

January 2010

Searching for Remedial Paradigms: Human Rights in the Age of Terrorism

Frances Howell Rudko

Follow this and additional works at: <http://scholarship.law.umassd.edu/umlr>

 Part of the [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Rudko, Frances Howell (2010) "Searching for Remedial Paradigms: Human Rights in the Age of Terrorism," *University of Massachusetts Law Review*: Vol. 5: Iss. 1, Article 5.

Available at: <http://scholarship.law.umassd.edu/umlr/vol5/iss1/5>

This Article is brought to you for free and open access by Scholarship Repository @ University of Massachusetts School of Law. It has been accepted for inclusion in University of Massachusetts Law Review by an authorized administrator of Scholarship Repository @ University of Massachusetts School of Law.

SEARCHING FOR REMEDIAL PARADIGMS: HUMAN RIGHTS IN THE AGE OF TERRORISM

FRANCES HOWELL RUDKO*

By recognizing the overriding importance of civil liberties even in wartime, the Supreme Court has . . . [perhaps] learned the lessons of our own history -- that especially in wartime, the nation depends on independent federal courts to guard the liberties of all and to be skeptical of claims of military necessity.¹

It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty.²

Nine years after the unprecedented terrorist attacks on September 11, judicial response to various governmental and individual methods of combating terrorism remains deferential and restrained. The courts have heard at least three types of cases brought by advocates for three distinct groups: the alleged perpetrators of terrorism; the victims of terrorist attacks; and third party humanitarian groups. Implicit in the practical question of how to deal effectively with

* Professor of Law, University of Massachusetts School of Law at Dartmouth.

¹ GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM*, 556 note (W. W. Norton and Company, Inc. 2004) (quoting Fred Korematsu's response to the *Guantanamo Bay* and *Hamdi* decisions).

² WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME*, 224-25 (Alfred A. Knopf, Inc., 1998).

terrorism is the broader consideration which Congress, the President and others must also address: how to respond to the terrorists' extreme human rights violations without violating international human rights norms and international humanitarian law.

In the courts, most attention has focused on the cases brought to vindicate the rights of detainees as alleged perpetrators of terrorism. Government military policies responding to terrorism include prolonged detention of "enemy combatants" with restricted habeas corpus access and a trial process in military commissions. Historically, during times of crisis, the federal government uses various control mechanisms (however ill conceived) to suppress activities deemed threatening to national security. A brief survey of recent cases in Part I will demonstrate that the Supreme Court has ruled haltingly but decisively to assure that the detainees receive due process rights afforded by the Constitution while, at the same time, protecting the government's national security interests.

A second group of cases are those brought to compensate victims of terrorism. These cases stem from earlier acts of terrorism, the Iran Hostage Event, the SS Cole Attack, but also include suits by victims of the 2001 attack. Congress and the Executive have provided methods of compensating the victims and increased the terror victims' ability to file civil suits against terrorist perpetrators. Seen as an effective deterrent to terrorism by making those who fund terrorist activities pay for their involvement, the cases are intermittently welcomed by the government. A discussion of the current commentary endorsing this approach illustrates that this remedial paradigm is gaining in importance.

Statutes restricting communication and material support to government-designated foreign terrorist organizations have spawned a third group of cases, brought by third parties to protect free speech and association rights of individuals and organizations adversely affected by the laws. In the 2009-2010 term, for the first time, the Supreme Court heard one of these cases, *Humanitarian Law Project, et al. v. Eric H.*

*Holder, Jr.*³ (hereinafter “*HLP, et al*”). The decision ended a twelve year litigation pursued by two citizens and six organizations who challenged the material-support provisions of the Patriot Act, initially passed within days of the 9/11 terrorist attack. A close review of the opinions in *HLP, et al* exemplifies again the cautious and deferential role espoused by the judiciary.

In each line of cases, the plaintiffs argue for a different remedial solution to the evils of terrorism. Terrorist acts, which either target or incidentally kill innocent civilians, are a profound violation of human rights law, recognized on both the municipal and international level, a fact also recognized by the plaintiffs in all of the cases, even though terrorist methods are often justified as a means to principled ends. Congress and the Executive enacted various measures in the wake of September 11 to counteract threatened terrorists’ attacks. Retaliatory and preventative action was comprehensive.⁴ When the United States government responded to terrorism with policies which arguably violate civil rights and human rights norms, civil liberties advocates argued that these policies must be changed to afford constitutional due process protections. Victims of terrorist activities and their advocates, by seeking damages from the perpetrators, strike at the financial viability of terrorist groups. Non-governmental groups, dedicated to enforcing human rights, focus on defeating terrorism by informing and educating the perpetrators in nonviolent methods of achieving their principled goals. These groups seek unrestricted access to communicate with the alleged terrorists and offer to the terrorists solutions which do not violate human rights.

³ *Holder v. Humanitarian Law Project*, 561 U.S. (2010); 130 S.Ct. 2705 (2010).

⁴ See Brief of Amicus Curiae Center on the Administration of Criminal Law in Support of Eric Holder, Jr., Attorney General, et al. at 4, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 5177141. “Preventing terrorism requires thwarting plots and starving terrorist organizations of the resources necessary to fund their violent missions. All elements of national power, including federal criminal law, contribute to this effort.”

I. PROLONGED DETENTION AND THE WRIT

In the wake of the terrorist attacks on September 11, the Supreme Court decided four major cases⁵ within a period of four years involving the rights of captured detainees, “enemy combatants,” being held indefinitely without being given the constitutional due process rights regularly afforded the criminally accused under the Constitution. Immediately after September 11, the President and Congress implemented a national defense strategy to punish the alleged terrorists and to prevent future terrorist attacks. Exercising shared war powers given to them by the Constitution, the two branches of government worked in tandem to secure the nation. Most notable for purposes of judicial review were the military commissions set up to try the detainees.

Within a few days of the September 11 attack, Congress passed the Joint Resolution for the Authorization for Use of Military Force (hereinafter “AUMF”)⁶ empowering the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . .”⁷ On November 13, 2001, President Bush issued an executive order⁸ setting up military tribunals to try non-United States citizens accused of terrorism. The President specifically noted that for the “safety of the United States and the nature of international terrorism . . . it is not practicable to apply in military commissions under this order the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”⁹ The order further provided that the terms of detention would be

⁵ The first of the cases, *Rasul v. Bush*, 542 U.S. 466 (2004) was followed the same year by *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) was heard two years later and *Boumediene v. Bush*, 553 U.S. 723 (2008) was heard two years after *Hamdan*.

⁶ AUMF, S.J.Res. 23, 107th Congr. See 115 Stat. 224 § 2(a) (2001). The resolution was issued pursuant to the War Powers Resolution of 1973.

⁷ *Id.*

⁸ Exec. Order, No. 57833, 66 C.F.R. 57833 (2001).

⁹ *Id.*

prescribed by the Secretary of Defense.¹⁰ These two events effectively set in motion the debate over civil liberties that would dominate the next decade and bring to the Supreme Court the prolonged detention cases beginning with *Rasul v. Bush* (2004) and culminating in *Boumediene v. Bush* (2008).¹¹

As early as March of 2002, Professor Ruth Wedgewood¹² of Yale University School of Law, speaking at the University of Illinois in Champaign, Illinois, in defense of the military commissions, was met by protestors organized by University of Illinois law professor Francis Boyle who described the courts as “un-American” “kangaroo courts.”¹³ The debate was quickly taken to the federal courts in cases brought by the detainees seeking to contest detention under the Suspension Clause of the Constitution.

A brief look at the detainee cases will reveal that the Supreme Court was divided in the decisions, showed deference to the two branches of government given war powers by the Constitution, and, accordingly, made case by case decisions conscious of a framework of shared government powers. The Supreme Court decided the first detainee case, *Rasul v. Bush*,¹⁴ in 2004. The petitioner was an alien captured in Afghanistan being held at Guantanamo Bay Naval Base in Cuba. The majority opinion by Justice Stevens found that habeas corpus relief would extend extraterritorially to the prisoners held at the United States military base, that the habeas statute confers a right to judicial review of the legality of executive detention of aliens in “a territory over which the United States exercises plenary and

¹⁰ *Id.* at 57834.

¹¹ *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008).

¹² Professor Wedgewood “helped draft proposals” for the military tribunal and emphasized in response to probing questions that “the United States court system [could] not adapt to the terrorist situation.” Alina Dizik, *U. Ill. Speaker Defends Military Tribunals*, U-Wire, 2002 WL 16985298, Mar. 29, 2002.

¹³ *Id.*

¹⁴ *Rasul v. Bush*, 542 U.S. 466 (2004).

exclusive jurisdiction, but not ‘ultimate sovereignty.’”¹⁵ Writing for Justices Roberts and Thomas, Justice Scalia would not extend the protection of the writ to aliens held “outside the sovereign borders of the United States and beyond the territorial jurisdiction of all its courts.”¹⁶ Justice Scalia decries the majority holding as a “wrenching departure from precedent.”¹⁷ Insisting that by “abandoning the venerable statutory line drawn in *Eisentrager*, the court boldly extends the scope of the habeas statute to the four corners of the earth.”¹⁸

In the same year the Court heard *Hamdi v. Rumsfeld*,¹⁹ a case brought by a United States’ citizen captured in Afghanistan, being held as an “enemy combatant” within the United States. Yasar Esam Hamdi was born in Louisiana in 1980 but was living in Afghanistan in 2001 when he was captured.²⁰ The Court found that a “citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”²¹ O’Connor, speaking for a plurality that included Chief Justice Rehnquist and Justices Kennedy and Breyer, thought the fact that habeas corpus had not been suspended assured the citizen-detainee a “fair hearing” before some “neutral decisionmaker,” but to others on the Court, the citizen-detainee was entitled to release.²²

¹⁵ *Id.* at 475.

¹⁶ *Id.* at 488.

¹⁷ *Id.* at 505.

¹⁸ *Id.* at 498.

¹⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

²⁰ *Id.* at 510.

²¹ *Id.* at 532.

²² *Hamdi*, 542 U.S. at 541 Souter, J., and Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment reasoned that the detention was unauthorized and that Hamdi should be released. Scalia, J., joined by Stevens, J., dissenting, reasoned that the law of war could not be applied under the open court doctrine (*id.* citing *Ex parte Milligan*, 71 U.S. 2 (1866) and noted that the court should grant the writ to Hamdi, after which time, “the Executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him.” (quoting *Id.* at 576) Scalia, J., dissenting, faults

Justice Thomas, dissenting, thought the question of Hamdi's lawful detention came to "the Court with the strongest presumptions in favor of the Government."²³ He concluded that "the Government's detention of Hamdi as an enemy combatant" was entitled to deference as the "President, in the prosecution of a war and authorized by Congress, has acted well within his authority[.]" and that Hamdi "received all the process to which he was due"²⁴

Although Justice O'Connor boldly stated that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens,"²⁵ she also recognized the sources that limited that power, "unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."²⁶ The dialogue between the branches of government is evidenced by the action taken by Congress and the Executive in response to the two cases decided in 2004. The Secretary of Defense, in July of 2004, created a review process by which detainees could contest their enemy-combatant status before a Combat Status Review Tribunal (hereinafter "CSRT") and Congress passed the Detainee Treatment Act (hereinafter "DTA") which restricted review of CSRT's rulings to procedural regularity issues and channeled appeals to the D.C. Circuit.²⁷

In *Hamdan v. Rumsfeld*,²⁸ the Supreme Court reaffirmed that the detainees were entitled to habeas corpus relief. The case was decided by a 5-3 majority, as Chief Justice Roberts, having heard the case below, recused. Salim Ahmed Hamdan, being held since 2002 at Guantanamo Bay, Cuba

the majority for "remediation of executive default," insisting that the "role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal." *Id.*

²³ *Id.* at 594.

²⁴ *Id.*

²⁵ *Hamdi*, 542 U.S. at 536.

²⁶ *Id.*

²⁷ *See generally* *Hamdan v. Rumsfeld*, 548 U.S. 557, 572-73 (2006).

²⁸ *Hamden v. Rumsfeld*, 548 U.S. 557 (2006).

was a Yemeni national captured abroad. He contested the procedures provided by the military commission court. The Supreme Court overturned the jurisdiction stripping provisions of the DTA and found that the military commissions procedures violated Article 36 of Uniform Code of Military Justice (hereinafter “UCMJ”) which requires that military commission procedures be equivalent to the procedures followed in courts martial.²⁹ Justice Stevens, writing for the majority, outlined the military commissions procedures.³⁰ He noted that the “accused and his civilian counsel may be excluded from and precluded from ever hearing what evidence was presented . . . [if] either the Appointing Authority or the presiding officer decide to ‘close’”; that “any evidence” can be admitted that, “in the opinion of the presiding officer ‘would have probative value to a reasonable person’”; and that “neither live testimony nor witnesses’ written statements need be sworn.”³¹ The Court also found that the procedures violated the requirements of Common Article 3 of the Geneva Conventions³² which Article 21 of the UCMJ recognizes as mandatory for military commissions under the laws of war.³³

Justices Scalia, Thomas and Alito, however, dissented. Each wrote a separate dissent with one common thread, the need to defer to the other branches of government. The dissenters would have granted the Government’s request for abstention, citing “considerations of inter-branch comity at the federal level [that] weigh heavily against our exercise of equity jurisdiction in this case . . . [exercise of which] brings the Judicial Branch into direct conflict with the Executive in an area where the Executive’s competence is maximal and ours is virtually non-existent.”³⁴ Scalia would also have upheld the jurisdiction stripping provisions of the DTA which

²⁹ *Id.* at 617-20.

³⁰ *Id.* at 613-15.

³¹ *Id.* at 614.

³² *Id.* at 625. See also *id.* at 625-36, for full discussion.

³³ *Id.* at 628. The Geneva Conventions are part of the law of war, and “compliance with the law of war is the condition upon which the authority [for military commissions] set forth in Article 21 is granted.”

³⁴ *Hamden v. Rumsfeld*, 548 U.S. 557, 676-77 (2006).

provided that “[n]o court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detainee by the Department of Defense at Guantanamo Bay, Cuba.”³⁵ He reasoned that the provision did not violate the Suspension Clause because “. . . it is clear that Guantanamo Bay, Cuba, is outside the sovereign ‘territorial jurisdiction’ of the United States . . . [and that p]etitioner, an enemy alien detained abroad, has no rights under the Suspension Clause.”³⁶ And Justice Thomas, in a separate dissent, continued the theme by arguing that “the President’s decision to try Hamdan before a military commission . . . is entitled to a heavy measure of deference.”³⁷

As if to invite more dialogue among the branches of government, Justice Breyer noted in his short concurrence, joined by Justices Souter and Ginsburg, that nothing “prevents the President from returning to Congress to seek the authority he believes necessary.”³⁸ And Justice Kennedy, speaking for Justices Souter, Breyer, and Ginsburg, was more explicit, “In light of the conclusion that the military commissions at issue are unauthorized, Congress may choose to provide further guidance in this area. Congress, not the Court, is the branch in the better position to undertake the ‘sensitive task of establishing a principle not inconsistent with the national interest or with international justice.’”³⁹

Post-*Hamdan*, Congress passed the Military Commissions Act (hereinafter “MCA”)⁴⁰ which would be tested in the next case to come before the Court, *Boumediene, et al v. Bush, et al.*⁴¹ Multiple aliens, detained as enemy combatants, presented the question, *inter alia*, of whether the detainees “have the constitutional privilege of habeas corpus”⁴² as guaranteed by the Suspension Clause. The Court, having resolved habeas

³⁵ *Id.* at 656. See also DTA, §1005 (e)(1), 119 Stat. 2742 (2005).

³⁶ *Id.* at 670.

³⁷ *Id.* at 680.

³⁸ *Id.* at 636.

³⁹ *Id.* at 655.

⁴⁰ MCA, 120 Stat. 2600 (2006).

⁴¹ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁴² *Id.* at 732.

questions in the previous cases by statutory analysis, answered the Constitutional question in the affirmative.⁴³ In a 5-4 decision, Justice Kennedy wrote the majority opinion joined by Justices Stevens, Souter, Ginsburg and Breyer. Chief Justice Roberts and Justice Scalia wrote separate dissents joined by each other and Justices Thomas and Alito. The majority ruled that the DTA procedures were not an adequate and effective substitute for habeas corpus,⁴⁴ and that § 7 of the MCA operated as an “unconstitutional suspension of the writ.”⁴⁵

Justice Kennedy specifically noted the “ongoing dialogue between and among the branches of Government” and recognized that Congressional passage of the MCA was in direct response to the *Hamdan* decision.⁴⁶ Although holding that the detainees could directly seek the writ of habeas corpus in federal district courts without exhausting the remedies in the DTA and the CRST process,⁴⁷ he stressed that, after the decision, the “outer boundaries of war powers [are left] undefined” and that the “political branches . . . can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.”⁴⁸ As the majority did not invalidate the procedures contained in the DTA and the MCA, except for § 7 of the MCA, it left intact the remedial paradigms in those provisions⁴⁹ and opened up federal jurisdiction with procedures to be designed by the district courts. Noting that the majority did not attempt “to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus,”⁵⁰ Justice Kennedy did identify two attributes of an acceptable habeas review; the privilege must entitle the “prisoner to a meaningful opportunity to demonstrate that he

⁴³ *Id.* at 733.

⁴⁴ *Id.* at 734.

⁴⁵ *Id.* at 792. MCA § 7 “denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment.” *Id.* at 736.

⁴⁶ *Boumediene v. Bush*, 553 U.S. 723, 738 (2008).

⁴⁷ *Id.* at 795.

⁴⁸ *Id.* at 797-98.

⁴⁹ *Id.* at 795.

⁵⁰ *Id.* at 779.

is being held pursuant to ‘the erroneous application or interpretation’ of relevant law” and “the habeas court must have the power to order the conditional release of an individual unlawfully detained-though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.”⁵¹ The Court further noted that more procedural protection might be required depending on the circumstances.⁵²

To the dissenters, the majority did not define an alternative effective habeas review, leaving “open the distinct possibility that its ‘habeas’ remedy will, when all is said and done, end up looking a great deal like the DTA review it rejects.”⁵³ Chief Justice Roberts, for the dissenters, defended the process created by the Congressional acts,⁵⁴ insisting that “the system that the political branches constructed adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy.”⁵⁵ Justice Scalia wrote separately to point out the “legal errors” in the Court’s opinion and to note, as before, that “The writ of habeas corpus does not, and never has, run in favor of aliens abroad . . . the Court’s intervention in this military matter is entirely *ultra vires*.”⁵⁶

The Supreme Court, in the detainee cases, gave the alien detainee at Guantanamo Bay Naval Base in Cuba a constitutional right to habeas corpus. The implementation of that right for each detainee remains unresolved. The decisions significantly reveal that the search for remedial paradigms continues and is, in fact, an inter-branch search.

Professor Aziz Z. Huq of Chicago University Law School, using admittedly limited empirical data,⁵⁷ critically

⁵¹ *Id.*

⁵² *Boumediene v. Bush*, 553 U.S. 723, 779 (2008).

⁵³ *Id.* at 825.

⁵⁴ *Id.* at 803-809.

⁵⁵ *Id.* at 802-803.

⁵⁶ *Id.* at 827.

⁵⁷ For the years, 2002-2009, Huq studied the trends in detainee population at Guantanamo Bay. *See Aziz Z. Huq, What Good is Habeas*, Vol. 26 No. 3, Const. Comment, 385 Summer 2010, at 402. He documented the yearly population of detainees including the transfers and

analyzed the effect of the decisions.⁵⁸ Using the two-fold purpose of *habeas* review advanced by Justice Kennedy in *Boumediene*, he attempted to define the impact the decisions had on (1) the personal liberty of the detainees and (2) the establishment of legal boundaries on executive detention policy.⁵⁹ He concluded that in relation to meaningful habeas review, the “net result of *Boumediene* . . . was to leave the substantive law of executive detention incrementally murkier than before.” In relation to the Executive’s legal position, he found that “*Boumediene* did not prompt any substantial change.”⁶⁰ The data supported Professor Huq’s conclusion that the *Hamdi* and *Rasul* decisions had the indirect effect of “nudg[ing] the Executive into more wholesale reconsideration of detainee processing.”⁶¹ This indirect effect finding supports the inter-branch dialogue the Justices encouraged in the opinions.

II. CIVIL DAMAGES FOR TORT VICTIMS

Debra M. Strauss, in a recent law review article,⁶² predicted that civil lawsuits brought by victims against terrorists and their supporters, encouraged by the Justice for Victims of Terrorism Act (hereinafter “JVTA”) passed in January of 2008, would increase. She explained the rationale for the second line of cases:

As the judgments from the civil lawsuits
build, the United States is well on its way to

releases, *id.* at 403; compared the population trends at Guantanamo Bay with population trends at Bagram, *id.* at 404-405; and compared habeas releases before and after the *Boumediene* decision.

⁵⁸ Aziz Z. Huq, *What Good is Habeas*, Vol. 26, No. 3, Const. Comment, 385 Summer 2010.

⁵⁹ *Id.* at 385, 395.

⁶⁰ *Id.* at 412.

⁶¹ *Id.* at 427.

⁶² Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT’L. L. 307 (2008-2009). Debra Strauss, a graduate of Yale University School, is Assistant Professor of Business Law, Fairfield University, Charles F. Dolan School of Business.

combating terrorism through this novel and different - nonmilitary approach, whereby one can compensate the victims of terrorism and at the same time potentially deplete the assets and financial support for future terrorist acts.⁶³

Although “progress to date is just the beginning,”⁶⁴ Professor Strauss envisioned a global financial war on terrorism which includes enforcement of civil judgments by a “three pronged approach:”

First, the Security Council should increase its enforcement of members’ effort to freeze assets overseas. . . . Second, the national courts of member states should commit to the enforcement of the civil judgments of U.S. courts for the victims of terrorism, levying upon the assets of organizations connected to terrorism wherever they may be found. . . . Finally, international courts should exercise concurrent jurisdiction in these matters, enabled by their potential access to the frozen assets of terrorists organizations . . . [and] should provide terrorism victims with access to frozen assets obtained through UN resolutions.⁶⁵

Professor Strauss proposed a global effort with “[s]trict enforcement of [U.N.] resolutions accented by the seizure of financial assets and the use of the international judicial system [as] the most effective, logical and realistic approach.”⁶⁶ She noted that the 1566 Working Group of the Security Council “already appears to be exploring an international compensation fund for the victims” and

⁶³ *Id.* at 310.

⁶⁴ *Id.* at 355.

⁶⁵ *Id.* at 352-53.

⁶⁶ *Id.* at 354-55.

suggested that the Group might “provide an independent avenue for victims of international terrorism to pursue civil lawsuits against terrorist groups and state sponsors of terrorism in international courts.”⁶⁷ Throughout the article, Professor Strauss stresses that the international community shares a strong commitment to fight terrorism and that there is a demonstrated common goal to wage a civil battle. She concluded that “it is only through the active role of the UN and other organizations, including the courts worldwide, that the international community can bring to fruition this struggle to reclaim the world from the clutches of terrorism.”⁶⁸

In an earlier article,⁶⁹ Professor Strauss surveyed the cases in the United States brought under the various acts⁷⁰ provided by Congress to facilitate suing terrorists and state sponsors of terrorism.⁷¹ Most notable is the terrorist exception to the Foreign Sovereign Immunities Act.⁷² This

⁶⁷ *Id.* at 353. See *id.* at 339-53, for a more complete understanding of the efforts made by the United Nations in this area. But see Eric Rosand, *The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counter-Terrorism Body Needed?* 11 J. CONFLICT AND SECURITY L. 399 (2006) for a critical analysis of the work of the United Nations and an alternative proposal for combating terrorism.

⁶⁸ Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT’L L. 307, 355 (2008-2009).

⁶⁹ Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits*, 38 VAND. J. TRANSNAT’L L. 682 (2005).

⁷⁰ In addition to common law tort actions available in every state, the federal statutes allow plaintiffs to seek civil redress. See the Alien Tort Claim Act, 28 U.S.C. § 1350 (1948); the Torture Victim Protection Act, Pub. L. No. 102-256, § 2(a)(1)-(2), 106 Stat. 73 (1993), *reprinted in* 28 U.S.C. § 1350 note (West 1993); the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (a)(7) [*amended by the Antiterrorism and Effective Death Penalty Act of 1996*]; and the Antiterrorism Act of 1991, 18 U.S.C. § 2333.

⁷¹ *Strauss, supra* note 69 at 683-725.

⁷² Traditionally, sovereign immunity was absolute. There are now several exceptions to the sovereign immunity concept as expressed in the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 et seq.; See also Portnoy, Aryeh S. et al., “The Foreign Sovereign Immunities Act: 2008 Year in Review” 16 L. BUS. RAM. 179, 180-83.

exception parallels the worldwide recognition in human rights law that a country cannot mistreat its own subjects or others with impunity. Professor Strauss proposed an aggregate model of litigation, using simultaneously the various remedies available to victims.⁷³ She also outlined the obstacles faced by victims when seeking to execute on judgments,⁷⁴ an issue addressed more fully in the 2009 article.

The two articles, taken together, provide a comprehensive alternative method of holding perpetrators of terrorism accountable, and, at the same time, compensating victims of terrorism for losses sustained by the victims themselves, their families, and others adversely affected. The effectiveness of the civil damage approach is validated by the lawsuits filed against terrorist groups, the Ku Klux Klan and Aryan Nations, by the Southern Poverty Law Center.⁷⁵ Huge damage awards successfully disabled the terrorists' activities. Morris Dees, co-founder and chief legal counsel for the Southern Poverty Law Center, vividly recounted the events surrounding the first of these verdicts and his satisfaction upon hearing of the jury award in 1987. He noted, with words optimistic for this line of cases, "History would show that an all-white Southern jury had held the Klan accountable after all these years."⁷⁶

Illustrating, however, the political and judicial hurdles faced by 9/11 victims in their attempts to hold terrorist state supporters accountable, the United States Supreme Court recently refused to hear an appeal in *In re Terrorist Attacks on September 11, 2001*.⁷⁷ The decision effectively upheld the

⁷³ Strauss, *supra* note 69 at 739-41.

⁷⁴ *Id.* at 724-38.

⁷⁵ See *id.*, n.7 at 742, for a discussion of cases filed in Ala., S.C., and Idaho, in which the Southern Poverty Center was awarded damages ranging from 6.3 million to 37.8 million dollars.

⁷⁶ MORRIS DEES WITH STEVE FIFFER, A SEASON FOR JUSTICE: THE LIFE AND TIMES OF CIVIL RIGHTS LAWYER, at 330 (1992). See Donald v. United Klans of Am., No. 84-0725-AH (N.D. Ala. Feb. 12, 1987).

⁷⁷ *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005); *aff'd* 538 F.3d 71 (2nd Cir. 2008); *cert. denied* Federal Ins. Co. v. Kingdom of Saudi Arabia, 129 S.Ct. 2859 (2009).

lower court's ruling that Saudi Arabia was immune from the civil suit filed by 6000 plaintiffs- relatives of victims killed in the attack, injured victims and business and governmental entities.⁷⁸ Although state sponsors of terrorism can be sued directly under the Foreign Sovereign Immunities Act exception, only Cuba, Iran, Sudan and Syria are presently on the list of state sponsors.⁷⁹ Daniel L. Byman, Senior Foreign Policy Fellow at the Saban Center for Middle East Policy, criticized the listings of state sponsors as a “flawed policy” and an “artifact of bad list management,” noting that the list is outdated and does not reflect current reality at any point in time.⁸⁰ Despite the fact that victims' suits face formidable challenges, including sovereign immunity,⁸¹ Professor Strauss, after analyzing case precedents in the area, concluded that this remedial paradigm is a viable option. The cases show that civil damages are being awarded by the courts against terrorists and their supporters.⁸² Global enforcement of the awards envisioned in the Strauss plan would accomplish the “ultimate goal of these lawsuits . . . to access and drain terrorist funds.”⁸³

III. MATERIAL SUPPORT FOR HUMANITARIAN PURPOSES

After numerous hearings and rulings in the lower federal court system, the consolidated cases in *Holder v. Humanitarian Law Project* (hereinafter, “*HLP et al*”) reached the Supreme Court last term.⁸⁴ When the decision was

⁷⁸ See *Supreme Court: 9/11 Victims Can't Sue Saudi Arabia, Princes*, N.Y. Post, June 29, 2009, available at www.nypost.com/f/print/news/national/supreme_court_victims_can_sue_saudi_ovl.

⁷⁹ See Andrew Selman, *A Guide on: The List of State Sponsors of Terrorism* (June 11, 2010), www.kela.org/SPOTGuide.pdf.

⁸⁰ See Daniel L. Byman, *The Changing Nature of State Sponsorship of Terrorism* (May 2008), www.brookings.edu/papers/2008/05_terrorism_byman.aspx.

⁸¹ *Strauss supra* note 69.

⁸² *Id.* at 683 et seq.

⁸³ *Strauss supra* note 62, at 310.

⁸⁴ See *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2713-16 (2010) for Roberts, C.J. recounting the circuitous procedural history of the

announced on June 21, 2010, Justice Breyer, to emphasize the importance of the dissent, read the minority opinion from the Bench. The Court heard *HLP, et al* as an applied pre-enforcement claim for declaratory judgment brought under 18 U.S.C. §2339 B (a)(1), the material-support provisions of the statute⁸⁵. A six judge majority opinion written by Chief Justice Roberts decided the case in favor of the government,⁸⁶ while a three judge dissent authored by Justice Breyer argued for remand and non-constitutional review.⁸⁷

The petitioners' constitutional claims and their involvement with terrorist organizations are similar. The Humanitarian Law Project⁸⁸ and its president, Ralph Fertig,⁸⁹

two cases which were consolidated at the District Court level. During the pendency of the cases, initially filed in 1998, the statute was amended to clarify the terms which HLP contends are still unconstitutionally vague.

⁸⁵ 18 U.S.C. § 2339B, enacted in 1996 as the Antiterrorism and Effective Death Penalty Act (AEDPA); revised in 2001 as part of the Patriot Act; and revised again in 2004 as part of the Intelligence Reform and Terrorism Prevention Act (IRTPA). The applicable section reads:

“Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for a term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism.”

See id. at 2713 n.1.

⁸⁶ *Id.* at 2712-31 (Stevens, Scalia, Kennedy, Thomas, and Alito, J.J., joined Roberts', C.J., opinion).

⁸⁷ *Id.* at 2731-43 (Ginsburg & Sotomayor, J.J., joined Breyer, J. dissenting).

⁸⁸ Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1205, 1208 (1998) (describing the Humanitarian Law Project as a nongovernmental organization formed in 1985 to “promote peaceful resolutions of conflict by using international human rights law and humanitarian law.” The group has consultative status at the United Nations and is active worldwide.).

filed its claim when Secretary of State Madeline Albright in 1997 designated⁹⁰ the organization, the Kurdistan Workers' Party (Paritya Karkeran Kurdestan, hereinafter "PKK")⁹¹ a foreign terrorist organization (hereinafter "DFTO"). Simultaneously with the filing of the suit, HLP ceased communicating with and assisting the PKK,⁹² while awaiting

⁸⁹ See generally Adam Liptak, *Right to Free Speech Collides With Fight Against Terror*, N.Y. TIMES, Feb. 10, 2010, available at http://www.nytimes.com/2010/02/11/us/11law.html?_r=1&ref=usapatriot (describing Ralph Fertig as a 79 year old civil rights lawyer, and a "freedom fighter," who was arrested in 1961 in Selma, Alabama). In a recent interview by the *New York Times*, he claims that the current climate is "more dangerous than McCarthyism," explaining that communists during the McCarthy era were ostracized whereas "[t]oday, the same person would be thrown in jail." (A version of this article appeared in print on Feb. 11, 2010, on page A18 of the New York edition.) Advocates for the victims also drew parallels, "AEDPA's ban on 'assistance' and 'advice' is essentially no different from the McCarthy Era attempt to root out association with and advocacy for groups unpopular with the government," explaining that "although few individuals were ultimately prosecuted under the McCarthy Era laws, thousands were persecuted." The Smith Act and the Subversive Activities Control Act "made it a crime to associate with . . . designated groups or to speak in support of these groups." Cf. Brief of Amici Curiae Victims of the McCarthy Era in Support of Humanitarian Law Project, et al., 2-3, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) (No. 08-1498), 2009 WL 4074857.

⁹⁰ 8 U.S.C. §§ 1189 (a)(1), (4)(B) (2004) (authorizing the Executive to identify and designate foreign terrorist organizations, known as DFTOs. The law provides for any organization, so designated, to contest the designation); HLP, *supra* note 88, at 310 (explaining that the PKK did not contest the designation, but the LTTE did so, unsuccessfully).

⁹¹ The PKK was established in 1970 and, since the mid 1980's, has pushed to establish an independent Kurdish state in southeast Turkey. In 1984, the group representing approximately 15% of the Turkish population launched its struggle against the government of Turkey using terrorist tactics. See also Gabriel Gatehouse, *Seeking Out the PKK Gunmen in Iraq's Remote Mountains*, BBC, July 21, 2010, <http://www.bbc.co.uk/news/world-middle-east-10703204> (reporting that since 1984, more than 40,000 people had been killed. The group has "used the inaccessible mountains of northern Iraq as a base from which to plan and execute attacks inside Turkey.").

⁹² See Opening Brief for Humanitarian Law Project, et al., at 10, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 3865433, for claim that HLP had been "assisting the PKK by training them to bring human rights complaints to the United

court determination that its communications with the organization were not criminally proscribed by the material-support provisions of §2339 B.⁹³ Nagalingam Jeyalingan, MD, a Tamil-American, and five nonprofit groups whose activities support the Liberation Tigers of Tamil Eelam (hereinafter “LTTE”), filed a separate but similar action.⁹⁴

As two of the thirty groups listed as DFTOs in 1997, both the PKK and the LTTE represent liberation movements seeking to establish autonomous states for minorities. The PKK are fighting to establish an independent Kurdish state in the southeastern portion of Turkey, and the LTTE to establish a homeland for the Tamils in the northeast portion of Sri Lanka. Within Sri Lanka, the Tamil sympathizers were aiding persons of Tamil descent in their struggle against the ruling powers in Sri Lanka.⁹⁵ The LTTE ostensibly ceased activities within Sri Lanka when it was defeated in 2009.⁹⁶

Nations, advocating on their behalf and assisting them in peace negotiations.”

⁹³ See 18 U.S.C. § 2339A(b)(1); see also 18 U.S.C. § 2339B(g)(4) (according to the material-support provisions, “a person or organization is prohibited from providing any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation, except medicine or religious materials”).

⁹⁴ For a complete description of the parties and organizations represented in the case, see Humanitarian Law Project, et al. v. John Ashcroft, et al., Case No.: CV 03-6107 ABC (MCx), Order re: Plaintiffs’ Motion for Summary Judgment and Defendants Motion to Dismiss, filed Jan. 22, 2004, United States District Court, Central District of California, at pages 8-11. Nagalingam Jeyalingan, a physician, was born in Sri Lanka and is a naturalized citizen. He is described as a “surgeon with specialized training in otolaryngology,” at 9, available at <http://fl.findlaw.com/news>.

⁹⁵ See *The History of the Tamil Tigers*, <http://english.aljazeera.net/focus/2008>. The LTTE was reported to have an international network with branches in over 54 countries (last visited Aug. 15, 2010).

⁹⁶ Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2716-17 (2010). See majority opinion, *id.* at 2716-17. Sri Lankan President Mahinda Rajapaska declared victory over the insurgents in May of 2009 ending the 26 year civil war struggle to create an independent Tamil Eelam state in the northern and eastern part of Sri Lanka. The separatist

After 2009, the LTTE continues as a “political organization outside Sri Lanka advocating for the rights of the Tamils.”⁹⁷ The petitioners wished to continue engaging with the PKK and the LTTE by supporting the lawful, nonviolent political advocacy activities in which both engage.⁹⁸

The narrow holding of the opinion was prefigured by the nature of the relief sought. The fact that the case was heard under the criminal sanctions of the Patriot Act as a pre-enforcement, pre-prosecution, as applied action for declaratory judgment necessitated a narrow holding.⁹⁹ Accordingly, Roberts applied the material-support provisions to the “particular speech” plaintiffs proposed to undertake:

(1) train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolves disputes, (2) teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief, (3) engag[ing] in political advocacy on behalf of Kurds who live in Turkey, and (4) engag[ing] in political

group LTTE was organized in 1976 and launched its first major attack in 1983, enjoyed varying degrees of success, using guerrilla war and terrorist tactics until the 2009 defeat. *See* Sengupta, Somini and Seth Mydans, *Rebels Routed in Sri Lanka after 25 Years of War*, N.Y. TIMES, May 17, 2009, available at <http://nytimes.com/2009/05/08/world/asia>. *See also* Anderson, Jon, Lee, *Death of the Tiger: Sri Lanka's brutal military victory over the Tamil insurgents*, THE NEW YORKER, Jan. 17, 2011, available at www.newyorker.com/reporting/2011.

⁹⁷ *Holder*, 130 S.Ct. at 2716.

⁹⁸ *Id.* (discussing that prior to the LTTE's defeat, they had trained the group to seek tsunami aid from international bodies and to help them negotiate peace agreements with the Sri Lankan government, these activities ceased when the group was defeated).

⁹⁹ *See id.* at 2731 (The majority opinion states “We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.”).

advocacy on behalf of the Tamils who live in Sri Lanka.¹⁰⁰

The petitioners, human rights advocates, contend that their free speech and association rights are infringed if they cannot continue working with the DFTOs. They emphasized that the two groups represent victims of human rights abuses, “the Kurds in Turkey, an ethnic minority subjected to substantial discrimination and human rights violations” and the “Tamils in Sri Lanka, “another ethnic minority that has been subjected to human rights abuse and discrimination.”¹⁰¹ The human rights advocates insisted that their engagement with the DFTOs involved a “broad range of lawful activities” unconnected with terrorist activity.

The Supreme Court heard oral arguments on February 23, 2010 and delineated the reasoning that would eventually resonate in the majority and minority opinions. Justice Roberts clarified the two constitutional challenges by *HLP, et al* to § 2339B of the statute.¹⁰² By criminalizing their material support activities to the PKK and LTTE, the statute violated free speech and association rights guaranteed under the First Amendment. The Supreme Court must also determine whether the terms - *training, personnel service and expert advice or assistance* - defined as proscribed material support in §2339(b)(1) were unconstitutionally vague.¹⁰³

HLP, et al argued that the statute was vaguely drafted and deprived them and other similar groups of due process under the Fifth Amendment as well as infringing their rights of free expression and association under the First Amendment. The governments argued that the terms, which has been amended and explained by Congress, were not vague but gave adequate notice of what constituted punishable conduct under the statute. Persons are clearly prohibited from engaging in

¹⁰⁰ See *id.* at 2729 (excluding the two that had become moot during the pendency of the litigation: teaching Tamils to apply for “tsunami-related relief” and helping LTTE to negotiate a peace settlement).

¹⁰¹ *Supra* note 92 at 12.

¹⁰² *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2714 (2010).

¹⁰³ *Id.*

conduct which would benefit the terrorist in terrorist activities.

The government supported its argument with legislative history. Congress had found that material support would include any support, humanitarian, political or financial, which would free up other resources that terrorists could then use for unlawful purposes. Congress specifically recognized that Foreign Terrorist Organizations, those designated by the government as DFTOs, “are so tainted by their criminal conduct that any contribution to . . . [the] organization facilitates that [criminal] conduct.”¹⁰⁴

Solicitor General Elana Kagan stressed the importance of these findings at oral argument telling Justice Breyer, “Congress is the reasonable person here. And Congress reasonably decided that when you help a terrorist - foreign terrorist organization’s legal activities, you are also helping the foreign terrorist organization’s illegal activities.”¹⁰⁵ She further insisted, “Congress made findings about the fungibility of these resources. Congress said over and over that these organizations [DFTOs] have no firewalls, no organizational firewalls, no financial firewalls.”¹⁰⁶ When Justice Ginsburg insisted that the humanitarian groups only wanted to “train [the PKK and LTTE] how to do lawful things, how to pursue their goals in a lawful, rather than terrorist way,”¹⁰⁷ Kagan responded that Congress had specifically prohibited “the provision of actual support: Services to the organizations that the organization can use in its activities, both legal and illegal.”¹⁰⁸ The same argument was made in an amici brief filed by persons involved in fighting terrorism who noted that “Congress had fashioned [a comprehensive scheme] over a period of years to address the complex problem of transnational terrorism”¹⁰⁹ realizing that

¹⁰⁴ AEDPA Pub. L. No. 104-132 § 301 (a) 7, 110 Stat. 1214, 1247.

¹⁰⁵ Oral Argument, at 39, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2010 WL 621318.

¹⁰⁶ *Id.* at 42:5-8.

¹⁰⁷ *Id.* at 45:10-11.

¹⁰⁸ Oral Argument, 45:24-25, 46:1-2.

¹⁰⁹ Brief of Amicus Curiae Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues in Support of

DFTOs use “putatively nonviolent programs to enhance incentives for terrorist activity.”¹¹⁰ Counsel David D. Cole representing *HLP*, however, responding to Justice Sotomayor’s question about money being fungible for terrorist groups,¹¹¹ noted that *HLP, et al*’s goals had “nothing to do with money.”¹¹²

Justice Roberts relied heavily on the fungibility arguments espoused by the government and amici and the fact that Congress had made specific findings about the fungibility of various kinds of aid given to the legal and legitimate activities of the terrorist organization. He very meticulously rejected plaintiff’s argument that, because the projected support to PKK and LTTE would only further the peaceful goals of the two organizations, *HLP, et al* activities should not be restricted. The Court looked to both Congressional findings¹¹³ and Executive conclusions¹¹⁴ to support its position on the fungibility of material support. Congress found that “foreign organizations that engage in terrorist activity are so tainted by the criminal conduct that *any contribution to such an organization* facilitates that conduct.”¹¹⁵ Roberts also noted that the State Department strongly supported the congressional finding that “all contributions to foreign terrorist organizations further their terrorism.”¹¹⁶ In the Executive’s view, “Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support . . . will ultimately enure to the benefit of their

Petitioners, at p. 8, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 5070069.

¹¹⁰ *Id.* at *12.

¹¹¹ Oral Argument, 61:16-20, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2010 WL 621318.

¹¹² *Id.* at 62:10-11.

¹¹³ *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2726 (2010).

¹¹⁴ *Id.* at 2727.

¹¹⁵ *Id.* at 2724 (quoting from AEDPA §§ 301 (a)(1)-(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose) (emphasis added by the Court)).

¹¹⁶ *Id.* at 2727.

criminal, terrorist functions - regardless of . . . [intent] to support non-violent non-terrorist activities.”¹¹⁷

The majority noted that the national security interest in the case included “national defense, foreign relations, or economic interests of the United States.”¹¹⁸ Stressing the foreign relations component, the majority found that material support “in any form also furthers terrorism by straining United States’ relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks.”¹¹⁹ The majority recognized that both the PKK and LTTE are insurgency groups at war with internationally recognized nations with whom the United States must deal as independent sovereigns in a global effort to combat terrorism. Chief Justice Roberts specifically mentioned Turkey, a NATO ally, as a nation with whom relations might be compromised when material support to its declared enemy is given by Americans and related non-profit organizations.¹²⁰

The majority also accepted the government’s argument that *HLP, et al’s* projected activities would lend legitimacy to the DFTOs¹²¹ and undermine United States’ efforts to delegitimize and weaken terrorist groups. Justice Breyer, dissenting, rejected the legitimacy rationale as ultimately detrimental to First Amendment protections.¹²² He characterized the arguments as antithetical to the First Amendment support of the deliberative process, fearing that the concept “would deny First Amendment protection to the peaceful teaching of international human rights law on the

¹¹⁷ *Id.* at 2727 (quoting McKune Affidavit, App. 133 ¶ 8).

¹¹⁸ *Id.* at 2713 (as defined in 8 U.S.C. § 1189 (d)(2) as legislation giving the Secretary of State authority to designate Foreign Terrorist Organizations).

¹¹⁹ Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2726 (2010).

¹²⁰ *Id.*

¹²¹ *Id.* at 2725-26. The group would be contributing material support that would “help lend legitimacy to foreign terrorist 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.” See also Brief for the Respondents at 56, Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 4951303.

¹²² *Id.* at 2736.

ground that a little knowledge about ‘the international legal system’ is too dangerous a thing.”¹²³

The government argued that, because the statute only regulated conduct, the “vast majority of its applications do not even . . . implicate the First Amendment.”¹²⁴ The Solicitor General explained that the material-support statute does not prohibit independent advocacy and insisted that the association clause does not give American citizens the right to “deal in whatever way they wish with foreign nations . . . or foreign organizations.”¹²⁵

Counsel David Cole forcefully asserted his clients’ rights to give peacetime assistance to further peaceful goals, an activity protected by the Constitution. He distinguished *HLP, et al.*’s proposed activities from acts of treason which are punishable as a crime under the Constitution. He argued that treason, which involved giving aid to the enemy, “c[ould] be in the form of speech” but that prosecution for treason required proof of specific intent to betray the United States.¹²⁶ His clients, to be guilty of a crime, would necessarily have to have the *mens rea* associated with the crime, i.e. the intent to further terrorist activity. Cole insisted that the PKK and LTTE are separatist groups with whom the United States is not at war, and that his clients’ speech-related activity had nothing to do with terrorism.

Chief Justice Roberts, for the majority, rejected the proposition that a specific intent requirement should be read into the statute for culpability to attach. He noted, “We reject plaintiff’s interpretation of §2339(B) because it is inconsistent with the text of the statute.”¹²⁷ The statute specifically prohibits “knowingly providing material support. . . a person [to violate the statute] must have knowledge that the organization is a designated terrorist organization . . . has

¹²³ *Id.* at 2738.

¹²⁴ Reply Brief for Petitioners at 11, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 2599311.

¹²⁵ Oral Argument at 34, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2010 WL 621318.

¹²⁶ *Id.* at 23-24.

¹²⁷ *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2717 (2010).

engaged or engages in terrorist activity . . . Congress . . . chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities."¹²⁸

Justice Breyer, writing for Justices Sotomayor and Ginsburg, accepted *HLP, et al*'s invitation to avoid deciding the First Amendment issue by reading the knowledge requirement as specific intent to further the terrorist aims of the organization. Such a reading necessitated remanding the case for proof of such intent.

I believe that a construction that would avoid the constitutional problem is 'fairly possible'... I would read the statute as criminalizing First-Amendment-protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions.¹²⁹

Accordingly, Breyer set up a four part test. The defendant would have to know or intend: (1) that he is providing support or resources, (2) that he is providing that support *to a foreign terrorist organization*, and (3) that he is providing support that is *material*, meaning (4) that his support bears a significant likelihood of furthering the organization's terrorist ends.¹³⁰

Breyer reasoned that such an interpretation is "consistent with the statutes text . . . [and] with Congress' basic intent . . ." ¹³¹ Breyer's textual analysis differs markedly from the analysis by Chief Justice Roberts who relied on the precise words used by Congress in context with the degree of

¹²⁸ *Id.*

¹²⁹ *Id.* at 2740.

¹³⁰ *Id.* at 2740-41.

¹³¹ *Id.* at 2742.

knowledge required in other sections of the Act, as well as the legislative intent expressed by Congress when passing the provision. Breyer, to find the specific intent requirement, relied primarily on Congress' expressed intent that the statute was not to interfere with First Amendment free speech and association.

Breyer also discredits the fungibility argument and the legislative history supporting it. He finds the evidence as too general and non-specific to be credited.

The most that one can say in the government's favor is that [the legislative history] might be read as offering highly general support for the argument. The statements do not, however, explain in any detail how the plaintiff's political-advocacy-related activities might actually be 'fungible' and therefore capable of being directed to terrorist use.¹³²

The majority interprets the communication urged by *HLP, et al* not as speech, but as *conduct which uses speech*. Chief Justice Roberts points out that direct advocacy which would implicate First Amendment concerns is not proscribed by the statute. Humanitarian organizations can freely speak - but cannot give "material support" to DFTOs.¹³³

Justice Breyer, however, regarded the communication and association urged by *HLP, et al* as pure political speech entitled to the highest constitutional protection. Attorney Cole, at oral argument during rebuttal, pointed out that "[t]he government has spent a decade arguing that our clients cannot advocate for peace, cannot inform about international human rights."¹³⁴ This theme would dominate Justice Breyer's dissent. After listing the protected speech and activities proposed by *HLP, et al*, he characterized them as the "kind that the First Amendment ordinarily protects."¹³⁵

¹³² *Id.* at 2735.

¹³³ *Id.* at 2723-24.

¹³⁴ Oral Argument 59:12-14.

¹³⁵ *Supra* note 133 at 2732.

He insisted that the court should remand the case and require the government to present “specific evidence, rather than general assertion” to prove that the statute requirements are the least restrictive means possible to accomplish the compelling government national security purpose.¹³⁶

Both opinions appropriate prudential doctrines of judicial restraint. The majority decides narrowly as an applied pre-prosecution request for declaratory judgment by relying heavily on the presumption that the legislative act is constitutional; by noting that the act was regularly passed and meticulously amended to provide clarity; by refusing to read beyond the text and legislative history; by applying plain meaning to the words used; by refusing to disregard the plain meaning of the words to find what Justice Breyer terms “actual intent.” The minority appropriates the prudential maxim of not deciding the constitutional issue if it is “fairly possible” to resolve the dispute another way, i.e. the canon of constitutional avoidance urged by *HLP, et al.* This the minority does by interpretation, construing the statute to require “specific intent to further the [DFTO’s] unlawful ends” coupled with a likelihood that the harm would result.¹³⁷

Chief Justice Roberts and Justice Breyer both agreed that the material-support requirements were not unconstitutionally vague. The application of the requirements marked the point of disagreement. The majority reviewed the proposed activities of *HLP, et al* and found that the organization would be punished for contravening the act, accepting essentially the government’s arguments. The minority required more proof that the activities were proscribed by the act, effectively accepting *HLP, et al’s* arguments, and remanding for

¹³⁶ *Id.* at 2742.

¹³⁷ *Id.* at 2740. *See also* Brief for Academic Researchers and the Citizens Media Law Project as Amici Curiae in Support of Respondents/Cross-Petitioners at 25, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 4271309. They argued for free speech and transparency, reasoning the “[t]he requirement of specific intent is particularly important where individuals seek to associate in some manner with groups (like those at issue in this case . . .) that engage in both lawful and unlawful activity.”

evidence of specific intent to further the terrorists' unlawful activity.

Although the government argued for application of the *O'Brien* intermediate standard of review,¹³⁸ the majority rejected that standard and applied strict scrutiny. The minority agreed that the stricter standard of review was necessary. The Court specifically rejected the *O'Brien* standard of review, but both cases present strikingly similar scenarios. In *O'Brien*, the government's interest in national security prompted the government's comprehensive selective service program with the requirement that draft cards remain intact. *O'Brien*, to protest the Viet Nam War, destroyed his draft card. The *O'Brien* court construed the activity, not as political speech, but as an act which would thwart or disrupt the operation of the selective service program, and thereby negatively impact national security. *O'Brien's* conviction was upheld. In *HLP, et al*, the government's interest in national security prompted the government comprehensive provisions to identify foreign terrorist organizations through the DFTO program and to prevent third parties from giving the organizations material support. *HLP, et al*, to further their humanitarian outreach to political insurgents, would counsel DFTOs in nonviolent methods to achieve their political ends. The majority characterized *HLP, et al's* activities not as political or "pure" speech but as activities that were specifically proscribed by the Patriot Act's material support provisions.

Urging the Court to adopt the lower *O'Brien* standard of review, the government had argued that "the statute at issue here regulates conduct, divorced from any relation to the content of expression."¹³⁹ The majority, however, rejected the proposition that the statute regulated conduct without any relation to speech. Chief Justice Roberts distinguished the

¹³⁸ See Reply Brief for Petitioners at 9, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 2599311, for the government argument that because the statute "regulates conduct and only incidentally restricts speech . . . the statute is subject to intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 377 (1968)."

¹³⁹ *Id.* at 11.

cases and found that the heightened level of scrutiny was necessary in *HLP, et al*, because speech was intricately involved in *HLP, et al*'s projected activities, and i.e. the humanitarian organizations intended to use speech to accomplish humanitarian goals. In *O'Brien*, the regulation was content neutral, draft cards were not to be destroyed for any reason. Recognizing that the *O'Brien* test applied only to content neutral regulations,¹⁴⁰ the majority noted that §2339B “regulates speech on the basis of its content,” the “[p]laintiffs want to speak to the PKK and the LTTE, and whether they may do so under §2339B depends on what they say.”¹⁴¹ Both the majority and the minority opinions rejected the *O'Brien* test. Justice Breyer reasoned that the stricter standard of review was necessary because he characterized *HLP, et al*'s projected activities as political or “pure” speech which is always protected under a *properly* applied strict scrutiny standard.

The majority and the dissent agree on the level of scrutiny required to review the material support provisions of the Patriot Act and on some other issues: the justiciability of *H.L.P. et al*'s pre-enforcement claim,¹⁴² the fact that the government has a compelling national security interest, and the fact that the four types of support proscribed by the Act are not unconstitutionally vague, but enforceable.¹⁴³

¹⁴⁰ See *Humanitarian Law Project*, 130 S.Ct. at 2723 (quoting Chief Justice Roberts, that the intermediate scrutiny test provides that “content neutral regulation will be sustained under the First Amendment if it advances important government interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those goals.”).

¹⁴¹ *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2723 (2010).

¹⁴² *Id.* at 2717. The Court found the case was justiciable because the plaintiffs faced “‘a credible threat of prosecution’ and ‘should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.’” Quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) and *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007).

¹⁴³ *Id.* at 2719-20 n.6 (applying the test for vagueness as stated in *United States v. Williams*, 553 U.S. 285, 304 (2008), “. . .whether the statute ‘provide[s] a person of ordinary intelligence fair notice of what is prohibited.’”). See *id.* at 2731, for Justice Breyer's dissent, “Like the

However, the opinions differ substantially in framing the issue before them. The majority defines the issue as whether the government may prohibit what Plaintiffs want to do - provide material support to the PKK and LTTE in the form of speech.¹⁴⁴ The dissent frames the issue as whether the government has “met its burden of showing that an interpretation of the statute that would prohibit this speech- and association- related activity serves the Government’s compelling interest in combating terrorism.”¹⁴⁵ Or, as restated, whether the Government has proved under the strict scrutiny standard of review that the specific speech and associated-related activity proposed by *H.L.P. et al* falls within the scope of material support proscribed by §2339B.

Highlighting the current tone of incivility in Supreme Court opinions, both Chief Justice Roberts and Justice Breyer disparage the other’s opinion. Chief Justice Roberts dismisses the dissent’s analysis of the prohibited speech as limited and unfounded,¹⁴⁶ faults the dissent for ignoring common sense and the evidence presented by the government,¹⁴⁷ for adopting the mental state requirement by ignoring Congress’ express rejection of the requirement,¹⁴⁸ for requiring hard evidence of intent from the Government, a “dangerous requirement,”¹⁴⁹ for giving insufficient weight to the Executive and Congressional findings and substituting its “own evaluation of the evidence for a reasonable evaluation by the Legislative Branch,”¹⁵⁰ for failing to address the “real dangers at stake” by living in a different “dissent’s world”

Court, and substantially for the reasons it gives, I do not think the statute is unconstitutionally vague.”

¹⁴⁴ *See id.* at 2724 n.10.

¹⁴⁵ *Id.* at 2731.

¹⁴⁶ *See id.* at 2723 n.4.

¹⁴⁷ *See* Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2726 n.6 (2010).

¹⁴⁸ *See id.* at 2718 n.3.

¹⁴⁹ *Id.* at 2727-28.

¹⁵⁰ *Id.* at 2727. C.J. Roberts, *quoting* from *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981), emphasizing also the fact that Congress’ ability to collect evidence and draw factual inferences is superior to the Court’s -- “. . . the lack of competence on the part of the court is marked.” *Id.* at 65.

heedless of the congressional and executive conclusion that “we live in a different world.”¹⁵¹ Justice Breyer faults the majority for its “development of the Government themes” on mere speculation,¹⁵² for stretching the concept of fungibility beyond constitutional limits,¹⁵³ for “assuming” without hard evidence that “those who are taught will put otherwise innocent speech or knowledge to bad use . . .,”¹⁵⁴ for adopting a rule which “would automatically forbid the teaching of any subject in a case where national security interests conflict with the First Amendment,”¹⁵⁵ for misunderstanding the word “relief” by not restricting it to mean only monetary relief and for ignoring plaintiff counsel’s denial at oral argument that *HLP, et al* do not intend to offer monetary relief to the DFTOs,¹⁵⁶ for reading too broadly Congress’ “informed judgment” to include the proposed activity,¹⁵⁷ for not requiring specific proof of fungibility but relying on generalities and speculation,¹⁵⁸ for “sacrific[ing] First Amendment protection for... speculative gain,”¹⁵⁹ for being “wrong about the lack of specificity” of the plaintiff’s advocacy claims,¹⁶⁰ for not remanding for factual determination under a “proper standard of review,”¹⁶¹ for failing to “examine the Government’s justifications with sufficient care,”¹⁶² for failing to require specific evidence and “tailoring of means to fit compelling ends.”¹⁶³

¹⁵¹ *Humanitarian Law Project*, 130 S.Ct. at 2729.

¹⁵² *Id.* at 2737 et seq.

¹⁵³ *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2738 (2010).

¹⁵⁴ *Id.* at 2738.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2738-2739.

¹⁵⁷ *Id.* at 2739.

¹⁵⁸ *Id.* at 2735.

¹⁵⁹ *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2739 (2010) (quoting from *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 127 (1973)).

¹⁶⁰ *Id.* at 2743.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

How do the opinions expressed in *HLP, et al* contribute to the search for a remedial paradigm? Both sides of the argument were fully presented and the discussion enriched. Although reasonable judicial minds differed on the effect and the scope of the government regulation, the immediate result is that the Congressional material-support statute is not unconstitutionally vague and no specific intent to further the unlawful ends of the terrorist organization is required to prove a violation. The specific activity proposed by *HLP, et al* is proscribed by §2339B. Although application of the material-support prohibitions to the plaintiffs' proposed activities survived strict scrutiny under the First Amendment, future applications may not pass constitutional muster as the majority warned.¹⁶⁴ Independent speech, speech not coordinated with a DFTO, remains untouched by the opinion, which indicates that future as applied challenges to the statute will continue. Chief Justice Roberts stressed that the narrow holding did not reach domestic terrorist groups and found only that "in prohibiting the *particular forms of support* that plaintiffs seek to provide to foreign terrorist groups, §2339 does not violate the freedom of speech."¹⁶⁵

The ultimate significance of the ruling awaits future assessment, but the continuing dialogue between the governmental branches is expected to accelerate. Free speech advocates claim that the case is another example of overreaction during a time of crisis. Initial response to the holding was predictable. Those who think that the Constitution speaks with one voice during times of crisis as well as in times of peace find the opinion unsettling.¹⁶⁶ The reaction of Kay Guinane and Suraj K. Sazawai is representative.¹⁶⁷ Calling the decision a "stunningly

¹⁶⁴ *Id.* at 2730.

¹⁶⁵ Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2730 (2010).

¹⁶⁶ See *Supreme Court's Humanitarian Law Project Ruling Fails the Common Sense Test*, June 29, 2010, available at www.charityandsecurity.org.

¹⁶⁷ *Id.* (Writing for the *Charities and Society Network* which Kay Guinane and other non-profit interest groups established in 2008 to respond to counter-terrorism activity perceived to impede unnecessarily

nonsensical result” which showed an “extraordinary level of deference to Congress and the administration in matters of national security,” the authors noted that Congress and the President must now take responsibility to “review current policies and make some changes” and predicted that Congress “will find that in most instances, allowing U.S. conflict mediators, peacebuilders and humanitarian aid workers to do their work weakens terrorist groups.”¹⁶⁸ Similarly, a group represented by David Cole,¹⁶⁹ which earlier called for reforms to the material support law, will presumably continue to work for reform.¹⁷⁰ Obviously, those who adhere to Cicero’s adage *inter arma silent leges*, and those who stress the immediate need to protect national security find the result laudable.¹⁷¹

and detrimentally the work of charitable organizations. The group, a project of OMB Watch, is headquartered at 1400 16th St. NW, Suite 210, in Washington, D.C.).

¹⁶⁸ *Id.*

¹⁶⁹ David Cole, Professor of Law at Georgetown University Law Center, and David Keene, Chairman, American Conservative Union, co-chaired the Constitution Project’s Liberty and Security Committee which recommended reforms on Nov. 17, 2009. See *Reforming the Material Support Laws: Constitutional Concerns Presented by Prohibitions on Material Support to “Terrorist Organizations,”* available at www.constitutionproject.org. The Committee made eight recommendations for reform. The first recommendation calling for amending the definition of material support to require intent to further illegal conduct is even more important given that the argument to the judiciary failed in *HLP, et al.* The report also calls for Congress to amend the categories of support to exempt additional examples of humanitarian aid, info@constitutionproject.org.

¹⁷⁰ David Cole analyzed the Supreme Court decision, noting that the Supreme Court ruled, for “the first time in its history that speech advocating only lawful non-violent activity can be subject to criminal penalty,” and concluded that the Court “appear[s] to be repeating history rather than learning from it.” David Cole, *the Roberts Court vs. Free Speech: Holder v. Humanitarian Law Project, a case decided by the Supreme Court, June 24, 2010*, THE N.Y. REVIEW OF BOOKS, Aug. 19, 2010.

¹⁷¹ See generally, Paul Rosenzweig, *Yes, Virginia, Supporting Terrorists IS a Crime* (June 21, 2010), Protect America, Rule of Law, at blog.heritage.org/2010/06/21/yes-virginia-supporting-terrorists-is-a-crime.

IV. CONCLUSION

Each of these three areas of litigation exemplifies an unending search to find the remedial paradigm that will effectively combat and prevent terrorism. The paradigms are neither comprehensive nor mutually exclusive. The solutions, and others that have been offered, reflect different approaches to solving terrorism issues. Academics are divided over whether the remedial paradigm should be part of a war strategy¹⁷² or a criminal strategy¹⁷³ or a combination of the two.¹⁷⁴ Others have found both strategies to be inadequate or deficient and have offered different solutions.¹⁷⁵ The necessity to combat terrorism continues as does the effort to find a remedial paradigm.

¹⁷² See generally Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (for authors' contention that the war on terrorism is a "real war." Although "there are indeed differences between this conflict and more traditional interstate conflicts . . .," the authors conclude that "Congress has authorized the President to fully prosecute a war against the entities covered by the [Authorization for Use of Military Force])."

¹⁷³ See Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326-27 (2003) Paust argues that the "United States simply cannot be at war with bin Laden and al Qaeda as such . . ." The laws of war should be left intact and not changed to encompass a "war on terror," but other "international laws involving criminal responsibility and universal jurisdiction, including crimes against humanity . . ." do apply to acts of terror.

¹⁷⁴ See Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J. L. & PUB. POL'Y 457, 479, 485 (2002) Professor Feldman suggests that the "war/crime distinction" may "break down" in the case of international terrorism . . ." and that a pragmatic, flexible approach which blurs the distinction may be appropriate to protect "republicanism.

¹⁷⁵ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029 (2004). Professor Ackerman, after concluding that neither the law of war nor the law of crime can deal with acts of terrorism, has "design[ed] a constitutional framework for a temporary state of emergency." *Id.* at 1037; see generally 1032-37. His model includes a limited role for the judiciary, as the solution "simply cannot afford the time needed for serious judicial review." *Id.* at 1066. He calls not for a constitutional amendment, but a legislative framework statute which would deal with terrorism on a state of emergency basis, using the techniques that "impose constitutional order on new and unruly realities that were unforeseen by the Founders." *Id.* at 1077.