Free Speech in the War on Terror: Does the Military Commissions Act Violate the First Amendment?

*by Ryan J. Vogel**

On October 17, 2006, President George W. Bush signed into law the U.S. Military Commissions Act (MCA), responding to the Supreme Court's holding in *Hamdan v. Rumsfeld*.[1] In *Hamdan*, the Court found that the military commissions that the U.S. government used to try detainees from the Global War on Terrorism (GWOT)[2] violated both the Uniform Code of Military Justice and the Geneva Conventions. Shortly after the Court issued the *Hamdan* decision, the government enacted the MCA to establish "procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violating the law of war and other offenses triable by military commission."[3]

Undoubtedly, critics raise a number of constitutional challenges to the MCA, including its treatment of *habeas corpus* and other basic due process rights. This article examines whether the MCA's "material support" provisions,[4] which allow the government to try persons suspected of having provided material support to terrorists in military commissions, violate First Amendment freedom of speech and association rights. First, it evaluates evolving definitions of "material support" in the U.S. Code over the last decade. As the MCA does not provide a definition for the term, the government relies on the recently expanded and contested statutory definition from 18 U.S.C. 2339 B. Next, the article reviews the case law and considers whether the MCA's "material support" provisions criminalize "mere advocacy" or any other forms of speech which may not lead to the "incitement of imminent lawless action." It also examines whether the case law indicates that the MCA's "material support" provisions are overly vague and have an unconstitutional "chilling effect" on First Amendment rights. Finally, this article analyzes whether the MCA applies to U.S. citizens and whether the First Amendment protects resident aliens. The article concludes that using the current definition from the U.S. Code, the MCA's "material support" provisions *do* violate the First Amendment. In order to find whether an actionable cause of action exists, however, the courts must determine whether the MCA applies to U.S. citizens and whether the First Amendment protects resident aliens' rights to association and speech.

The Evolving Definition of Material Support

The MCA allows the government to bring "unlawful combatants" from the GWOT before military commissions for trial. Section 948a(1)(A) of the MCA defines an "unlawful combatant" as:

Military Commissions — which the Bush Administration has tried to revive to try 'unlawful enemy combatants' in the War on Terror — were used during the World War II era.

> (i) a person who has engaged in hostilities or who has purposefully and *materially supported* hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[5]

In determining First Amendment issues in the MCA, this article focuses on the "material support" provisions in 948a(1)(A)(i). The MCA includes in its definition of "unlawful combatants" not only those who have actively engaged in hostilities against the United States, but also those who have "materially supported" hostilities. While the MCA provides no further guidance in determining what constitutes "material support," its inclusion relies on prior statutory definitions.

18 U.S.C. 2339B prohibits material support to terrorist organizations and outlines its elements.[6] Congress first banned material support to persons or organizations that the Secretary of State deemed "terrorists" under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Aiming to eliminate funding and assistance to terrorist organizations, some with charitable or humanitarian branches within the United States, Congress enacted broad prohibitions on material support for such organizations. Congress defined "material support or resources"

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in AEDPA 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 medical or religious materials."[7] The AEDPA definition made no distinction between support for lawful and unlawful practices and included the ambiguous terms "training" and "personnel," which lead to uncertainty on the types of actions falling under these definitions.

In the wake of the September 11, 2001 terrorist attacks on New York and Washington, D.C., the USA PATRIOT Act expanded the definition of material support. Section 805 of the PATRIOT Act amended 18 U.S.C. 2339 to include the terms "expert advice or assistance" after "training."[8] Similar to court findings that "training" and "personnel" from prior definitions were overly vague and unconstitutional, courts also found that the terms "expert advice" and "assistance" were unconstitutionally vague.[9] The PATRIOT ACT is like AEDPA insofar as both statutes are vague and fail to distinguish between support for lawful and unlawful objectives.

Congress responded to these definitional ambiguity problems by enacting the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA). To bolster the material support provisions in 18 U.S.C. 2339, Congress added the following definitions to the terms "personnel," "training," and "expert advice or assistance:"

> [P]ersonnel (1) or more individuals who may be or include oneself) . . .;
> (2) the term 'training' means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and
> (3) the term 'expert advice or assistance' means advice or assistance derived from scientific, technical or other specialized knowledge.[10]

IRTPA amendments establish that a person must have knowledge that a group is a designated terrorist organization that has engaged in or currently engages in terrorism for a person to have materially supported a terrorist group.[11] Like AEDPA and the PATRIOT Act, IRTPA did not include a distinction between support for lawful and unlawful objectives. The material support provisions in 18 U.S.C. 2339B, as amended by IRTPA, are current and in force. The newly amended provisions have been challenged in the courts and the MCA will provide another opportunity for their review.

Whether "Expert Advice," "Assistance," or "Training" Constitute Protected Speech

To determine whether material support provisions in the MCA violate First Amendment free speech protections, courts must first determine whether "advice," "assistance," or "training" are protected speech.[12] The following three tests may establish whether the forms of speech prohibited in the material support definitions constitute protected speech.

The Clear and Present Danger Test

Congress expressly and controversially invoked the language of war when drafting and passing the MCA. The MCA expressly governs only military trials for "unlawful combatants" charged with war crimes.[13] The significance of invoking this languages lies within the Court's findings that the Constitution allows greater latitude to prohibit speech that creates a "clear and present danger."[14] The Court in *Schenck v. United States* held that, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[15] The Court further found that during a time of war the government can restrict speech that might hinder the war effort, even if that speech would be protected in peace time.[16] The Court's understanding of the current situation is reflected in its decisions in *Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Hamdan v. Rumsfeld*, in which it consistently affirmed government classifications of counterterrorist strategies as operating within a "war" on terrorism.[17] The Court may likely determine that the MCA operates within a time of war and that certain forms of speech could create a "clear and present danger" to national security.

"The PATRIOT ACT is like the Antiterrorism and Effective Death Penalty Act: both statutes are vague and fail to distinguish between support for lawful and unlawful objectives."

Even if some speech created a clear and present danger, the question remains whether free speech in the form of "advice," "assistance," or "training" in the MCA's definition of material support amounts to a "substantive evil" that the government may legitimately suppress. In *Schenck*, the Court found that distributing anti-war materials aimed at obstructing the draft constituted a hindrance to the national war effort, or substantive evil, and held that speech that hinders the war effort may be restricted by the government.[18] Additionally, in *Gillars v. United States* the Court found that a U.S. citizen aided and comforted the enemy by recording a Nazi radio drama while the United States was at war with Nazi Germany.[19] The Court held that because the defendant's words were spoken knowingly and purposefully as "part of a program of propaganda warfare," the First Amendment did not protect her treasonous speech, and Congress had a right to prohibit the evil.[20] Assuming courts continue to accept government arguments that the United States is engaged in a global "war" on terrorism, MCA material support provisions may pass the clear and present danger test. As distribution of anti-war

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pamphlets "hindered" war efforts, and participation in enemy propaganda campaigns "aided and comforted" the enemy, the Court may find that certain forms of aid, assistance, or training benefit the "enemy"[21] (terrorist organizations) during a time of "war" (GWOT) and constitute a substantive evil, which the First Amendment does not protect.

The Brandenburg Test

If courts continue to find that certain speech within the GWOT may pose a "clear and present danger" and that terrorists are "enemies," the government must still prove that aiding, assisting, or training "terrorist organizations" is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[22] The Court expanded the clear and present danger test through a series of decisions[23] that culminated with *Brandenburg v. Ohio*. The Court considered an Ohio law that punished members of the Ku Klux Klan for advocating lawless action.[24] Finding that the First Amendment forbids such undistinguished government intrusion on free speech, the Court held that "[s]tatutes affecting the right of . . . freedom of speech must observe the established distinctions between mere advocacy and incitement to imminent lawless action."[25] The courts will likely apply the same test to the MCA.

Whether the MCA criminalizes protected speech depends upon whether courts interpret "aid," "assistance," or "training" as the kind of speech that may incite imminent lawless action. The government may argue that any aid, assistance, or training to enemy terrorists inherently leads to lawless action, even if the imminence is protracted. In *Rice v. Paladin Enterprises, Inc.*, for example, the Court found that a publisher could not claim protection under the First Amendment for publishing a how-to guide for hired murderers.[26] The Court held that speech amounting to aiding and abetting a crime, even if the imminence is extended, is not protected speech.[27] With the MCA, the government might assert that any assistance to organizations the government designates as terrorists constitutes aiding and abetting a crime and is not protected under the First Amendment.

This reasoning fails to distinguish between *advocacy* of unlawful action and *incitement* to unlawful action.[28] It is clear that the First Amendment does not protect aiding, assisting, or training a terrorist organization in ways likely to result in imminent lawless action. Activities outside the First Amendment's protection may include education on bomb making or instruction on killing specific people or targets. It is less clear whether the First Amendment would fail to protect transparent and manifestly benign aid, assistance, or training in the form of humanitarian projects or peace negotiation skills, or forms which do not incite imminent lawless action to "terrorist" organizations with humanitarian aid branches.

The Vagueness Test

The meaning and application of the MCA's material support provision must be clear to a person of common intelligence.[29] Courts have found vague and ambiguous statutes unconstitutional for three reasons:

> (1) to protect accused persons from being punished for behavior they could not have known was illegal; (2) to avoid subjective enforcement of laws based on government officers' 'arbitrary and discriminatory enforcement'; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms.[30]

Courts have used this test to determine whether definitions for "aid," "assistance," or "training" are overly vague when applied to material support for terrorism, and whether the vagueness results in a "chilling effect" on the First Amendment.

The Court considered these questions in *Humanitarian Law Project v. Gonzales (HLP II)*. Challenging AEDPA and later the PATRIOT Act, Plaintiffs in *HLP II* sought to support *lawful* activities of two organizations the government designated as terrorists.[31] Specifically, Plaintiffs sought to support the organizations through "training in the use of humanitarian and international law," training in political and advocacy skills at the national and international levels, aid following devastating tsunamis, and "training in . . . present[ing] . . . claims to mediators and international bodies for tsunami-related aid."[32] Plaintiffs argued that these forms of aid, assistance, and training would be prohibited under 18 U.S.C. 2339B, using definitions of material support found in AEDPA and the PATRIOT Act.[33] The Court agreed with Plaintiffs that the terms "expert advice," "assistance," or "training" are impermissibly and unconstitutionally vague.[34] The Court also agreed with Plaintiffs that the 2004 IRTPA amendment[35] to 18 U.S.C. 2339B is "inadequate to cure potential vagueness issues because it does not clarify the prohibited conduct with sufficient definiteness for ordinary people."[36]

Definitions of material support in 18 U.S.C. 2339B under the vagueness test and under all three tests are weak, and fail to draw a distinction between support for lawful activities and support for activities directly related to terrorism. Relying on 18 U.S.C. 2339B to define material support, the MCA prohibits *all* forms of aid, assistance, and training — not just forms that incite imminent unlawful activity, or forms that directly assist

the commission of crimes.[37] The law treats support for overtly unlawful actions and entirely legal activities alike, leading at times to absurd results, such as prosecution of a college student running a website with links to websites featuring Muslim *sheikhs* advocating violent *jihad*.[38] This failure to distinguish between lawful and unlawful activities is done notwithstanding evidence that both chambers of Congress anticipated more narrow and specific readings of material support prohibitions while drafting the legislation.[39] Consequently, it seems that just as the Court in *HLP II* held that the material support provisions in AEDPA and the PATRIOT Act were impermissibly vague, the courts may find the MCA material support provisions to be equally vague and chilling of First Amendment freedoms.

Identifying The Scope of the MCA's Application

If courts find that the MCA violates First Amendment rights because it does not incite imminent lawless action or because it is impermissibly vague, courts must still determine to whom the statute applies, and whether the First Amendment protects accused violators of the statute.

Does the MCA Apply to U.S. Citizens?

It is uncertain whether the MCA excludes U.S. citizens from the jurisdiction of military commissions. The definition of "unlawful enemy combatant" in section 948a fails to distinguish between citizens and non-citizens.[40] Section 948b provides that MCA procedures apply to "alien unlawful enemy combatants."[41] Congressional and executive leaders assert that military commission may try persons defined as "unlawful enemy combatants" under section 948a regardless of their citizenship status.[42] Moreover, in *Hamdi*, the Court found that the government could hold U.S. citizens as "enemy combatants" in the GWOT;[43] and the MCA's "unlawful enemy combatant" definition may apply to U.S. citizens.[44] Courts must determine whether including "alien" to the term "unlawful enemy combatants" in one section of the MCA adequately protects U.S. citizens accused of materially supporting or belonging to terrorist organizations from falling within the scope of the MCA. Under such a broad interpretation of the MCA, U.S. citizens that the Executive has determined either materially supported or belonged to a terrorist organization may be subject to arrest, indefinite detention, and trial by military commissions that provide fewer legal rights and procedural safeguards than those available within civilian courts.[45]

Do Resident Aliens Have First Amendment Rights?

The issue of resident aliens' constitutional rights complicates the scope of the MCA's application. While the MCA expressly applies to all aliens, including resident aliens living legally within the United States, it is unclear whether First Amendment rights extend to non-citizens living within the country's territory.[46] Legal experts disagree on whether the Constitution applies to non-citizens, but courts have found that resident non-citizens have constitutional rights, including First Amendment rights. [47] While the Constitution reserves some rights exclusively for citizens, such as the right to vote, the Bill of Rights does not distinguish between citizens and non-citizens when referring to basic civil liberties, including First Amendment free speech rights.[48] Instead, the Bill of Rights restricts specific governmental actions. While the scope of constitutional rights available to resident aliens is ambiguous, most experts agree that the Constitution provides non-citizens with First Amendment rights, such as speech and association. Similar to the scenario where the MCA applies to U.S. citizens, if courts find that First Amendment rights do not protect resident aliens, the MCA would ostensibly authorize the Executive to arrest, indefinitely detain, and try by military commission any non-citizen living within the United States suspected of having provided aid, assistance, or training to an organization the Executive deemed as "terrorist."

Recommendations for Upholding Constitutional Liberties

Courts will soon consider whether the MCA violates constitutional provisions, including the First Amendment. The MCA defines "unlawful enemy combatants" as those who have materially supported terrorist organizations, and it relies on 18 U.S.C 2339B to define material support. The courts should find that the MCA's material support provisions are vague and violate the First Amendment. Similarly, the MCA's material support provisions do not distinguish between aid, assistance, and training for lawful and unlawful activities. Courts should therefore find that lawful forms of aid, assistance, and training do not incite imminent lawless action. Courts must determine whether the MCA's definition of "unlawful enemy combatant" applies to U.S. citizens, since the statute is not clear. Finally, courts must reaffirm whether the First Amendment protects resident aliens' rights to association and speech within the context of the GWOT.

To avoid such First Amendment challenges to the MCA, the U.S. government should make clear distinctions between *lawful* activities not related to terrorist acts and *unlawful* terrorist activities within the statutory definitions of material support. Narrowing the definition of material support would still allow the government to prosecute dangerous and unlawful support to terrorists while respecting citizens' and residents' First Amendment rights. ***HRB***

ENDNOTES: Free Speech in the War on Terror:

[1] Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006).

[2] While the rhetorical term "war on terror" has been used in the past century by other governments, such as Great Britain, France, and Russia, the current U.S. Government uses it to describe an actual state of armed conflict, fought against a number of "global terrorist" organizations, including Al Qaeda.

[3] The United States Military Commissions Act (MCA), 10 U.S.C. § 948b(a) (2006).

[4] *Id.*

[5] *Id.* at § 948a(1)(A)(i) and (ii) (emphasis added).

[6] *See* 18 U.S.C. § 2339B (1996).

ENDNOTES *continued on page 22*

[7] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 323, (codified at 18 U.S.C. § 2339A and scattered sections of U.S.C.).
[8] USA PATRIOT ACT (PATRIOT Act) § 805(a)(2)(B), Pub. L. No. 107-56, 115 Stat. 272 (codified at 18 U.S.C. § 2339B).
[9] *See* Humanitarian Law Project v. Ashcroft, 309 F.Supp.2d 1185 (C.D. Cal. 2004) (HLP I); Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000).
[10] 18 U.S.C. §§ 2339A, 2339B(1)-(3).
[11] *Id.* at § 2339B.
[12] This article does not consider whether the term "personnel" is protected by the First Amendment because the court in *Humanitarian Law Project v. Gonzales (HLP II)* found the term to be permissible, while the terms "aid," "assistance," and "training" were found to be impermissibly vague. 380 F.Supp.2d 1134, 1152 (C.D. Cal. 2005).
[13] Congress expressly intended the MCA to establish procedures for trying unlawful enemy combatants engaged in hostilities against the United States for violations of the *law of war* by military commission. MCA, 10 U.S.C. § 948b(a).
[14] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).
[15] *Id.*
[16] *Id.*
[17] *See* Rasul v. Bush, 542 U.S. 466 (2004); *see also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *Hamdan*, 126 S.Ct. 2749.
[18] *Schenck*, 249 U.S. at 52.
[19] *See* Gillars v. United States, 182 F.2d 962, 966 (U.S.App. D.C. 1950).
[20] *Id.* at 971.
[21] Much like the controversial and contested definition of "war" in the context of counter-terrorism, the definition of "enemy" may become equally important in deciding whether military laws or civilian laws apply to terrorism cases. Because a "global war on terrorism" is so broad and ambiguous, defining the enemies may prove to be cumbersome at best and dangerously over-inclusive at worst.
[22] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[23] *See, e.g.*, Gitlow v. People of State of New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927); Stromberg v. People of State of Cal., 283 U.S. 359 (1931); Herndon v. Lowry, 301 U.S. 242 (1937); Dennis v. United States, 341 U.S. 494 (1951).
[24] *See Brandenburg*, 395 U.S. 444.
[25] *Id.* at 449.
[26] *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 263-4 (4th Cir. 1997).
[27] *Id.* at 267.
[28] *Consider* Communist Party of Ind. v. Whitcomb, 414 U.S. 441 (1974).
[29] *See* United States v. Wunsch, 84 F.3d 1110, 1119 (9th Cir.1996) (citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).
[30] Foti v. City of Menlo Park, 146 F.3d 629, 638 (9th Cir.1998) (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).
[31] Humanitarian Law Project v. Gonzales (HLP II), 380 F.Supp.2d 1134, 1152 (C.D. Cal. 2005). The plaintiffs wished to continue their support to the lawful, nonviolent activities of the Partiya Karkeran Kurdistan (Kurdistan Workers' Party or PKK) and the Liberation Tigers of Tamil Eelam (LTTE). The PKK and the LTTE were designated as foreign terrorist organizations by the Secretary of State.
[32] *Id.*
[33] *Id.* at 1140-41.
[34] *Id.* at 1149.
[35] The 2004 IRTPA amended 18 U.S.C. 2339B, adding: "(i) Rule of Construction — Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States."
[36] *HLP II*, 380 F.Supp.2d at 1149.
[37] *See e.g.*, United States v. Satar, 272 F.Supp.2d 348 (S.D.N.Y. 2003).
[38] *See* David Cole, *Criminalizing Speech: The Material Support Provisions, available at* http://www.abanet.org/natsecurity/patriotdebates/material-support-2#opening (last visited Feb. 13, 2008).
[39] *See* H.R. Rep. No. 107-236(I) at 71 (2001); 147 Cong. Rec. S10990-02, S11013 (2001).
[40] MCA, 10 U.S.C § 948a.
[41] *Id.* at § 948b.
[42] *See* R. Jeffrey Smith, *Detainee Measure to Have Fewer Restrictions*, Washington Post, Sep. 26, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/25/AR2006092501514.html (last visited Jan. 20, 2008).
[43] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004)
[44] If the Court continues to find that U.S. citizens can be held and tried as unlawful enemy combatants, the Court will likely require, as it did in *Hamdi*, that the government ensure additional due process rights to citizens when they are detained and tried.
[45] It is worth noting that the court in *U.S. v. Hammoud* held that an executive designation of a group as a "terrorist organization" could not be challenged by a person convicted of providing material support to that organization. 381 F.3d 316 (4th cir. 2004).
[46] This article does not examine the extensive discussion, brought to the forefront in part by the GWOT detention center at Guantánamo Bay and other secret CIA detention centers outside of the United States, on whether the First Amendment protects non-citizens living *outside* the territorial United States. So far, the Court has narrowly interpreted their rights using the war-time framework, affording them only basic due process protections. *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004); *Hamdi*, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006).
[47] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Landon v. Placencia, 459 U.S. 21 (1982); Mathews v. Diaz, 426 U.S. 67 (1976); In re Griffiths, 413 U.S. 717 (1973); Woodby v. INS, 385 U.S. 276 (1966); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Bridges v. Wixon, 326 U.S. 135 (1945); Fong Yue Ting v. United States, 149 U.S. 698 (1893).
[48] *See* U.S. Const. amend. I–X. The first ten amendments to the Constitution use the terms "people" and "person" to designate the source and recipient of the rights ascribed in the Bill of Rights, in contrast to the Constitution which uses "citizen" and "resident" as well. Many experts and judges have interpreted this as meaning that the Bill of Rights, with its most fundamental liberties, was meant to provide protections against government oppression for all persons within the United States, and not just citizens.