ARTICLE

The Chilling Effect of the "Material Support" Law on Humanitarian Aid: Causes, Consequences, and Proposed Reforms

Sam Adelsberg, Freya Pitts & Sirine Shebaya*

I. Introduction

In 1996, Congress enacted what is now known as the "material support" statute.[1] This statute imposes criminal liability on individuals who "knowingly provide[] material support or resources to a foreign terrorist organization," or attempt or conspire to do so.[2] Nearly fifteen years after the statute was first enacted, the Supreme Court in *Holder v. Humanitarian Law Project* affirmed the constitutionality of this broad grant of authority to the government to prosecute individuals providing material support—including humanitarian aid—to foreign terrorist organizations.[3] Humanitarian aid refers to supplies (such as food and basic necessities), technical assistance (such as medical assistance or training), and educational materials provided for the purpose of alleviating poverty and deprivation or the effects of natural or human-made disasters. This decision has led many charitable organizations to raise concerns about the reach of the statute and the chilling effect it has on their activities in the parts of the world most desperately in need of aid.

* Samuel Adelsberg and Freya Pitts are J.D. Candidates at Yale Law School. Sirine Shebaya is a member of the Yale Law School class of 2012. This Article was prepared in connection with *International Law and Foreign Affairs*, a course at Yale Law School, under the supervision of Professor Oona Hathaway, Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School, and with the assistance of Celia Choy, Samir Deger-Sen, Philip Levitz, Haley Nix, John Paredes, Sally Pei, and especially Spencer Amdur.

[1] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303(a), 110 Stat. 1250 (codified as amended at 18 U.S.C. § 2339B (2006 & Supp. III 2009) [hereinafter AEDPA].

[2] *Id.*

[3] Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

For the most part, the government has exercised the broad grant of discretion under the statute to prosecute those alleged to have committed serious terrorism-related offenses. Indeed, there have only been a relatively small number of material support prosecutions. As of 2010, the government reported having charged about 150 persons with violating the statute.[4] Nonetheless, within both the humanitarian aid community and Muslim charitable donor community, there is still a palpable fear of prosecution of individuals or organizations that exclusively provide humanitarian aid. As a result, the statute has had a greater impact on humanitarian aid organizations than the small number of prosecutions might suggest. It has led some organizations to reconsider providing humanitarian aid, particularly in war-torn areas where terrorist organizations are active—precisely where aid is often most needed. Reducing aid in these areas may, in turn, undermine the very counterterrorism policies the statute is meant to advance by discouraging aid in high-risk areas.

The chilling effect on humanitarian aid was evident, for example, in the summer of 2011, when U.S. aid groups proved reluctant to provide humanitarian assistance to victims of a famine in the Horn of Africa. In particular, aid groups expressed fear of prosecution for providing famine aid in areas of Somalia controlled by al-Shabaab, a designated terrorist organization. In August 2011, the U.S. Department of State held a press briefing in which it announced that U.S. aid groups providing famine aid in Somalia would not be prosecuted for violating the material support statute if they acted in good faith to reach victims of the famine.[5] This assurance helped address the immediate problem, but it leaves unaddressed the broader set of concerns raised by humanitarian groups in the United States.[6]

This Article proceeds as follows. Part II provides an overview of the material support laws and their interpretation by the Supreme Court in *Holder v. Humanitarian Law Project*. Part III describes the pattern of prosecutions under the material support laws and identifies perceived deviations from that pattern. Part IV explores the reported chilling effects these laws have had on humanitarian and development organizations. Part

---

[4] *Id.* at 2717.

[5] *Background Briefing on Somalia and Delivery of Humanitarian Assistance*, U.S. DEP'T OF ST. (Aug. 2, 2011), http://www.state.gov/p/af/rls/spbr/2011/169479.htm.

[6] *See* discussion *infra* Section III.B for a fuller discussion of the humanitarian crisis in Somalia.

V offers a menu of substantive and procedural measures that could help alleviate the chilling effects by providing greater clarity about the scope of application of the material support laws.

This Article recommends new substantive prosecutorial guidelines to formalize safe harbors for aid that meets specific criteria based on: (1) the types of aid provided, (2) the recipient organizations, and (3) the presence or absence of a specific intent by the donor. It then offers four procedural approaches to instituting these substantive guidelines that may be used as alternatives or in combination. First, and likely to be most effective, is a formal amendment to the statute. This approach, however, appears to be politically infeasible, at least in the short term. The remaining three approaches would ideally be used in combination: the government could publish an advisory memorandum or statement, amend Department of Justice internal guidelines, and engage in targeted community outreach. Each of these approaches has been used in the past to address similar kinds of challenges. Together they offer the best available options, barring statutory amendment, for addressing the chilling effect of the material support statute on humanitarian aid.

II. The Scope of the Material Support Statute

The material support statute provides broad discretion to prosecute individuals who provide material support to foreign terrorist organizations. First, the statute imposes criminal liability on any individual who "*knowingly* provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so."[7] Thus, an individual need not have intent to further terrorist aims in order to be guilty of material support. The statute requires only that the person have knowledge that the organization is a designated terrorist organization, or that the organization has engaged or engages in terrorist activity.[8] Thus an individual or organization may be

---

[7] 18 U.S.C. § 2339B(a)(1) (emphasis added). Under the Immigration and Nationality Act, the Secretary of State has authority to designate a "foreign terrorist organization" for the purposes of the material support statute. 8 U.S.C. § 1189(a)(2)(B)(i) (2006).

[8] 18 U.S.C. § 2339B(a)(1). Just as the Secretary of State has authority to designate "foreign terrorist organizations" under the criminal material support statute, the Department of Treasury Office of Foreign Assets Control (OFAC) has the authority to designate "specially designated terrorist" or "specially designated global terrorist" organizations or individuals under the International Emergency Economic Powers Act (IEEPA), Executive Order 12947, and Executive Order 13224. *See* 50 U.S.C. §§ 1701–1702 (2006); Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995); Exec. Order No. 13224, 66 Fed. Reg. 49,079

convicted of material support without any showing of intent to further the aims of a terrorist organization.

Second, a wide range of support—including traditional humanitarian support—falls within the scope of the statute. For the purposes of the statute, "material support or resources" means:

> [A]ny 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 (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[9]

In addition to the two explicit exceptions listed in the statute—medicine and religious materials—the law also authorizes the Secretary of State to issue further exceptions. The scope of this authority is limited: with the concurrence of the Attorney General, the Secretary of State may approve the provision of material support or resources only in the categories of "personnel," "training," or "expert advice or assistance" to a foreign terrorist organization.[10] The Secretary of State cannot, however, issue an exception to permit the provision of any funds, equipment, or supplies; there is no exception for a humanitarian crisis.[11] Further, the statute specifies that the Secretary of State may not approve the provision of "any material support that may be used to carry out terrorist activity," including any unlawful activity involving, for example, highjacking, sabotage, hostage taking, assassination, and the use of biological, chemical, nuclear, and other

---

(Sept. 23, 2001). IEEPA authorizes the President to regulate economic transactions during a national emergency. As part of that authority, the President has the power to seize and freeze an organization's assets "during the pendency of an investigation." 50 U.S.C. § 1702(a)(1)(B) (2006). Under Executive Order No. 12947, it is illegal for any individual or organization to engage in any kind of transaction with a designated group. Exec. Order No. 12947, *supra*, at 5079. Under Executive Order No. 13224, OFAC has the authority to designate additional organizations and to seize and block the funds of organizations it determines "assist in, sponsor, or provide . . . support for" or are "otherwise associated" with designated organizations. Exec. Order No. 13224, *supra*, at 49,080.

[9] 18 U.S.C. § 2339A(b)(1) (2006 & Supp. III 2009).

[10] 18 U.S.C. § 2339B(j).

[11] *Id.*

weapons.[12] This language could be used to bar a range of possible exceptions, as many types of aid "may" conceivably be used to carry out terrorist activity. The strict limitations on the Secretary of State's ability to create exemptions do not preclude informal declarations such as the one given in the context of the famine in Somalia. But such informal announcements may not provide enough reassurance to aid organizations, thus severely reducing the availability of humanitarian assistance to civilians in areas heavily controlled by designated terrorist organizations. Moreover, the time it takes to come forward with an informal announcement on a case-by-case basis may result in delays in the provision of much-needed humanitarian supplies.[13]

In June 2010, the Supreme Court rejected an as-applied constitutional challenge to the material support statute in *Holder v. Humanitarian Law Project*.[14] In that case, an American NGO sought declaratory relief prohibiting its prosecution for providing international humanitarian and human rights law training to members of two organizations, the Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), for the purpose of promoting their political goals in a peaceful manner. Both are designated foreign terrorist organizations that currently use violent means to achieve political aims. The plaintiffs specifically challenged the statute's prohibition on providing training, expert advice or assistance, service, and personnel, arguing that the statute was impermissibly vague and thus violated the Fifth Amendment's Due Process Clause, and that it further violated their First Amendment freedoms of speech and association.[15] Although the material support statute contains an explicit provision providing that it should not be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment, the Court rejected these arguments and held that the statute was constitutional as applied to the particular types of support the plaintiffs sought to provide to terrorist organizations.[16]

In the majority opinion, Chief Justice Roberts emphasized the importance of deference to "the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist

---

[12] *Id.*; 8 U.S.C. § 1182(a)(3)(B)(iii) (2006) (defining terrorist activity).
[13] *See infra* Section III.B.
[14] Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).
[15] *Id.* at 2712–16.
[16] 18 U.S.C. § 2339B(i)*; Humanitarian Law Project,* 130 S. Ct. at 2712.

organization—even seemingly benign support—bolsters the terrorist activities of that organization."[17] He argued that providing any form of material support confers legitimacy on such organizations and can free other resources to be used for terrorist purposes.[18] He also pointed to the possibility that terrorist organizations might use knowledge of international law and systems for sinister tactical purposes.[19]

The activities at issue in *Humanitarian Law Project* did not involve financial support or even humanitarian aid in the form of food and clothing. Rather, the plaintiffs sought to train PKK members to use humanitarian and international law to resolve disputes peacefully, to teach PKK members to petition the United Nations and other representative bodies for relief, to offer legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government, and to engage in political advocacy on behalf of Kurds living in Turkey and Tamils living in Sri Lanka.[20] Confirmation of the constitutionality of the material support statute as applied to this limited type of political support indicates that the Court would likely find it constitutional as applied to monetary donations made to designated organizations, even those made for humanitarian purposes. From a strategic perspective, this may be problematic for two reasons. First, it can prevent efforts to deradicalize such organizations or to motivate them to move away from terrorism. In some instances, this may hurt, rather than help, counterterrorism efforts.[21] Second, it may hamper important humanitarian aid goals of the U.S. government. In situations where a designated organization has a virtual monopoly over distribution channels on the ground, such as the LTTE in Sri Lanka, the provision of

---

[17] *Humanitarian Law Project*, 130 S. Ct. at 2728; *see also* AEDPA, *supra* note 1, at § 301(a)(7) (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").
[18] *Humanitarian Law Project*, 130 S. Ct. at 2725.
[19] *Id.* at 2729–30.
[20] *Id.* at 2716.
[21] This is particularly true in situations where there appears to be popular legitimacy to the goals, if not the methods, of the designated organization. To illustrate, while most people would oppose the methods used by the IRA, many supported the political goal of independence for Ireland. The same is true for the LTTE in Sri Lanka and for numerous organizations that resort to violence or terrorism and that have a virtual monopoly over one side in ongoing political disputes. In these types of situations, providing such organizations with alternative non-violent avenues to pursue their goals may support counterterrorism efforts.

humanitarian supplies to populations in dire need may require at least some level of interaction with the relevant organization.[22]

III. Prosecution under the Material Support Statute

In contrast to the broad mandate granted to the government in *Humanitarian Law Projec*t, criminal prosecutions under the material support laws have generally followed a narrower pattern. The government typically targets individuals who satisfy three restrictive criteria: (1) they provide direct, often physical, support to terrorist activity; (2) they funnel aid through clearly identified terrorist organizations; and (3) they intend to further terrorist aims through the provision of material support. Two cases have been perceived as falling outside the general pattern, and these cases have contributed to existing uncertainty about the scope of the activities that would trigger prosecution under the material support laws. This Part discusses both the general pattern and the two exceptional cases in turn.[23]

A. General Pattern of Prosecution

While *Humanitarian Law Project* highlighted the government's broad authority to prosecute under the material support statute, a survey of cases filed against defendants who have allegedly provided material support to foreign terrorist organizations suggests that the government does not pursue all individuals within the reach of this statute.[24] Instead, the general pattern of prosecution indicates that the government typically targets individuals who satisfy three more restrictive criteria: (1) they provide direct, often physical, support to terrorist activity; (2) they funnel aid through clearly identified terrorist organizations; and (3) they intend to further terrorist aims through the provision of material support. If implemented consistently,

---

[22] *See* Section III.B. for a discussion of these issues in the context of Sri Lanka and Somalia.

[23] For a description of the government's recent material support enforcement activities, see *Countering Terrorist Financing: Progress and Priorities: Hearing Before the Sub Comm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Lisa O. Monaco, Assistant Att'y Gen., Nat'l Sec. Div.), *available at* http://www.judiciary.senate.gov/hearings/hearing.cfm?id=3ecd5819f60e5afabd0394b210ecd9f3.

[24] It should be noted, however, that this analysis is based solely on cases actually filed and therefore does not capture other uses of the material support statute, such as threats of prosecution in order to encourage an immigrant to take voluntary departure or an individual to become an informant; or other investigative activities that may affect humanitarian organizations even without the actual filing of a lawsuit.

these criteria would not capture individuals providing humanitarian aid in crisis areas.

The first common characteristic of the majority of material support cases is the type of aid provided. In *Humanitarian Law Project,* the Court confirmed the government's authority to prosecute individuals for providing trainings in peaceful dispute resolution, offering legal expertise, and engaging in political advocacy.[25] However, *Humanitarian Law Project* was not a criminal prosecution, and the government has never prosecuted a group or individual for providing international law training or pursuing political activism vis-à-vis designated terrorist groups. Instead, the individuals targeted are generally accused of providing more conventional forms of support to terrorist organizations, including financial support,[26] recruitment support,[27] weapons,[28] communications support,[29] or personnel (for example, by attending an al-Qaeda-affiliated training camp).[30]

A review of the cases also indicates that the material support statute is usually used to target support provided to a limited group of recipients: organizations that the United States has unambiguously and publicly designated as terrorist organizations. Of the material support prosecutions brought between September 2001 and July 2007, for example, roughly one-third involved alleged material support provided to al-Qaeda.[31] In a

---

[25] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730–31 (2010).
[26] *See, e.g.*, United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008) (defendant alleged to have raised money for Hamas and al-Qaeda); United States v. Al-Arian, 308 F.Supp.2d 1322 (M.D. Fla. 2004) (defendants alleged to have provided fundraising and logistical support to facilitate suicide bombings in Israel).
[27] *See, e.g.*, United States v. Marzook, 383 F. Supp. 2d 1056 (N.D. Ill. 2005) (defendant alleged to have actively recruited for Hamas).
[28] *See, e.g.*, United States v. Al Kassar, 582 F. Supp. 2d 488 (S.D.N.Y. 2008) (defendants alleged to have conspired to provide weapons to FARC); U.S. v. Aref, No. 04-CR-402, 2007 WL 603508 (N.D.N.Y. Feb. 22, 2007) (defendants alleged to have laundered money used for buying arms intended to assassinate the Pakistani ambassador in New York).
[29] *See, e.g.*, United States v. Vergara, 612 F. Supp. 2d 36 (D.D.C. 2009) (defendant alleged to have provided advanced communications networks and satellite telephones to members of FARC).
[30] *See, e.g.*, United States v. Goba, 240 F. Supp. 2d 242 (W.D.N.Y 2003) (defendants alleged to have attended an al-Qaeda training camp in Afghanistan); U.S. v. Mustafa, 406 F. App'x 526 (2d Cir. 2011) (defendant alleged to have trained at an al-Qaeda training camp).
[31] Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 851, 894–901 (2007) (table listing federal material support prosecutions between September 2001 and July 2007).

substantial proportion of the remaining prosecutions, the foreign terrorist organization involved was either Hamas or FARC.[32]

Finally, the government typically employs the material support statute to prosecute individuals who have deliberately provided material support to designated terrorist organizations with the clear intent that this support be used to further terrorist activity.[33] Material support charges frequently appear as part of a larger terrorism prosecution alongside other charges relating to conspiracy and violent crime. These accompanying charges suggest that, in these cases, the material support was a deliberate component of a plan to support terrorism.[34] Although the material support statute requires only knowledge that the organization is a designated terrorist organization, or that the organization has engaged or engages in terrorist activity, the defendants in typical material support cases would have satisfied a more stringent intent requirement.

If the material support statute were used exclusively to prosecute individuals who provide direct aid to clearly designated terrorist organizations with demonstrable intent to further their terrorist aims, the statute would be less likely to generate a chilling effect on humanitarian aid. As the next section shows, however, at least two prosecutions have raised doubts in the aid community about the government's adherence to this pattern.

B. Perceived Deviations From the Pattern of Prosecution

The pattern of prosecution described above suggests an intention to use the statute to prosecute only individuals who intentionally provide weapons or other forms of direct support to armed wings of clearly designated foreign terrorist organizations, and not to prosecute humanitarian aid organizations or their donors. Yet certain prosecutions have been cited as apparent deviations from this pattern. These cases are widely publicized within the concerned communities and have fueled

---

[32] *Id.*

[33] *See, e.g.*, United States v. Al-Arian, 308 F. Supp. 2d 1322 (M.D. Fla. 2004) (defendants alleged to have provided fundraising and management, and organizational and logistical support to facilitate suicide bombings).

[34] *See, e.g.*, United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) (defendant also charged with conspiracy to murder nationals of the United States, contributing services to al-Qaeda and the Taliban, conspiracy to contribute services to al-Qaeda and the Taliban, and using and carrying firearms and destructive devices during crimes of violence).

concerns among aid organizations that the provision of humanitarian aid could render them liable to criminal prosecution.

The first case that is cited as a deviation from the above pattern involved the prosecution of members of the Holy Land Foundation, once the largest Muslim charitable organization in the United States.[35] The material support at issue did not involve weapons or personnel; the defendants were convicted on the basis of their provision of funds to *zakat*[36] committees in the West Bank and Gaza—organizations that the government maintained were fronts for Hamas. While the committees themselves had not been designated terrorist organizations, the government presented extensive evidence at trial that linked HLF and its founders to Hamas and its leadership.[37] The defense responded by presenting evidence that the United States Agency for International Development (USAID) and the International Committee for the Red Cross (ICRC) had previously donated to and worked with some of these same committees to provide humanitarian assistance to Palestinians in Gaza.[38] The defendants also presented testimony that their efforts to obtain information from the Treasury Department about which organizations were off-limits were unsuccessful.[39] Ultimately, the jury found the defendants guilty of violating the material support statute.

In its December 2011 opinion on appeal, the Fifth Circuit found that the Holy Land Foundation had "more or less openly supported Hamas" via the *zakat* committees before the designation of Hamas as a foreign terrorist organization in 1995.[40] After 1995, the court noted that this support "became less obvious," but the Holy Land Foundation continued to

---

[35] *See* United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011); Holy Land Found. for Relief and Dev. v. Ashcroft, 219 F.Supp.2d 57, 69 (D.C. Cir. 2002), *aff'd,* 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1506 (2004).

[36] *Zakat* is a mandate of Islam that requires donating a portion of one's wealth each year to charitable causes. It is similar to tithing in the Judeo-Christian tradition. *Zakat* committees are committees that administer aid from *zakat* donations.

[37] *See El-Mezain*, 664 F.3d at 527–35.

[38] AMERICAN CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE "WAR ON TERRORISM FINANCING" 62 (2009) [hereinafter ACLU REPORT].

[39] *Conviction of Holy Land Foundation Raises Questions, Concerns for Non-Profits*, CHARITY & SECURITY NETWORK (Nov. 25, 2008), http://www.charityandsecurity.org/news/Conviction_Holy_Land_Raises_Questions_Concerns_Nonprofits.

[40] *El-Mezain*, 664 F.3d at 486.

support *zakat* committees controlled by Hamas.[41] According to the court, the funding supported Hamas's social wing, which provides social services including education and medical care, but also uses these services to build grassroots support for Hamas and its violent activities.[42]

From the perspective of the aid community, the case appeared to deviate from the broad pattern of prosecuting the provision of direct support to further the violent aims of a terrorist organization. The dominant narrative in the concerned communities was that the government prosecuted an organization for giving funds to *zakat* committees rather than Hamas itself. Although the facts of the prosecution fit within the reach of the material support statute, many in both the Muslim and humanitarian aid communities maintain that the case deviates from the established narrower pattern of prosecution described above.

Another case that appears to deviate from the pattern of restrained prosecution is *U.S. v. Rahmani*.[43] In *Rahmani*, the defendants argued that there was uncertainty in the designation of Mujahedin-e Khalq (MEK) as a foreign terrorist organization in light of statements by members of Congress that, despite its historical designation, the MEK was now a legitimate resistance movement fighting the Iranian regime and engaged in a legitimate struggle for democracy.[44] However, the Ninth Circuit observed that the MEK had been designated as a terrorist organization, and the prosecution was therefore valid under the material support statute, even if it was true that the organization was not currently an active terrorist organization.[45] Although the conduct in question was undoubtedly illegal under the material support statute, *Rahmani* deviated from the traditional pattern of prosecution in that the appropriateness of the designation was heavily contested, not unambiguous as in most prosecutions.[46] This arguably entitled the defendants to expect that their actions would fall

---

[41] *Id.*

[42] *Id.* at 485–86.

[43] United States v. Rahmani, 209 F. Supp. 2d 1045 (C.D. Cal. 2002), *rev'd sub nom.* United States v. Afshari, 426 F.3d 1150, 1162 (9th Cir 2005).

[44] *Id.* at 1050–51.

[45] *See Afshari*, 426 F.3d at 1154–56.

[46] Contributing to the uncertainty about the MEK's designation was the fact that other organizations have retained formal terrorist designation, even after they began to be perceived as legitimate political actors. For example, it was not until 2008 that the African National Congress was removed from a terrorist watch list to which it was added in the 1970's. *See* Mimi Hall, *U.S. Has Mandela on Terror List*, USA TODAY, Apr. 30, 2008, http://www.usatoday.com/news/world/2008-04-30-watchlist_N.htm.

within the class of conduct that, although covered by the material support statute, the government would typically choose not to prosecute.[47]

Such perceived deviations from the broader pattern of prosecution under the material support laws may be contributing to the uncertainty about the government's intended use of the material support statute and about which organizations and donors should consider themselves to be at risk. In particular, the publicity surrounding the *Holy Land Foundation* case may obscure awareness of the general pattern of enforcement described above, fueling fears of prosecution, especially in the Muslim community. The next Part describes the resulting chilling effect on humanitarian aid as reported by charitable and international development organizations.

IV. Chilling Effect on Humanitarian Aid

Members of the charitable giving and development aid communities have identified three types of chilling effects that have resulted from material support laws and their application.[48] First, the laws have reportedly had a chilling effect on individual charitable donations by Muslim donors and to Muslim charities. Second, the material support statute has reportedly caused a change in the behavior of development and funding organizations that continue to work in troubled regions because it has impaired their ability to fund small, grassroots organizations and to work in conflict regions. Finally, material support laws may at least initially have affected the overall amount of funding available for international aid and development. Moreover, material support laws may undermine effective counterterrorism efforts by eroding trust in law enforcement in the Muslim community and blocking humanitarian activities widely viewed as central to combating radicalism.

A. Chilling Effect on Donations to Muslim Charitable Organizations

Between May and November of 2008, the ACLU conducted 115 in-person and telephone interviews with Muslim community leaders and

---

[47] These assessments of the *Holy Land Foundation* case and the *Rahmani* case, and the perceptions they gave rise to, are all based solely on publicly available information. Information not available to the public may reveal that the cases are not in fact deviations from the pattern or are less deviant than they appear; however, since that information is not available, the perception remains and undermines confidence in the general pattern.

[48] The chilling effects result both from the possibility of prosecution under 18 U.S.C. § 2339B and from the Treasury Department's designation authority under additional material support provisions. *See supra* note 8.

American Muslims directly affected by material support laws. The interviewees were of different backgrounds and resided for the most part in Texas and Michigan. Interviewees included: the executive directors of four operating Muslim charities; attorneys representing Muslim charities; Islamic spiritual leaders and scholars; and individuals who were named unindicted co-conspirators in the Holy Land Foundation criminal case. The ACLU also interviewed two former Treasury Department officials.[49]

Interviewees reported decreasing or even ceasing their donations to Muslim organizations because of a fear of negative repercussions, including retroactive liability.[50] Executive directors of some Muslim charities also reported substantial decreases in incoming donations.[51] Interviewees identified a number of different factors that gave rise to this chilling effect. Factors included perceived deficiencies and discriminatory motives in criminal prosecutions; a discriminatory pattern of enforcement and designation; publicized raids and investigations of Muslim charities, including the freezing of their funds for several years without a resolution;[52] FBI interrogation and reported "harassment" of individual donors to Muslim charities, including legally operating ones;[53] and the naming of 246 unindicted co-conspirators in the lawsuit against the Holy Land Foundation.[54] Each of these factors appears to have contributed to uncertainty among Muslims about which organizations are off-limits, resulting in an overall decrease in donations.[55]

---

[49] ACLU REPORT, *supra* note 38, at 25.
[50] *Id.* at 89–95.
[51] *Id.* at 54, 64.
[52] *See* ACLU REPORT, *supra* note 38, at 59–60, 64–67; *see also* Laurie Goodstein, *U.S. Muslims Taken Aback by a Charity's Conviction*, N.Y. TIMES, Nov. 26, 2008,, at A23, *available at* http://www.nytimes.com/2008/11/26/us/26charity.html.
[53] *See generally* ACLU REPORT, *supra* note 38, at 71–73, 97–99.
[54] Named unindicted co-conspirators in the HLF case included some of the country's largest, most influential Muslim organizations, including the Islamic Society of North America, the North American Islamic Trust, and the Coalition on American-Islamic Relations. *Id.* at 53. The HLF case appears to have been particularly influential in the Muslim community: interviewees and advocates report that the prosecution led to a pervasive fear of discriminatory, politically motivated prosecutions of Muslim organizations, and a concern that charitable donors would be found guilty by association. *See* Goodstein, *supra* note 52; *see also* ACLU REPORT, *supra* note 38, at 53.
[55] Unfortunately, aside from the aforementioned ACLU REPORT, *supra* note 38, little research has been conducted in this area. The argument for a strong chilling effect would be strengthened by further quantitative research regarding the levels of donor capital within the Muslim community. Similarly, the effects on humanitarian aid would benefit from

Broadly speaking, interviewees' apprehension seemed based primarily on two overriding concerns: first, a perception of a lack of due process in the enforcement of material support laws,[56] and second, a perception of bias against the Muslim community.[57] These concerns appear to have arisen both from criminal prosecution under the material support statute and from actions taken by the Treasury Department, such as the freezing of charities' funds.[58] The perception of bias may also have been exacerbated by the general rise in anti-Muslim sentiment in the aftermath of the terrorist attacks of September 11, 2001. However, it seems apparent that it is not the targeting of particular organizations, in itself, that has formed

---

additional analysis of the correlation between a fear of prosecution and decreased humanitarian aid levels in certain regions.

[56] For example, the naming of 246 unindicted co-conspirators—a practice discouraged by the Department of Justice—many of whom were Muslim and some of whom were influential American Muslim organizations, apparently led to a fear of guilt by association in the Muslim community. It also led to concerns about the inability of the unindicted co-conspirators to clear their names. Individuals named as co-conspirators reported detrimental effects on their personal lives and job prospects, and some named organizations reported significant decreases in their donations. ACLU REPORT, *supra* note 38, at 53. In addition, the ACLU REPORT noted allegations of harassment of individual HLF donors by the FBI and of pretextual prosecutions (for example for minor immigration infractions). Many Muslim donors reported that these incidents, the lack of clarity in what could lead to designation, and the availability of retroactive liability caused them to cease their donations to Muslim charities. *Id.* at 71–73.

[57] One factor that may underlie this perception of bias is the fact that most of the designated organizations are affiliated with Islam. As a contrasting case, Chiquita admitted to paying $1.7 million directly to two designated terrorist organizations in Colombia between 1997 and 2004. Yet no criminal charges were ever filed and none of its assets were ever frozen. Instead, it paid a $25 million fine and continued to operate. Halliburton also reportedly conducted business with Iran, a designated state sponsor of terrorism, but has never been prosecuted or had its assets frozen. Jeffrey Morley, *Halliburton Doing Business With the 'Axis of Evil',* WASH. POST, Feb. 3, 2005, http://www.washingtonpost.com/wp-dyn/articles/A58298-2005Feb2.html. By contrast, the ACLU Report notes that certain Muslim charities have seen their assets frozen and their operations halted sometimes for years without any explanation or ultimate conclusion as to their fate. ACLU REPORT, *supra* note 38, at 47. In fact, the 9/11 Commission noted that in two analyzed cases there was "little compelling evidence" to support designation and criminal prosecution, that it "came at considerable cost of negative public opinion in the Muslim and Arab communities," and that it "raise[d] substantial civil liberties concerns." NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 111–112 (2004), *available at* http://govinfo.library.unt.edu/911/staff_statements/index.htm#monographs.

[58] *See supra* notes 55–56.

these perceptions, but rather the absence of explanation by the government and the lack of clarity about their criteria for designation.

B. Changing the Behavior of Humanitarian Organizations

In addition to the reported chilling effect on individual giving within the Muslim community, members of the development community have identified a change of behavior in their international development work that they attribute to the expansion of the material support laws. Although there is limited quantitative research measuring the chilling effect, the research available and anecdotal evidence suggests that this has proven to be particularly problematic when natural or socio-economic disasters, such as earthquakes or famine, strike regions under the control of designated organizations such as al-Shabaab in Somalia or the LTTE in Sri Lanka.

For example, according to certain aid groups, material support laws are currently compromising the provision of relief to counter the famine that is devastating Somalia.[59] Even the State Department reportedly withheld about $50 million of aid to Somalia out of fear that its employees would be prosecuted under the material support laws for administering the assistance, since large portions of Somalia are controlled by al-Shabaab.[60] The State Department sent a letter to the Treasury Department seeking assurances that its employees would not be prosecuted for providing humanitarian relief.[61] As one official noted, "[w]e were compelled to hold up that amount once there were legitimate concerns that the aid might be being diverted . . . We have to follow the law."[62] It is reasonable to infer that procedures causing delay even for the State Department would likely result in a greater chilling effect on non-governmental organizations.

---

[59] *See* Joshua Hersh, *Somalia Famine: Aid Groups Say U.S. Anti-Terror Laws Are Still Holding Them Back*, HUFFINGTON POST, Aug. 18, 2011, http://www.huffingtonpost.com/2011/08/18/somalia-famine-aid-groups_n_930815.html. The article cites a CARE official and other unspecified humanitarian organizations who have indicated that material support laws and regulations hinder their efforts to effectively and quickly respond to humanitarian aid.

[60] *See, e.g.*, Justin Fraterman, Criminalizing Humanitarian Relief: Are US Material Support for Terrorism Laws Compatible with International Humanitarian Law? 41 (Jan. 14, 2011) (unpublished manuscript) (on file with authors), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1750963; Jeffrey Gettleman, *US Delays Somalia Aid, Fearing It Is Feeding Terrorists*, N.Y. TIMES, Oct. 1, 2009, http://www.nytimes.com/2009/10/02/world/africa/02somalia.html?pagewanted=all.

[61] Gettleman, *supra* note 60.

[62] *Id.*

Similarly, when a tsunami hit Sri Lanka in 2004, aid was reportedly hampered in regions controlled by the LTTE because organizations knew that any provision of humanitarian aid within those regions would expose them to criminal liability. Many reportedly chose to provide only medical supplies, which are exempted under the statute. However, after the first week, these supplies failed to address the increasingly pressing needs of the affected populations for food, clothing, water, and sanitation.[63]

Moreover, the material support laws have reportedly had a negative effect on small charities working in certain areas.[64] Funding organizations have reportedly had to stop funding small, grassroots community organizations for two reasons: first, small grassroots organizations in underdeveloped regions often do not have the accounting capability or expertise to meet onerous financial reporting requirements imposed by the Treasury Department.[65] Second, in regions such as Northern Sri Lanka, any tie to the LTTE, for example by way of a brother or a relative of a member, is enough to disqualify grassroots organizations as a potential target of funds.[66] As a result, U.S.-based funding organizations now must deny applications for funds from small organizations that they previously

---

[63] *See Implementation of the USA PATRIOT Act: Prohibition of Material Support Under Sections 805 of the USA PATRIOT Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 26 (2005) (statement of Ahilan T. Arulananatham, Staff Attorney, American Civil Liberties Union). *See also* Fraterman, *supra* note 60.

[64] *See, e.g.*, Stephanie Strom, *Small Charities Abroad Feel Pinch of U.S. War on Terror*, N.Y. TIMES, Aug. 5, 2003, http://www.nytimes.com/2003/08/05/national/05CHAR.html (discussing the impact of burdensome regulations on small charities operating in Trinidad & Tobago, and relating concerns raised by major funding organizations such as The Rockefeller Foundation). The voluntary guidelines issued by the Treasury Department have had negative effects on charities. *See e.g.*, OMB WATCH, COLLATERAL DAMAGE: HOW THE WAR ON TERROR HURTS CHARITIES, FOUNDATIONS, AND THE PEOPLE THE SERVE 39–40 (July 2008), *available at* http://www.foreffectivegov.org/files/npadv/PDF/collateraldamage.pdf [hereinafter OMB WATCH REPORT]; Letter from Grantmakers Without Borders to the Department of Treasury Opposing Risk Matrix (May 30, 2007), *available at* http://www.gwob.net/advocacy/GwoB_Treasury_Letter-Risk_Matrix.pdf; William P. Fuller & Barnet F. Baron, *How the War on Terror Hits Charity*, THE CHRISTIAN SCI. MONITOR, July 29, 2003, http://www.csmonitor.com/2003/0729/p11s01-coop.htm (arguing that adherence to the guidelines does not protect charities from prosecution, yet imposes burdensome intelligence-gathering and reporting requirements on them).

[65] Telephone Interview with Nimmi Gowrinathan, Operation U.S.A. (Oct. 24, 2011).

[66] *Id.*

would have funded.[67] Increasingly, funding organizations are turning back to a model of funding large, national organizations rather than small community-based organizations. According to one development aid worker who focuses on Sri Lanka and Pakistan, this funding approach inhibits sustainable development because it prevents development organizations from building community capacity—an ingredient that is essential both to long-term change and to preventing terrorism.[68]

C. Reducing the Availability of Funds for International Aid

In addition to changing the behavior of international development organizations that still fund organizations working in troubled regions, material support laws may have reduced the availability of funds for international aid and have caused some organizations to turn away from international work altogether, at least initially. According to OMB Watch, a nonprofit research and advocacy organization, international grant-making typically takes three forms: grants to U.S.-based organizations that work internationally, such as Save the Children; grants directly to overseas recipients, known as cross-border grants; and grants to intermediaries that re-grant funds to organizations and projects outside the United States. OMB Watch reported a decrease in all three categories, and in cross-border grants in particular.[69]

Interviewees for one study, quoted in the OMB Watch Report, noted the special difficulty of complying with counterterrorism measures in the cross-border grant context for practical reasons and because of "organizational anxiety due to the draconian consequences of non-compliance."[70] Interviewees also expressed concern about "the long-term consequences to international grantmaking because of the unpredictability of counterterrorism enforcement."[71] Even the appearance of a risky grant-making environment reportedly causes some organizations to turn away from international work altogether. This has especially affected grant-

---

[67] *Id.*
[68] *Id.*
[69] OMB WATCH REPORT, *supra* note 64, at 51–53.
[70] *Id.* at 52.
[71] *Id.*

making organizations with small budgets "because they lack the personnel or resources to engage in the exhaustive new procedures."[72]

D. Implications for National Security

The broad reach of the material support statute and uncertainty about its application in the aid community have further implications for national security. Although the statute is designed as a tool to incapacitate those supporting terrorism, the perception of unrestrained prosecutorial reach in material support cases has a deleterious effect on national security itself.

The most straightforward effect of this perception is the alienation of a community whose participation is vital to contain the domestic threat of terrorism: the American Muslim community.[73] If the American Muslim community feels unfairly targeted by law enforcement, it will be less likely to cooperate with law enforcement. Conversely, minimizing any perception of discrimination should strengthen relationships between the Muslim-American community and law enforcement, thereby improving the efficacy of counterterrorism operations. This intuition is consistent with a recent social science study finding, among both American and European Muslims, an association between experiencing discrimination and expressing

---

[72] *Id.* at 53. Another issue raised by charitable organizations in this context is the fact that the Treasury Department has refused to transfer the seized assets or funds of organizations under investigation to other, non-designated charities and instead has held on to the money. KindHearts USA, whose assets have been frozen for more than five years, requested in 2006 "that its funds be released and spent by the UN, USAID, or any other humanitarian program, asking only that 'special consideration be given to the refugees in the earthquake ravaged areas of Pakistan since the overwhelming majority of frozen funds were earmarked for projects therein.'" *Id.* at 63. The request was denied. Id. Similarly, the Islamic American Relief Agency (IARA-USA) has made repeated requests to have frozen funds released to other humanitarian and disaster aid relief, even proposing a reasonable monitoring program or a change in governance and personnel to ensure that the funds are not diverted, but OFAC denied the request. *Id.* at 63–64.

[73] *See* Dennis L. Jensen, Enhancing Homeland Security Efforts by Building Strong Relationships between the Muslim Community and Local Law Enforcement (March 2006) (unpublished M.A. thesis, Naval Postgraduate School) (on file with the Defense Technical Information Center, *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA445337); Nicole J. Henderson, Christopher W. Ortiz, Naomi F. Sugie, Joel Miller, *Law Enforcement and Arab American Community Relations After September 11: Technical Report*, (New York: Vera Institute of Justice, 2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Arab_American_technical_report.pdf.

justifications for suicide bombing. The study concludes that if further investigations confirm that perceived discrimination is a risk factor for supporting political violence, initiatives to reduce discrimination should reduce the risk of terrorism.[74] Efforts to correct the perception that the Muslim community is unfairly targeted in material support cases should promote cooperation in this vital population.

Additionally, a decrease in humanitarian aid may undermine development efforts that could help de-radicalize impoverished or marginalized communities. By failing to immunize organizations providing training on positive alternatives to violent action, the material support laws may in some cases entrench, rather than reduce, radicalism.[75] Decreasing support of governmental and legal institutions in vulnerable areas may hamper important development efforts central to combating radicalism.

In some cases, overbroad criminal statutes may be desirable because they have the effect of discouraging harmful behavior at the margins, even where that behavior is not typically prosecuted. In the case of humanitarian aid, however, overbroad criminalization appears to discourage *positive* behavior at the margins, as well. Because no legislative or judicial solutions to this problem appear to be forthcoming, administrative reforms may well be the most effective way to minimize the negative chilling effects that could result from lack of clarity about the application of broad material support laws.[76]

V. Possibilities for Reform

The Court in *Humanitarian Law Project* concluded that broad criminal liability under the material support statute is constitutional. However, given

---

[74] Jeff Victoroff, Janice Adelman & Miriam Matthews, *Psychological Factors Associated with Support for Suicide Bombing in the Muslim Diaspora*, 33 POL. PSYCHOL., 791, 791–809 (2012).
[75] *See* 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 (2004).
[76] The State Department currently lists 51 organizations as designated Foreign Terrorist Organizations. *See* Bureau of Counterterrorism, U.S. Department of State, *Foreign Terrorist Organizations*, (Sept. 28, 2012), http://www.state.gov/j/ct/rls/other/des/123085.htm. In addition, the Treasury Department has a 555-page list of Specially Designated Nationals, which includes individuals, groups, and organizations. *See* U.S. Department of Treasury, *Resource Center: Specially Designated Nationals List (SDN)*, (Mar. 14, 2013), http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx.

the resulting chilling effect on humanitarian aid, it is nonetheless important to examine possible strategies for restricting the scope of potential prosecution and creating explicit exceptions to criminal liability. In evaluating these strategies, the government's interest in maintaining flexibility to prosecute those truly engaged in terrorist activity must be balanced against the importance of creating credible exceptions that reassure humanitarian organizations that they will not be targeted for providing humanitarian aid. This Section of the Article first proposes several substantive guidelines, derived from the government's existing pattern of prosecution, which could be used to clarify the extent of enforcement. It then examines procedural options for introducing and publicizing these guidelines.

A. Substantive Guidelines

Our proposed substantive criteria for restricting prosecutions under the material support statute are derived from the patterns of prosecution described above. The material support statute is primarily intended to prosecute terrorists who willfully provide financial and military support to known terrorist groups. The government can therefore achieve the purposes of the statute while alleviating the chilling effect on humanitarian aid by creating and publicizing safe harbors. It should do so by designing criteria around each element of the general pattern of prosecution: the type of aid, the target organization, and the intent of the donor. Formalization of these limiting factors, which already guide the government's material support enforcement, would provide clarity and security to donors and aid organizations that might otherwise fail to provide aid for fear of prosecution.

1. Clarify and Publicize Guidelines Concerning Types of Aid

One strategy would be to create and publicize a safe harbor for certain types of aid. This would build on existing prosecutorial practice, as well as existing statutory exemptions for medicine and religious materials already incorporated into the text of the material support statute.[77] The government would clearly identify specific types of permissible aid and thereby mitigate chilling effects on these types of aid for all organizations, including those grassroots organizations working directly with local partners. The safe zone could include, for example, international human rights law training (which was at issue in *Humanitarian Law Project*) and food

[77] 18 U.S.C. § 2339A(b)(1) (2006 & Supp. III 2009).

and shelter delivered in the event of a humanitarian crisis. Aid fitting these criteria would be clearly identified as falling within the safe harbor.

Administering this type of exemption is not without challenges. It could be difficult, for example, to assess which types of aid are most urgently needed, or which situations constitute a humanitarian crisis for the purposes of crafting and publicizing an exemption for food and shelter provided in the context of such a crisis. This type of exemption might also arguably allow inadvertent support of terrorist activities.[78] However, these challenges could be mitigated in significant part through a careful drafting of guidelines. The Treasury Department provides one possible model of this approach: in October, it adopted general licenses authorizing exportation of food to Sudan and Iran, despite sanctions and transactions regulations. The licenses apply to food alone, and contain additional provisions to mitigate security concerns. In particular, the licenses do not apply to specified areas, and additional authorization is required with respect to specific food items and exports directed to certain individuals.[79]

2. Clarify and Publicize Guidelines Concerning Recipient Organizations

Another guideline would focus on individual organizations—providing a safe harbor for donations made in support of humanitarian aid provided by those organizations. At a minimum, this would involve the introduction of a formalized application, accreditation, and monitoring

---

[78] In *Humanitarian Law Project*, for example, Chief Justice Roberts worried that the provision of humanitarian aid to terrorist organizations could make funds available for terrorist activities. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2725 (2010).

[79] 76 Fed. Reg. 63191, 63191–97 (Oct. 12, 2011) (to be codified at 31 C.F.R. pts. 538, 560), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/gl_food_exports.pdf. The fact that OFAC excluded specified geographic areas raises some serious concerns, as those areas may be most in need of food and other humanitarian aid; however the general licensing procedure provides a helpful model of the type of substantive clarification that could be offered to those fearing prosecution under the material support laws. *See also* OFFICE OF FOREIGN ASSETS CONTROL, DEP'T OF THE TREASURY, GENERAL LICENSE NO. 11: AUTHORIZING CERTAIN SERVICES IN SUPPORT OF NONGOVERNMENTAL ORGANIZATIONS' ACTIVITIES IN SYRIA, (Sept. 26, 2011), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/syria_gl11.pdf (authorizing export of services to Syria in support of humanitarian aid, democracy building, education, and non-commercial development); OFFICE OF FOREIGN ASSETS CONTROL, DEP'T OF THE TREASURY, GENERAL LICENSE NO. 2: AUTHORIZING PROVISION OF CERTAIN LEGAL SERVICES WITH RESPECT TO SYRIA, (Aug. 18, 2011) *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/syria_gl2.pdf.

procedure for organizations to be placed on, and maintain their place on, an exemption list. This would assist individual private donors by providing them with a clear list of "safe" recipient organizations through which they could channel charitable donations. This approach not only allows donors to know that there are organizations to which they may contribute without fearing prosecution but it also provides unequivocal reassurance to the exempted organizations that they may pursue humanitarian aid projects without risk of prosecution.

A permutation of this approach was recently piloted in the case of the partnership between the American Charities for Palestine (ACP) and USAID. Although the precise details have not been released, the partnership was established through a Memorandum of Understanding (MOU) between the two organizations to work together to deliver aid to the Middle East. Presumably, this MOU would provide assurances to donors and preclude prosecution for those donating funds through ACP.[80] In a similar vein, the Office of Foreign Assets Control issues licenses for designated organizations to exempt them from trade sanctions programs. For example, pursuant to a Treasury Department general license, employees and contractors of six major international organizations are authorized to perform transactions in and involving Iran.[81]

---

[80] *See* Press Release, USAID, USAID Partners with Charity To Expand Assistance to Palestinians, Aug. 1, 2008, http://www.reuters.com/article/2008/08/02/idUS12240+02-Aug-2008+PRN20080802 ("The MOU signing marks the first step for ACP and USAID to create a mechanism to facilitate American donations for charitable causes in the West Bank and Gaza. Under this MOU, ACP will mobilize private donations from the American community and then will collaborate with USAID to jointly program the funds in direct support of mutually agreed upon projects and activities in the West Bank and Gaza, particularly in the areas of health and education.").

[81] Iranian Transaction Regulations, 71 Fed. Reg. 48795 (Aug. 22, 2006) (to be codified at 31 C.F.R. pt. 560), *available at* http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/iran_gl2_082206.pdf. The organizations designated include the United Nations, the World Bank, the International Monetary Fund, the International Atomic Energy Agency, the International Labor Organization, and the World Health Organization. The license is not a blanket immunization; for example, fund transfers must be routed through a third country bank, and transactions involving certain goods or technology require separate authorization. *See also,* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, GENERAL LICENSE NO. 8: OFFICIAL ACTIVITIES OF INTERNATIONAL ORGANIZATIONS, (Sept. 9, 2011), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/syria_gl8.pdf (authorizing "all transactions and activities otherwise prohibited [in Syria] that are for the conduct of the official business of the United Nations, its Specialized Agencies, Programmes, and Funds, by employees, contractors, or grantees thereof"); OFFICE OF

The drawback of this approach is that it does not address the concerns of smaller organizations that are often best placed to reach communities in need, especially in situations involving conflict or natural disaster. Even exempted organizations might themselves face difficulties when exigencies demand that they risk their exemption by working with partner organizations on the ground. Further, any approach involving the development of a list of officially sanctioned charities risks actual or perceived discriminatory application. Finally, unconditional immunization of designated "non-terrorist" organizations creates the risk that an organization acting in bad faith might petition for and then use an exemption as a shield against prosecution for intentional support of terrorism, rather than humanitarian relief efforts.

An audited self-regulation system, which creates a presumption against prosecution for any organization that implements a series of rigorous internal controls, could mitigate, although not fully solve, these problems.[82] The standards could be promulgated by the Department of Justice, in consultation with the Treasury and State Departments, to reflect both counterterrorism and humanitarian goals, and charities could opt into the system.[83] The Treasury Department, in conjunction with the Internal Revenue Service, would periodically audit a random sample of the charities that opted in to this system to ensure compliance.[84] If the auditors found that a given charity had not followed the guidelines, the charity could no

---

FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, LIST OF AUTHORIZED PROVIDERS OF AIR, TRAVEL, AND REMITTANCE FORWARDING SERVICE TO CUBA, AND REMITTANCE FORWARDERS, (Jan. 2, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_tsp.pdf.

[82] A self-regulation system, albeit one very different from that proposed here, was suggested in Peter Margulies, *Accountable Altruism: The Impact of the Federal Material Support Statute on Humanitarian Aid*, 34 SUFFOLK TRANSNAT'L L. REV. 539, 557–59 (2011).

[83] This document would be similar to the guidelines produced by the Treasury Department. *See* U.S. DEP'T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES, http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/guidelines_charities.pdf.

[84] The auditing process would ensure compliance among the charities. Writing in the context of self-regulation with privately promulgated rules, Ian Ayres and John Braithwaite argue, "retaining public enforcement (detection and punishment) . . . is likely to be an important component in constituting genuine private self-enforcement." IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 103 (1992).

longer take part in the self-regulation system.[85] Non-adherence to the standards would not, by itself, constitute a violation of the law. Moreover, implementation of the institutional controls would not be a complete defense but would signal to prosecutors that a given organization sought to comply with the guidelines. Compliance with the self-regulation system would be given significant weight in the prosecutorial discretion analysis and would cut against prosecuting a given organization.

There are a number of different models for designing a self-regulation system.[86] One useful model is sexual harassment policy under fair employment law. Under the Supreme Court decisions *Faragher v. City of Boca Raton*[87] and *Burlington Industries, Inc. v. Ellerth*,[88] an employer is entitled to an affirmative defense against a harassment claim where: (i) there is no tangible employment action (that is, the employee is not terminated, demoted, or subject to reassignment), (ii) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (iii) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. According to these rulings, if a company sets up protocols for monitoring ongoing issues and responding to problems, their internal

---

[85] The auditing process for these charities need not be overwhelmingly detailed to ensure compliance. A study showed that even in an area where the risks of disaster are rather profound—for example, nuclear regulation—the United States only monitors about one to two percent of safety-related activities at nuclear plants annually. *See* Peter K. Manning, *The Limits of Knowledge: The Role of Information in Regulation*, in MAKING REGULATORY POLICY 49, 70 (Keith Hawkins & John Thomas, eds., 1989).

[86] The most prominent model involves the creation of a self-regulatory organization (SRO) that exercises some degree of regulatory authority over an industry or profession. The regulatory authority could be applied in addition to some form of government regulation, or it could fill the vacuum of an absence of government oversight and regulation. In securities law, SROs, such as the Financial Industry Regulatory Authority (FINRA) enforce certain industry standards and requirements related to securities trading and brokerage. *See About the Financial Industry Regulatory Authority*, FINANCIAL INDUSTRY REGULATORY AUTHORITY, http://www.finra.org/AboutFINRA/ (last visited Mar. 20, 2013). Another example is the American Medical Association, which sets rules for ethics, conflicts, disciplinary action, and accreditation in medicine. *See Strategic Focus*, AMERICAN MEDICAL ASSOCIATION, http://www.ama-assn.org/ama/pub/about-ama.page? (last visited Mar.. 20, 2013). While this model can be applied in the material support context through the creation of an SRO that would set and enforce material support standards, the government would likely be reluctant to provide a non-governmental body with such an important national security task.

[87] 524 U.S. 775 (1998).

[88] 524 U.S. 742 (1998).

control system can serve as a defense in court.[89]

Another useful model for a self-regulation system is the Foreign Corrupt Practices Act (FCPA).[90] Before initiating litigation against a corporation for engaging in corrupt practices abroad under the FCPA, the Department of Justice "considers a company's compliance efforts in making appropriate prosecutorial decisions, and the United States Sentencing Guidelines also appropriately credits a company's compliance efforts in any sentencing determination."[91] Under an adapted system, an aid organization's pre-existing compliance policies and procedures, and its good-faith efforts to comply with the regulations set forth by the government, should be relevant as a matter of law when the government is weighing prosecution. As the stakes are arguably higher in the terrorism context, a robust internal control system would not be dispositive of a given organization's culpability but could still factor heavily into the culpability analysis.

This system would preserve the incentive structure for charities to perform necessary due diligence while leaving the government with the necessary flexibility to pursue organizations and individuals that it deems to be supporting terrorism. Importantly, it would provide an added layer of comfort and assurance to those organizations working in conflict areas where groups designated as terrorist organizations may be the only feasible avenue to provide aid to people in need. Obvious drawbacks to the audited self-regulation system are its implicit bias toward larger charities[92] that can afford to implement the additional controls and the added governmental infrastructure that would be needed to perform the audits. Moreover, as evidenced by the negative response from charities to the unilateral voluntary

---

[89] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998) (noting that employer's adoption of effective anti-harassment policy, along with plaintiff's failure to file complaint with employer pursuant to this policy, will usually provide employer with complete defense under fair employment law).

[90] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-23, 91 Stat. 1494, (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd-1 to 78dd-2, 78ff (1994)) as amended by International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff (1999).

[91] *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 26 (2010), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:66921.pdf.

[92] *See supra* note 64 and accompanying text.

guidelines previously issued by the Department of Treasury,[93] such a system would have to be designed with input from development organizations in order to have a chance at success. It is important to recognize that this policy is unlikely to be effective at eliminating all of the harmful chilling effects caused by the material support statute, and so should only be used in combination with other policies.

3. Clarify and Publicize a Specific Intent Requirement

A third type of safe harbor would focus on the donors covered by the statute based on the intent of their donation, rather than the identity of the organization or the type of aid at issue. Prosecutors would refrain from prosecuting those individuals who, although they provided material support to a terrorist organization as defined by the statute, did not intend to further terrorist aims, thereby creating a specific intent requirement.

The introduction of an intent element would mitigate the chilling effect for well-intentioned donors, as individuals who inadvertently furthered terrorist aims would not be vulnerable to prosecution. Yet this approach would require prosecutors to prove intent to further terrorist aims, which would make the task of prosecution more difficult.

The substantive clarifications outlined above would provide guidance to donors and organizations wishing to provide humanitarian aid without risking prosecution prerogatives. It is unlikely that any one of these approaches could, in isolation, provide a comprehensive solution to the chilling effect on humanitarian aid; however, if adopted in combination, they would formalize the pattern of prosecution described above and provide reassurance to organizations and donors. A menu of possible procedural options for implementation of these substantive guidelines is presented below.

B. Procedural Options

Apart from confronting the question of which substantive criteria should apply to material support prosecutions, in order to promote humanitarian aid, the government must address the procedural dilemma of identifying the best method of implementing its chosen policies. This Subsection addresses the advantages and disadvantages of various possible

---

[93] *See* OMB WATCH REPORT, *supra* note 64, at 39–49.

approaches. It first discusses the possibility of a statutory amendment, which would conclusively narrow the current scope of liability, and provide reassurance to humanitarian organizations and donors, thereby effectively addressing the chilling effect on aid outlined in this report. Recognizing the political roadblocks involved in any effort to amend the statute, it then describes a menu of additional possible approaches to implementation. These options should not be viewed as alternatives; rather, a comprehensive material support policy might utilize several strategies in combination.

In assessing the strengths and weaknesses of these approaches, it is important to recognize the tension between the political difficulty of formally constraining prosecutions and the necessity of making a credible commitment in order to assuage the fears of the aid organizations involved.[94] Binding prosecutors with more formalized procedural guidelines may be politically unpopular; however, concessions to prosecutorial flexibility necessarily impose costs in terms of efficacy. If a prosecutor can easily override or ignore a procedural protection for a donor or humanitarian organization, those safeguards will not provide the necessary reassurance to counter the chilling effect produced by uncertainty surrounding the material support statute.

1. Amend the Statute

The most obvious and likely most effective approach to implementing the recommended substantive changes is through amendment of the statute. An amendment could introduce the human rights law training and humanitarian crisis safe harbors discussed above, or add a specific intent requirement. Alternatively, an amendment could expand the power granted to the Secretary of State under Section 2339B(j) to issue exceptions. Currently, the Secretary may approve the provision of material support or resources to a foreign terrorist organization only in the categories of "personnel," "training," or "expert advice or assistance."[95] A

---

[94] *See* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 3 (1971) ("There is a competing tension between the need in prosecutorial decision-making for certainty, consistency, and an absence of arbitrariness on the one hand, and the need for flexibility, sensitivity, and adaptability on the other."). Abrams was commenting on the need to strike this balance in the context of criminal prosecution in general. The imperative is even stronger where, as in the case of the material support statute, a lack of certainty in prosecutorial decision-making has a significant negative impact on the flow of charitable and humanitarian aid to people in need.

[95] 18 U.S.C. § 2339B(j) (2006 & Supp. III 2009).

revision might permit the Secretary of State to issue exceptions for funds, equipment, and supplies in the event of a humanitarian crisis. There is, moreover, precedent for this approach: the material support statute has been substantively altered three times in the past twenty years.[96]

Although amending the statute would provide the most comprehensive and effective protection from prosecution to aid organizations—and is therefore most likely to address the chilling effect on legitimate humanitarian aid—such an amendment currently appears politically infeasible in the near term. We therefore turn next to three other approaches that could be used to ameliorate the chilling effect on material support—either individually or, better, in combination.

2. Publish an Advisory Memorandum or Statement

The Department of Justice could issue an advisory memorandum or statement articulating a series of exemptions from prosecution under the material support statute. The substantive exemptions proposed above generally reflect existing government practice. An advisory memorandum or statement would publicize and memorialize the government's prosecutorial discretion policy for material support prosecutions, thus providing security to those already highly unlikely to be prosecuted.[97]

This approach has already been used on a smaller scale by the Department of State to address the chilling effects of the material support statute. As noted earlier, the Department of State held a press briefing in August 2011 announcing that U.S. aid groups that provided famine aid in Somalia would not be prosecuted for violating the material support statute if they acted in good faith to reach victims of the famine.[98]
It is important to note that the Department of Justice is not authorized to give advisory *opinions* to non-governmental entities, with two statutory

---

[96] CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339(A) AND 2339(B), at 1–2 (2010).
[97] An advisory memorandum would be distinct from an Office of Legal Counsel memo that provides authoritative legal advice to the President and all the Executive Branch agencies. Notably, the Office of Legal Counsel "is not authorized to give legal advice to private persons." *Office of Legal Counsel*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/olc/ (last visited Mar. 20, 2013).
[98] *See supra* note 5.

exceptions.[99] No law, however, precludes a press statement or memorandum released by the Attorney General articulating a general scope of prosecutorial discretion in the material support context.[100] Publicly releasing an advisory memorandum would provide humanitarian organizations and donors with only limited reassurance as there is no requirement that such a memorandum be followed and as it could be reversed by new leadership or on other grounds. This approach therefore would not provide the same security to affected organizations as a statutory amendment. Thus, it may not effectively address the chilling effect. However, it may be a good start as it offers a way for the Department to communicate its policies to the public and thereby address some of the concerns of aid organizations.

3. Amend Internal Guidelines

Another approach—which could be used in conjunction with an advisory memorandum or statement—is to amend internal guidelines.[101]

---

[99] One exception is in the antitrust realm. *See* Antitrust Division Business Review Procedure, 28 C.F.R. § 50.6 (Westlaw, through Feb. 14, 2013). The Department of Justice has been willing in certain circumstances to review proposed business conduct and state its enforcement intentions. *See, e.g.*, Business Review Letter from Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, to Robert A. Skitol, Esq., Drinker, Biddle & Reath, LLP (Oct. 30, 2006), *available at* http://www.justice.gov/atr/public/busreview/219380.htm. The other exception is in the Foreign Corrupt Practices Act realm. *See* U.S. DEP'T OF JUSTICE, *Foreign Corrupt Practices Act Review Opinion Procedure Release, No. 11-01*, (June 30, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2011/11-01.pdf. In both of these cases, the Department of Justice, upon receiving statutory authority, established a procedure to provide responses to specific inquiries by "requestors" concerning conformance of their conduct with the Department of Justice's enforcement policy.

[100] Published advisory opinions do not conventionally address the use of any type of prosecutorial exception although they have discussed the use of prosecutorial discretion in certain circumstances. *See, e.g.*, Memorandum to the Deputy Att'y Gen. on Limitations on the Detention Authority of the INS (Feb. 20, 2003), *available at* http://www.justice.gov/olc/INSDetention.htm (discussing the authority of the Attorney General to make discretionary decisions bearing upon the removal of an alien based on policy considerations and concluding that the Attorney General is not rigidly bound by the ninety-day removal period, even in situations where it would be possible to remove an alien).

[101] For a general discussion of the use of internal policy to guide prosecutorial discretion, see Abrams, *supra* note 94. He points out that policy is "particularly needed to maintain . . . consistency" in prosecutorial discretion with respect to certain kinds of offenses. *Id.* at 11. These offenses "usually have an element of controversy about them" and "[t]here is often lacking a popular consensus that enforcement should be one hundred percent or that the

Limitations on material support prosecutions could be formalized through amendments to the U.S. Attorneys' Manual or in the format of published internal memoranda. Like an advisory memorandum or statement, new internal guidelines would provide a forum to articulate the government's position without sacrificing prosecutorial flexibility or encountering the legislative roadblocks that would be involved in pursuing an amendment to the material support statute itself. Yet the approach is not a complete answer to the problem of chilling humanitarian aid in crisis areas. First, these guidelines are non-binding, except as the Department of Justice chooses to internally enforce them,[102] and are subject to revision. As a result, they may not provide aid groups significant reassurance. Second, as compared to statutory amendment or an advisory opinion, internal guidelines are just that: internal. Even though they may be publicly available, they may not be sufficiently publicized to produce the desired effect. Hence this approach is likely to be most effective if combined with the approach previously described—publication of an advisory memorandum or statement. However, even a non-binding and largely internal document would, at the very least, signal to concerned communities that the government is thinking critically and carefully about its prosecutorial power. Symbolic actions such as these, if publicized effectively, may significantly reduce the chilling effect.

There is significant precedent for this approach. The following subsections outline several examples of relevant language in the U.S. Attorneys' Manual and published internal memoranda that might provide guidance in crafting similar policies for material support prosecutions.

i. Amend the U.S. Attorneys' Manual

Language in the U.S. Attorneys' Manual already constrains prosecutors with respect to international terrorism prosecutions, including those brought under the material support statute; the manual indicates that prior express approval of the Assistant Attorney General of the National Security Division (AAG) or his designee is "presumptively required for

---

conduct should be treated as a serious crime or, indeed, as a crime at all." *Id.* Abrams' examples include "so-called consensual and victimless crimes," business crimes, domestic disputes, minor offenses with a "high incidence of occurrence" (such as traffic offenses), and offenses that are "defined in vague terms." *Id.* at 12–13. Prosecution of humanitarian aid organizations under the material support statute also seems to belong in this category.

[102] *See generally* Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167 (2004).

certain court actions" involving international terrorism-focused statutes.[103] Further guidance could outline substantive limits to prosecution.

The DOJ has already adopted this approach for the Racketeer Influenced and Corrupt Organization Act (RICO), which, like the material support statute, provides broad authority to prosecutors. DOJ policy, as articulated in the U.S. Attorneys' Manual, limits RICO prosecutions to cases "where the unlawful conduct was both continuous and egregious and where there is the prospect of significant forfeiture of ill-gotten proceeds or of interests in a tainted enterprise."[104] The RICO guidelines indicate that:

> [d]espite the broad statutory language of RICO and the legislative intent that the statute '. . . shall be liberally construed to effectuate its remedial purpose,' it is the policy of the Criminal Division that RICO be *selectively* and *uniformly* used. It is the purpose of these guidelines to make it clear that not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved.[105]

The guidelines go on to instruct prosecutors to consider various factors outside the elements of the statute to guide their charging decisions.[106] Similar guidelines could be crafted to limit prosecution under the material support statute to the intended targets of the statute, and to exclude individuals and organizations providing legitimate humanitarian aid.[107]

---

[103] U.S. ATTORNEYS' MANUAL § 9-2.136(H), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm (last visited Mar. 20, 2013).

[104] Podgor, *supra* note102, at 173–174 (quoting Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 671 (1990)).

[105] U.S. ATTORNEYS' MANUAL, *supra* note 103, § 9-110.200 (emphasis added).

[106] For example, factors include whether the charge is brought merely for plea bargaining purposes, *id.* § 9-110.320, and whether a RICO count is necessary to "reflect[] the nature and extent of the criminal conduct involved" or to provide a basis for sentencing. *Id.* § 9-110.310.

[107] It is important to note, however, that, like all of the examples in this section, the RICO guidelines are not binding on prosecutors. The U.S. Attorneys' Manual includes the following disclaimer: "These guidelines provide only internal Department of Justice guidance. They are not intended to, do 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. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice." *Id.* § 9-110.200.

In the context of corporate fraud, the DOJ issued a 2003 policy memorandum, "Principles of Federal Prosecution of Business Organizations," designed to "guide Department prosecutors as they make the decision whether to seek charges against a business organization" itself,[108] as opposed to against only individuals implicated in business crimes. The principles have since been updated and incorporated into the U.S. Attorneys' Manual.[109] The guidelines mainly scrutinize "the authenticity of a corporation's cooperation."[110] Prosecutors are also instructed to consider "collateral consequences, including disproportionate harm to shareholders, pension holders, and employees not proven personally culpable, and impact on the public arising from the prosecution."[111] At least in this context, there is precedent for DOJ guidelines explicitly instructing prosecutors to take into account "special policy concerns," including an organization's efforts to comply and the greater ramifications of prosecution for the public in exercising prosecutorial discretion.[112] Prosecutors could similarly be directed to consider the good faith intentions of organizations and the risk to

---

[108] Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Department of Justice, on Principles of Federal Prosecution of Business Organizations 1 (Jan. 20, 2003), *available at* http://www.justice.gov/dag/cftf/business_organizations.pdf (last visited Mar. 20, 2013) [hereinafter Principles of Federal Prosecution or Business Organizations]. The guidelines refer to corporations, but they also "apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations." *Id.* at 2 n.1.

[109] U.S. ATTORNEYS' MANUAL, *supra* note 103, § 9-28.000. The principles were added to the Manual in August 2008.

[110] Principles of Federal Prosecution of Business Organizations, *supra* note 108, at 1. Other factors prosecutors are directed to weigh include the nature and seriousness of the offense, risk of harm to the public, the pervasiveness of wrongdoing within the corporation, the corporation's history of similar conduct, voluntary disclosure of wrongdoing, the existence and adequacy of a corporation's compliance program, the corporation's remedial actors, and the adequacy of other remedies, including civil or regulatory enforcement actions and the prosecution of individuals responsible for the corporation's malfeasance. These considerations align with previously existing language in the U.S. Attorneys' Manual detailing factors prosecutors should consider in deciding whether prosecution of individuals should be declined because no substantial federal interest would be served by prosecution. These factors include federal law enforcement priorities, the nature and seriousness of the offense, the deterrent effect of prosecution, the person's culpability in connection with the offense, the person's criminal history, the person's willingness to cooperate in the investigation or prosecution of others, and the probable sentence or other consequences of conviction. U.S. ATTORNEYS' MANUAL, *supra* note 103, § 9-27.230.

[111] Principles of Federal Prosecution of Business Organizations, *supra* note 108, at 3. *See also* U.S. ATTORNEYS' MANUAL, *supra* note 103, § 9-28.1000.

[112] Principles of Federal Prosecution of Business Organizations, *supra* note 108, at 13.

charitable giving and humanitarian aid when contemplating a material support prosecution.

ii. Publish Internal Memoranda

The DOJ might also issue internal memoranda that would limit the range of material support prosecutions. The DOJ has used a published memorandum to U.S. Attorneys to promulgate a limited non-enforcement policy with regard to medical marijuana. In 2009, Deputy Attorney General David Ogden introduced a policy of non-enforcement of the federal marijuana ban against persons who act in "clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[113] The memorandum does not legalize medical marijuana under federal law, but it does reprioritize enforcement toward "significant traffickers" of illegal narcotics and "manufacturing and distribution networks" that are the primary intended targets of federal drug laws, rather than individuals who use marijuana for medical purposes and are in compliance with state law.[114]

In the material support context, as in the medicinal marijuana context, the memorandum could serve as a vehicle to effectively exclude a certain class of conduct that is technically illegal (that is, providing humanitarian aid via designated organizations or the medical use of marijuana) from prosecutorial enforcement, on the basis of the purpose for which individuals engage in the illegal behavior. Nevertheless, the non-enforcement policy for medical marijuana does not create any legally enforceable right that would result in dismissal of a criminal prosecution brought despite the guidance in the memorandum.[115] Because the

---

[113] Memorandum from David W. Ogden, Department of Justice, on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 2 (October 19, 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf, [hereinafter Medical Marijuana Memo].

[114] *Id.* at 1–2.

[115] The memorandum makes clear that it is "intended solely as a guide to the exercise of investigative and prosecutorial discretion." *Id.* at 2. It explains, "this memorandum does not alter in any way the Department's authority to enforce federal law . . . . This guidance regarding resource allocation does not 'legalize' marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law . . . create a legal defense to a violation of the Controlled Substances Act." *Id.* The fact that prosecutors may disregard or retreat from policies articulated in internal guidelines

memorandum articulates a nonbinding policy, the DOJ also has limited power to detect and sanction non-compliance by prosecutors.[116] The same challenges would undermine the effectiveness of any attempt to address the chilling effect described above through the use of internal guidelines on the material support statute.

In the context of immigration, U.S. Immigration and Customs Enforcement (ICE) Director John Morton issued two memoranda for all ICE employees, on the subject of prosecutorial discretion, in June 2011. The first memorandum "outlines the civil immigration enforcement priorities of U.S. Immigration and Customs Enforcement (ICE) as they relate to the apprehension, detention, and removal of aliens."[117] The memorandum instructs ICE attorneys to focus on pursuing individuals who pose a serious threat to public safety or to national security, recent illegal entrants, and fugitives; it specifically directs that, in terms of prosecutorial discretion, "particular care" should be taken when dealing with certain classes of individuals, including juveniles and the immediate family members of U.S. citizens.[118] The second memorandum sets out ICE policy on prosecutorial discretion with respect to victims of serious crimes, including domestic violence and trafficking, witnesses, and certain plaintiffs, and specifies that "[a]bsent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime."[119] The guidelines

---

may lead to even more uncertainty. *See* Erik Eckholm, *Medical Marijuana Industry is Unnerved by U.S. Crackdown*, N.Y. TIMES, Nov. 24, 2011, at A22 ("[I]n the last several weeks, federal prosecutors have raided or threatened to seize the property of scores of growers and dispensaries in California that, in some cases, are regarded by local officials as law-abiding models . . . Medical marijuana advocates accuse the Obama administration of going back on earlier promises not to go after groups abiding by local laws.").

[116] Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana,* 22 STAN. L. & POL'Y REV. 633, 639–40 (2011) (arguing that, because of these problems, the non-enforcement policy for medical marijuana does not satisfactorily accomplish either of its intended objectives, namely to reprioritize the use of the federal government's criminal justice resources, and to empower state governments to regulate medical marijuana according to local preferences).

[117] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[118] *Id.* at 4.

[119] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to Field Office Directors, Special Agents in Charge, and Chief Counsel,

do not confer legal status on groups of aliens, nor do they create a private right of action;[120] however, they do provide information for ICE employees, immigrant communities, and immigration lawyers about intended enforcement policies, much in the way that a material support policy memorandum could do.[121]

The examples described above demonstrate that internal guidelines, either in the U.S. Attorneys' Manual or in published internal memoranda, are an appropriate and feasible avenue for introducing substantive guidance on enforcement and prosecutorial discretion. These strategies can be effectively translated to the material support context in order to provide the clear statement of government policy necessary to begin to address the chilling effect on humanitarian aid. However, even if the DOJ crafted, implemented, and consistently followed such guidelines, this approach could not truly address the problem unless affected organizations both knew about the restrictions through effective publication and believed that the guidelines provided a credible protection against future prosecution.

Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

[120] *Id.*

[121] Department of Justice guidelines modeled on this type of instruction will only combat the chilling effect among humanitarian aid organizations if well publicized and reliably implemented. Without proper implementation and training in relevant offices, this type of policy implementation risks introducing more confusion. *See* Julia Preston, *Deportations Under New U.S. Policy Are Inconsistent*, N.Y. TIMES, Nov. 12, 2011, http://www.nytimes.com/2011/11/13/us/politics/president-obamas-policy-on-deportation-is-unevenly-applied.html?pagewanted=all ("A new Obama administration policy to avoid deportations of illegal immigrants who are not criminals has been applied very unevenly across the country and has led to vast confusion both in immigrant communities and among agents charged with carrying it out."); *see also* Letter from Janet Napolitano, Sec'y, Department of Homeland Security, to Senator Dick Durbin (Aug. 18, 2011), *available at* http://durbin.senate.gov/public/index.cfm/files/serve?File_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226 ("[T]he June 17, 2011 prosecutorial discretion memorandum is being implemented to ensure that resources are uniformly focused on our highest priorities. Together with the Department of Justice (DOJ), we have initiated an interagency working group to execute a case-by-case review of all individuals currently in removal proceedings to ensure that they constitute our highest priorities. The working group will also initiate a case-by-case review to ensure that new cases placed in removal proceedings similarly meet such priorities.").

4. Carry Out Targeted Community Outreach

The DOJ can also assuage the fears of charitable organizations working in humanitarian zones, and donors to such organizations, through a sustained outreach program within those communities. Again, this approach would be most effective if carried out in coordination with the issuance of an advisory memorandum or statement and the creation of new internal guidelines. For charitable organizations, this would involve expanding a dialogue with those groups. This dialogue could take many forms. One possible form would be the creation of a commission—comprised of leaders in the humanitarian aid community, the Muslim donor community, and relevant government agencies—whose mandate would be to propose mutually beneficial recommendations to the Attorney General.[122] Alternatively, the government might utilize press briefings to articulate when groups need not fear prosecution under the material support laws, as it did in response to the famine in Somalia.[123]

The DOJ, in concert with other federal agencies, has already initiated certain outreach programs to facilitate communication with relevant groups.[124] The existing programs might consider increasing efforts

---

[122] There are hundreds of commissions charged with handling such responsibilities as providing insight on juvenile delinquency prevention, election assistance, and establishing accounting standards. For a listing of these commissions, see *Boards, Commissions and Committees*, USA.GOV, http://www.usa.gov/Agencies/Federal/Boards.shtml (last updated Nov. 28, 2011).

[123] U.S. DEP'T OF STATE, *Background Briefing on Somalia and Delivery of Humanitarian Assistance*, http://www.state.gov/p/af/rls/spbr/2011/169479.htm (last visited Nov. 18, 2011).

[124] According to the DOJ website:

> Since September 11, 2001, the Civil Rights Division has engaged in an extensive program of outreach to Muslim, Sikh, Arab, and South-Asian American organizations. This outreach has included meetings of senior Civil Rights Division officials with community leaders to address backlash-related civil rights issues, providing speakers at national and regional conventions and other community events, and hosting a quarterly meeting that brings together leaders from these communities with officials from a variety of federal agencies including the Department of Homeland Security, the FBI, the Department of Transportation, and others, to address civil rights issues in a comprehensive way.

CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, *Initiative To Combat Post-9/11 Discriminatory Backlash*, *available at* http://www.justice.gov/crt/legalinfo/discrimupdate.php (last visited Mar. 20, 2013).

to reach the American Muslim community—which is a significant donor base for charitable organizations providing humanitarian aid in crisis areas.[125] The DOJ could clarify that it does not target Muslim donors for enhanced enforcement. While this may be obvious, it may help diffuse some of the misconceptions within the Muslim community. In doing so, the DOJ could also provide assurance to donors that the statute will not be used to retroactively prosecute otherwise law-abiding donors if charities are designated as foreign terrorist organizations in the future. While on its own, such an assurance may not negate the perception of bias, it would at least provide a clear statement of DOJ policy and, if combined with other proposed recommendations, could help to alleviate some concerns in the community. Finally, the DOJ could clarify its intention to adhere to the policy in the U.S. Attorneys' Manual that discourages naming unindicted co-conspirators in material support prosecutions.[126]

Conclusion

The material support statute has made it more difficult for U.S.-based aid organizations to build community capacity in impoverished areas, and to provide humanitarian aid to populations living in conflict regions and territories controlled by designated terrorist organizations. The broad scope of liability under the material support laws and the lack of guidance with respect to which conduct falls within the scope of acceptable behavior have made it difficult for organizations to provide humanitarian aid in certain regions without fear of prosecution. This has had a particularly significant impact among donors within the American Muslim community.

An amendment to the material support statute to clarify the types of aid, organizations, and donors covered is the best solution to these problems, but it is also the least politically feasible, at least in the short term.

---

[125] *See supra* Part III.

[126] The United States Attorneys' Manual generally recommends against naming unindicted co-conspirators, although use of this practice is not prohibited by law or policy. *See* U.S. ATTORNEYS' MANUAL, *supra* note 103, § 9-11.130 ("In the absence of some significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments."). This practice has been used previously in the material support context. *See* Holy Land Foundation for Relief and Development v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003); *see also* ACLU REPORT, *supra* note 38, at 54 ("Many Muslims told the ACLU that the release of the [unindicted co-conspirator] list has added to the climate of fear among American Muslims and their apprehensions that the U.S. government has a policy of imposing guilt on Muslims by association.").

We therefore recommend in the meantime that these clarifications to the statute be put in place through three other approaches, ideally in combination: first, publication of an advisory memorandum or statement; second, published internal DOJ guidelines; third, targeted community outreach. Together, these efforts could help address the material support statute's chilling effect on humanitarian aid.