THE FOLLOWING DOCUMENT IS

A TRANSCRIPT OF

FREE SPEECH, HUMAN RIGHTS AND COUNTERTERRORISM LAWS: A Briefing on What's at Stake in the Supreme Court Case Holder v. Humanitarian Law Project

FEBRUARY 17, 2010

HOSTED BY

CHARITY & SECURITY NETWORK

and

The CONSTITUTION PROJECT

MODERATOR:	**Kay Guinane,** Director, Charity & Security Network
PANEL:	**Sharon Bradford Franklin,** Senior Counsel for The Constitution Project **Stephen Vladeck**, Professor of Law at American University's Washington College of Law **Shayana Kadidal**, Co-Counsel of The Humanitarian Law Project; Senior Managing Attorney at The Center for Constitutional Rights in New York City **Lisa Schrich**, Professor of Peace Building at Eastern Mennonite University; Director of the 3D Security Initiative

Kay Guinane: Welcome to this forum sponsored by the Charity & Security Network and The Constitution Project. My name is Kay Guinane, I'm the Program Manager of the Charity and Security Network, which is an advocacy and education campaign launched in November 2008, aimed at bringing down barriers to legitimate operations of US nonprofit organizations that are created by our national security laws. This includes disaster relief, aid, development, human rights, training in peace building and conflict resolution work.

Our method of doing that is to draw on the expertise and experience in the nonprofit sector to offer concrete and practical alternative approaches, and that's part of our current campaign work. Because the material support laws create such incredible barriers and difficulties for legitimate operations of all kinds of nonprofit organizations, we've been very concerned about The Humanitarian Law Project case. And now that the case is at the Supreme Court level, we wanted to take this opportunity and joint with our colleagues at The Constitution Project to provide information on what is a complex case that is easily misunderstood.

So thank you for coming. Thank you to our panelists for being here, and thank you also to the Connect US Fund for supporting this event.

Sharon Bradford Franklin: So I'd like to join Kay in welcoming you all here today. I'm Sharon Bradford Franklin, Senior Counsel with The Constitution Project. And I want to also thank the Charity and Security Network for co-sponsoring this even with us.

For those of you not familiar with The Constitution Project, we are a bipartisan, nonprofit organization that promotes constitutional safeguards through our Rule of Law Program and our Criminal Justice Program. And most relevant to today's panel is the work of our Liberty and Security Committee, which brings together people from across the political spectrum to work to insure that we promote both our national security and our civil liberties.

As you all know, we're here today because next Tuesday (Feb. 23, 2010) the Supreme Court will hear oral argument in the case of Holder v. Humanitarian Law Project, a constitutional challenge to current provisions of the law that prohibit material support to groups that have been designated as terrorist organizations. The basic goals of these laws are not controversial- namely establishing that it is a crime to provide various types of aid or support to terrorist organizations. However, as our panel of experts will explain in more detail, the material support statutes extend beyond punishing conduct that supports terrorist activities, and broadly prohibit various types of aid that human rights groups and peace building groups might otherwise seek to provide.

We have two goals here with today's program. First, to explain the full scope of the material support prohibitions and the legal and practical problems they create. And second, to clarify that the case before the Supreme Court is actually fairly narrow, and to outline what issues actually are and are not before the court.

The Constitution Project has been involved in these issues in two ways, with a report we released and with an amicus brief in this case, and copies of those as well as materials from Charity and Security Network are outside on the table when you came in. Our report is entitled Reforming the Material Support Laws, Constitutional Concerns Presented by Prohibitions on Materiel Support to Terrorist Organizations. In this report our bipartisan committee noted that while cutting off support of terrorist activity is an important and legitimate part of the United State counterterrorism strategy, the existing laws on material support raise serious constitutional concerns under the First, Fourth and Fifth Amendments.

Our report includes eight specific recommendations for reforms, some of which would require action by Congress, and others of which can be handled by changes at the agency level. But only two of our eight recommendations are actually relevant to the case before the court, and could be resolved or at least ameliorated by a favorable judicial decision, rather than through legislation or agency regulation.

First, we recommend that Congress should amend the definition of material support to insure that if pure speech is punished, it is only if that is intended to further illegal conduct. And second, we make a recommendation that will be partially addressed by favorably court ruling. Namely, that Congress should carefully craft an amendment to expand the currently very narrow exemption from the definition of material support for humanitarian aid, which currently covers only medicine or religious materials. And our committee has recommended that it should be expanded to include such humanitarian aid items as medical services, civilian public health services, and provided to noncombatants, food, water, clothing and shelter. And only the part of this recommendation that would allow services would actually be addressed by a court ruling in favor of the Humanitarian Law Project.

And as I mentioned, based on this report, The Constitution Project, together with The Rutherford Institute, filed an amicus brief in the Supreme Court in support of the Humanitarian Law Project. Our brief focuses on the First Amendment issues in this case and urges that the challenge provisions the Material Support Statute prohibiting service, training, expert advice or assistance, and personnel to designated groups chills free speech and association in violation of the First Amendment.

We have an expert panel here today to explain these legal questions and the potential impact of the court's ruling. But before I introduce them, more specifically, I want to let you know how we are going to proceed.

First, Professor Steve Vladeck will describe the legal issues that are and are not before the court, and will provide an overview of the material support statute. Next, Shayana Kadidal will outline the litigation involving the Humanitarian Law Project, including the types of aid the group seeks to provide and the impact of the current restrictions. He will also discuss various legislative proposals before Congress for reforming the Material Support Statute that will extend beyond the narrow questions before the court in this case. Finally, Professor Lisa Schrich will discuss the broader real world impact of the current restrictions on peace building groups and her own the ground experiences in

trying to conduct this work.

After these opening presentations, I will moderate a discussion briefly among the panelists giving them a chance to respond to one another, and then we will open the floor up to Q and A with the audience.
You do have programs before you with more detailed bios of the panelists, but I just want to give you some highlights here. Our first speaker again, will be Professor Stephen Vladeck, who is a Professor at American University's Washington College of Law, where his teaching and research focus on federal jurisdiction, national security law and constitutional law. He was part of the legal team that successfully challenged the Bush Administration's use of the military tribunals in the landmark case of Hamdan v. Rumsfeld, and has been active in authoring and co-authoring a variety of amicus briefs in various lawsuits challenging government surveillance and detention policies.

Our next speaker will be Shayana Kadidal, who is Senior Managing Attorney of The Guantanamo Global Justice Initiative at the Center for Constitutional Rights in New York City. He has also been very active in working on the Guantanamo litigation and representing detainees, and is actually co-counsel for The Humanitarian Law Project in the case before the Supreme Court and throughout the litigation before that.

Lisa Schrich is a Professor of Peace Building at Eastern Mennonite University, and also is the Director of the 3D Security Initiative, which promotes civil society perspectives on conflict prevention and peace building and US security policy making. She has worked in over 20 countries as a trainer, consultant and facilitator in peace building programs.

So with that, I will turn this over for opening remarks by each of our panelists.

Stephen Vladeck: Thank you Sharon, thanks to The Constitution Project. This is actually I think a very useful event because at least, in my experience, it's actually kind of tricky to explain what is and what is not at stake in this case. And so today, I have

the rather onerous responsibility of simplifying this case into a seven minute presentation, so we'll see how that goes.

This all begins in 1994 when Congress, for the first time, creates a criminal restriction Title 18 of the United States code that makes it a federal crime to provide material support to terrorists. And the 1994 statute defines material support as currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications, equipment, facilities, weapons, lethal substances, explosives, personnel, transportation and other physical assets except medicine or religious materials.

In 1996, in the Antiterrorism and Effective Death Penalty Act (ADEPA), Congress adds a new provision Title 18, it also makes it a crime to provide these kinds of material support to so-called foreign terrorist organizations, or what we'll probably refer to a lot on this panel as FTOs, who are designated as such by the Secretary of State. And the designation as an FTO actually has three distinct consequences.

First, the US Financial institutions possess, or control in funds in which a designated FTO or its agent has an interest are required to block all financial transactions involving these funds. Second, representatives and specified members of a designated FTO are inadmissible to this country. And third, as relevant here, it is illegal for anyone within the United States or anywhere subject to its jurisdiction to provide material support to a designated FTO.

Based on this third effect, a number of lawsuits arise where individuals and groups seek to challenge the constitutionality of the scheme, and there really are two major classes of constitutional arguments.

The first derives from a Supreme Court case which some of you may be familiar, called Scales v. United States. Scales is a 1961 decision that basically stands for the proposition that the Constitution prohibits guilt by association. That a criminal offense

that literally imposes guilt because of your association with another is unconstitutional under the First and Fifth Amendments, but second, there are all these terms in the material support statute the meaning of which is not immediately clear. And so separate from the freedom of association issue, is the more complicated and more specific question of what we call “vagueness doctrine” in constitutional law, whether these terms are so unclear that any reasonable person cannot know where the line is between conduct that's legal and conduct that is prescribed. And so these challenges arise immediately after the Antiterrorism and Effective Death Penalty Act goes into law in early 1997.

The players in this case, about whom you will hear much more from Shayana, are six organizations, a retired federal administrative law judge and a surgeon. And the two groups at issue are the Kurdistan Workers' Party, or the PKK, and the Tamil Tigers. These are entities that engage in a wide variety of, I think it's safe to say, both lawful and unlawful activities. To that end, both were designated by the Secretary of State in 1997 as FTOs. And so the plaintiff subsequently sued the challenge of the constitutionality of the statute and argued only that they seek to provide support to nonviolent and lawful activities of the PKK and The Tamil Tigers.

In the first round of litigation in 1998, the District Court ruled in part for the plaintiffs, and then joined the Attorney General's enforcement of ADEPA with respect to its prohibition on providing training and personnel to PKK and The Tamil Tigers on the ground that these prohibitions were unconstitutionally vague because they couldn't direct a criminalized conduct protected by the First Amendment. Specifically, the court noted, a plaintiff who wishes to instruct members of the designated group on how to petition the UN to give aid to their group could plausibly decide that such protected expression falls within the scope of the terms of personnel and training.

But the court otherwise rejected the plaintiff's claims, and the Ninth Circuit affirmed albeit by adding a mens rea requirement to the statute, i.e. that the government must prove that the defendant knew that the organization to which it provided material

support was an FTO, or was otherwise engaged in unlawful activities. At the time, the Supreme Court denied both The Humanitarian Law Project's petition for a writ of certiorari and the government's conditional cross-petition for a writ of certiorari, sending the case back to the lower courts.

After 9-11, Congress enacted the USA Patriot Act, one provision of which amended the material support statute to include a prohibition against providing "expert advice or assistance" to a designated FTO. The plaintiffs filed a separate action challenging this provision on constitutional grounds, and again, prevailed in the District Court which ruled that this provision, too, was unconstitutionally vague.

At least largely in response to this exact litigation, Congress, as part of the Intelligence Reform and Terrorisms Prevention Act of 2004, or IRTPA, amended ETPA, the 1996 statute in an attempt to alleviate some of the constitutional convenes that had arisen. Thus the IRTPA codified the 9th circuit mens rea requirment specified in the prohibited material support must be normally provided. Congress, in the IRTPA, also amended the definition of material support in three other ways.

First, it included an additional ban on providing "service". Second, it defined for the first time the terms training and expert advice or assistance. And third, it clarified, or at least attempted to clarify, that the prohibition against providing personnel to designated organizations was somewhat limited and tried to incorporate the Ninth Circuit’s analysis of that issue.

So to sort of crystallize, this under IRTPA, training refers to "instructing or teaching designed to impart a specific skill, as opposed to general knowledge". Expert advice or assistance encompasses "advise or assistance derived from scientific, technical or other specialized knowledge". And personnel includes "one or more individuals who work under the terrorist organizations direction or control, or who organize, manage, supervise or otherwise direct the operation of that organization". So this is what the IRTPA tries to clarify in 2004.

Okay, getting to the current lawsuit. After, and in light of, the IRTPA, the case was sent back to the District Court which ruled that a specific intent requirement vitiated the plaintiff's guilt by association claim. As to vagueness, the District Court held that the IRTPA did not cure the constitutional problems with regard to the material support statute's prohibition of provided training or service, but that it did cure the constitutional problem with the regard to the prohibition on providing personnel. With regard to the ban on providing "expert advice or assistance", the court upheld the portion of that definition that referred to scientific and technical knowledge, but struck down that they are not providing other specialized knowledge, as again, being unconstitutionally vague. And the Ninth Circuit affirmed the Distinct Court in every respect.

Based on the Ninth Circuit's decision, the government petitioned for writ of certiorari challenging each of the three holdings that had found individual aspects of the Material Support Statute to be unconstitutionally vague. The Humanitarian Law Project opposed writ of certiorari, but filed a conditional cross-petition noting that if the court took the case, it should also consider whether the lower courts were wrong in upholding the bans on providing scientific and technical knowledge and personnel to designated FTOs. And the Supreme Court granted both petitions last September.

Hence the question presented in this case. Whether 18 USC 2339B (a) (1), which prohibits the known provision of any service, training, expert advise or assistance, or personnel to a designated FTO violates the First and Fifth Amendments. To be clear, this case is not about charitable donations, despite a number of reports to the contrary. That issue has been settled by case law and it is not fair within the range of the question presented. This case is entirely about these other types of material support that are nonmonetary that go to assistance, to counseling, to other conduct where I think we could have a spirited debate about whether it is protected conduct under the First Amendment, or conduct that may lawfully be criminalized.

So with that, I'll let Shayana explain more about the details of this case in particular.

Shayana Kadidal: Well thanks, Steve for handling the hardest part of this, I suppose, which is making sense of the history of a case that's gone on for 12 years.

Stephen Vladeck: Did that make sense?

Shayana Kadidal: It did, yeah. I'll start by talking a little bit about what our clients want to do. The Humanitarian Law Project and Judge Fertig, sort of specialize in nonviolent conflict resolution, so you know, they say that they wish to sort of talk to the PKK and its membership about methods for peacefully resolving its disputes with the Turkish Government carrying out human rights monitoring in Kurdish parts of Turkey and bringing human rights complaints to various international bodies.

The Tamil groups, have a lot of sort of I supposed non speech aid that they initially propose to do. So just to give you background, the LTTE, the Liberation Tigers of Tamil Eelam, for the longest time during the course of this litigation, were basically the functioning government of the eastern sort of parts of Sri Lanka, the parts that were basically ethnically and linguistically Tamil speaking. And these were areas that were heavily affected by the civil war, as you can imagine. But also devastated by the Boxing Day Tsunami in 2004. And so as the functioning government, it was very difficult to do just for materially humanitarian aid in those areas without dealing with the LTTE in one way or the other. So our Tamil plaintiffs groups, a lot of which were consistent of sort of Tamil/Sri Lankan American physicians in the US wanted to do medical aid in those areas, they wanted to send money and medicines and those kind of things to help in both infrastructure reconstruction in war devastated areas, but also to share their medical expertise and in fact, to travel there themselves and help out on the ground. Then there were others who were lawyers and wanted to help with the peace negotiations and do the same sorts of things essentially that HLP wanted to do with the Kurds in Turkey.

Now the prohibition Steve mentioned, there are four main ones that are at issue forcing an essentially kind of sub-definitions of the category of material support or resources, training, expert advice or assistance, services and personnel. Steve mentioned some of the limitations that the government has put forward earlier on in this case, and some of which were adopted by Congress.

So for instance, with training, the government has said it has to be training in specialized skills, you can't get in trouble for teaching someone about something that's general knowledge. Expert advice, it's the same sort of thing, it has to be scientific, technical or specialized in nature relating to a profession or a set of professional skills. But two of the things have change quite a bit in 2004, we have a little bit less in the way of useful guidance as Steve mentioned with respect to personnel. For instance, putting yourself and offering your own skills to an organization. Well, the statute makes it clear that you can't do that if you're operating at the direction or control of the prescribed organization. And if makes it clear that if you're acting entirely independent of the organization that there's a safe harbor there. But what about the gulf in between those two sort of extremes? What about things that fall into that gap? Some sort of at loose collaboration essentially. That's a lot of what's at issues in the case.

Then with respect to services, well to some extend services is a category that really can kind of encompass all of the other sort of sub-definitions; training, personnel and so forth. And the government has offered a vast array, even in the briefing of the Supreme Court of sort of what is claims are limiting definitions for service. So it says well you know, it has to be for services to an organization, so it has to be for the benefit of the organization, and it ought to be at the command or at the behest of the organization, whatever the behest of means.

In the final brief that they filed yesterday, they said that additionally that it ought to be able to channel towards, or directed to, the organization rather than something that indirectly benefits the organization. So none of these things, we believe, are things that really are very helpful clarifications, and I'll talk through some hypothetical's that have

come up in the litigation and in real life as clients have come to us, different clients, for advice about these restrictions effect them.

But as Steve mentioned and Sharon mentioned, there are some exemptions, as the exemption for medicines, not for medical services though, so our Tamil plaintiffs would still be in trouble there. And for religious materials, which is kind of an interesting one. So religious materials urging terrorism can be donated freely, and this is one of several sort of content based aspects of the ban here which we think through for you First Amendment scholars out there in the audience, throw this restriction into the realm of straight scrutiny.

I'll talk a little bit about the aid community, but I think Lisa is really going to hit that the most squarely. Again, most of these material prohibitions, as Steve said, are not at issue with the Supreme Court. We're talking about things that are really sort of pure political speech. But for the Sri Lankan groups, one of the really gauling things about these prohibitions was that just basically the hypocrisy of the US in the wake of the tsunami, for instance. The US Government urged other governments and other organizations to donate freely to the relief mechanism that had been set up to pool funds for use in both Sinhala speaking and Tamil speaking areas of Sri Lanka, areas that are controlled by the government in Colombo and the LTTE. The LTTE is this mechanism to distribute those funds were set up so the LTTE at five out of nine votes on the court that controlled that the LTTE control this, and the US Government was urging people to give money to this as the same time that they were saying we can't give money to it because of the material support prohibitions. For years, US officials drove around in those areas that were controlled by the LTTE with their driver in the front seat making bribes from officials and checkpoints in LTTE areas while the state department official in the back seat looked the other way. And it's one of the ironies, I suppose, that law students made, is the fact that one of the things that some of these folks were seeking were books on federalism. That's something you can imagine could be quite relevant to try and govern a country with multiple linguistic and ethnic populations. They were eager to get this sort of stuff, again, prohibited very clearly by

the material sort of the prohibitions on giving tangible goods, as opposed to speech in the Material Support Statute.

Now Lisa will talk a lot more about how this impacts similar aid groups, but let me on to talking about some of the hypotheticals, and again, the case at the Supreme Court is purely about sort of speech, and some of the more fun hypotheticals come out of that, or at least they did in the lower courts. So as to expert advice or training, again, the government claims that this is limited by this notion of all these specialized skills that fall within this prohibition. Is advice on preventing torture claims to the UN as HLP wants to gave to the PKK, is that specialized knowledge because it's scientific? Is there some medical component to it which makes it professional? These are things I think that there's a great deal of uncertainty about, and the courts below have considered these and evaluating the vagueness challenge. One might ask, is advice about economics that some of the Tamil groups might want to give for development purposes, or wanted to give, or when the LTTE controled those areas in Sri Lanka. Is economics ever science? I supposed in the wake of 2008 we all have to asks ourselves that question.

Personnel, now the personnel provision, there's a whole separate paragraph that was added to the statute again, trying to limited it by saying it's got to be at the direction or control of the organization. An entirely independent sort of provision of yourself as personnel, that's not going to be something that gets on the wrong side of the statute. But again, there's a big gap between those two things that are mentioned in the text.

So, the Lynn Stewart case was full of examples of how difficult this is to work out and practice. The government at one point said that it would be okay for someone to serve as outside counsel to a designated group, but that serving as in-house counsel was not. And the court found that answer impermissibly vague. The government added, in talking about whether or not where the distinction is between being a quasi-employee and being sort of just a member something like that, they said well you know it when you see it, eluding to the Supreme Court's obscenity standard. But obviously, that's

not something that's practically workable for a group trying to figure out where it's criminal liability lies.

And then there is the services ban. Obviously, the problem with it is that it overlaps all the other stuff. So you might be teaching general knowledge and you might think you're on the safe side of the training and expert advice prohibitions, but what if that general knowledge is provided for the benefit of a group- does that put you on the wrong side of the line. Same thing for things that are independent advocacy that you're doing on the personnel side, you might be okay there. But if you're doing it for the benefit of the group, where does that put you?

Well the government claims that these restrictions, these provisions narrowing each of the sub-definition, they will have to be read in part, they also have to be read together, this is the first time though that the Supreme Court that the government has said that in 12 years of litigation. So you wonder how an ordinary citizen would really manage to figure all this out themselves. And I think, given that the term services was added in 2004 in a series of modifications that were really I think very specifically in response to questions that the judges has asked in oral argument in the Ninth Circuit, that really points out how Congress's intervention thus far has really one step forward and two steps backwards. And I'll talk a little bit about one general change what we would like to see made to the statute that I think would help quite a bit more.

Well if you're interested in these sort of aspects of the case I'd urge you to look at the briefs because some of it can be pretty entertaining. I think we mentioned basket weaving at one point, below, and the government claimed that might fall somewhere in the ambiguous area, just trivialized the statute, which was really fundamentally about terrorism. Well I think one counterargument to that, although it's not part of this case, that the immigration context, just those sorts of things have been known to trigger material support bar on asylum claims for people who've come to he United States and are seeking asylum from war torn areas where they have interacted with groups that are on these lists. The Patriot Act and the Real ID Act added material support laws to

getting asylum. So for instance, the Third Circuit in a case recently found that setting up tents in a religious gathering where members of a violent fringe group that belong to that religious sect were present, but that qualifies as material support and prevented someone from getting asylum. Other cases involved people who are forced to dig graves, do laundry or get a glass of water at gunpoint. There's a terrific report on all of this stuff which sounds absurd, but is real and obviously has a tremendous impact on people's right here in the US by the Georgetown Law School Immigration Clinic if anyone is more interested in that.

From my personal standpoint, I guess what's really hard is not so much this concept of can the lay people understand what this statute means, looking at all the sort of limitations that the government's put in all these little briefs that they've filed, and because that's always been a little bit of a legal fiction even though that's how the court say that you measure vagueness. But it's really how do we, as lawyers, advise clients who are walk in the door, and that's where the real problem is. Maybe I'm a little biased about saying that that's where the real problem is.

But just offering you two examples of that kind of notion of loose association and where does it fall between entirely independent advocacy and doing something at the behest of an organization.

So imagine that one of our groups decides that it wants to write (inaudible) in newspapers defending the PKK and arguing against its designation as a foreign terrorist organization, what can they do in consultation with members of the group? Can they take edits from members of the group? Can they coordinate the timing with members of the group, the publication of that? Well I think al of those things are really kind of the questions that we can't give them clear answers on, which is why those prohibitions were so troubling to the Ninth Circuit, which ruled in their favor three times. And if you think that that's stuff ought to be banned, well note that the New York Times and the Washington Post and the LA Times published op-eds that were write Hamas members

defending Hamas against its designation. I think it reported several times in the last three years.

Another hypothetical, imagine a sympathetic journalist goes to cover a conflict overseas where a group on the list is present. They want to do coverage, they go with the intention of doing coverage that is sympathetic to this group. They end up speaking to members of the group at length about political strategy, including the timing of various events that the group is sort of planning to do, to try to create of a better public image around itself. How would you advise a group like that, and the journalist who is traveling and is going to interact with obviously the entirely independent, safe harbor doesn't came into play here.

Well I think the answer is that does a lawyer really have no idea how to even advise and hopefully the Supreme Court will clarify things. Whenever you meet clients on the transactional side, the one thing they always want is clarity and we can't give that to our clients in this regard.

The government's stats on prosecutions that they included in their brief are very telling:150 people indicted on the Material Support Statute since '96, and only 75 convictions thus far. Compare that to the over 99% conviction rate in federal charges, generally. I think that tells you that despite the taint of foreign terrorist organizations hanging over these indictments, juries are very justifiably skeptical despite the fact that the elements on paper ought be pretty easy to meet. And despite that fact that you can't challenge the designation at all in a criminal prosecution.

Well let me just end by saying that what we would propose as the main thing for Congress to modify here is that, and we've asked the Supreme Court to do this as well, is to impose what we call a specific intent requirement. That in order to violate the statute, and at least for our plaintiffs, with their pure speech, which is a conduct at issue, that to hold that you can't be held liable for vicariously, for the illegal conduct of an organization that you are associated with unless you have the specific intent to further

the illegal ends of that organization. That's the principle that comes out of the communist party cases that Steve's talking about.
So with that, I'll turn it over to Lisa who's going to talk to us about the impact of this on the aid groups.

Lisa Schrich: Right. So I'm coming more from the petitioner's side of this, and in looking at these laws as a deterrent for the work that we do and I'm just back from Afghanistan so I'll start with a story there since it's most fresh in my mind.

I'm working with a Canadian group, also a network of peace building organizations working in collaboration with Afghan non-governmental organizations that do a range of aid work, from humanitarian, to community development, to conflict resolution and peace building. And the goal of the project, it's called Afghanistan Pathways to Peace, is to foster a public peace process in Afghanistan, which is more inclusive of civil society, women's groups, human rights groups, development groups, to include their issues and their analysis and their agenda items on the national peace process in Afghanistan.

Now, as an American citizen I am the only American on this team that is pulling this together, and I have different rules form the US laws, and the material support statutes are different for me than they are for the rest of the members of the team. They impact me in a variety of ways.

The project is looking to do a number of things with a wide variety of groups, some of the whom may belong to the Taliban, and the Taliban is one of these organizations that is hard to know for many people who may be in it or may be not. There's sort of shades of Taliban. So it's never clear to me when I'm sitting down with a large group of people in a room in Kabul, who in the room may be Taliban or not. So if we're researching the issues of what are the core grievances that need to be on the National Peace Process Agenda- how do you develop a negotiation agenda- We're listening to many different people. Does my listening to people who may belong to the Taliban count as material support? That's the question.

An upcoming phase of this with Peace Process Project is facilitating civil society meetings that also may include Taliban people, who belong to the Taliban to facilitate communication and join to setting of the negotiation agenda.

And finally, we may be training them in actual negotiation techniques. There are peace processes in many countries around the world, Guatemala, South Africa, Bali, and the ones that succeed have all the key stakeholders trained in principle negotiations. Harvard Project of Peace Negotiation has done much of this training, and it's a key factor in the success of the peace process.

Now Afghanistan is an interesting case study because the Taliban are not on the FTO list, the Foreign Terrorist Organization list that the State Department puts together. However, they are on the Treasury Department's list as an Specially Designated Global Terrorist Entity, or SDGT. So basically one of the issues of this law is that there are different terrorist lists and it's not exactly clear to me, in civil society, which of the lists I need to be looking at. And the more I start looking into it I can't even find anyone in the US Government that I would go to to find out if my activities are going to be perceived as legal or illegal.

So the vagueness of the lists is part of the issue and so is the vagueness of the law. My Canadian colleagues that I'm working with on Afghanistan Pathways to Peace, their counterterrorism law specifies that providing a service to a designated terrorist organization is only a crime if its purpose it to enhance the ability of any terrorist group to facilitate or carry out terrorist activity. So it's very specific that whatever service you're providing is only criminal if it's increasing the likelihood that they will use that for terrorism. In this case, it's the opposite. The peace building negotiation training is the idea of trying to end the war, trying to pull them out of the armed conflict. So in a sense, the US law is deterring American citizens from participating in training, facilitating, researching, in places like Afghanistan, Palestine, Lebanon and many areas where

there are designated groups- that is not clear if we would be engaging with them, would it be counted as a crime.

Now I want to say this US law is counter productive to US interests, because often US diplomats cannot do the kinds of things that civil society is doing. I have many colleagues in US State Department and USAID, I've talked with people in the US military, there is an interest in civil society engaging with groups like the Taliban because it's so difficult for people within the US government to do these things. So the US government is on records saying we need reconciliation of the Taliban. We just had the London conference on Afghanistan where the Karsi government is reaching out to the Taliban in reconciliation.

Now when I go to Kabul, I stay in unarmed car, I walk around the city, I meet with lots of different people. I'm not a main target because I'm not in the government, so civil society has much more flexibility and freedom to meet with many different people. So it's counterproductive actually to the US interest in ending war to make it unclear to me whether I can participate in this sort of activity to facilitate peace processes.

The solution to these problems, there's a number of different recommendations I have. One is to specify the intent in the US law, just as the Canadians have done, so that the service is only criminal if it's increasing the likelihood of their armed violence or terrorist activity.

Secondly, we need some sort of unified terrorist listing.

Sharon Bradford Franklin: Thank you all. Okay. I want to start off with a question for all three of you. All three of you have touched on in your presentations on the integral requirement or lack thereof, how under current law there's a knowledge requirement that people have to know that it's a designated group or that the group's activities include unlawful conduct, but not a specific intent requirement. And I'd like to ask if Steve, well if all the panelists would touch on if that change were to be made in the law,

so there were specific intent requirement how, as a legal matter, particular for Steve, and as a practical matter, particularly for Lisa, and Shayana you can pick or do both, that would change things.

Stephen Vladeck: Well I guess I'll take what I think would be the easier part of that question which is the legal instrument. I think legally it would actually have a very significant impact from the government's perspective on what the burden of proof would be in cases brought under the statute. I leave it to all of you to decide whether it's a positive or a negative impact. I think it would be an impact, because rather than merely demonstrating that individual defendants were on notice and were aware of the particular activities that they were supporting, you would actually have to show, if you were the government, that the purpose of this court was to further these activities. And I think it's not hard to understand why that is a very heightened showing, compared to the current status of the law and why it would make these cases significantly harder to prove, significantly harder to make. And I think in that regard it's important to point out something that Shayana mentioned that I neglected to mention in my opening, the Material Support Statute, part of why it is so important is because it really has become the anti-terror weapon of choice for federal prosecutors after September 11th. Most terrorism prosecutions in the civilian courts, since September 11th, have been brought at least partially under the Material Support Statute for a very obvious reason. It is a lot easier to prove that a terrorism suspect provided material support to a FTO, to one of these designated groups, than if they there were actually involved in acts of terrorist. And so I think that adding the specific intent requirement would change that calculus quite substantially, whether for better ore for worse.

Shayana Kadidal: Right, and the fact that it's not there now still hasn't prevented the government from having great difficulty in these prosecutions. Again, because it is the weapon of choice, and on this Ashcroft model of you arrest someone when you haven't gathered all the evidence and throw a news conference, it sometimes it becomes difficult to figure out what exactly you think people have done. You see that with the

Lackawanna Six case, and folks like John Walker Lindh were charged with material support.

I want to draw everyone's attention back to those communist party cases, when you think about what was at stake, the US involved with the Cold War, sort of an existential threat much more so than I think you can realistically argue in our current global war on terror. In Scales, the case from the early '60s, the court went on at length about how Scales is a member of the communist party, how they had all these international links, how they were involved in terrorism. And yet, that wasn't enough to hold him liable without specific intent to further those goals of the larger communist party.

The DeJong, a case from the 1930's, the Supreme Court said that DeJong had gone to a communist party rally, he was a member and that he acted under the party's auspices. It also says that in speaking in encouraging others to join the party and found all those other nefarious things about the party's goals at large, but found that DeJong himself had only advocated peaceful. And so does this is not the kind of standard that has been absent from US criminal law for a long time.

And then the most recent significant case, NAACP vs. Claiborne Hardware, a case that was decided in 1982 but stretches way back to the late '60s about violent kind of enforcement, essentially, of economic and boycotts in the deep south. Again, the court said well some NAACP leaders may have threatened violence if you didn't comply with the boycott, but the court said to be held liable you had to engage in or directly insight that illegal violence. So the Supreme Court has never criminalized, in a blanket manner, a political speech this seeks to further only lawful nonviolent activity. It's not something that's unheard of. In fact, to find the opposite direction I think would really require the court to toss aside a huge number of precedents stretching back over the last century.

And I just wanted to stay something about Lisa's first question, which is it illegal to listen to the Taliban? Well it turns out that on pages 60 and 61 of the government's first brief in this case, at the Supreme Court level, filed on December 22nd, they do clarify that.

They say you can peaceably assemble with members of these groups. So it's good to know that after 12 years.

Lisa Schrich: Thank you for that clarification. Just on the practical level let me talk about the examples in Palestine, because there are many nonprofit community development organizations working in Hamas controlled areas that are not able to get funding from the US to do education training, democracy training, good governance work with civilians who have some association with Hamas, which it's very difficult to find anybody who doesn't have a connection with Hamas in some of these regions. And so again, it's counterproductive to US interests in these regions to promote democracy, to promote good governance, and education, and human rights training. So all of these things are actually not happening because of this law being unclear about whether it is criminal to provide human rights training or democracy training to people that may have the association with Hamas.

Sharon Bradford Franklin: Okay. I want to ask each of you a separate question now before we open it up with Q & A with the audience.

Starting with Steve, as our constitutional law expert and Supreme Court watcher on the panel, I'm wondering if you give us any kind of prediction on how you think this case may come out.

Stephen Vladeck: I actually am usually not the least bit shy about predicting how the Supreme Court is going to rule in cases, and I'd liked to say that I'm actually usually pretty accurate. I have no idea. And let me just try to say why I have no idea, because I think that might help actually answer the question.

The way that this case is sold, I think in the briefs by both parties, is as a case with monumental implications. The government sells this as a case that goes to their ability to treat terrorism as a crime and to use the criminal courts to prosecute individuals who might even be loosely affiliated with al-Qaeda and other terrorist groups. A government

lawyer, I think in the Ninth Circuit, once said the whole purpose of this regimen is to make these organizations radioactive, and that that is the driving prerogative, and the Ninth Circuit's decision risks that ability on the government's part.

In the other direction, you have Shayana and his colleagues I think rightfully suggesting that the implications in the other direction are just as extreme because it goes to the heart of the First Amendment and the significance of protective unpopular speech during times of crisis. Anthony Lewis has freedom for the thought that we hate, rather than not just freedom for the thought that we like.

If you take seriously both extremes, and if you agree that both are concerning implications and concerning potential affects in this case, then I think there will be an enormous amount of pressure on the court to decide this case narrowly, and to actually avoid as best as possible going all the way in one direction or the other. And the irony is that the easiest way for the court to decide it narrowly may simply be to affirm, like to actually agree with the Ninth Circuit on the three and a half provisions that are unconstitutionally vague, agree that the other provision and a half are fine, and that the specific intent, or, sorry, the knowledge requirement added by the IRTPA ameliorates the guilt by association concerns.

I'm not saying that is the right result, but I think that that would be the way that the court could resolve this case on the narrowest grounds and reach into the smallest number of huge potentially, massively significantly constitutional questions. And if they go that route, I don't think it will be 5 to 4. I think it could very well be unanimous, or at least 7 to 2, or 8 to 1. If they go beyond that though, I think it's going to be quite a mess.

Sharon Bradford Franklin: Okay. Shayana, we've emphasized here that the question for the court is only a small part of what's at issue with Material Support Statute and the problems that peace building groups and human rights groups have found. If you could just give a brief overview of if the court were to rule in your favor, of what legislative reform you might still be seeking for the statute.

Shayana Kadidal: Alright. Well as Steve said, the court could very well affirm with the Ninth Circuit's has done here, which it has done repeatedly since 2000 on the vagueness front. In which case, we would be seeking something legislatively that reaffirms that principle from the communist party cases about vicarious liability, how you can't hold someone liable without, if they don't have specific intent to further the illegal ends of the organization. Now that wont save everything, there could be pure political speech that is that sort of thought that we hate that in fact, urges someone to further the illegal ends of an organization, that problem is still out there. But for our plaintiffs, that's certainly a narrow solution which is why we are hopeful maybe the Supreme Court will actually leave that here.

Sharon Bradford Franklin: Things like expanding the exemption from material support statutes?

Shayana Kadidal: Sure. Yeah, they're are a lot of things and I think the best place to go to look for these, is or a report than Kay Guinane's group, the Charity and Security Network has put together, but certainly things like exempting specifically medical services, the kind of forms of humanitarian release that you spoke about in the introduction. Those would all be extraordinarily useful. And in the past what's happened every time the cases gotten past the Ninth Circuit panel Congress has intervened and tweaked the statute a little bit, and unfortunately, it's usually the two steps backwards, with one step forward. But this is the one time it hasn't happened which is why this case has now gotten up to the Supreme Court. But we're hopeful that Congress will take a more comprehensive approach and certainly one that's more responsive to what the A community wants.

Sharon Bradford Franklin: Okay. Lisa, and if you could just give us some examples, if the court were to rule in favor of Humanitarian Law Project of how that might free you up in a way. What kinds of things might you be able to do on the ground or the groups that you work with that you're not able to do or not sure if you're able to do right now?

Lisa Schrich: Well we can join our European and Canadian colleagues doing things that they're already doing. And there are also restrictions that they face, and sometimes their government says we know you may be doing something that's technically illegal, but they communicate directly to the NGOs, but we want you to talk with these groups. So just know that we are going to look the other way, and you do it and just don't talk about it publically. So that kind of communication, even with the government, I think is an evolution of this that needs to happen, clearer channels of NGOs sharing what we're doing, being transparent about it with key people who would want to know.

Sharon Bradford Franklin: Okay. I'd like to open this up to questions from the audience. We have a microphone in the aisle, so if people who do want ask questions, would please work their way there, especially since we are being recorded, that would be particularly helpful. And when you do ask a question if you could first of all identify yourself, and if you could also make sure to actually ask a question.

Stephen Vladeck: Or at least end your comment with a question mark.

Sharon Bradford Franklin: While we're waiting for people to get up there, I will ask one more question for the panelists since I don't she people there yet.

Shayana talked a bit I his opening about the hypothetical's than have come in before the court and the questions that are out there, and I'm wondering if any of our panelists would like to take a crack at telling us how you would draw the line as to what, under proper interpretation of the law, not the existing or what the government is arguing in its briefs, but a few words to say what the constitution should permit, should not permit under the First Amendment, what type, where you would draw the line between conduct that should be protected by the First Amendment and conduct that would actually be supported terrorism that could be prohibited, consistent with the First Amendment.

Stephen Vladeck: I think when you clear away the statutory underbrush, and what I mean by that is when you clear away the fact that is what really lurking over this case is that Congress's use of terms that are not easily defined. I think what you see is actually a really hard question lurking in the background about where the line is between protected speech and unprotected, and therefore, proscribable conduct in support of terrorist groups.

My own personal view is that the answer, whatever the answer is, it requires an lawful lot of legislative specificity. Congress can actually do a lot in this field by simply speaking more clearly. And that it is telling that despite the sort of popular and public understandings of this case, the real issue before the Supreme Court is not the sort of Scales guilt by associate debate, but it is whether average, ordinary citizens understand what it means to provide service or personnel. If Congress actually were to find ways to legislate more clearly I think it could move the line much more closer to where the government would want it to be, that certainly than where it is today. That's just my opinion though.

Shayana Kadidal: My gut sense here is that the government really, what Congress was really after might be, let me step back from that a little bit. Congress did add something to this statute, I think it's 2339B (i) that is essentially kind of First Amendment safe harbor. It says that nothing here should be construed to prohibit activities that are protected by the First Amendment. Now generally, courts don't give a whole lot of credence to that when they're vaguness problems with the rest of the statute. But standing kind of right against that, is this notion that the government promoted throughout the litigant below that Congress's intent was to really make these groups radioactive. And think about that in the context of some of the other hypotheticals. Like working with GreenPeace, an organization that engages in illegal activity inside and outside of the United States I suppose. Can you freely criminalize all sort of coordinated activity with GreenPeace. I mean, that would be consistent with making a group that engaged in illegal activity overseas radioactive. And again, I think that just comes up

right against all these communist party cases, the real, the fundamental gist of what those cases are all about.

So I'm not sure whether necessarily narrowing is the best thing. I think that's one of the interesting things that'll certainly come out of the argument, whether or not a narrower statute is, or a statute with more specificity laid out is in fact, any improvement.

Lisa Schrich: It's a bit of an aside, but it's related because of the free speech First Amendment. In Afghanistan there was some discussion in our group about what if we did the training on Afghan television, our negotiating training and what a peace process included. Because this is in a general knowledge or a specific knowledge, and again it's unclear. But if you're doing something on national television, because you want the entire public, including the Taliban, to know what a peace process, what the components of it make it successful are, and how to negotiate successfully, it's just an interesting thought. If we did it over the television is that okay instead of doing that in person?

Shayana Kadidal: Is it support too?

Lisa Schrich: Yes.

Shayana Kadidal: Or is that just something that restricts the services.

Stephen Vladeck: To add why I think it is so hard just to answer some of these questions and to sort of play prognosticator, I think it's also important to remember, this is the first terrorism related, or at least specifically terrorism based criminal case the Supreme Court is hearing since September 11th. It heard cases about terrorism as a sentencing enhancement, but that's it. And so the court, it's hard to predict where the court is going to be and whether those who are traditionally skeptical of the vague statutes, even on the more conservative side of the spectrum, might let down their

concerns in the context of terrorism. So that's part of why the atmospherics here are so, I think, tricky and difficult to project.

AUDIENCE Q & A SESSION

Sharon Bradford Franklin: Okay. I see we do now have a line at the microphone. So again, reminders to please identify yourself and please actually ask a question.

Karen Grezai: Thanks Sharon. I'm Karen Grezai (sp?), I'm at the Fried Franl law firm here in Washington DC. Shayana eluded a little bit to the material support context, the material support concept in the asylum and inadmissibility context, and I wanted to ask, given the outcome of this, the case that you're talking about is far from certain, I wondered if you could make any comments on whether the decision, regardless of what it may be squarely in the criminal context, would have an impact on the material support provisions with regard to asylum eligibility or admissibility generally.

Shayana Kadidal: I'm not completely up on the wording of the immigration provisions, but I suppose it's possible that what kind of effect, especially if the intent requirement is something the Supreme Court brings into play.

Stephen Vladeck: Actually, if I remember right, it does specifically refer to materials the court has defined by 2339A. And so I mean, part of the problem is that since 1994, as Congress has grown increasingly happy with the idea of material support, it has continually cross-referenced back to the original definition. So this shows up in several contexts, one of which is immigration law, one of which is in criminal law, and unrelated but I think not completely irrelevant context is also military conditions. And so there could be, I don't think it's easy or desirable to speculate as to what implications could be, but this will show up in all of those contexts. And that's why I think that even though the specific activities that these plaintiff groups want to conduct can be very narrowly described and tightly confined. That's why this case could have various sweeping implications if the court does decide to block them.

Shayana Kadidal: Although in the commission's context I think this case is probably unlikely to have a direct impact because the government itself said, I believe in March in its briefs, that you've got to be substantially supporting al-Qaeda or Taliban or a group associated with them, and that meant that it didn't include things like insignificant or unknowing support. So there, you're really looking at another context that the government says is crucial to an international security efforts, post 9-11, who can we detain under the authorization to use military force, but they're requiring things that are much closer to what we traditionally require in sort of conspiracy context. Again, intent to further the ends, the unlawful ends of the conspiracy agreement to further those ends. And not the sort of material support situation where if you provide one tiny bit of fundable services or $1 that's fungible, then you're liable essentially for every sort of illegal act of the group says. Courts in the military commission context have said that you've got to kind of stand at the command hierarchy. So again, that's closer to the traditional principles of conspiracy law. And we survived pretty well as a society before the Material Support Statute and enforcing those principles to go after the same sorts of targets the government thinks are the the core of what want to use this Material Support Statute against.

Sharon Bradford Franklin: Next question.

Sahar Aziz: Hi, my name is Sahar Aziz and I'm here with the Bill of Rights Defense Committee. I had a question, I wanted to flush out kind of what Stephen had said, and I have a follow up question with regard to the avoidance doctrine. So if the Supreme Court does decide to avoid the constitutional issues and rule more narrowly, what are the factors the way against just adopting the specific intent requirement? I think from a layperson's perspective it may seem to be the simplest answer, which is okay, you need a specific intent and therefore, we don't have to do with the constitutional questions. And I'm just curious to know what are the factors that are for and against it, aside from the political issues?

Stephen Vladeck: Just purely legally, and I say this not because I agree with this argument, but just to describe it. I think the government's argument would be and has been that Congress's deliberate choice in 2004 to incorporate a knowing standard, as opposed to a specified intent standard, is really the driving consideration that the instances in which the court has grafted a specific intent requirement onto criminal statutes are usually cases where the statute says nothing without the relevant mens rea. And I think the notion that Congress specifically thought about mens rea, provided that It would be one thing, that the court would instead adopt another as a save in construction is going to be hard to square for those justices who are really quite closely tied to the letter of the statute. It's not saying they can't do it, I mean in constitutional avoidance cases the court has done far more violence to statutes than that. But I think that would be the countervailing argument.

Shayana Kadidal: And from a policy standpoint obviously, the government loves having the flexibility of charging anybody without when there is something apparent on the surface of the facts that we need to meet there's certainly a level of intent. There's a case going on right now in New York City that where a kid's been in solitary confinement for two and a half years, awaiting trial on charges that he essentially loaned to a serial informer that use of his couch in London, had stored some luggage for him that contained waterproof socks and ponchos, and let him use his cell phone, and that informer who's testified in seven or nine cases or something like that, turned out to, sent those socks and ponchos onto the al-Qaeda or the Taliban or off in Afghanistan. So there the intent doesn't jump out at you from the facts, but of course the government probably wants to certainly be able to have maximum leverage to extract a plea or cooperation or find out information about other people that this kid may know. So it's again, I point to that low conviction rate which the government highlighted in its brief really, 75 out of 150 cases, it's kind of astonishing, it tells you something about it's being used.

Sharon Bradford Franklin: Another question at the microphone there?

Michelle Morris: Hi my name is Michelle Morris, I'm a student at Gallaudet University. My question is in regards to your website, there's no statuary limit currently on the executive designation to designated groups, and I'm wondering how that might be addressed in this case.

Stephen Vladeck: Shayana mentioned this before, and I think it's worth emphasizing that one of the hard questions that arises in the context of the Material Support Statute is whether a criminal defendant make collaterally attack the designation of an FTO. Whether you may challenge your indictment for providing material support by saying that the group that was an FTO actually should not have been designated as an FTO. There's case law in this, and the case law says no, that you cannot in a criminal case collaterally challenge the designation process, that in fact, the only real remedy is for the group itself to challenge the Secretary of State's determination. I think in the DC Circuit is the way the law is set up, and if you want to read more about his there's actually a very anger descent by Judge Kaczynski in a case from 2005 called the United States vs. Afshari, A-F-S-H-A-R-I, explaining why this has raises a whole host of separate problems. That's not an issue here, because to my knowledge neither the PKK nor the Tamil Tigers have sought, in this litigation, or the plaintiffs haven't sought to challenge that their validity, the validity of the designation, but there's a least case law that seems to suggest that the criminal defendants cannot raise this argument, only the organizations can.

Shayana Kadidal: Right. The organizations are extremely limited. There are three elements to designation as an FTO. The groups got to be foriegn, it's got to essentially engage in violence terrorism, and that it has to its activities have to threaten the national security of the United States, including our economic interests needs to be threatened essentially. That last one has been held to be unjusticiable, meaning that courts can't really look at what the executive has don't there. It's an area of kind of complete defference, essentially, the court of appeals have said. So you really don't really don't get much very significant if you're a group seeking to challenge your designation.

Beyond that, there's a second scheme which Lisa had mentioned, that creates SDGTs, Specially Designated Global Terrorists. This was set up by executive order after 9-11, President Bush declared a national emergency under IEEPA, the International Emergency Economic Powers Act, and designed the Taliban and a bunch of other groups I think at that point, and that list has suddenly grown, or since then has grown a great deal.

The interesting thing about the scheme that was created there is that you can be designated as a group for association with other groups. We have parallel litigation, a case we called The Humanitarian Law Project 4, which we talk about on our website, www.ccrjustice.org/hlp. If you scroll al the way down you'll see that case which has, we've gotten a negative panel decision from the Ninth Circuit and we're kind of, it's on pause while the Supreme Court decides this case. But the government there said well we've never designated a group simply because of association. Then they came back and said well we actually looked through our records and we designated one group solely because of their associations. Then they took a closer look and found a brief that said well you know, we actually designated three groups because of their associations. When we got a partial win in that case we moved our attorneys fees under the Equal Access to Justice Act, saying that the federal government really and kind of gone over the line there, and the government didn't even contest that and we got a nice $12,000 check as a result. But it just shows you that the designation principle is really very open-ended, and it's worse outside of Material Support Statute.

Lisa Schrich: And to add onto the that, that the Taliban is not on the FTO list now, but there's a lot of pressure to put them on, and again, it's unclear which list, but then also if you start working with a group like the Taliban that then in the process of working with them gets added to the list, what is the implication of that.

Sharon Bradford Franklin: I should mention also, especially if the website you mentioned was The Constitution Project website, in our report recommending reforms to the Material Support Statute, I mentioned that we have eight specific

recommendations, and six of them are beyond this case, and a number of them do deal with recommendations to reform the designation process and increase the due process protections to organizations that do seek to challenge their designation problems, such as their assets are freezed and they can't necessarily even use any of their own assets to higher a lawyer to make those challenges. So we have those types of recommendations as well, but those are not at issue in this Supreme Court case.

So I think we have another question at the microphone?

Unidentified Male Speaker: I have a question for Shayana and Lisa. Shayana, you were asked by the moderator if, or you gave your option that if the MSL, the material support law, were further defined that you're not sure that would actually help much? But then I heard Lisa say that other countries like European countries and Canada have this better scheme, that it's if you're furthering the terrorism potential, as opposed to peace efforts.

So Lisa, have you seen that further scheme, that more explicit scheme actually create less problems for them? For example, do we have these kinds of overlap and constitution problems happening in Canada and Europe as much as here? And if we don't, would that kind of attest to the fact that it would help if we were more specific?

Lisa Schrich: I've seen that it does help, because the Canadians are free to go foreword in this project, and any US funder who's been approached raises the question of this law, of material support and whether the unclarity of whether knowing whether this project is supporting a peace process. That might engage with the Taliban eventually, it's going to be illegal or not. So it's definitely a factor in how different organizations are moving ahead with it. It's funded by the Canadian government right now, this peace process project, and Canadian organizations like CARE are moving forward and supporting it. But others that have more of a US base are saying now to the funding.

Shayana Kadidal: I don't know offhand really, how widespread these kind of systems are. New laws that are parallel to the Material Support Statute, but my impression is putting Canada to one side, it's a common law country, country that generally, most of the civil law countries in Europe don't have systems like this and in fact, the conspiracy law is somewhat unknown to the systems as well. And the US is pushing pretty hard to get other developed countries to adopt these kinds of schemes. And in fact, they're also pushing through the mechanisms at the UN. Again, I'm sure know a ton more detail about this, but the 1267 list through the UN is something that the US pushed for after 9-11. So I think, by and large these schemes don't exist elsewhere, so that's another thing that's really at stake here. Again, this case is about speech, but I supposed the way it comes out will effect the perception of whether or not these are workable systems and whether it's a good idea for European countries to kind of accede to the US's pressure. And of course, the list is astronomically long, I mean it's interesting for folks probably to go to the OFAC website, the Office of Foreign Assets Control at Treasury, which maintains a unified list, a searchable PDF that runs to 414 pages I think the last I checked, that's triple spaced, 8 or 9 point text, listing all the groups that are on the various lists.

Stephen Vladeck: I will say this about Europe, I think that one of the things that's important, if you can buy this, there's actually a lot more financial regulation within our, most of our European friends. And so there's a lot more direct targeted of finances and of interaction of financial support for terrorist organizations.

So I think Shayana is right that especially civil law jurisdictions have been more sensitive to compete in this kind of guilt, at least directly, but insofar as the government regulation, there actually is a very, very rigorous regimen of interfering with government prevention with the EU and the terrorist groups throughout the EU

Unidentified Male Speaker: Thanks.

Sharon Bradford Franklin: Okay. I see someone else at the microphone.

Jason Harris: Hi, my name is Jason Harris, I'm Congressmen Hastings Legislative Director, and I ask this question because Congressman Hastings has introduced legislation to perform containment practices for suspected terrorists or those suspected in involvement in terrorism. How might this ruling that we're talking about, whichever way the Supreme Court rules, effect detainees, whether they're at Guantanamo Bay or Baghram, or if we move them to a prison facility in the United States, are these statutes that can be used or not, or what's the impact?

Stephen Vladeck: I think there are two different levels of impact, there's direct and there's indirect. Directly, I think the most important implication of this case could be in the extent to which it does or does not provide a means of prosecuting those who are currently held at Guantanamo in our Article 3 civilian courts. So as the Obama Administration continues to figure out what to do with the remainder of the cases at Guantanamo, for those who have been pushing, and I'm one of them, for more trials in Article 3, for more use of our ordinary criminal justice system, the scope of the Material Support Statute will have a lot to say about how viable an option that is. And I suspect that that will be weighing on the court's mind that affects this case.

Indirectly, insofar as with respect to continuing detention authority, I think it's very unlikely that it'll have an effect. Mostly for the reasons Shayana already articulated, but that the courts have already required a greater showing to justify detention as what we used to call enemy combatant- formerly know as, than even the government's argument for under the Material Support Statute, under their view of the statute in this case. And so I think the way it would show up is more in how it influences the decision to bring cases to the Article 3 courts and not in the continuing detention and justification for detention out of that system.

Shayana Kadidal: And it's hard to imagine, government said they're going to prosecute about 30 people at Guantanamo. You could look that the CSRT records and see that there are about that many folks who are said to have some significant tie to Al-

Qaeda, some significant tie to something like the Cole bombing, or 9-11, or you name it. It's not going to be difficult. Whatever the Supreme Court does with the specific intent requirement or anything else here to prosecute those folks under the Material Support Statute, there's a separate question in military commissions, which is material support a traditional law of war offense? Remember the MCA was passed in 2006, everyone who's going to be prosecuted under it pretty much has been put into detention way before that, so there's a retroactivity question which the government can only get around if it argues that all the offenses you've been charged under the MCA, the Military Commissions Act, are in fact traditional offenses against the common law for, that they were already offenses, the MCA just puts it down into the US code. Now that's a question that everyone's going to lose, and it doesn't really matter what the the Supreme Court does here, it's going to lose that. Because again, these are, conspiracy and material support are just unknown in concept and half the world, they have never even traditional law of war offenses. The four justices on the Supreme Court laid this out in great dealt in Hamdan, Justice Kennedy decided you didn't have to go that far. But that again, is while just about every charge sheet and military commission says material support on it with I think two exceptions. The flaws with using that is a charge in military commission are not going to be effected, they're probably fatal, although they'll probably emerge four years down the road when those cases hit the federal courts.

Stephen Vladeck: And just as a point of information, I think that the question of whether material support, as defined by the Military Commissions Act, is a viable and valid chargewas actually argued to the so-called Court of Military Commission Review I think three weeks ago in the Hamdan case. So I agree entirely that I think it's very likely that anything the Supreme Court says in this case will bear on those cases, but that's yet another issue about the general idea of material support that is percolating in the courts today.

James Sanford: Hello, my name is James Sanford, I'm a student at the Howard University School of Law, as well as a member of Charity and Security Network. I had a

question as to as far as the legal arguments that have been presented, has it been bought up the conflict, or the seeming conflict between the Material Support Statute and the principles of international law pertaining to charitable organizations, specifically, our principles that have been brought forward by the Red Crescent and the International Red Cross as far as neutrality and humanity goes, and how that may effect international organizations, charitable organizations, to really do their work with an international committee.

Shayana Kadidal: I'm sorry, I don't know a whole lot about it. I feel like when you folks may actually have some stuff, something written up on that.

Lisa Schrich: I'm not an expert on this, but yes, the nonprofit world operates on principles of moral, basically promoting basic human rights and the principles of international trade, which are in the last stage of a report. How the Work of Charities Can Counter Terror (www. http://www.charityandsecurity.org/system/files/CharityandSecurityNetwork_How_the_Work_of_Charities_Can_Counter_Terror.pdf), because actually terrorism is the opposite of what we are seeking. And so I'm not sure exactly, your question is the relevance of international law to this case. And I'm not sure about that meaning.

Stephen Vladeck: And I hank legally the reality is that it is a sort of colorable, but not particularly likely to convince argument for the current Supreme Court. That issue interprets the Material Support Statute in light of governing international law. This court is really not that wedded to the notion that international law has much to say about, especially domestic criminal statutes. And has been less willing to use the so-called "charming Betsy" stance, pursuant to which we're supposed to interpret statutes in a way that's not inconsistent with international law. When criminal statutes are at stake, it's usually because other candidates, the rule of law, the constitutional avoidance, etcetera will do similar work. I think here the problem is that because Congress has been legislating so specifically in response to this exact ligation, there's less of an argument that the law is unclear, or at the very least, that Congress's intent is unclear.

There's just a question of whether Congress can override these international law norms the way that it has attempt to.

Shayana Kadidal: I'm not sure we spent any of our 30,000 words, at least at the Supreme Court, raising the international law issue, so that could be relevant.

Sharon Bradford Franklin: Okay. I'd just like to ask each of our panelists, or give them the opportunity if they would like to make any closing remarks or particularly, on the likely impact of this case or the narrowness of likely not impact of this case, once it's actually decided.

Shayana Kadidal: Well this case is about speech, in terms of the issues that are at issue right now at the Supreme Court. Obviously, there are broader things that our plaintiffs wanted to do over the years, particularly in Sri Lanka. But it's worth reemphasizing again, the Supreme Court has never upheld such a blanket criminalization of political speech that seeks to further only lawful, non-violent activity.

Lisa Schrich: I'd summarize by saying this case is about the ability of US NGOs and civil society to participate in the stated US interests and democracy governess human rights. And that it's counterproductive to those interests.

Kay Guinane: Thank you. I'd like to close this out for today by thanking you all for coming, thanking our speakers. The oral argument in this case is set for next Tuesday, February 23rd at 10:00 a.m. in the Supreme Court. That afternoon, at 3:30 p.m., the Center for Constitutional Rights Supreme Court Institute in Georgetown Center and National Security Law will be holding a symposium on the oral argument that will include speakers from both sides of the case. I encourage you to continue to follow this issue. Obviously, we have a problem, the Supreme Court's decision may or may not help solve it, but in the end, between the courts, the Congress and us as the public, we need to reconcile our national security needs with our argument rights and free speech

principles, and that's where we think this should be heavy. So thank you for coming, and please join me in thanking our panelists and moderator.

END OF TRANSCRIPT