THE SEARCH FOR BALANCE BETWEEN PREVENTING TERRORISM AND SAVING LIVES: HOW ONE CITATION MEANS MORE THAN JUST A CONVICTION

Michael Koehler[*]

Introduction

"If you learn from defeat, then you haven't really lost!"[1] One of the most interesting aspects of the legal field is how a "loss" in one case can be spun into a "win" in another case. Oftentimes we focus too much on an unfavorable precedent created in a case, but sometimes there are opportunities created by that precedent we can use to our advantage. For the United States Government, it must be difficult to watch a conscientious objector be granted leave from military service after providing countless hours of expensive training on that recruit. It may be less difficult, however, if that conscientious objector's arguments can help you prosecute those who choose to aid terrorists and their plots against the United States. On the opposite side of the discussion, it may be a glorious day when a conscientious objector is granted approval to discharge from military service upon realizing that their duties do not coincide with their deeply held beliefs. However, the eventual downside to such relief could be the disappointment of knowing that your arguments have helped take away the freedoms of others. The most conflicting situations occur when that defendant was simply performing duties in accordance with something akin to the Hippocratic Oath.

The above scenarios are similar to what happened for the concerned parties as a result of the combined reading of two recent cases. The first case was regarding a conscientious objector from the military and the second case concerning the United States Government's successful prosecution of a physician for attempting to materially support a foreign terrorist organization. While this note certainly does not condone the defendant's actions in the second case, for obvious reasons to be discussed, the reasoning in the court's opinion raises questions on the future of the law's application in a not-too-distant scenario. By not only raising these questions on future application, but also providing potential rationales and solutions, we can hopefully find a sense of clarity in

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[*] Business Editor, Rutgers Journal of Law and Religion: J.D. Candidate May 2019, Rutgers Law School.

[1] Zig Ziglar, *Learn from Defeat*, ZIGLAR, http://www.ziglar.com/quotes/learn-defeat/.

how the two seemingly conflicting cases apply their overlapping issues. Furthermore, we will look to understand how this overlapping of the two doctrines can be remedied for those defendants negatively affected by their broadening reach and application in criminal cases.

The easiest way to understand how these two cases have provided such contrasting results for the parties involved, despite being based within normal precedent, is to return to the legislative beginnings of the two legal areas. By understanding how each area of the law has consistently broadened through judicial decisions and legislative amendment, it is easy to see the continual broadening leading to a slight overlapping. This overlapping eventually led to a clashing, and what is now a combined application of the two unrelated legal principles. This is the analysis of how a conscientious objector's argument made its way into the criminal prosecution of a wayward American doctor.

Conscientious Objector Legislative History

The United States Government does not require military service for those who conscientiously object to "war in *any form*."[2] However, that conscientious objection must be based on "religious training and belief" in order to avoid military service obligations.[3] The key to determining who is considered a conscientious objector depends on how broad that phrase – "religious training and belief" – is interpreted. Under the statute it is noted the phrase "does not include essentially political, sociological, or philosophical views, or a merely personal moral code."[4]

Enacted as part of the Military Selective Service Act of 1948, 50 U.S.C. 3806(j) also provides for alternative service options in the case that a conscientious objector's application is approved under the statute.[5] Such alternatives include both a reclassification into a non-combatant role within the service as well as complete discharge to civilian service if the conscientious objector's beliefs require

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[2] 50 U.S.C. § 3806(j) (2018) (emphasis added). It is imperative to understand that, even as far back as the 1960s in the United States, there has been argument over whether there should be selective conscientious objection to certain wars with which the objector's beliefs do not agree. *See also* H. Patrick Sweeney, *Selective Conscientious Objection: The Practical Moral Alternative to Killing*, 1 LOY. L.A. L. REV. 113 (1968).

[3] 50 U.S.C. § 3806(j) (2018).

[4] *Id.*

[5] *Id.*

further removal from the war effort.[6] These two reclassification options have become another key part of the conscientious objector process, because the Department of Defense places the burden of choosing the more appropriate option on the applicant through clear and convincing evidence.[7]

While 50 U.S.C. 3086 only acts as Congress' notice that conscientious objectors have an option to abstain from military service, the more specific D.o.D. Instruction 1300.06 provides the guidelines for the process and more specific requirements for completing a successful conscientious objector status application from within the military.[8] While this Instruction controls in all branches of the military, due to each branch's organization under the Department of Defense, each branch also has their own policy regarding the specifics of conscientious objector applications. However, their deviations from the parent D.o.D. Instruction are largely related to procedural aspects for each particular military branch.[9]

The Supreme Court of the United States on Conscientious Objectors

The Supreme Court first chose to address the issues of conscientious objector statutes and policies in the case of *United States v. Seeger*.[10] *Seeger* was actually a comprisal of three cases brought forth against individuals who had refused to serve the military as part of the draft during the Vietnam War.[11] Each of the

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[6] *Id.*

[7] Office of the Under Sec'y of Defense for Personnel and Readiness, Dep't of Defense Instruction 1300.06 Conscientious Objectors (2017). Under this instruction governing all military branches under the Department of Defense, the burden is placed on the applicant to choose the appropriate reclassification option, but also makes no guarantees to follow that recommendation proffered by the applicant. Also, there is no mention of "no compromise" in the D.o.D. Instruction, but there is in the more specific branch regulations. This leaves open to interpretation whether the D.o.D. requires a finding for approval or refusal, or if refusal for complete discharge could be satisfied by finding for reclassification to another role.

[8] *Id.*

[9] Air Force Instruction 36-3204, Procedures for Applying as a Conscientious Objector (2017); Army Regulation 600-43, Conscientious Objection (2006); Commandant Instruction 1900.8, Conscientious Objectors and the Requirement to Bear Arms (1990); Marine Corps Order 1306.16F, Conscientious Objectors (2013); Navy Personnel Command 15560D MILPERSMAN Section 1900-020, Convenience of the Government Separation Based on Conscientious Objection (2002).

[10] U.S. v. Seeger, 380 U.S. 163, 164 (1965).

[11] *Id.* at 164.

appellants challenged the constitutionality of the "religious training and belief" phrase of 3806(j), arguing that the United States Government could not force them into military service based on the interpretation that a conscientious objector applicant must show a belief in a Supreme Being superior to all human relations.[12] This was a significant difference in interpretation between the Government and the named respondent especially, because Seeger was agnostic – and thus held no belief in any specific Supreme Being.[13] In a unanimous opinion, the Court determined that application of the conscientious objector status was applicable to the appellants because they each had a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those" who were approved as conscientious objectors under 50 U.S.C. 3806(j).[14] Thus, the Court had created the first significant rule regarding conscientious objector applicants – that their beliefs must be sincere and meaningful, and parallel those who believe in a Supreme Being. While this new rule was not an expansive interpretation of the statute itself, the rule created by the Court in interpreting 50 U.S.C. 3806(j) would prove to be more susceptible to expansion than perhaps the Court could anticipate.

Five years later, the Supreme Court considered the case of another Vietnam War draft objector in *Welsh v. United States*.[15] However, the *Welsh* case differed from *Seeger* in that he did not claim to believe his objection was grounded in any religious belief.[16] In fact, Welsh refused to compare his belief to that of any religion – and outright denied the existence of any Supreme Being.[17] In a 5-3 opinion, the Court declared that terming a person's beliefs as "religious" was a very broad scope.[18] As such, the denial of a conscientious objector's application because of his or her mere refusal to classify his or her beliefs as traditionally religious "places an undue emphasis on the registrant's interpretation of his own beliefs."[19] Therefore, conscientious objector status could be granted to all those who argued in favor of "deeply held moral, ethical, or religious beliefs" that would require abstention from war in any

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[12] *Id.* at 165-68.
[13] *Id.* at 166-67.
[14] *Id.* at 176, 185-88.
[15] Welsh v. United States, 398 U.S. 333 (1970).
[16] *Id.* at 335-38.
[17] *Id.* at 341-42.
[18] *Id.* at 342-44.
[19] *Id.* at 341.

form.[20] Considering the specific exclusion of a moral code by 50 U.S.C. 3806(j), the Court's decision in *Welsh* expanded the statute's reach beyond what may have been initially intended to apply for conscientious objector status. Additionally, the Court's decision also showed a strong favor for individuals' rights over the Government's interest in manning the military services and a strict interpretation of Congress' initial intentions.

The third Vietnam-era case considered by the Supreme Court sought to clarify the boundaries of conscientious objector status applications. The appellants in *Gillette v. United States* did not oppose war in any form, but specifically opposed the Vietnam War.[21] Furthermore, they also had various bases to their objections, including a view of Humanism – which encourages the life and respect of all humankind regardless of condition.[22] The United States Government asserted that 3806(j) should be interpreted so that conscientious objectors must object to *all wars*, not just specific conflicts the conscientious objector did not support.[23] The Court published an 8-1 opinion in which it set forth the requirement that a conscientious objector must object to *all war* in order to be relieved of military service, and that there is no particular sectarian affiliation or theological position required.[24] Interestingly, the lone dissent by Justice Douglas professed a belief that more closely resembles Selective Conscientious Objection – where a conscientious objector would have the ability to judge a war based on its facts in order to determine whether or not it was just and participation was allowed under his or her religious beliefs.[25] The

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[20] *Id.* at 344.

[21] Gillette v. United States, 401 U.S. 437, 440 (1971).

[22] *Id.* Similar viewpoints and philosophies can be found throughout conscientious objector case law, as well as various religions, and is focused on in the reasoning for selective conscientious objection. *See also* Sweeney, *supra* note 2; *see also* Asbjern Eide & Chama Mubanga-Chiboya, *Conscientious Objection to Military Service*, United Nations Report for the Sub-Commission on Prevention of Discrimination and Protection of Minorities (1985) (determined the prominence of pacifism was deemed the leading reason why many countries chose to recognize conscientious objector laws in the first place).

[23] *Id.* at 443-46.

[24] *Id.* at 454.

[25] *Id.* at 470-75. *See also* Sweeney, *supra* note 2. The article on selective conscientious objection specifically tackles Catholicism and how the religion requires a classification under just war theory in order for Catholics to be religiously permitted to participate in war. Just war theory is a determination made based upon a set of principles and the objectives of the war to decide whether the war is worth waging in the first place.

majority addressed the potentiality of this argument leading to a First Amendment claim for Gillette, however, when it found that 3806(j) conformed with the Free Exercise Clause and carried significantly weighted government interests – namely the impact selective draft refusals would have on the Vietnam War effort – it determined the argument was not persuasive enough.[26] The most important component of *Gillette* was the shift in momentum from the broadening of conscientious objector law to a more strict interpretation of Congress' intent in including the language "all wars" in 5806(j). Oddly, this strict interpretation seemed to fly directly in the face of the decisions in Seeger and Welsh, with all three cases concerning Vietnam-era objection to war.[27]

Perhaps the most famous of conscientious objector cases occurred in the same year as *Welsh*, and featured Cassius Clay – also known as Muhammad Ali – who appealed a Kentucky Review Board's decision regarding his application for conscientious objector status.[28] Clay objected to the Vietnam War and applied for conscientious objector status, but was rejected by the Initial Board in Kentucky as well as the Appeals Board during the application process.[29] He was subsequently convicted of willful refusal to submit to induction into the armed forces.[30] The Appeals Board referred Clay's conscientious objector application to the Justice Department for review.[31] The Justice Department determined that Clay did not meet the requirements of its three tests to determine conscientious objector status: (1) that he was conscientiously opposed to war in any form, (2) that his opposition was based on a religious training or belief, and (3) that his objection was sincere.[32]

When the Supreme Court reviewed the process regarding Clay's application, it took major issue that when the Appeals Board

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[26] *Id.* at 455.

[27] David Cortright, *Peace: A History of Movements and Ideas* 164-65 (Cambridge University Press) (2008) "Distinct from the millions who [avoided] the draft were the many thousands who resisted the conscription system and actively opposed the [Vietnam] war.".

[28] Clay v. United States, 403 U.S. 698, 699 (1971).

[29] *Id.* at 699-700.

[30] *Id.* at 698-99.

[31] *Id.* at 699-700.

[32] *Id.* at 700. Interestingly, all three parts of the test applied to Mr. Clay can still be found as key elements of the Department of Defense Instruction today. Specifically, the requirement that there be evidence of the sincerity of the applicant's beliefs has become the most important of those criteria for applicants to prove.

finally rejected Clay's application it did not include the reasons set forth by the Justice Department.[33] This lack of proper notice on which of the three tests Clay failed proved to be grounds for reversal of his conviction for "dodging" the Vietnam draft.[34] The Court's decision in *Clay* placed a heavy procedural burden on the United States Government to ensure the entire reasoning behind its decision to approve or reject a conscientious objector's application was provided as notice. This goes a long way toward explaining why each branch of the military ensures to keep an updated policy on the specific procedures for conscientious objector applications. It also shows how despite the Court seemingly reversing traditional momentum toward a broader interpretation of 3806(j) in Gillette, it still placed much more weight upon the individual's arguments than those of the United States Government during the Vietnam era.

Conscientious Objector Application in *Watson v. Geren*

The combination of the Vietnam conscientious objector cases provided applicants with broad precedent-supported arguments that courts would accept in order for applicants to avoid military service for which they had initially volunteered. This broad approach to 3806(j) can be observed in recent conscientious objector cases like that of *Watson v. Geren*.[35] Dr. Timothy Watson was an Army doctor who applied for conscientious objector status and discharge from the United States Army.[36] His application was denied by the Department of the Army Conscientious Objector Review Board (DACORB), but similar to the *Clay* case, the Board did not provide an adequate statement of reasons to support its denial of Dr. Watson's claim.[37] Although the Army did not contest the Court's determination that there was inadequate notice regarding DACORB's denial of Dr. Watson's claim, the Army argued the proper remedy would be a remand to the Board in order to fulfill the notice requirement to Dr. Watson.[38] While the 2nd Circuit agreed with the Army in that respect, it ultimately found that remand would be futile because of the claims Dr. Watson made in his application.[39]

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[33] *Id.* at 701, 703-05.
[34] *Clay*, 403 U.S. at 704-05.
[35] Watson v. Geren, 569 F.3d 115, 134 (2d Cir. 2009).
[36] *Id.* at 118-19.
[37] *Id.* at 118, 126-27.
[38] *Id.* at 129.
[39] *Id.* at 129-30, 134.

An analysis of Dr. Watson's claim, however, shows an even further broadening of the application of conscientious objector status by courts. Dr. Watson began his explanation of why conscientious objector status should apply by saying that "warfare is immoral" and he "cannot participate in warfare or support warfare in any form."[40] However, the most controversial aspect of Dr. Watson's claim – and that which this note focuses on – was his argument that "participating in the care of injured active service members, thereby speeding their recovery and return to active military operations, results in the functional equivalent of weaponizing human beings."[41] This was a rare assertion that the indirect results of providing healthcare and aid to soldiers would contradict the moral and ethical beliefs of the applicant. Furthermore, Dr. Watson's application focused more upon the philosophical and moral teachings of various different influential figures rather than a specific and strong faith in a Supreme Being.[42] He proceeded to quote from the Christian Bible, the Qur'an, the Rig Veda; and "commented that Eastern philosophies and writers, from Hinduism and Gandhi to Islam, Buddha, Confucius, and Lao-Tse, were also a source of great inspiration."[43] When asked what could prove the depth of his belief in his philosophical and moral stance against war and even indirect participation in the overall war effort, Dr. Watson explained that he "set aside time each day for reflection."[44]

The ten outside supporting letters that Dr. Watson submitted were equally unusual in the context of conscientious objector application cases because they did not conform to the usual required

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[40] *Id.* at 119. The verbiage used by Dr. Watson in his application to the DACORB was nearly identical to that in the Vietnam-era Supreme Court decisions, suggesting he had done more research on the issue than the 2nd Circuit seemed to acknowledge. The Government identified this preparedness and would eventually argue this use of "boilerplate" material indicated a lack of sincerity – which was denied by the 2nd Circuit.

[41] *Watson*, 569 F.3d at 119.

[42] *Id.* at 120.

[43] *Id.*

[44] *Id.* at 121. This argument seems weak when compared to the Department of Defense Instruction 1300.06 that states "When the Service evaluates applications, the member's conduct, in particular *the outward manifestation* of the beliefs asserted, will be carefully examined and given substantial weight" (emphasis added).

standards set forth previously either.[45] Dr. Watson's parents each stressed his honesty rather than stressing his longtime deep religious or philosophical beliefs against war in any form.[46] His wife, supervisors, and colleagues wrote about his changes in beliefs, and how Watson went from supporting the war effort in Afghanistan and Iraq to participating in protests against war in Washington D.C.[47]

The evidence that brought Dr. Watson's case even further toward denial was when an Army chaplain, psychiatrist, and investigating officer each questioned Dr. Watson on his beliefs prior to the DACORB interview. The chaplain indicated that he was not completely convinced of Dr. Watson's Humanism stance because of his reluctance to agree that abortion procedures would be a similar attack on the sanctity of human life as war.[48] The investigating officer similarly expressed a lack of certainty in Dr. Watson's beliefs due to the timing of when he contracted with the Army to help pay for medical school, and then when he realized he would not be willing to join active duty service toward the end of his residency – just prior to the end of his education process and when actual military obligations would begin.[49] Dr. Watson maintained a theme throughout that investigation, and during his opening statement, that the United States Government's actions during the Iraq and Afghanistan invasions greatly solidified his beliefs against war.[50]

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[45] *Id.* at 122-23. Note, again, that the required outward manifestations which the evidence must show under the Department of Defense Instruction include: "(a) Training in the home and religious organization. (b) General demeanor and pattern of conduct. (c) Participation in religious activities. (d) Ethical or moral convictions gained through training, studying, contemplation, or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated. (e) Credibility of the applicant and persons supporting the claim."

[46] *Id.* at 122. Under the aforementioned Instruction requirements, an argument can be made this highlighted quality went to the credibility of the applicant under (e). However, when we analyze the above requirements, the applicant's credibility seems as though it should be the weakest of the five.

[47] *Watson*, 569 F.3d at 123-24.

[48] *Id.* at 124-25. Although the Army chaplain would eventually to go on and provide the lone approval for Dr. Watson's application among himself, the DACORB President, and the DACORB Staff Judge Advocate. Id. at 127.

[49] *Id.* at 126. Similar to the chaplain, it seemed that Dr. Watson eventually won over the investigating officer, Colonel O'Neill, because he ultimately recommended approval of Dr. Watson's application. However, after forwarding O'Neill's report of his investigation – including notes on his interview with Dr. Watson – four individual Army officers recommended disapproval of Dr. Watson's application.

[50] *Id.* at 125-27.

Although this seemingly would indicate that a particular war or mission was spurring Dr. Watson's beliefs – similar to the Gillette case – the 2nd Circuit took Dr. Watson's word that his stance applied to all wars.[51]

The United States Army's stance echoed some of the concerns from Dr. Watson's critics. Firstly, the timing of Dr. Watson's claims was conspicuous, and had been seen before in applicants who simply had a change of mind after entering into a contractual agreement with the armed forces.[52] Secondly, the Army argued that Dr. Watson's beliefs were in regards to just the Wars in Iraq and Afghanistan – and not all wars in any form, as is required.[53] Thirdly, Watson's beliefs could not be significantly sincere because of how they resembled "a grab-bag of references to various political and religious figures."[54] Finally, the Army argued that Dr. Watson's delay of filing for conscientious objector status until more than six months after his views crystallized indicated a lack of sincerity as well.[55]

The 2nd Circuit quickly dispatched of the Army's first argument that the timing of Dr. Watson's application could serve as an indication of intent to avoid military service for reasons other than legitimate conscientious objector status. The court determined that the timing of an application could never serve as grounds for disapproval alone.[56] Similarly, the court found the Army's last argument on the timing of Dr. Watson's claim to be futile because the six-month wait was not a significant enough amount of time to warrant a question of sincerity alone.[57]

The court gave much more thought to the Army's second argument based on the objection of all wars. However, despite the tone of the many letters, the investigation, and Dr. Watson's Army supervisors and colleagues – all of which focused on the change in Dr. Watson's beliefs being around the invasions in Iraq and

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[51] *Id.* at 125. It was an interesting decision by the court to take Dr. Watson's word in this respect despite what was indicated in the review of his application. Particularly because this was a *de novo* review on appeal rather than a motion where one party's assertions should be considered the default. This is especially intriguing because the Army was contending the sincerity and credibility of Dr. Watson throughout the application process.

[52] *Id.* at 131.

[53] *Watson*, 569 F.3d at 131.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 132.

[57] *Id.* at 133.

Afghanistan – the court determined there was not enough evidence provided by the DACORB to pass the "Basis in Fact Standard"[58] of the 2nd Circuit on conscientious objector status tests.[59] The court did not believe there was enough logical or objective support for the DACORB's denial to substantially blur the picture painted by Dr. Watson as part of his claim.

To the Army's third argument, the court could not make the same leap that Dr. Watson's beliefs in such various and different sources constituted a lack in sincerity of one belief against war or armed conflict.[60] The court interpreted Dr. Watson's claims of influential figures to simply be an answer to the Army's questions throughout the process[61], and seemed to place the emphasis on the Army to ask more specific questions in order to place the applicant's assertions more closely toward a religious or specifically traditional belief system. The concerns expressed by the Army officers in Dr. Watson's chain of command – mainly those about his Hippocratic Oath contradiction, the abortion issue, and Dr. Watson's claims being well-counseled – were also tackled by the court.[62] All three were decided to be insufficient and therefore useless for the Army on future arguments, to assert as other grounds the DACORB considered in denial of Dr. Watson's application.[63]

The result of Watson further expanded the available arguments to conscientious objector applicants in the future and showed that the United States Government's interests in maintaining the personnel it had contractual agreements with was

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[58] *Id.* The Basis in Fact Standard requires "the government must show some hard, reliable, provable facts which would provide a basis for disbelieving the applicant's sincerity, or it must show something concrete in the record which substantially blurs the picture painted by the applicant."

[59] *Watson*, 569 F.3d at 130-31, 132-33.

[60] *Id.* at 133-34.

[61] *Id.*

[62] *Id.*

[63] The Watson case is a loss for the United States Government initially because of their loss of the future physician-officer Dr. Watson was eventually expected to become. However, we must also include all of the time and finances placed into the training and support of personnel as well as the loss of this expectation. The opposing argument to this narrative, though, is that with the rising cost of supporting personnel – leading to the rise of the private military contractor – the Government may have actually saved money through allowing conscientious objectors to discharge. *See* David Arthur & Daniel Frisk, *Growth in DoD's Budget From 2000 to 2014*, CONG. BUDGET OFF. (Nov. 2014), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/49764-MilitarySpending.pdf.

not significant enough when weighed against the individual's beliefs against war – even if there was little evidence to show that those beliefs expanded beyond a single or few conflicts. Specifically, the key takeaway from Dr. Watson's application is that despite the lack of demonstrated religiosity, or questionable sincerity of those beliefs, or lack of specificity of a conscientious objector applicant's belief system, very indirect support of the overall war effort – such as a medical doctor's role – can be enough to constitute the same amount of consideration as those on the front lines with the same belief system. Put more simply, Dr. Watson's arguments significantly lowered the bar for what could be considered actively supporting a war effort in the context of conscientious objector status applications.[64] The crux of this note is to show that when courts expand their rulings in one area of the law, it can also affect other areas of the law – which takes us to the world of federal prosecution for attempting to provide material support to a designated foreign terrorist organization.

Material Support Legislative Background

According to 18 U.S.C. §§ 2339A and B, it is unlawful to provide material support to designated foreign terrorist organizations.[65] Section 2339(B), similar to its counterpart Section 2339(A), provides for financial repercussions for violations – but the United States Government has chosen to focus primarily on criminal conviction and imprisonment as the modus operandi once a violation has occurred.[66] Where Section 2339A focuses more on the defendant providing support directly to designated terrorists committing specific acts of terrorism, Section 2339B is a broadened version that also extends to material support provided to *organizations* generally.[67] This is key because it allows the United States Government to reach defendants it normally wouldn't have been able to under Section 2339A, but it also allows the Government

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[64] Note that according to Protocol I of the Geneva Conventions – medics are considered non-combatants because of their special duties performed as part of the engaged military forces. *See* Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. I-17512.

[65] 18 U.S.C. §§ 2339(A) – (B) (LexisNexis 2018).

[66] Abdulrahman Alwattar, *The Material Support Statutes and their Tenuous Relationship with the Constitution*, 20 U. PA. J. CONST. L. 473, 473-88 (2017).

[67] CHARLES DOYLE, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. §2339A AND §2339B 13 (2016).

to intervene at a much earlier stage in its investigation than would normally occur.[68] This is because the defendant does not need to have provided material support directly to a known terrorist, but only needs to have provided support that eventually finds its way to the overall organization.

Under the original Antiterrorism and Effective Death Penalty Act of 1996, the Secretary of State was given authority to designate which organizations would be deemed foreign terrorist organizations.[69] This determination must be based on terrorist activity that threatens the security of United States nationals or the national defense, foreign relations or economic interests of the United States.[70]

Both Section 2339A and B have been consistently expanded by Congress since the mid-1990s, but the PATRIOT ACT added one of the most important phrases for these statutes in 2001 – following the attacks on 9/11.[71] Different than aiding and abetting, Section 2339A "does not require that the supplier also have whatever specific intent the perpetrator of the actual terrorist act must have…"[72] The phrase "expert advice or assistance" was added to the definitions under the material support statutes – further broadening what could be considered as an offense aiding terrorism.[73] Furthermore, attempts and conspiracies were to be treated as the equivalent of substantive offenses of providing material support.[74]

Today, Sections 2339A and B consider a very broad range of acts, including "training" and giving "expert advice and assistance" to others, to fall under the definition of material support.[75] These terms were still considered extremely broad, however, and so definitions were interpreted for "training" and "expert advice" under

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[68] Alwattar, *supra* note 66, at 477.

[69] U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL TITLE 15. PROVIDING MATERIAL SUPPORT TO TERRORISTS (2018) [hereinafter DOJ CRM].

[70] *Id. See also* Pub. L. 104-132, § 302, 110 Stat. 1214, 1248; *see also* Section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189 (2004). Many questions can be raised about the issues associated with the amount of power this duty of designation provides the Secretary of State. While it makes national security much more streamline and efficient, there is ample opportunity for abuse of such an expedient power to occur.

[71] *See* DOYLE, *supra* note 67, at 1-2.

[72] See DOJ CRM, *supra* note 69.

[73] 18 U.S.C. § 2339(A) – (B) (LexisNexis 2018).

[74] *See id.* § 2339A.

[75] *See id.* § 2339A(b)(1).

the statutes. Congress eventually settled on "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge", and "expert advice" to mean "advice or assistance derived from scientific, technical or other specialized knowledge."[76] These definitions are also interpreted to apply to Section 2339B although they are written into Section 2339A.[77]

Section 2339B is much less intended to apply to those about to aid in carrying out a terrorist attack, and more about the elimination of origin points of resources for the organizations responsible for terrorist attacks.[78] Practically, Section 2339B has worked as a broadening of Section 2339A to include any context where Section 2339A would be unable to apply because the aid provided could not be connected to a specific act or person affiliated directly with an imminent organized terrorist attack. The United States Government subsequently can apply Section 2339B in these instances and use a more distant affiliation to show the aid eventually made its way to a recognized terrorist organization in order to prosecute the defendant.

Section 2339B also differs from Section 2339A in that it allows for various other civil remedies under the statute – such as financial civil fines and injunctions in addition to imprisonment.[79] Furthermore, the broad reach of Section 2339B is displayed by Congress' inclusion of provisions and subsections for all different scenarios due to the modernization of terrorist organizations – such as rules for financial institutions, Department of Treasury investigations, and classified material procedures.[80] For the purposes of this note we will focus on the broad application of Section 2339B in the context of criminal prosecutions of individual defendants.

Distinct to Section 2339B from many other crime statutes is the two-part knowledge requirement placed on the United States Government when prosecuting a defendant. The Government must prove the defendant (1) knowingly provided something to the organization, and (2) the defendant knew the organization engaged

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[76] *See id*. §§ 2339A(b)(2) – (3) (LexisNexis 2018).
[77] *See* DOYLE, *supra* note 67, at 15.
[78] *Id.*
[79] 18 U.S.C. § 2339B(b) – (c) (LexisNexis 2018). The inclusion of these subsections represents the versatility the provision provides for the Government when prosecuting the various types of people, organizations, and entities that could fall under the statute's purview.
[80] *Id.*

in terrorist activity.[81] While these requirements may seem strict toward the United States Government, the lack of needing to prove intent for the defendant's actions and the inability for defendants to challenge a group's terrorist designation provide the Government with some advantages in criminal proceedings.[82]

Caselaw on Material Support

The most important case regarding Sections A and B on providing material support is Holder v. Humanitarian Law Project.[83] This is largely because it is the primary case in which the Supreme Court of the United States was forced to interpret and give a determination on the constitutionality of Sections A and B, among others, when applied to criminal defendants.[84] This is important because there had been other fringe considerations of the applicability of Sections A and B, however the Supreme Court never directly tackled the statutes' constitutionality in the previous cases.

The backdrop of *Holder* began when the then-Secretary of State, Eric Holder, designated the Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) as foreign terrorist organizations.[85] The PKK aimed to establish an independent state for the Kurdish people in Turkey.[86] The LTTE sought to establish an independent state for the Tamils in Sri Lanka.[87] While both groups engaged in a wide variety of activities to support these causes – such as political and humanitarian efforts – they also committed numerous terrorist activities against their respective governments.[88] In some of these attacks there was harm done to American citizens, and, as such, these attacks and the volatility of the organizations sparked the Department of State to label them as foreign terrorist organizations.[89]

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[81] 18 U.S.C. § 2339B(a)(1) (LexisNexis 2018).
[82] *See* DOYLE, *supra* note 67, at 4. (Indicating there have also been discussions and cases on whether the inability to fight organization designations constitutes a due process violation or legislative abuse of power issue.) These challenges to the material support provisions from various different directions – including First Amendment, Fifth Amendment, and others – certainly serves to weaken the credibility of the provisions despite their approval by the Supreme Court.
[83] Holder v. Humanitarian L. Project, 561 U.S. 1 (2010).
[84] *Id.* at 7.
[85] *Id.* at 9.
[86] *Id.* at 9-10.
[87] *Id.*
[88] *Id.*
[89] *Holder*, 561 U.S. at 9-10.

The actual lawsuit of *Holder* began thereafter when two United States citizens, along with six other domestic organizations, initiated constitutional challenges to Sections 2339A and B among other anti-terrorism statutes.[90] Their reasoning behind initiating these challenges was that they wished to provide legal counsel to PKK and LTTE in order to aid their negotiations and to promote civilized discussions between their respective state governments as well as the United Nations.[91] This process was hoped to eventually aid in each organization becoming more legitimate, less violent and volatile, and perhaps coming to compromises with recognized powers around the world so that their ultimate objectives could be achieved peacefully.[92]

The plaintiffs' case alleged that the material-support statutes violated the Fifth Amendment's Due Process Clause because the terms of the statutes were impermissibly vague.[93] The plaintiffs specifically pointed to the previously-discussed terms of "training" and "expert advice or assistance," among others, as being too vague.[94] The Ninth Circuit Court of Appeals was found to have erroneously combined this Fifth Amendment challenge with its First Amendment analysis when it found for the plaintiffs and enjoined the United States Government from enforcing the material-support statutes.[95] The Supreme Court, however, found that the actions prohibited by the material-support statutes were not vague, but that the statutes "provide[d] a person of ordinary intelligence fair notice of what is prohibited."[96] In fact, the Court pointed to the various instances that Congress amended the statutes for clarity in order to provide more narrow and understandable definitions.[97] While the Court seemed to agree that the statutes have a broad reach–stating "although the statute may not be clear in every application" –the terms within its definitions

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[90] *Id.*
[91] *Id.*
[92] *Id.* at 10. In all actuality, neither terrorist organization's cause was ultimately successful. It may be impossible to understand how large of an effect their designations as terrorist organizations by the United States played in that failure. However, it undeniably can be considered a large hurdle in the path to legitimacy in the international community considering how influential the United States Government's opinions can be on its allies.
[93] *Id.* at 14.
[94] *Id.* at 14, 18.
[95] *Holder*, 561 U.S. at 18-20.
[96] *Id.* at 20 (quoting United States v. Williams, 553 U.S. 285, 304 (2008)).
[97] *Id.* at 21.

applied to the plaintiffs' planned conduct.[98] Ironically, many of the plaintiffs' own arguments considered their proposed actions to be a sort of "training" and "expert advice or legal assistance."[99]

The plaintiffs also contended that the statutes were vague in their application, and that their political advocacy should not be covered under the material support provisions' wide-reaching umbrella.[100] The Court found this argument unconvincing, however, because the plaintiffs were not merely advocating – as they admitted themselves in other arguments – but were actually providing a service to the now-deemed foreign terrorist organizations.[101] This admitted conduct, "providing a service," was exactly what the material support statutes outlawed.[102] As such, the Court sided with the United States Government on the plaintiffs' second vagueness argument.[103]

In addition to their Fifth Amendment challenges, the plaintiffs also claimed that the statutes violated their First Amendment Rights to freedom of speech and association.[104] Their freedom of speech claim was based on the banning of their "pure[ly] political speech."[105] The Court quickly dispatched this argument, however, because plaintiffs were still allowed to say what they wished, just not "under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."[106] Interestingly, the Court also rejected the Government's argument that the only issue was the plaintiffs' conduct, and not their speech in any way.[107] The Government was attempting to have the Court apply only strict scrutiny through this

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[98] *Id.*

[99] *Id.* at 21-23. It remains unclear if there would have been any difference in the case if the plaintiffs had not made this mistake of essentially conceding to the application of the definitions.

[100] *Id.* at 23-24.

[101] *Holder*, 561 U.S. at 24-25.

[102] *Id.; see also* DOYLE, *supra* note 67. (Government does not have to show a defendant's intent was to further the illegal terrorist activity). This remains controversial when we consider how much the Government must prove the defendant has done knowingly, but completely disregards the intent behind those purposeful actions.

[103] *Holder*, 561 U.S. at 23-25.

[104] *Id.* at 25-26.

[105] *Id.* at 25.

[106] *Id.* at 25-26.

[107] *Id.* at 26-28. Congress eventually addressed both the First Amendment overbreadth challenge and the due process vagueness challenge in later amendments to the material support provisions.

strategy, but the Court identified that clearly there was a restriction on the basis of plaintiffs' speech with the terrorist listeners because the legal advice would have to be delivered through some avenue of speech – not merely through conduct.[108]

By refusing to agree with either party's argument on the level of importance placed on free speech under the statutes, the Court laid out its view of how the statutes were still valid under the First Amendment. The Court took into account the Government's argument that the statutes were enacted as part of an "urgent objective of the highest order" – protecting against future terrorist attacks by restricting United States citizens and entities from aiding foreign terrorist organizations.[109] With that goal in mind, the statutes validly restricted free speech to certain listeners because those groups designated as terrorist organizations were deemed as "so tainted by their criminal conduct *that any contribution to such an organization* facilitates that conduct."[110] Additionally, the Court pointed out that it would be extremely easy for the organizations to take advantage of the plaintiffs' misplaced trust, and to use their advice and optics while still furthering their criminal enterprises in the background.[111] Finally, Chief Justice Roberts also found it persuasive that United States citizens choosing to lend legitimacy to these organizations would jeopardize diplomatic relations with other foreign countries involved in the conflicts, and the United States Government had a duty to restrict its citizens from such actions.[112]

Interestingly, similar to other cases, plaintiffs do have an argument that the Court – by relying on the Government's arguments, statements, and information more than observable evidence – is giving too much deference to the Government's other branches in determining this aspect of the Free Speech claim. However, the Government is well within precedent to argue that the Court provided such deference to the Executive and Legislative Branches in line with prior case law.[113]

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[108] *Id.* at 26-28.
[109] *Holder*, 561 U.S. at 28.
[110] *Id.* at 29 (emphasis in original).
[111] *Id.* at 30-31.
[112] *Id.* at 32.
[113] Similar positives and negatives to this case can be observed in the reasoning from cases such as United States v. Hamdi, 542 U.S. 507 (2004) – where the Court struggled with the rights of the individual when compared to the national security interests of the country. In *Hamdi*, the Court created a middle ground between the

The Freedom of Association facet of the plaintiffs' claims was dispatched even more quickly by the Court than the Free Speech arguments. The plaintiffs argued that the statutes criminalized their mere association with the PKK and LTTE – which could have been deemed a Constitutional violation and led to the striking of the statutes.[114] However, this was one of the claims the Ninth Circuit actually rejected also – deciding the statutes did not merely penalize association, but also prohibited the providing of material support.[115] As long as the plaintiffs did not provide anything that could be considered material support to the organizations – which is what the Court determined their planned interactions would have fallen under – they were not in violation of the statutes.

Justice Stephen G. Breyer, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor, dissented from the majority in *Holder*. He agreed that the statute was not unconstitutionally vague. However, Justice Breyer disagreed that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy meant to further the designated organizations' lawful political objectives. He reasoned that the Government had not met its burden to show that the prohibition of speech by the statute served a compelling governmental interest.[116] While preventing terrorism was a noble claim, the fact that the plaintiffs' actions were lawful on their face – teaching and advocating – made the Government's arguments less compelling. Justice Breyer focused specifically on how the Government was essentially outlawing the "communication and advocacy of political ideas and lawful means of achieving political ends."[117] Perhaps most importantly, the dissent wished the case to be remanded to the lower courts in order to determine exactly what type of activities the plaintiffs wished to engage in so that the Court could determine if these acts fell within the required mens rea of the statutes.[118] One must "knowingly" aid a terrorist organization

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Habeas Corpus petitioner and the Government. Here, the Court decided too much weight was in the Government's favor.

[114] *Holder*, 561 U.S. at 39-40.

[115] *Id.*

[116] *Id.* at 42-46.

[117] *Id.* at 42.

[118] *Id.* at 60-61. The dissent comes to the question of whether the material support provisions could be determined unconstitutional under a different set of facts – perhaps looking to the Ninth Circuit's decision to see why that court found that they were unconstitutional and forced the case to the Supreme Court in the first place. This reasoning is supported in how the plaintiffs slightly altered their

to fall under the statutes, and plaintiffs could have made a case that they would not knowingly aid the organizations in terrorist acts, but merely provide political advice toward a legitimate goal.

Upon determining that none of the plaintiffs' constitutional challenges were convincing, the Court held that the statutes were valid when applied to the particular forms of support and communication that the plaintiffs had planned to engage in with the foreign terrorist organizations.[119] As such, the material support statutes were solidified even further in modern law – having defeated a lengthy (the case spanned more than twelve years) litigation battle and receiving official approval from the Supreme Court with a 6-3 decision. It is also important – and a focus of this note – to understand that the Government had convinced the Court that even seemingly benign and harmless support to foreign terrorist organizations could bolster terrorist activity beyond measure as part of an "in the background" argument. What was planned as completely innocent legal and political advice to peacefully relieve conflicted countries could now be prosecuted under the same statutes as someone who provided weapons launch codes to world-ending terrorists.

Arguably the second-most popular application of Sections 2339A and B occurred in a civil suit immediately following *Holder* – where seemingly countless victims of the 9/11 Terrorist Attacks applied the Anti-Terrorism Act (ATA) and its contained subsections permitting a private action applying the material support statutes.[120] The plaintiffs' goals were to hold a plethora of defendants liable for their alleged material support of the primary actors on 9/11.[121] This incredibly expansive multi-district litigation battle included a clash over whether the defendants had provided material support to the 9/11 hi-jackers and their deadly terrorist plot.[122]

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arguments upon reaching the Supreme Court to include concerns about potential violations of the provisions outside of their case's existing facts – essentially presenting hypotheticals to the Court.

[119] *Id.* at 40.

[120] Despite no private cause of action under 18 U.S.C. §§ 2339(A) or (B), 18 U.S.C. § 2333 permits the filing of a civil action for "those injured in their person, property, or business by an act of international terrorism." This is accomplished through the application of 18 U.S.C. § 2331 – which considers violations of the material support provisions to be "acts of international terrorism."

[121] Terrorist Attacks on September 11, 2001, 740 F. Supp. 2d 494 (S.D.N.Y. 2010).

[122] *Id.* at 504.

While the subsequent litigation broke into multiple directions because of differing issues and jurisdictions,[123] our key focus on the case is the opinion given by Judge Daniels in New York's Southern District Court. When discussing the material support provisions' application, the opinion specifically pointed out how the *Holder* case had expanded the reach of the provisions. Judge Daniels remarked how connecting the support of a terrorist organization's non-terrorist activities to its terrorist causes opens up the door that makes it foreseeable "a terrorist organization could use any material support provided to it as a broader strategy to promote terrorism."[124]

The Court would eventually go on to dismiss most of the plaintiffs' claims; however, all the claims that survived were based upon the pleadings made in connection with the material support provisions.[125] This clearly showed the expansive reach of the material support sections when compared to other claims made by the plaintiffs with similar evidence.

Combined Application in *U.S. v. Farhane*

The ever-growing reach of Conscientious Objector laws and the material support provisions finally came to overlap in the feature case of this note – *United States v. Farhane*.[126] In *Farhane*, a United States citizen and licensed physician was sentenced to 25 years in prison for violating the material support statutes after promising to act as a doctor for al Qaeda – the foreign terrorist organization responsible for the 9/11 Terrorist Attacks on the United States.[127] Dr. Rafiq Sabir, born as Rene Wright, challenged his conviction in an appeal to the Second Circuit on multiple grounds including:

> "that (1) § 2339B is unconstitutionally vague and overbroad, (2) the trial evidence was insufficient to support his conviction, (3) the prosecution's peremptory jury challenges exhibited racial bias, (4) evidentiary rulings deprived him of the right of confrontation and/or a fair trial, (5) the district court abused its discretion in addressing alleged juror

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[123] *Id.* at 504-05.
[124] *Id.* at 517.
[125] *Id.* at 524.
[126] 634 F.3d 127 (2d Cir. 2011).
[127] United States v. Farhane, 634 F.3d 127 (2d Cir. 2011).

> misconduct, and (6) the prosecution's rebuttal summation deprived him of a fair trial."[128]

Key for our purposes, is Dr. Sabir's first challenge: that the material support provision is unconstitutionally vague and overbroad.

The investigation into Dr. Sabir began in 2001, when the FBI began investigating a long-time friend of Dr. Sabir's, co-defendant Tarik Shah.[129] Shah spoke to a confidential informant of the FBI's and promised he would provide support to al Qaeda through martial arts training for *mujahideen* (*jihad* warriors) to show his commitment to the *jihad* (holy war).[130] In these communications, Shah would reference his friend – who was revealed in 2004 to be Columbia University graduate Dr. Sabir, an emergency room physician at the time.[131]

Perhaps the most important factor in the events leading up to Dr. Sabir's conviction was a 2005 swearing of allegiance by the two men to al Qaeda in the presence of the FBI confidential informant. In 2005, while visiting New York between stints working at a hospital in Saudi Arabia, Dr. Sabir and Shah pledged an oath to aid Osama bin Laden and al Qaeda.[132] While Shah was much more vocal in his support for war and violence, Dr. Sabir remarked that the terrorist organizations were "most deserving" of his help and provided contact information to the confidential informant.[133] About a week later, both men were arrested and indicted on the material support charges, with Shah pleading guilty in 2007 and Dr. Sabir being found guilty at trial a month later.[134]

As stated earlier, the content of Dr. Sabir's vagueness challenge is the focus of this note and was the primary concern of the Second Circuit's analysis as well. Dr. Sabir contended that the statutory terms "training," "personnel," and "expert assistance and advice" were too vague to provide notice prior to his actions and thus caused a violation of due process.[135] Initially, the Court fell back on the *Holder* decision – stating that "Such a general complaint is now foreclosed by *Holder*…" and "The Supreme Court there observed that these terms did not require the sort of 'untethered, subjective

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[128] *Id.* at 132.
[129] *Id.*
[130] *Id.*
[131] *Id.* at 132-33.
[132] *Id.* at 133.
[133] *Farhane*, 634 F.3d at 133.
[134] *Id.* at 133-34.
[135] *Id.* at 134-35.

judgments' that had compelled it to strike down statutes…"[136] Additionally, the Court pointed to the same reasoning from *Holder* that narrowing definitions by Congress weighed against the terminology being vague throughout the provisions.[137]

However, the Court continued to analyze Dr. Sabir's arguments anyway. After quickly dispatching his contentions on why "training" and "personnel" should be deemed vague,[138] the Court addressed two arguments that could cause great conflict when accompanied by even a slightly better set of circumstances regarding the defendant. The latter of these arguments tackled by the Court will be addressed first, which was Dr. Sabir's assertion that "expert assistance and advice" was unconstitutionally vague terminology when applied to Dr. Sabir.[139]

The Court began by agreeing with the District Court that the medical expertise of a physician falls under "scientific, technical or other specialized knowledge" as defined in Section 2339A of the material support provisions.[140] The Court went even further to compare this level of expertise with the legal counsel considered in *Holder*, and determined that it required even more specialized knowledge than the plaintiffs in that case.[141] Proceeding logically, the Court then stated that "[a]ny person of ordinary intelligence would readily recognize that such expert assistance (well outside the scope of one's regular hospital duties), with the stated object of permitting al Qaeda fighters to advance "on the path of *Jihad*" is

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[136] *Id.* at 140.

[137] *Id.* Recall that Dr. Sabir's challenge was still prior to the 2010 amendments Congress passed to address the vagueness and due process issues. This suggests there could have been a problem with the application of the material support provisions prior to that change, during the period of Dr. Sabir's contentions.

[138] *Id.* at 140-41. Dr. Sabir's challenge to the vagueness of "training" was rejected because he was considered to have conspired with Shah throughout the process of talking to al Qaeda. Because Shah was intending to train al Qaeda fighters in martial arts, Dr. Sabir was convicted because he had affiliated with Shah and aided his plans of joining the group. Dr. Sabir's vagueness challenge to the application of "personnel" was rejected even more swiftly because the court found he was attempting to provide himself to al Qaeda as an on-call doctor for the terrorist organization.

[139] *Farhane*, 634 F.3d at 141.

[140] *Id.*

[141] *Id.* Although the Court did not provide a justification for this determination, one can assume it is because of the amount of education and training required to be an effective emergency room physician when compared to the requirements for giving political and legal advice to foreign organizations.

exactly the sort of material support proscribed by § 2339B."[142] The most controversial aspect of this decision would be the string cite following that conclusion – where the Court cited to "*Watson v. Geren* (upholding conscientious objector claim of doctor who refused to serve in United States Army based on belief that treating wounded soldiers would be functional equivalent of weaponizing human beings)."[143]

Thus, the marriage of two controversial expansions of the law finally occurred in a single case. Where each expansion was controversial in its own right, the Second Circuit decided to present them together as a single forgone conclusion – determining that any doctor of ordinary intelligence would hold the belief that medically treating soldiers could be considered material support for a war effort by essentially "weaponizing human beings." Like any court's decision, there are positives and negatives with following a certain line of reasoning, but it is the critic's role to point out the potential future dilemmas that arise from an opinion. The major issue with the Court's decision to cite *Watson* is that the case itself is questionable because of how broad the conscientious objector doctrine had become when compared to its original restrictions. Even if one were to argue that modern times require a modern look at conscientious objector status, the continual broadening of the doctrine's application leads to the classic argument of "open door" questions – and just how far we allow the doctrine to go before anyone can claim any belief before escaping a contract they signed for service in the armed forces.

The other issue with the Court's determination that any doctor of ordinary intelligence would hold the same belief as the doctor in *Watson* is that the overwhelming majority of doctors likely do not hold this belief; otherwise, obtaining physicians for military service would be extremely difficult. In actuality, the contrary is true, as the Government is the side placing great restrictions on its allowance of just who can be eligible to serve in its Armed Forces.[144]

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[142] *Id.* The key being that the Court adopted the Government's framing of Dr. Sabir's services to be aiding terrorism as opposed to performing emergency medical services – which would have been directly within the scope of his regular duties as a doctor.

[143] *Id.*

[144] Eric Milzarski, *Being a Conscientious Objector Isn't What You Think it Is*, WE ARE THE MIGHTY (Oct. 15, 2018), https://www.wearethemighty.com/history/truth-about-conscientious-objector (explaining that recruits are asked prior to processing

One of the main reasons a review board is normally required for conscientious objector status approval is because of how rarely the process occurs.[145] Even if it were more commonplace, the Government would hopefully create a system that was more efficient and streamlined in order to process applications without risking further investment into personnel who will be eventually discharged because of their beliefs.

However, whereas some may see the negative issues with the inclusion of *Watson* in *Farhane*, there are some positives depending upon perspective. For one, the United States Government gains a fairly decent tradeoff. As previously discussed, while the *Watson* case makes it more likely that conscientious objectors will be able to avoid service they committed to, its inclusion in *Farhane* gives courts an idea of just how expansive the Government's reach can be under the material support provisions and still be considered constitutional. Even taken at its most basic level, the inclusion shows that when a minority subset of a profession has a specific belief on an issue, it can be understood that others within that profession could reasonably have that same beliefs. This sharing of beliefs and what can be considered "any person of ordinary intelligence's" views demonstrate how broad the material support analysis becomes upon including the *Watson* citation. While there are no concrete examples of this broadening occurring yet, one could think of scenarios in which the material support provisions are applied because a minority group within a profession considers certain acts material support.

Similar moral dilemmas can result when we consider the former of the two major arguments, we are focused on from Dr. Sabir's contentions in *Farhane*. The Court recognized that Dr. Sabir argued "that his offer of life-saving medical treatment was simply consistent with his ethical obligations as a physician and not reflective of any provision of support for a terrorist organization."[146] While this certainly was the most creative argument in favor of Dr.

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whether they are conscientious objectors, as well as the other strict requirements to enter military service).

[145] U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: NUMBER OF FORMALLY REPORTED APPLICATIONS FOR CONSCIENTIOUS OBJECTORS IS SMALL RELATIVE TO THE TOTAL SIZE OF THE ARMED FORCES (2007), https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-07-1196/html/GAOREPORTS-GAO-07-1196.htm.

[146] *Farhane*, 634 F.3d at 141.

Sabir, the Court was quick to dismiss it because of the facts and circumstances within Dr. Sabir's case. The Court stated:

> Sabir was not prosecuted for performing routine duties as a hospital emergency room physician, treating admitted persons who coincidentally happened to be al Qaeda members. Sabir was prosecuted for offering to work for al Qaeda as its on-call doctor, available to treat wounded *mujahideen* who could not be brought to a hospital precisely because they would likely have been arrested for terrorist activities.[147]

The Court made the clear distinction that Dr. Sabir had gone further than to simply honor his Hippocratic Oath – instead replacing it with an oath to bin Laden and al Qaeda.[148] The Court focused on Dr. Sabir's oath as the most important fact against his "moral obligation" argument, and stated his pledge had made him "one of the soldiers of Islam" more than an independent physician.[149] To finalize its stance, however, the Court couched its argument in the previous determination it made that Dr. Sabir's voluntary pledge to al Qaeda fulfilled an attempt at providing material support through the "personnel" restriction.[150]

The issue with the way the Court tackles this argument – seemingly by falling back on the "personnel" restriction rather than analyzing the conflicting moral obligation head-on – is that a door is opened for when the "personnel" prohibition is not violated but a physician still aids a foreign terrorist organization. One could visualize a certain set of facts where this may occur, and the court would need to justify a new way to analyze the situation in order to come to a similar conclusion – that the violation of the material support provisions was more prominent than the defendant following a professional responsibility, duty, or oath. Admittedly, it is more likely that courts will encounter a set of circumstances where the facts favor the Government – as in *Farhane* – but one cannot help but imagine an eventual abuse of application of the

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[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id. See* citation referencing *Holder*, 561 U.S. at 22 (holding that statute limiting "personnel" to persons working under terrorist organization's direction or control, rather than independently, adequately avoided vagueness).

material support provisions should their broadening power continue unchecked.

Combined Application and Arising Issues

There are various complex issues resulting from the inclusion of *Watson* in the *Farhane* court's reasoning. In fact, it's easy to think of clear examples where things could go awry in the application of the precedent set by the Second Circuit. Firstly, there is the issue we pointed out that minority views within a profession could be used to justify the argument that ordinary people in the same position should act in a prescribed fashion. In *Farhane*, it was that all doctors would be on notice regarding the supplying of material support because Dr. Sabir personally felt he was aiding in a war effort by treating soldier-patients. For a first hypothetical, imagine there is a group of engineers who traveled abroad as part of a mission to provide access to water for a village of people suffering from an earthquake.[151] Initially the mission seems innocuous, but the engineers come to realize that part of the village makes up a sect of a designated terrorist organization. If a minority of that group considered building a bridge to water access immoral due to aiding the terrorists – as would undoubtedly be a factor in their decision – would the court really be able to consider those who built the bridge criminals under the statute? According to the letter of the law, the engineers would have fulfilled the elements required for the Government to hold them accountable for their actions.[152] These are actions that, outside of the law, would likely be commended for their life-saving effort to prevent thirst, disease, and death. It is close moral dilemmas like this, with facts more sympathetic than those in *Farhane*, that present the greatest obstacle for courts and how they have applied both the conscientious objector and material support doctrines.

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[151] A similar, but much less dire situation occurred in Afghanistan in 2010 where a village was finally connected to the modern world through work funded by the World Bank and other international relief organizations. *Bridge Connects Rural Community to the World*, THE WORLD BANK (Feb. 2, 2016), http://www.worldbank.org/en/news/feature/2016/02/02/bridge-connects-rural-community-to-the-world.

[152] The material support provision under Section 2339B would apply due to the Extraterritorial Jurisdiction subsection contained in the statute. This allows the Government to pursue defendants for violations of the federal law committed internationally. *See* 18 U.S.C. §§ 2339B(d)(1), (d)(2).

A much more specific hypothetical can provide us with an idea of just how large of a gray area the *Watson* and *Farhane* decisions have created within the overlap of conscientious objector and material support doctrines. Suppose a physician is on a mission outside of a warzone providing international medical relief – something countless doctors do every day in our society.[153] The physician is presented with her next patient: an infamous man who she recognizes as a member of a designated foreign terrorist organization. Being thousands of miles away, the physician treats the man because of the Hippocratic Oath she took to aid those in need.[154] Under the material support statutes, she has fulfilled the knowledge requirements, and by medically aiding the man she has knowingly provided material support to a terrorist organization. The doctor has now done similar acts to what Dr. Sabir intended to do, but with the simple difference that this doctor did not pledge allegiance to the terrorist organization. Does the court find that this doctor has provided material support and allow the Government to prosecute? Or does the court side with the doctor and her moral obligation couched in a long tradition of the Hippocratic Oath?

Although it is much easier to identify the gray areas through hypotheticals specifically tailored for conflicts to arise, we can find real-world examples where these doctrines cause issues. For material support especially, we know that there have been – according the American Civil Liberties Union – "prosecutions that have targeted, often unfairly, minorities and the vulnerable…"[155] The Arab American Institute pointed specifically to those same provisions – even more specifically, the lack of required proof of intent of a defendant's actions – as part of its concerns over potential discriminatory targeting of Arabs and Muslims in applying the

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[153] For example, the organization "Doctors Without Borders" treated over 749,000 patients internationally in 2017. DOCTORS WITHOUT BORDERS, 2017 ANNUAL REPORT (2017), https://www.doctorswithoutborders.org/sites/default/files/2018-12/MSF-USA%20Annual%20Report%202017%20web.pdf.

[154] The modern Hippocratic Oath contains: "I will apply, for the benefit of the sick, all measures [that] are required . . . ." Peter Tyson, *The Hippocratic Oath Today*, WGBH EDUC. FOUND. (Mar. 27, 2001), https://www.pbs.org/wgbh/nova/article/hippocratic-oath-today.

[155] Christopher Anders & Aaron Madrid Aksoz, *Christopher Wray Has a Troubling Record on Civil Liberties*, ACLU BLOG (Jul. 12, 2017, 11:00 AM), https://www.aclu.org/blog/national-security/christopher-wray-has-troubling-record-civil-liberties?redirect=blog/washington-markup/christopher-wray-has-troubling-record-civil-liberties [hereinafter ACLU Article].

law.[156] We even confirmed how broad their application was when they were among the only surviving claims we observed in the *In re 9/11* case.

Finally, Due Process issues arise as the application of the material support doctrine broadens with inclusions such as *Watson*'s. The expansion of the conscientious objector doctrine into material support application raises questions on how criminal procedure will tackle such an expansive statute backed by Supreme Court approval. The Fundamental Fairness analysis of Due Process is known to be subject to problems like judicial bias, vagueness, and inconsistency. Sometimes, a case is boiled down to what a judge will consider enough to shock the conscience. This is a dangerous situation when we consider the repercussions at stake in these criminal prosecutions, where the defendant can be subject to up to life imprisonment in some instances.[157] Not only is the defendant facing extreme ramifications for his or her actions –where there might have been noble intent to begin with –but there is also the issue of an ever-expanding "catchall" statute that courts seem content to overlap with other expanding doctrines – a harsh reality that negative results will likely follow.

Proposed Solutions

It's not enough to merely point out the issues that arise from the reasoning that has led to today's broad versions of the conscientious objector and material support doctrines – we must look to provide solutions to the questions we raise. Already under Section 2339B of the material support provisions is one potential solution to the prosecution of those who would fall into the gray areas of the law – such as those in the hypotheticals discussed.[158] The issue with this subsection of 2339B, however, is that it requires approval from the Secretary of State and the Attorney General of the United States *prior* to acting in any way that would violate the statutes.[159] Therefore, in circumstances such as the physician

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[156] Ryan Suto, *Material Support and the New FBI*, AM. ARAB INST. BLOG (Jul. 20, 2017), http://www.aaiusa.org/material_support_and_the_new_fbi [hereinafter AAI Article].

[157] *See* DOYLE, *supra* note 67.

[158] *See* 18 U.S.C. § 2339A(b)(i).

[159] *Id.* The use of the past-tense phrase "was approved" indicates that the approval must be prior to the act in question under the statute, although there is no case law found on challenges as to whether approval could be given retroactively.

hypothetical provided above, this subsection would be inapplicable and the defendant could be prosecuted per usual.

In reality, this potential result has been contemplated before – and has led to some eventually calling for reform of the material support provisions. In 2011, Vermont Senator Patrick Leahy called for reform due to the issues affecting humanitarian relief for the people of Somalia.[160] Because the material support provisions were so broad, and there was a chance some terrorist organizations would end up with supplies, those attempting to provide support for famine in Somalia were hesitant to act before approval from the Secretary of State.[161] This situation could easily be seen playing out in the engineer hypothetical we discussed as well, where discussions of morality and hesitation because of vagueness or approval lead to further suffering for those in vulnerable positions. While it is understandable why Congress elected to put the subsection for approval into the material support provisions, it is time to recognize that the broadening and vagueness of the statutes have rendered the safe harbor inadequate for all situations.

Due to the existing subsection being inadequate, statutory reform should occur that covers the specific instances and gray areas discussed throughout this note.[162] When the necessity of third parties is immediate, and there are life and death situations, prior approval from only two key figures in the Government seems unrealistic – even in today's era of immediate contact through modern technology. An obvious recommendation is that Congress should work to include something within the material support statutes that authorizes a retroactive application for approval from the Secretary of State and the Attorney General. If it is intended that these two positions be the only ones with say on these national security issues, then this solution would allow that power to remain intact while also giving defendants an opportunity to argue necessity before having their liberties taken during the criminal proceedings.

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[160] Letter from Patrick Leahy, Senator of Vermont, to Attorney General Eric Holder and Secretary of State Hillary Rodham Clinton (Aug. 3, 2011), https://www.leahy.senate.gov/press/comment-of-senator-patrick-leahy-on-application-of-material-support-laws-to-humanitarian-relief-in-somalia.

[161] *Id.*

[162] Multiple articles call for reform of both CO and MS doctrines but for this note it's likely easier to deal with the material support doctrine's reach because of how it is still relatively new and has less support in longstanding judicial precedent, despite the decision in *Holder*.

Additionally, another option is to specifically carve out exceptions addressing these gray areas created by the *Watson* and *Farhane* combined precedents. However, this would undoubtedly put an enormous amount of pressure on Congress and the drafters of the exceptions – something that would take an immense amount of research. There would likely be calls for retroactive application and appeals of decisions on cases in the past, not to mention the amount of effort it would take to pass an amendment regarding something deemed somewhat controversial within the political community.[163]

Perhaps the most effective solution available is one that would require Congress the most work but would involve a sort of full-circle approach toward the issues raised in this note. When a conscientious objector wishes to exit military service, that applicant must go through a process of review by a board within the applicable service branch. That board–in *Watson* it was the DACORB–acts as the initial authority upon determining which applicants are approved or denied. Subsequently, if the applicant feels the decision should be reviewed further, there is an avenue for appeal to the civilian judicial system.[164]

The call for reform to the material support statutes could pull from these procedures observed in the conscientious objector area of law.[165] There already exists various Senate Committees that are involved with issues similar to those addressed by the Courts in *Holder* and *Farhane*.[166] By simply amending the material support provisions, the entire process could be filled with more checks and balances – hopefully resulting in a fairer approach to the application of the law.

Power to designate foreign terrorist organizations could be initially placed on the committee or subcommittee, which would have the time to review concerning terrorism events and understand how the American public views those specific actors. If that is too much power relinquished from the Secretary of State and

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[163] *See* ACLU Article, *supra* note 155; *see also* AAI Article, *supra* note 156 (referencing the appointment of a new FBI Director and his political affiliations in the context of applying the material support provisions).

[164] DEP'T OF DEFENSE, INSTRUCTION 1300.06, *supra* note 7.

[165] Noah Bialostozky, *Material Support of Peace? The On-the-Ground Consequences of U.S. and International Material Support of Terrorism Laws and the Need for Greater Legal Precision*, 36 YALE J. INT'L L. 59-73 (2011).

[166] LIBRARY OF CONGRESS, COMMS. OF THE U.S. CONGRESS, https://www.congress.gov/committees (last visited Feb. 25, 2018).

the Executive Branch, then there could even be a required approval or suggestive procedure from those positions to the committee.[167] In either instance, the issue of having too much power to designate within the hands of a single political official would be resolved. The potential downside to this type of reform – beyond the intensive initial amendment process – is that there is a risk the designation process becomes more inefficient due to having so many "hands on the wheel." However, this lack of efficiency could be the tradeoff to obtain a more just beginning to the material support prosecution process.

Even if our Government is unwilling to reform the designation process, there needs to at least be changes made to the way in which we apply the material support provisions on the "back end" of the process – as part of the criminal prosecution. Understandably, navigating the terrain of criminal procedure and invoking change without harming the individual's rights and the Government's interests is difficult to accomplish simultaneously. However, there have been calls for "greater legal precision" in how the material support provisions are applied for years now.[168] By requiring committee review, or establishing some sort of review board similar to that in the conscientious objector cases, before the Government is allowed to proceed with criminal prosecution, we could arguably create a more efficient system while still maintaining both the individual freedoms and rights of defendants as well as ensuring the Government is protecting its citizens. Arguments against requiring a type of review board approval would mainly be that it would make the process more inefficient. However, the opposite may prove to be true when we consider whether a new process may limit how often cases go to trial – ultimately saving money and time within the judicial system. Most importantly, a review board or committee designed specifically to deal with cases consistently involving the material support provisions would become experts on the types of scenarios that should lead to criminal prosecution, and those that should allow the defendants to proceed without fear of imprisonment (such as our hypothetical defendants). Of course, this exercise of expertise over the issue would not preclude defendants or the Government from appealing

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[167] This would be similar to how conscientious objector review boards have approval at different levels – such as the investigating officer, the chaplain's recommendation, and then the various officers comprising the review board itself.
[168] Bialostozky, *supra* note 165.

the board's decision to the judicial system, but it would also provide courts reviewing material support cases with an outside opinion on what should be considered criminal under the provisions. This is not to call into question the ability of courts to come to correct decisions on their own, but it would work to lighten an admittedly heavy criminal caseload for our judicial system while also providing outside support for judges' ultimate decisions in cases.

Conclusion

The *Watson* and *Farhane* courts ultimately expanded the reach of the conscientious objector and material support legal doctrines respectively. While the eventual overlapping of the two doctrines in *Farhane* has led to serious questions and gray areas within the application of the material support provisions, we can look to the procedures within conscientious objector law to develop solutions to these issues. While there may be calls for reform of the doctrines, or a more conservative approach by courts in their applications, it may be better to take a more innovative approach in creating solutions. The United States Government learned from its loss in *Watson* to make a prevailing argument in *Farhane*. It is now time to learn from conscientious objector laws, as a legal community, to create a better system under the material support provisions.