasoned that "[t]o say that funding *simpliciter* constitutes an act of terrorism is to give the statute an almost unlimited reach" that "might

135. *Id.* at 300.

136. Crimm, *supra* note 128, at 1430.

137. *Id.*

138. David Firestone, *Traces of Terror: The Charity*, N.Y. TIMES (June 6, 2002), *available at* http://query.nytimes.com/gst/fullpage.html?res=9904EEDD163DF935A35755C0A9649C8B63&scp=1&sq=traces%20of%20terror:%20the%20charity&st=cse.

139. MCGEOUGH, *supra* note 112, at 308.

140. *Id.* at 308–09.

141. Boim v. Quranic Literacy Inst. (*Boim I*), 291 F.3d 1000, 1011 (7th Cir. 2002).

also lead to constitutional infirmities by punishing mere association with groups that engage in terrorism."[142] The court therefore held that the Boims' theory of liability based on funding Hamas was "insufficient because it sets too vague a standard, and because it does not require a showing of proximate cause."[143] The court held, in agreement with the government's brief, however, that liability for aiding and abetting international terrorism was inherent in the law.[144] The court also held that the Boims could attempt to establish HLF's civil liability by proving its criminal liability for provision of material support to terrorist organizations.[145]

At trial, the court granted summary judgment for the Boims against HLF because it found that HLF was collaterally estopped from denying it had provided material support to Hamas because it had lost on the same claim in its challenge to the government's designation of it as a terrorist group, as discussed in section six of this paper.[146] The jury then returned a $52 million verdict against the Quranic Literacy Institute, which the court tripled to $156 million pursuant to the statute.[147] The trial court also deemed the other defendants jointly and severally liable for these damages.[148]

On appeal, however, the Seventh Circuit overruled the grant of summary judgment against HLF, holding that the district court erred in its finding of collateral estoppel.[149] The Seventh Circuit explained that the D.C. Circuit's holding in the designation challenge did not actually establish HLF's knowledge of Hamas's terrorist activities or intent to support such activities as required for civil liability.[150] It thus remanded on the question of HLF's civil liability because there had not yet been any finding that HLF's financial support of Hamas caused Boim's death.[151] The court concluded dramatically, noting that:

142. *Id.* (emphasis in original).

143. *Id.* at 1012.

144. *Id.* at 1016–17.

145. *Id.* at 1016.

146. Boim v. Quranic Literacy Inst. (*Boim II*), 340 F. Supp 2d 885, 906 (N.D. Ill. 2004) (citing Holy Land Found. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003)).

147. Boim v. Holy Land Found. (*Holy Land I*), 511 F.3d 707, 710 (7th Cir. 2007), *vacated on grant of rehearing and rehearing en banc*, Boim v. Holy Land Found. (*Holy Land II*), 549 F.3d 685 (7th Cir. 2008).

148. *Holy Land I*, 511 F.3d at 710 n.1.

149. *Id.* at 710.

150. *Id.* at 730–31.

151. *Id.* at 733.

> [b]elief, assumption, and speculation are no substitutes for evidence in a court of law . . . [w]e must resist the temptation to gloss over error, admit spurious evidence, and assume facts not adequately proved simply to side with the face of innocence and against the face of terrorism . . . no matter how great our desire to hold someone accountable for the unspeakably evil acts that ended David Boim's life.[152]

Upon rehearing en banc, the Seventh Circuit upheld the verdict, but agreed with the initial panel that the Boims had not proven HLF's liability.[153]

3. The Ineffectiveness of Civil Actions Under the Material Support Law

The Boims' attempt to impose civil liability on HLF was ineffective with respect to both the Boims' goal and the broader goal of fighting terrorist financing. Through their novel reading of the law, the Boims attempted to turn it into an effective tool against terrorist financers. Before the Boim case, private parties had been unable to actually collect the huge sums in damages they won from terrorist groups like Hamas. The Boims attempted to solve this problem by going after Muslim charities as well. However, although the Seventh Circuit upheld the jury's verdict, it remanded on the issue of HLF's liability. The decision on remand is yet unclear, but the United States Supreme Court recently declined to hear the Boims' appeal on the liability of one of the individual defendants.[154] Thus, after eight years of litigation, the Boims are no closer to collecting damages than other families were under the prior reading of the statute. Despite their novel reading of the statute, they have been unable to actually prove HLF's liability through its fundraising. As before, any damages remain purely symbolic and do not actually help stop terrorist financing.

Beyond the Boims' failure to achieve their own goals, their civil action also highlights the problems of such an approach as a tactic in the broader strategy against terrorist financing. The Boims' civil action depended heavily on the material support law. The Seventh

152. *Id.* at 757. *See also* MCGEOUGH *supra* note 112, at 395.

153. *Holy Land II*, 549 F.3d at 700 (citing *Holy Land I*, 511 F.3d at 720–33).

154. *Supreme Court Denies Appeal for Terror Victim*, JTA, Oct. 21, 2009, http://jta.org/news/article/2009/10/21/1008626/us-court-denies-appeal-for-american-victim-of-terror-in-israel.

Circuit originally allowed the Boims to attempt to impose civil liability on HLF if they could show HLF violated the criminal prohibition on material support. However, imposing criminal liability is the government's job, and not the job of individual citizens. Indeed, the government prosecuted HLF for this very offense while the Boim litigation was proceeding. The government's prosecution of HLF led to a conviction and thus achieved the goal that the Boims' civil action was incapable of achieving. Even if the Boims had prevailed in imposing civil liability based on a criminal offense, HLF's penalty would be merely financial and thus less effective than the heavy prison sentences the government won in its criminal prosecution.

Likewise, the Seventh Circuit overturned the trial court's ruling that the Boims could rely on the D.C. Circuit's ruling in the seizure case to collaterally estop HLF's defense and win summary judgment against it. As with the criminal prosecution, targeting the assets of terrorist financers is a job for the government, and not for private actors. Similarly, even when the government successfully froze HLF's assets, the Seventh Circuit found that this was insufficient to also establish civil liability.

Although the same constitutional controversies plagued this civil case, individual citizens were nonetheless able to creatively apply the criminal statute as a basis for an equally controversial civil verdict. Were the constitutional controversies regarding the material support statutes fully resolved, perhaps such civil actions could potentially play a beneficial role in the response to terrorism. But until those controversies are fully resolved, such civil actions only engender further controversy regarding the reach and application of the statutes. Moreover, as discussed, the material support statutes originated in the national security context and are designed to be used by federal prosecutors in the legal fight against terrorism. Actions such as the Boims', however, have found support despite their clearly problematic nature.[155] At the very least, Congress should provide clearer guidelines as to how, if at all, the material support statute may give rise to a civil cause of action. Ideally, however, Congress should limit all such civil actions, at least until the

155. *See, e.g.*, John D. Shipman, Note, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526, 571 (2008) (arguing that "[w]ith Congress by their side, victims of terrorism should be permitted to seek justice in any venue where it can be dispensed, despite any political or diplomatic ramifications.").

controversies surrounding the underlying material support statute have been decisively settled.

E. The Prosecution of HLF

Although imposing criminal liability on terrorist financers is best left to the government, the government's prosecution of HLF shows that this legal mechanism has led to considerable controversy even when successful. Although it has been effective in achieving the direct goal of stopping terrorist financing, the controversies it causes also make the broader goals of the war on terror more difficult to achieve. While the government successfully used this mechanism against HLF, its use of this mechanism also did more to alienate Muslim Americans than its use of the other two mechanisms. Despite such concerns, the government must prosecute criminal activity where it exists, but the prosecution of HLF nonetheless shows the problems associated with this mechanism and suggests that it may need reform and should be used only when essential.

1. The Government's Case

In 2004, the government charged HLF and its leaders with forty-two criminal offenses for materially supporting terrorism.[156] The government's core charge was that HLF funneled money through West Bank *zakat* committees controlled by Hamas to pay family members of suicide bombers. Attorney General John Ashcroft remarked that "[t]oday, a U.S.-based charity, that claims to do good works, is charged with funding works of evil." He explained that "[f]or the past 33 months, the Department of Justice has used every tool within the law to identify, disrupt and dismantle terrorist networks and those organizations that supply the blood money that makes such murderous acts possible."[157] Ashcroft continued:

> To those who exploit good hearts to fund secretly violence and murder, this prosecution sends a clear message: There is no distinction between those who carry out terrorist attacks and

156. Those arrested included: abu Baker, Elashi, Abdulqader, el-Mezain, and Abdulrahman Odeh. In addition to the material support charge, the defendants were also charged with money laundering, conspiracy, and tax fraud. *See* Eric Lichtblau, *Arrests Tie Charity Group to Palestinian Terrorists*, N.Y. TIMES (July 28, 2004), *available at* http://www.nytimes.com/2004/07/28/politics/28terror.html?scp=1&sq=arrests%20tie%20charity%20group&st=cse.

157. John Ashcroft, U.S. Att'y Gen., Prepared Remarks of Attorney General John Ashcroft: Holy Land Foundation Indictment (July 27, 2004).

> those who knowingly finance terrorist attacks. The United States will ensure that both terrorists and their financiers meet the same, certain justice.[158]

The trial began on July 16, 2007, and the prosecution built its case around the argument that HLF donations were distributed through Hamas-controlled *zakat* committees, which allowed Hamas to use its other resources for terrorism.[159] Prosecutors had compiled more than one million pages of documents and thousands of hours of surveillance recordings.[160] They presented more than 1,000 exhibits and almost two months of testimony.[161] According to the prosecution, HLF had raised over $57 million since its founding in 1989 and had sent $36 million to the West Bank and Gaza.[162] The prosecution called two Israeli intelligence agents who testified anonymously that HLF was one part of a global Hamas finance network and that Hamas controlled the *zakat* committees to which HLF sent funds.[163] On cross-examination, however, one agent admitted he did not know who was in charge of the *zakat* committees at the time when HLF transferred funds and that British and Dutch authorities had cleared other groups that donated to the committees for lack of evidence.[164] The defense's witness Edward Abington, formerly the second-highest ranking intelligence official at the State Department, testified that during his tenure as consul general in Jerusalem in the 1990s, he received daily CIA briefings and visited the *zakat* committees but had never been aware that the *zakat* committees were part of Hamas.[165]

Despite the government's overwhelming evidence, its case faced a challenge similar to the Boims' with respect to proving the connection between HLF and Hamas. The government was unable to convince jurors either that Hamas controlled the accounts to which the Holy Land Foundation made donations or that the Holy Land

158. *Id.*

159. MCGEOUGH, *supra* note 112, at 384.

160. *Id.* at 383.

161. Leslie Eaton, *No Convictions in Trial Against Muslim Charity*, N.Y. TIMES (Oct. 22, 2007), *available at* http://www.nytimes.com/2007/10/22/us/22cnd-holyland.html?_r=1&scp=1&sq=No%20Convictions%20in%20Trial%20Against%20Muslim%20Charity&st=cse.

162. MCGEOUGH, *supra* note 112, at 383–84.

163. *Id.* at 387.

164. *Id.*

165. *Id.*

Foundation intended to provide support for terrorism.[166] The jury was not convinced that Hamas controlled the *zakat* committees. The jury acquitted three defendants of virtually all charges and deadlocked with respect to two others.[167] One juror told a reporter, "I kept expecting the government to come up with something, and they never did. From what I saw, this was about Muslims raising money to support Muslims, and I don't see anything wrong with that."[168] When the judge polled the jurors, three disputed the forewoman's account of the deliberations so the judge had them return for further deliberation. When they failed to reach a verdict upon further deliberation, the judge declared a mistrial for all the defendants.[169]

Commentators from a range of perspectives agreed that the prosecution had been a failure. One critic argued that "[i]t suggests the government is really pushing beyond where the law justifies them going."[170] The former United States Attorney for the Eastern District of Texas, where the trial occurred, called the verdict "a stunning setback for the government . . . a two-by-four in the middle of the forehead."[171] Likewise, the Undersecretary of the Treasury at the time of the asset freeze called the verdict "the continuation of what I now see as a trend of disappointing legal defeats" in terror-financing cases.[172]

Despite this initial setback, however, the defendants were ultimately convicted on retrial. The government retried the case and won convictions for each defendant in 2008.[173] The second prosecution was successful in part because prosecutors did a better job of focusing in on the nuances of the *zakat* committees to show the jury how HLF's donations freed up other assets for Hamas to use for

166. *See, e.g.*, MCGEOUGH, *supra* note 112, at 390 (citing Greg Krikorian, *Weak Case Seen in Failed Trial of Charity*, L.A. TIMES (Nov. 4, 2007), *available at* http://articles.latimes.com/2007/nov/04/nation/na-holyland4/4 ("one juror told a reporter, 'I kept expecting the government to come up with something, and they never did. From what I saw, this was about Muslims raising money to support Muslims, and I don't see anything wrong with that.'")).

167. *Id.* at 388.

168. *Id.* at 390 (citing Greg Krikorian, *Weak Case Seen in Failed Trial of Charity*, L.A. TIMES, Nov. 4, 2007).

169. MCGEOUGH, *supra* note 112, at 388–89.

170. *Id.*

171. Eaton, *supra* note 161.

172. *Id.*

173. Gretel C. Kovach, *Five Convicted in Terrorism Financing Trial*, N.Y. TIMES Nov. 25, 2008, at A16, *available at* http://www.nytimes.com/2008/11/25/us/25charity.html?scp=1&sq=Five%20Convicted%20in%20Terrorism %20Trial&st=cse.

terrorist attacks.[174] According to a leading Muslim-American advocate, Muslim Americans were shocked by the verdict and further confused with regard to what charitable giving was allowed.[175] In May 2009, the defendants were sentenced to a combined 180 years in prison.[176] The defendants are currently appealing.[177]

2. The Limitations of Prosecutions Under the Material Support Law

The HLF prosecution shows that while this legal tactic is effective at punishing terrorist financers, it is also poses problems with respect to the government's broader need to work with Muslim Americans in the war on terror. Unlike the civil action, the criminal prosecution of HLF was successful and this mechanism must remain part of the government's arsenal. However, to best balance the specific terrorist finance goals with the broader war on terror goals, several considerations should govern the use of this mechanism in the future.

The government should take seriously current concerns over the material support law. A common suggestion for reform calls for Congress to heighten the intent requirement for prosecutions of material support or create an affirmative defense for humanitarian assistance.[178] Regardless of any changes to the law, the government should be mindful of the potent effects prosecutions of Muslim charities can produce. It should recognize this tactic as a crucial one that is nonetheless best used when the government interest clearly outweighs the negative consequences that the HLF case shows are likely to result from such prosecutions.

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174. MCGEOUGH, *supra* note 112, at 384.

175. Laurie Goodstein, *U.S. Muslims Taken Aback by a Charity's Conviction*, N.Y. TIMES (Nov. 26, 2008), *available at* http://www.nytimes.com/2008/11/26/us/26charity.html?scp=1&sq=U.S.%20Muslims%20Taken%20Aback%20by%20a%20Charity%92s%20Conviction,%20&st=cse.

176. Press Release, U.S. Dep't of Justice, Federal Judge Hands Downs Sentences in Holy Land Foundation Case Holy Land Foundation and Leaders Convicted on Providing Material Support to Hamas Terrorist Organization (May 27, 2009).

177. Miriam Rozen, *Appeals Follow Sentencing of Defendants in Holy Land Foundation Case*, TX. LAWYER (May 28, 2009), *available at* http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202431047371&slreturn=1&hbxlogin=1.

178. *See, e.g.*, AHILAN T. ARULANANTHAM, AM. CONST. SOC'Y FOR LAW AND POLICY, A HUNGRY CHILD KNOWS NO POLITICS:' A PROPOSAL FOR REFORM OF THE LAWS GOVERNING HUMANITARIAN RELIEF AND 'MATERIAL SUPPORT' OF TERRORISM 10 (June 2008), *available at* http://www.acslaw.org/Advance%20Spring%2009/A%20Hungry%20Child%20Knows%20No%20Politics.pdf.

IV. Recommendations for Reform

A. Limit the Use of the Statute for Civil Litigation

Despite the controversial and largely unsettled nature of the material support statute, private individuals have taken advantage of the statutes to bring their own civil actions. As the Boim case shows, this approach is controversial at best and problematic at worst. To prevent the further unsettling of this area of the law, Congress should prohibit the use of the material support criminal statutes by individual parties in civil actions.

Although the same constitutional controversies plagued this civil case, individual citizens were nonetheless able to creatively apply the criminal statute as a basis for an equally controversial civil verdict. Were the constitutional controversies regarding the material support statutes fully resolved, perhaps such civil actions could potentially play a beneficial role in the response to terrorism. But until those controversies are fully resolved, such civil actions only engender further controversy regarding the reach and application of the statutes. Moreover, as discussed, the material support statute originated in the national security context and is designed to be used by federal prosecutors in the legal fight against terrorism. At the very least, Congress should provide clearer guidelines as to how, if at all, the material support statute may give rise to a civil cause of action. Ideally, however, Congress should limit all such civil actions, at least until the controversies surrounding the underlying material support statute have been decisively settled.

B. Add a Specific Intent Requirement

Adding a specific intent requirement is the most apparent way to clarify the law's scope and address constitutional concerns. The Ninth Circuit held that no such requirement was necessary in light of IRTPA's knowledge requirement amendment, but such an amendment would nonetheless clarify the law and its application for both legal and practical reasons.

Legal controversy persists despite IRTPA's knowledge requirement amendment. For example, one critic raises the question of what exactly the knowledge requirement applies to, and points out that "[i]f 'knowingly' only modifies 'provides,' the mental state will be satisfied by any donation that is not accidental or inadvertent of material support to a group that is a designated foreign terrorist

organizations." [179] Under such a reading of the amended knowledge requirement, "[t]he donor would not have to know that the aid is material support and, more important, would not have to know that contribution is going to a designated foreign terrorist organization."[180]

Likewise, from the national security perspective, the amended law remains nonetheless favorable precisely because it "[h]as a very permissive *mens rea* standard. The government has no obligation to show that the defendant knew or intended that the support would be used for any particular purpose, let alone facilitate a crime."[181] Instead, the government need merely show that "the defendant knew the identity of the true recipient of the support and that the defendant either knew that the group had been designated as a terrorist organization, or, more likely, that the group engaged in terrorism."[182] According to this view, the statute remains "particularly useful"[183] because "[e]ven where prosecutors cannot prove membership [by associational status] . . . the broad range of conduct otherwise associated with such groups—again without reference to whether the government can link the individual to any particular violent plot."[184]

Such an argument, however, proposes only a temporary solution for several reasons. First, it leaves the material support law susceptible to continued challenges on constitutional grounds. Second, it calls for exploiting the statute's weakness, thereby continuing the controversial approach of creative applications of the statute. Indeed, its proponent also proposes adding a "certification provision" in order to "reduce if not eliminate the risk that [section] 2339A would be deployed in circumstances unrelated to terrorism, thus cabining the impact of the broad, prevention-oriented approach to [section] 2339A . . . ."[185] That the weak *mens rea* requirement requires a corralling provision to prevent it from affecting other areas of criminal law shows that the amended requirement still does not end the controversy. Furthermore, it begs the question why such a controversial application is acceptable with respect to the material

179. Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861, 873 (2004).

180. *Id.*

181. Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 680–81 (2009).

182. *Id.*

183. *Id.* at 681.

184. *Id.* at 681.

185. *Id.* at 712.

support law but not with respect to other laws. Adding a specific intent requirement would finish the work begun by the knowledge requirement amendment and would help resolve the controversial uses of the material support law that nonetheless remains attractive to some.

Such a change would also have helpful practical implications for prosecuting terrorism. Lest it seem that this argument would obliterate the strength of the material support statute or that any change would be merely theoretical, the prosecution of HLF shows the practical limitations of the knowledge requirement.

Conclusion

The legal challenge to the material support statute has taken over a decade to litigate and has changed course several times in response to repeated amendments to the law. The need for such amendments results not only from legal challenges to the law, but also from the law's key role in the legal response to terrorism. This response has evolved significantly over the past three decades, and will no doubt continue to evolve along with the challenge terrorism presents. Given the evolving nature of the law and its practical application, the final decision on the law's constitutionality did not fully resolve the practical challenges facing the prosecutor or the donors. The prosecutor and the donor remain in the same position—unsure how best to proceed under the law given the controversies and debates that have long surrounded it.

The reforms that this Note proposes would assist both the prosecutor and the donor because they are based not only on the constitutional debate surrounding the material support law, but also on its practical implications. Further legislation to limit the use of the material support statute in civil actions would ensure that the already challenging terrain that the prosecutor and donor must navigate would not be further complicated by the controversial actions of individual citizens. A specific intent requirement would better instruct the would-be donor and would also assist the prosecutor in deciding which cases to prosecute and how best to win convictions.

The need to prosecute terrorism and the desire to make legal donations are not mutually exclusive. Much of the controversy surrounding the constitutionality of the material support law stems from the fact that it often places the interests of the prosecutor and the donor at odds. In addition to resolving the debate over the law's constitutionality, proper reform of the law and its application will

ensure that the prosecutor and the donor can proceed under the law in a manner that allows them both to better achieve their complementary goals.

In the aftermath of HLF's experience and the issuance of recommended guidelines, Muslim Americans have responded with helpful initiatives of their own. For example, a recently formed San Francisco organization called Muslim Advocates has partnered with the Better Business Bureau to create a voluntary accreditation program for Muslim charities.[186] The organization's lawyers scrutinize Muslim charities and counsel them on how best to comply with the government's standards and regulations.[187] The group's leader has also issued a list of recommendations to the government and recently met with President Obama at the White House Ramadan celebration.[188] Such efforts offer a helpful route to achieve the related goals of stemming terrorist financing and allowing Muslim Americans to fulfill their *zakat* obligations.

As this Note has shown, the current approach to terrorist financing has alienated Muslim Americans, made it difficult for them to fulfill their *zakat* obligations, and therefore made it unlikely that they would cooperate with the government. Such a result has made it more difficult for the government to achieve its goal with respect to both terrorist financing specifically and the war on terror more broadly because it alienated Muslim Americans who could potentially provide crucial knowledge toward these goals.

As President Obama recognized in his Cairo speech, the issue of *zakat* plays a crucial role in the war on terrorism. Terrorist financing is a particularly challenging facet of this war because of the complex, often dual-natured Muslim charities that exist to collect and distribute *zakat*. A successful legal approach to terrorist financing must proceed from an understanding of this complexity. It must therefore be based on a strategy that at once allows Muslim Americans to fulfill their *zakat* obligations and allows the government to fight terrorist financing and the broader war on terror as effectively as possible.

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186. Moni Basu, *Accreditation Aims to Ease Fear in Muslim Charitable Giving*, CNN (Sept. 19, 2009), *available at* http://www.cnn.com/2009/US/09/19/muslim.charities/index.html?iref=allsearch. *See also* http://www.muslimadvocates.org.

187. Basu, *supra* note 187.

188. Farhana Khera, *Breaking Down Barriers to Charity*, ON FAITH (June 17, 2009, 11:29 AM), http://onfaith.washingtonpost.com/onfaith/eboo_patel/2009/06/what_president_obamas_cairo_sp.html. *See also* Press Release, White House Office of Press Sec'y, Expected Attendees (Sept. 1, 2009).

Such a strategy must begin with further reform of the material support statute.