The Constitutionality & Ethics of Licensing Lawyers to Advise Designated Foreign Terror Organizations

Elinor R Jordan, J.D.
THE COURT CLOSES A DOOR BUT LEAVES AN OPEN WINDOW:
THE CONSTITUTIONALITY AND ETHICS OF LICENSING LAWYERS TO ADVISE DESIGNATED FOREIGN TERROR ORGANIZATIONS

Elinor R. Jordan*

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INTRODUCTION

Lawyers are “masters of a science that is necessary, but which is not generally known.”¹

An ordinary person relies on her attorney to comprehend and sometimes challenge the law or the decision of a governmental body.² This role of the lawyer as interpreter between government

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¹ Law Clerk, Hon. David W. McKeague, U.S. Court of Appeals for the Sixth Circuit.

* Law Clerk, Hon. David W. McKeague, U.S. Court of Appeals for the Sixth Circuit.

ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 271 (1839).
and individual serves as a bulwark of American democracy and separation of powers by ensuring that minority voices are heard and given opportunity for redress. Our society also has a general respect for the role of attorneys in voicing the position of the most insular, and sometimes the most hated, minority voices. In the context of war, our nation—like most, if not all nations—has prioritized the safety of the majority above the voice of the minority. However, in the past, the attorney’s ability to serve as a mouthpiece for the minority has remained in-tact. Lawyers have taken on the responsibility to shine a light on dark shadows of our past and, at times, prevented government action that would trammel minority rights. As Justice Jackson once observed, “[w]hen rights ‘are threatened,’ . . . they are worth only ‘what some lawyer makes them worth.’ . . . ‘Civil liberties are those which some lawyer, respected by his neighbors, will stand up to defend.’” Given this history, a lawyer’s capacity to serve as a diligent advocate for the clientele she chooses to represent is perhaps most important in times of war.

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4 Take, for example, the positive reporting regarding Judy Clarke, who was appointed to represent Jared Loughner—the man accused of a shooting rampage in Tuscon, Arizona on January 8, 2011. Media reports described Clarke as being up to the task of separating her emotion from the challenge at hand and was cited favorably for having done the tough job of representing the Unibomber and alleged perpetrators of 9/11 attacks. See, e.g., Korva Coleman, Experienced Public Defender to Assist Accused Tuscon Shooter, National Public Radio broadcast Jan. 11, 2011.

5 See generally Korematsu v. U.S., 319 U.S. 432 (1942) (upholding Japanese internment during World War II, despite strict scrutiny review); Dennis v. U.S., 341 U.S. 494 (1951) (upholding the conviction of Eugene Dennis, a general secretary for the Communist Party, for conspiring to overthrow the government, establishing the clear-and-present danger test). In Dennis, Justice Black lamented “[p]ublic opinion being what it now is, few will protest the conviction of these [Communists]. There is hope, however, that in calmer times, when present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the . . . place where they belong in a free society” 341 U.S. at 581 (Black, J., dissenting). As Geoffrey Stone discusses, many newspapers at the time of the Dennis opinion applauded the decision, reporting, for example, that “liberty shall not be abused to its own destruction.” GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 411 quoting The Smith Act Upheld New York Times 30 (June 5, 1951).

6 For example, consider, Abe Fortas, a prominent attorney in the late 1940s of the firm Arnold Fortas & Porter, chose to represent persons facing the loyalty boards or the House Un-American Activities Committee (HUAC) during the Cold War, despite the danger that activity presented for his own reputation. See STONE, supra note 5, at 419.


8 See STONE, supra note 5, at 242.
The foundation of diligent advocacy is lawyer advice in the form of speech. Nonetheless, in the context of the War on Terror, federal regulations and the Supreme Court have shut a door to some forms of attorney speech, due to the compelling interest of national security. In *Holder v. Humanitarian Law Project*, the Supreme Court held that federal regulations prohibiting lawyers from giving free legal advice to Designated Foreign Terrorist Organizations (“DFTOs”) do not violate lawyers’ First Amendment rights of free speech and association. Reasoning that money is fungible, so that even seemingly benign legal support could free up funds for terror-related activity elsewhere, the Court ruled that silencing lawyers who would represent DFTOs was not a violation of the lawyers’ First Amendment rights. However, the Court did not address a statutory window left open for attorneys who wish to provide legal advice to DFTOs. This window is cracked open by 31 CFR § 597.505 and 31 CFR § 501.801 (jointly “the Licensing Scheme”) which describe a mechanism to permit attorneys, under certain circumstances, to provide advice to DFTOs.

Although on its face the holding in *Humanitarian Law Project* seems to be a stumbling block to the protection of lawyer speech, it can also be read as a rebuke to those commentators who would exclude lawyer speech from First Amendment protections. While the Court did not find that the Material-Support Statute, as applied to Plaintiffs, violated their First Amendment rights, it unequivocally stated that the speech itself was worthy of constitutional protection.

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9 Knafe, *supra* note 3, at 2. “A necessary predicate to meaningful, effective litigation is the attorney’s advice to her client about the client’s legal rights and the proposed course of action.” *Id.*

10 See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). Holding constitutional 18 U.S.C. § 2339B(a)(1), which makes it a federal crime to “knowingly provid[e] material support or resources to a foreign terrorist organization.” *Humanitarian Law Project*, 130 S. Ct. at 2707. In so holding, the Court determined that providing legal advice amounts to expressive conduct that implicates First Amendment rights, but ruled that the statute met strict scrutiny evaluation. *Id.* at 2731.

11 *Id.*

12 *Id.* at 2725-30.

13 31 CFR § 597.505; 31 CFR § 501.801.

14 *Humanitarian Law Project*, 130 S.Ct. at 2724.
order to maintain consistency with the holding in *Humanitarian Law Project*, the Court should recognize lawyers’ First Amendment speech interests in the causes and clients they choose to represent.

This Essay will articulate and defend its assertion that an attorney’s choice of cause and client represents expressive behavior that is subject to First Amendment protection. Further, this Essay will explore the Licensing Scheme to determine whether it represents a valid prior restraint under the Court’s free speech jurisprudence. In addition, it will discuss ethical challenges for attorneys who seek both to comply with the Licensing Scheme and to maintain baseline standards of legal ethics. This Essay will conclude that, in order to provide an adequate window to *Humanitarian Law Project*’s slamming door, the Licensing Scheme must, at a minimum, be reformed. Without adequate protection of a lawyers’ right to represent whomever she chooses, the country stands to lose a vital guard against the “excesses of democracy.”15

I. LAWYER SPEECH AND *HUMANITARIAN LAW PROJECT*

Lawyer advice, referring to that speech which is addressed to a client and would be covered by the attorney-client privilege, is not directly addressed in Supreme Court jurisprudence. Some attorney speech, particularly that speech which is meant to attract prospective clients, is considered commercial speech.16 One important distinction between lawyer advice and the majority of other speech addressed by First Amendment jurisprudence is that it is private in nature, and not meant to be heard by the general public.17 The Supreme Court

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15 *See DeTocqueville, supra* note 1, at 348.
16 *See, e.g., Millavitz v. U.S.*, 130 S.Ct. 1324, 1339 (2010). An irony in this area of law is that commercial speech, which is expressly given a lower level of protection than other forms of speech throughout most jurisprudence, is protected attorney speech, at least on some level. Conversely, speech that is actually aimed at advising clients, which is much more likely to be high-value speech, is not given any express protection in the Court’s jurisprudence. I thank Professor Renee Knake for pointing this out in conversation.
has not directly addressed this differentiating factor when it has ruled on attorney speech cases.\textsuperscript{18} However, in \textit{Humanitarian Law Project}, the representation of a client’s cause; e.g. advising on international law, petitioning the United Nations, and advising on the availability of United Nations resources; was considered \textit{expressive conduct} worthy of First Amendment protection.\textsuperscript{19} This designation, if it is found applicable to advice,\textsuperscript{20} pulls lawyer advice out of the realm of pure conduct, which is not reached by the First Amendment Freedom of Speech,\textsuperscript{21} and into the realm of protected speech interests.\textsuperscript{22} This section will address the case and set forth a framework for considering attorney speech in the context of advising DFTOs.

\textbf{A. Humanitarian Law Project}

The case of \textit{Holder v. Humanitarian Law Project} (“HLP”) was litigated, in various forms, over the course of twelve years.\textsuperscript{23} Among other plaintiffs and bases for challenge, the \textit{HLP} professional plaintiffs challenged the validity of a statute barring material support to DTFOs, claiming it violated their First Amendment rights.\textsuperscript{24} Importantly, the professional plaintiffs wanted to provide services akin to legal services, namely advising on compliance with international law and instruction on petitioning before the United Nations.\textsuperscript{25} However, the professional plaintiffs were not all lawyers, and did not seek to provide traditional legal

\begin{itemize}
  \item \textsuperscript{18} Knake, \textit{supra} note 3, at 4.
  \item \textsuperscript{19} \textit{Humanitarian Law Project}, 130 S.Ct. at 2725-26.
  \item \textsuperscript{20} See infra, text accompanying notes 57-60.
  \item \textsuperscript{21} Texas v. Johnson, 491 U.S. 403 (1989).
  \item \textsuperscript{22} Compare \textit{Id.} with United States v. O’Brien, 391 U.S. 367 (1968) (finding expressive conduct in flag burning and pure conduct that could be freely regulated by the government in burning a draft card during the Vietnam War Era; regulation of the former activity violated the First Amendment where regulation of the latter did not).
  \item \textsuperscript{23} \textit{Holder v. Humanitarian Law Project}, 130 S.Ct. 2705, 2713 (2010).
  \item \textsuperscript{24} \textit{Id.} The plaintiffs in \textit{HLP} included a naturalized Tamil physician and five nonprofit groups “dedicated to the interests of persons of Tamil descent.” Pet. Brief ii. The named plaintiff, the Humanitarian Law Project, which is a human rights organization that consults with the United Nations, and its president, Ralph Fertig, a former administrative law judge, contested the limits on lawyer speech that will be discussed in this Paper. \textit{Id.} The named plaintiff also contested the Material-Support Statute on grounds of vagueness. \textit{Humanitarian Law Project}, 130 S.Ct. at 2714. A discussion of this claim is beyond the scope of this Paper.
  \item \textsuperscript{25} \textit{Humanitarian Law Project}, 130 S.Ct. at 2724.
\end{itemize}
counseling or defense.\textsuperscript{26} It follows that the Court does not specifically address the issue of attorney speech.\textsuperscript{27}

The Antiterrorism and Effective Death Penalty Act (AEDPA) authorizes the Secretary of State to designate a group as a “foreign terrorist organization” based on a finding that it is “(A) a foreign organization, (B) engages in terrorist activity, and (C) the terrorist activity threatens the security of United States nationals or the national security of the United States.”\textsuperscript{28} Federal law prohibits “knowingly providing material support or resources to a foreign terrorist organization.”\textsuperscript{29} The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, i.e. the “Patriot Act,” added “expert advice or assistance” to the definition of “material support” in 2001. “Expert advice or assistance” is, in turn, defined by the Intelligence Reform and Terrorism Prevention Act (IRTPA) as “scientific, technical, or other specialized knowledge,” encompassing legal advice.\textsuperscript{30}

The \textit{HLP} professional plaintiffs (“Plaintiffs”) initiated litigation upon finding that the Kongra-Gel, or the Kurdistan Workers’ Party (“PKK”) and the Liberation Tigers of Tamil Eelam (“Tamil Tigers”) had been designated as DFTOs by Secretary of State Janet Reno.\textsuperscript{31,32} The

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\textsuperscript{26} \textit{Id.} at 2716. \\
\textsuperscript{27} \textit{See infra} text accompanying notes 57-60. \textit{Contra} text accompanying notes 61-62. \\
\textsuperscript{28} 8 U.S.C. § 1189(a)(1). \\
\textsuperscript{29} 18 U.S.C. § 2339B(a)(1). \\
\textsuperscript{31} \textit{Humanitarian Law Project}, 130 S.Ct. at 2713. The Tamil Tigers seek an independent Tamil state in Sri Lanka, and the PKK seeks the formation of an independent Kurdish state in southeastern Turkey. Humanitarian Law Project v. Reno 9 F.Supp.2d 1176, 1180-81 (C.D. Cal. 1998) (“Reno I”). The Secretary of State found that both groups committed “numerous terrorist attacks, some of which have harmed American citizens.” \textit{Id.} at 1180-82. \\
\textsuperscript{32} At the outset of litigation, the Material-Support Statute did not expressly include expert assistance. The Plaintiffs initiated litigation by moving for a preliminary injunction, which the District Court granted based on the probability of success on the claim, the definition of “material support” was impermissibly vague. \textit{Reno I}, 9 F. Supp. at 1204. The Court of Appeals affirmed, outright rejecting the Plaintiffs’ speech claims and only on the grounds of vagueness. \textit{Reno v. Humanitarian Law Project}, 205 F.3d 1130, 1137-38 (9th Cir. 2000) (“Reno II”). After the Patriot Act became law, expressly adding the term expert advice or assistance to the definition of material support, the Plaintiffs amended their complaint to challenge the constitutionality of that term as applied to their legal advice. \textit{Humanitarian Law Project}, 130 S.Ct. at 2714. After the IRTPA became law, the circuit court vacated its decision and remanded to the district court for further proceedings. \textit{Humanitarian Law Project v. Gonzales}, 380 F.Supp.2d
\end{flushright}
Plaintiffs sought to provide legal advice to these DFTOs in matters unrelated to their terrorist activities. Specifically, the Plaintiffs claimed that the Material-Support Statute interfered with their ability to “(1) ‘train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes’; (2) ‘engage in political advocacy on behalf of Kurds who live in Turkey’; and (3) ‘teach PKK members how to petition various representative bodies, such as the United Nations, for relief.’” The Material-Support Statute squarely criminalizes such advice.

Upon reviewing the Material-Support Statute for vagueness, the District Court granted partial relief to the Plaintiffs. The Ninth Circuit Court of Appeals affirmed the finding of the District Court, holding that “as applied to plaintiffs, the terms ‘training’ ‘expert advice or assistance’ and ‘service’ were vague because they ‘continued to cover constitutionally protected advocacy.’” The Supreme Court granted certiorari to review 1) whether § 2339B violates Due Process based on vagueness; 2) whether § 2339B violates the lawyers’ right to free speech under the First Amendment; and 3) whether § 2339B violates Plaintiffs’ First Amendment freedom of association.

The Court found that § 2339B did not violate the attorneys’ First Amendment right to freedom of speech. The Plaintiffs claimed that their advice should be considered “pure...
political speech.”

On the other side of the spectrum, the Government contended that the advice-giving behavior was not speech at all, but rather conduct. The Court rejected both parties’ characterizations as “extreme positions.” The Court stated that “[t]he First Amendment issue before us is more refined than either [P]laintiffs of the Government would have it.”

The Court noted that what the Plaintiffs wanted to do was to “provide material support to the PKK and [Tamil Tigers] in the form of speech.” Based on this more refined definition of what was being suppressed by the Material-Support Statute, the Court found an analogous case in *Cohen v. California*. In that case, a generally applicable regulation of conduct prohibited breaches of the peace. Cohen wore a jacket with an epithet on it, and was convicted of breaching the peace. However, the Court in that case recognized that the law proscribing a breach of the peace was only directed at Cohen because of the offensive content on his jacket. Given that this was inherently expressive conduct, the Court applied more rigorous scrutiny, reversing Cohen’s conviction.

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40 *Id.* at 2723 (noting that the Plaintiffs’ claim was not correct because the Plaintiffs could still speak and write about the DFTO clients).
41 *Id.* (comparing *O’Brien*, in which destroying draft cards was considered conduct and not speech, creating an intermediate scrutiny test). *U.S. v. O’Brien*, 391 U.S. 367 (1968).
42 *Humanitarian Law Project*, 130 S.Ct. at 2723.
43 *Id.* at 2724.
44 *Id.*
45 403 U.S. 15 (1971). *Contra cf. Holy Land Foundation*, 219 F. Supp. 2d at 81 (finding an analogy between a foundation’s desire to donate funds to the humanitarian efforts of a DFTO and *O’Brien*, 391 U.S. 367). *Holy Land Foundation* found that such donations “implicate both speech and nonspeech elements” and should be subjected to intermediate scrutiny. *Holy Land Foundation*, 219 F. Supp. 2d at 81. It was only because the foundation did not contend that it made the contributions as a means of political expression that the court did not apply strict scrutiny, as called for in *Buckley v. Valeo*, 424 U.S. 1 (1976). *Id.* at n.37. Thus, the court indirectly hinted at the possibility that expressive conduct, done for an expressly political purpose, may be more closely protected.
46 *Id.* at 16.
47 *Id.*
48 *Id.*
49 *Id.* at 18-19. The Court also invoked *Texas v. Johnson* in its discussion, in which the Court overturned a conviction for flag burning because the regulation was based on the expression. 491 U.S. 403 (1989).
Applying Cohen’s “more demanding standard”\textsuperscript{50} to the \textit{Humanitarian Law Project} Plaintiffs, the Court considered their speech to be inherently expressive conduct.\textsuperscript{51} The Court implied that this more demanding standard, which was not explicitly described as strict scrutiny, would require government action repressing such inherently expressive conduct to be \textit{necessary} to further an \textit{urgent} government objective.\textsuperscript{52} Although the Plaintiffs argued that the Material-Support Statute, as applied to them, was not necessary to the admittedly urgent government interest of combating terrorism, the Court rejected that argument. The majority based its decision on the findings of Congress, as expressed in the AEDPA that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that [criminal] conduct.”\textsuperscript{53} The majority reasoned that Congress had therefore “considered and rejected” the Plaintiffs’ argument; because money is fungible,\textsuperscript{54} there is no reason to assume the existence of any firewall that would prevent savings through expert advice in one area from proliferating to illegal uses.\textsuperscript{55} The Court held that there was no First

\begin{footnotesize}
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\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Humanitarian Law Project}, 130 S.Ct. at 2724.
\item \textsuperscript{52} \textit{Id.} at 2724.
\item \textsuperscript{53} 18 U.S.C. § 2339B (expressing the provision’s Findings and Purpose).
\item \textsuperscript{54} Cf. \textit{Holy Land Foundation for Relief & Dev. v. Ashcroft}, 219 F. Supp. 2d 57, 82 (D.D.C. 2002), citing \textit{HLP I}, 205 F.3d at 1136. The notion that money is a fungible good which can be used for illicit purposes even if it is initially provided for licit ones was discussed by the District Court for the District of Columbia in \textit{Holy Land Foundation}. This is one of the underlying purposes behind strict Treasury regulation of all entities subject to sanctions or DFTO status. However, note the difference between the inference that money being given directly to a DFTO could be used for either humanitarian supplies or bombs and the inference that provision of free legal services will free up resources from elsewhere that could be used for illicit purposes. Take, for instance, a college student’s parents came to visit her on campus, they might do a few different things without being asked: a) give her some cash intended for books; b) add money to her cafeteria charge card; and c) offer to take her tax information to H&R block so that she doesn’t need to deal with her taxes. If this student had a habit of using marijuana, which the parents wanted to encourage her to stop, the parents would likely want to avoid the funds going to her habit. The logical parent may decide not to give their child cash in that situation. In addition, the parent may even choose not to add money to a cafeteria card, particularly if that money could be withdrawn in any way. However, it is fairly unlikely that the child’s bad habit would cause the parent not to pay for the child’s taxes to be filed. If the child never asked for this service, then it is not a direct inference that money going into tax advice will be shifted into marijuana-buying power. Likewise, the connection between direct cash donations and terror activity is more direct than the connection between a donation of professional legal services and that same activity.
\item \textsuperscript{55} \textit{Humanitarian Law Project}, 130 S.Ct. at 2725-26. “Both common sense and the evidence submitted by the Government make clear that material support of a terrorist group’s lawful activities facilitates the group’s ability to attract ‘funds,’ ‘financing,’ and ‘goods’ that will further its terrorist acts.” \textit{Id.} at 2726 n.6.
\end{itemize}
\end{footnotesize}
Amendment violation in the Material-Support Statute’s regulation of the Plaintiffs’ speech.\textsuperscript{56}

The Court, in a manner which is becoming characteristic of the Roberts Court, ruled very narrowly, only deciding that a prohibition on “what the plaintiffs want to do—provide material support to the PKK and [Tamil Tigers] in the form of speech” did not violate First Amendment protections.\textsuperscript{57} Attorney David Cole, who represented the Humanitarian Law Project, focused on the relationship to the Court’s clear-and-present danger speech jurisprudence,\textsuperscript{58} and described what he thought the Court’s ruling meant in the *New York Times Review of Books*: “the Court ruled—for the first time in its history—that speech advocating only lawful, nonviolent activity can be subject to criminal penalty, even where the speakers’ intent is to discourage resort to violence.”\textsuperscript{59} Cole does not contend that the Court decided the attorney speech issue, but rather had addressed speech that involved direct contact with a DFTO.\textsuperscript{60} However, not all commentators agree. Margaret Tarkington asserts that the Court did decide the *Humanitarian Law Project*, 130 S.Ct at 2716.\textsuperscript{57}

\textit{Id.} Even so, Justice Breyer was convinced that the Government had not met the burden of showing that the Material-Support Statute even served the Government’s interest in combating terrorism. *Id.* at 2731, Breyer, J., dissenting. David Cole, the attorney who argued *HLP* notes the connection of this ruling with the War on Terror. David Cole, *The Roberts Court’s Free Speech Problem*, N.Y. REVIEW OF BOOKS BLOG, http://www.nybooks.com/blogs/nyrblog/2010/jun/28/roberts-courts-free-speech-problem/. Comparing it with the stringent standard applied to review of government action in *Citizens United*, Cole observed that the Court “deferred to rank speculation, rather than requiring the government to meet the heavy burden of hard evidence and narrowly tailoring that speech prohibitions based on content have heretofore required.” *Id.* History could lump the *HLP* decision with the many decisions limiting speech rights that were deeply steeped in the wartime culture in which they were rendered. See, e.g., supra note 5.


Under this law, when President Jimmy Carter monitored the June 2009 elections in Lebanon, and met with all of the parties to advise them on fair election practices, he could have been prosecuted for providing “material support,” in the form of “expert advice” to a designated group, because he advised Hezbollah. It means that when the *New York Times*, *Los Angeles Times*, and *Washington Post* published op-eds by Hamas leaders in recent years, they were engaging in the crime of providing “material support” to a designated terrorist group, because doing so provided Hamas a “service.” And it means that my clients, a retired judge and a human rights group, cannot continue to work for peace and human rights on behalf of the Kurds in Turkey, as they had been doing before the law took effect, without risking long prison terms.

\textit{Id.}\textsuperscript{57}

\textit{Id.}\textsuperscript{60}
Law Project case based on attorney speech, and further claims that the Court would allow the professional plaintiffs to act as lay individuals, but not as individuals in their advocacy. Peter Marguilies characterizes the decision as “a hybrid form of scrutiny that limits terrorist groups’ exploitation of information asymmetries, while preserving safe harbors for advocacy that challenges government policy.”

B. A Framework for Analyzing Regulation of Attorney Speech While Counseling Clients

Going forward, Humanitarian Law Project could be used as precedent to inform the level of protection that should be afforded to attorney speech. The Court looked specifically to the behavior that the Professional Plaintiffs wanted to engage in to evaluate its speech value, and applied intermediate scrutiny because that behavior was inherently expressive. In his dissent, Justice Breyer, joined by Justices Ginsburg and Sotomayor, pointed out that the standard applied to the Humanitarian Law Project Plaintiffs was not strict scrutiny, which would require the prohibition to the “justified by a ‘compelling’ [governmental] need that cannot be ‘less restrictively’ accommodated.” The notable difference in the standard articulated by the majority was that the means the government employs need not be the least restrictive means

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63 Importantly, the implications for the Licensing Scheme, described infra are arguably still pertinent even if the Court would have specifically decided attorney speech in Humanitarian Law Project. See Cf. 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) (holding that although restricting alcohol sales passed constitutional muster, restriction of alcohol advertisements did not; it was error to believe that all “regulations were subject to a similar form of constitutional review simply because they target a similar category of expression). In 44 Liquormart the Court expressly declined to follow its own decision in Posadas de Puerto Rico Assoc. v. Tourism Co. Puerto Rico. 478 U.S. 328 (1986). In that decision, the Court had held that an act limiting advertisement of gambling was not facially unconstitutional because the population-specific ban on commercial speech related to casino gambling was cleared by the Central Hudson standard; it was “up to the legislature” to decide how to do regulate gambling. The Court in 44 Liquormart “reject[ed] the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily ‘greater’ than the power to suppress speech about it.” 517 U.S. at 511. Similarly, the licensing scheme must stand on its own and separately pass scrutiny even if the underlying behavior is deemed to properly come under government oversight.
64 See supra Subsection I.A. and accompanying notes.
65 Id. at 2734, BREYER, J., dissenting.
available, but could instead be merely “necessary.” Over Justice Breyer’s objection, it could be inferred that governmental intrusion upon attorney speech, when counseling clients, is subject to that “more demanding standard,” even if it will not necessarily be afforded strict scrutiny review.

It follows that a workable framework for analyzing attorney speech could be to ask whether the government intrusion was necessary to a compelling government interest. Although the Court did not directly articulate this test, the provision of it by implication is, in a sense, groundbreaking, as the Court has not “directly confronted the question of whether the First Amendment protects attorney advice.” At bottom, where the behavior of counseling a client is so controversial that engaging in it necessarily involves expressive conduct, in order to be faithful to its jurisprudence, the Court should employ a similar test. This test acknowledges that attorney speech is inherently political, and becomes even more so when the interests of a politically controversial client are at stake. Thus, on some level, the Court in Humanitarian Law Project may have provided a framework for analyzing governmental restraints on attorney speech that take place after the fact, but Supreme Court jurisprudence has always reviewed prior restraints, such as the Licensing Mechanism that is described in this Paper, with special suspicion.

C. The Expression Behind an Attorney’s Choice of Cause and Client

There is a history of public association of lawyers with the causes they represent.

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66 Id. at 2724.
67 Id. Although it was not discussed in Humanitarian Law Project, the Court has also upheld expressive conduct as protected speech in the context of campaign donations. This is perhaps an even neater analogy between what the HLP professional plaintiffs wanted to do, attorney speech while counseling, and Supreme Court jurisprudence. E.g. Buckley v. Valeo, 424 U.S. 1 (1976) (holding that making campaign donations is expressive conduct protected with heightened scrutiny).
68 See Id.
69 Knake, supra note 3, at 8 (noting that Humanitarian Law Project did not directly address this point).
70 See Id. at 34.
Examples are myriad. Even when the Sedition Act of 1918 was being considered in the Senate, Senator Thomas asked whether a lawyer defending an accused violator of the Act would, in turn, be violating the Act, because he would be “defend[ing] the accused’s action.”

Perhaps the best demonstration is the late attorney William Kunstler, the title of whose biography says it all, “William Kunstler: the Most Hated Lawyer in America.” Kunstler drew protests in front of his home for his representation of despised defendants like Omar Abdel Rahman, the “Blind Sheikh” accused of involvement in the 1993 World Trade Center Bombing. Lynne Stewart, another attorney who has been convicted and imprisoned for her association with the same controversial client (Rahman) is yet another of perhaps countless examples of attorneys who risk their reputation to assist clients—indicating that who they represent is inherently meaningful.

Arguably, the Model Rules acknowledge this fact by allowing attorneys to refuse appointed representation of clients when the client’s cause is “so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.” This association, coupled with the expressive nature of providing advice, urges that the choice of client in itself is expressive behavior that must fall under the protection of the First Amendment, regardless of whether the attorney actually agrees with the client’s views or actions. However, the Court has not addressed this issue, and Humanitarian Law Project arguably does not bind the Court to this contention.

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73 Id.
75 ABA MODEL RULES OF PROF’L CONDUCT, R. 6.2(c) (2009). Contra, cf. ABA MODEL RULES OF PROF’L CONDUCT, R.1.2(b) (2009) (clarifying that “[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.”). The argument here is not that the Model Rules accept the notion that an attorney adopts the cause of a client as her own, but simply that the Model Rules recognize the tendency of society to do so. This Paper asserts that because society recognizes the choice of client as expressive, and because the Court implicitly did so in Humanitarian Law Project, this speech interest should be protected, and only subject to constitutionally valid prior restrictions.
II. **THE LICENSING SCHEME**

The application of the Material-Support Statute to attorney advice, as approved by the Supreme Court in *Humanitarian Law Project*, closes a door to attorneys who would represent DFTOs. However, the statutory scheme provides a window for representation: the Code contains a licensing mechanism, by which attorneys who wish to advise DFTOs may do so. This representation is subject to the regulations of the Treasury Department, as promulgated by the Office of Foreign Asset Control (“OFAC”).

The OFAC’s role in regulation was first outlined in the Trading with the Enemy Act of 1917, and its powers were expanded to peacetime by the International Economic Emergency Powers Act of 1977. The OFAC is responsible for regulating the interchange of assets between the United States and various regulated foreign entities. Several OFAC regulations explicitly regulate the attorney-client relationship. In

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77 See generally *Humanitarian Law Project*, 130 S.Ct. at 2724; 18 U.S.C. § 2339B.

78 See generally 31 C.F.R. 501.801; 31 C.F.R. 597.505. The Office of Foreign Asset Control “administers and enforces economic sanctions programs primarily against countries and groups of individuals, such as terrorists and narcotics traffickers. The sanctions can be either comprehensive or selective, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals.” U.S. TREASURY, OFFICE OF FOREIGN ASSET CONTROL, *Frequently Asked Questions and Answers*, http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx (last visited Dec. 29, 2010).


81 U.S. TREASURY, OFFICE OF FOREIGN ASSET CONTROL, *Mission*, http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx (last visited April 5, 2011). The mission of the OFAC is articulated as follows:

The Office of Foreign Assets Control (OFAC) of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States. OFAC acts under Presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under US jurisdiction. Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments.

Id.

82 Jill M. Troxel, *Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Relationship*, 24 REV. LITIG. 637, 645 (2005). The rise of the administrative state regulating various activities in the interest of addressing terrorism was covered very well by Prof. Ilya Podolyako. See Podolyako, *supra* note 75. For additional criticism of the OFAC’s specific role and lack of
fact, the OFAC has “asserted the authority to regulate (and by implication restrict or prohibit) the formation of an attorney-client relationship.” The types of clients subjected to such regulations vary from narcotics kingpins to companies with ties to the destabilization of the Balkan states, and cover many different types of legal services. While each of these regulations raises similar concerns, insomuch as it directly imposes upon an attorney’s freedom to choose her cause and client, this Section will focus on the scheme associated with the Material-Support Statute.

This Licensing Scheme allows for “legal advice and counseling . . .on the requirements and compliance with the laws of any jurisdiction within the United States.” Also, the Licensing Scheme allows licensed representation of a DFTO “when named as a defendant in or otherwise made a party to domestic U.S. legal, arbitration, or administrative proceedings” or in the initiation and conduct of such proceedings on behalf of the DFTO. Further, the Licensing

precision in regulation post September 11, 2001, specifically noting the problem of “inexpert banking supervisors taking on a law enforcement role,” see David Zaring & Elena Baylis, Sending the Bureaucracy to War, 92 IOWA L. REV. 1359, 1404 (2007). “Administrative agencies like the Treasury Department have been unfit, inexpert, and unsupervised in their efforts to detect and deter terrorists.” Id. at 1424.


Id. Prof. Troxel lists the regulations in force as:

- “Terrorism Sanctions Regulations enacted in 1996;
- Foreign Terrorist Organizations Sanctions Regulations enacted in 1997;
- Narcotics Trafficking Sanctions Regulations enacted in 1998;
- Foreign Narcotics Kingpin Sanctions Regulations enacted in 2000; and
- Western Balkans Stabilization Regulations enacted in 2002.”

Id. (internal citations omitted). Prof. Troxel further points out that the penalties to attorneys who fail to comply with such licensing schemes are quite stiff, citing a fine against the firm of Dewey Ballantine for $13,750 resulting from a deal involving a debt in which a North Korean firm held an interest. Id. at 652. Prof. Troxels article provides an excellent analysis of the confidentiality issues arising from these licensing schemes, also discussed infra. Id. at 643-54.

E.g. Anne Beck & Sylvia Tonova, No Legal Representation without Governmental Interposition, GEO. J. LEGAL ETHICS 597, 597 (2004). Beck & Tonova outline the predicament of U.S. attorneys John Rostow and Steven Brown, who were defending an individual before the International Criminal Tribunal for the former Yugoslavia, and discovered that they would be subject to criminal prosecution and fines of roughly $250,000 if they continued to represent their client, but would violate a court-imposed duty of loyalty to their clients if they withdrew or disclosed the information necessary to obtain a license to continue representation. Id.

31 C.F.R. 597.505(a). Because international law is largely considered part of U.S. law, the Licensing Scheme arguably would allow an attorney in the position of the Humanitarian Law Project Plaintiffs to obtain a license for their proposed activities, such as providing training in general principles of international law to the Tamil Tigers and PKK. See Amicus Brief, 26 quoting The Paquete Habana, 175 U.S. 677, 700 (1900).

31 C.F.R. 597.505(b), (c).
Scheme allows licensed representation in proceedings relating to sanctions, detention of DFTO agents within a U.S. jurisdiction, which also allows such provision of services to be free of charge when “prevailing U.S. law requires access to legal counsel at public expense.”\(^88\) Finally, the Licensing Scheme allows for representation of DFTOs in seeking judicial review of the DFTO designation.\(^89\) Through the open window of this Licensing Scheme, attorneys may engage in the expressive conduct of representation in virtually all capacities they would be able to do so for a non-DFTO client.\(^90\)

A. Prior Restraints on Speech Generally

When the government punishes speech that has already been released, the speaker has had the opportunity to express her opinion. However, when the government restrains speech before it is released, that particular expression never has the opportunity to enter public discourse. That is why the “Supreme Court has declared that ‘prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.’”\(^91\)

In fact, one of the catalysts for the First Amendment was the Framers’ reaction to licensing requirements for publication that had been imposed in England.\(^92\) Prior restraints take on several forms, such as injunctions, gag orders, and licensing schemes. The classic form of prior restraint on speech, and the one used here, is a license issued by a government entity.

The Court has provided a test for whether licensing is a valid prior restraint. First, the government must have an important reason for licensing.\(^93\) Second, the licensing entity must be

\(^{88}\) 31 C.F.R. 597.505(d), (e), (f).
\(^{89}\) 31 C.F.R. 597.505(g). Such proceedings take place pursuant to 8 U.S.C. § 1189(b)(1).
\(^{90}\) Appendix A provides an easy-to-read summary of the expressive activities a licensed attorney may engage in based on the Licensing Scheme.
\(^{92}\) CHEMERINSKY, supra note 91 at 1092. See also Lovell v. City of Griffin, GA, 303 U.S. 444 (1938).
\(^{93}\) Cox v. New Hampshire, 312 U.S. 569 (1941) (allowing licensing where the permit could only be denied
given almost no discretion.\textsuperscript{94} Finally, procedural safeguards must ensure prompt determinations and judicial review of denials.\textsuperscript{95} While each element of the test is a necessary component, the level of discretion in the second prong requires the most consideration. It requires that the criteria for issuing a license be clearly articulated and content neutral.

Consider first a licensing scheme that was rejected by the Court. In \textit{City of Lakewood} the City denied a newspaper permission to place coin-operated newspaper-dispensing devices on city sidewalks.\textsuperscript{96} The face of the ordinance allowed the mayor to decide what installations could be placed on streets, but put no express limits on the mayor’s discretion.\textsuperscript{97} The Court found the ordinance, which regulated the private placement of any structure on public property, was unconstitutional on its face.\textsuperscript{98} The Court explained that “the absence of express standards makes it difficult to distinguish . . . a licensor’s legitimate denial of a permit and its illegitimate use of censorial power. These guideposts check the licensor’s discretion and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech.”\textsuperscript{99}

Compare \textit{Cox v. New Hampshire}, in which the Court considered an ordinance that required persons wishing to put on a parade or demonstration to get a permit beforehand.\textsuperscript{100} Under that ordinance, the design was simply to alert the city, so that proper policing could be provided, and the only grounds for denial were if the area for the parade or demonstration was

\textsuperscript{94} Id.
\textsuperscript{95} Freeman v. Maryland, 380 U.S. 51 (1965).
\textsuperscript{97} Id. at 753.
\textsuperscript{98} Id. The ordinance was described as follows: “If the mayor denies an application, he is required to ‘stat[e] the reasons for such denial.’ In the event the mayor grants an application, the city issues an annual permit subject to several terms and conditions. Among them are: (1) approval of the newsrack design by the city’s Architectural Board of Review; (2) an agreement by the newsrack owner to indemnify the city against any liability arising from the newsrack, guaranteed by a $100,000 insurance policy to that effect; and (3) any ‘other terms and conditions deemed necessary and reasonable by the Mayor.’” Id. at 753-54.
\textsuperscript{99} Id.
\textsuperscript{100} Cox, 312 U.S. at 572.
already being used for something else at the proposed time. In Cox, the Court emphasized the fact that the “licensing board was not vested with arbitrary power or an unfettered discretion.”

Due to the primacy of the Framers’ concern for prior restraints on speech, any licensing scheme that regulates speech or expressive conduct must be intensely scrutinized. The information that is required to issue a license, and the criteria on which license determinations shall be based must be content-neutral and carefully delineated. Further, the task of issuing licenses must be ministerial in nature, with virtually no discretion available.

B. The Historical Development of the Licensing Scheme

Like the Material-Support Statute, the Licensing Scheme was an outgrowth of the Antiterrorism and Effective Death Penalty Act of 1996 (“the Act”). Although many of the details of the Act were drafted nearly a decade before passage, the catalyst for the Act was the April 19, 1995 bombing of a nine-story federal office building in Oklahoma City. Over twenty people were killed in the bombing, including seventeen children (resulting from the destruction of a nursery inside the building), and over 200 people were injured. Subsequent to the bombing, Senator Dole offered S.735 and Representative Hyde submitted H.R.1710. The Act received widespread bipartisan support in the wake of the national tragedy, and passed with broad margins (91-8-1 in the Senate and 293-133-7 in the House). Shortly after that, revised omnibus comprehensive bills, H.R.1635/S.761, were presented to President Clinton. It is

101 Id. at 576.
102 Id.
107 Id.
108 Id.
notable that, although Timothy McVeigh carried out this crime with the material support of Terry Nichols, he was not a foreign terrorist, but rather a U.S. citizen.\textsuperscript{109} This suggests that, although members of Congress voted on the Act in response to the national tragedy, they did not carefully consider the full breadth of the Act, which addressed many issues beyond domestic terrorism.\textsuperscript{110} Based on the climate in Congress at that time, there is reason to believe that careful consideration was not given to the Material-Support Statute, at least insomuch as it would apply to lawyers.

The Act delegated authority to the Secretary of State, along with the Attorney General and the Secretary of the Treasury to create a list of DFTOs.\textsuperscript{111} The Act further charged the Treasury Department with crafting and implementing Foreign Terrorist Sanction Regulations.\textsuperscript{112} In response to this mandate, the Treasury promulgated a final rule to define procedures to block funds destined for DFTOs.\textsuperscript{113} The Final Rule was promulgated on October 8, 1997, and contained the list of professional services including legal advice that would be subject to license.\textsuperscript{114} The legal licensing options portion of the Code has gone largely unchanged since then, except to tie the Licensing Scheme to penalties under the Trading with the Enemy Act of 1917, as amended by the Civil Penalties Adjustment Act of 1990, which provided for a civil penalty of $100,000–$1 million for violators.\textsuperscript{115}

C. Procedure for Obtaining a License

In order to avail themselves of the privileges granted through the Licensing Scheme,
attorneys must first obtain the license. The process by which one may obtain a specific license is laid out in 31 C.F.R. 501.801. The oversight of such applications has been delegated to the Director of the Office of Foreign Assets Control (“the Director” and the “OFAC”), and must be filed in letter form and submitted by mail. The applicant must supply the following information: (1) the names of all interested parties and the principal—if application is being filed by an agent; (2) taxpayer identification number; (3) such further information deemed necessary to a proper determination by the OFAC. In the event of a denial, the party may request an explanation of the reasons for a denial by correspondence or personal interview. Licenses are issued by the OFAC acting on behalf of the Secretary of the Treasury (the “Secretary”), or directly by the Secretary. If they do obtain a license, licensees may be required “to file reports with respect to the transaction covered by the license.”

Despite the threat of terrorism, the role of attorneys as a necessary intermediary between unpopular views and the government should be preserved. Although *Humanitarian Law Project* has closed a door to attorneys who would exercise their First Amendment rights by representing DFTOs, the statutory framework is meant to provide a window to allow such speech in a way that does not threaten the War on Terror. This window for democracy is worth keeping open, but that can only be achieved if the Licensing Scheme itself is constitutional, and allows attorneys to practice in compliance with their ethical obligations. This section will

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116 Appendix B provides an easy-to-read summary of the process by which an attorney may apply for a license via the Licensing Scheme.
117 31 C.F.R. 501.801(2). Applications for the un-blocking of funds to pay for such services can be filed through an application, which can be found at www.treas.gov/ofac. Id.
118 31 C.F.R. 501.801(3).
120 31 C.F.R. 501.801(6).
121 31 C.F.R. 501.801(5). The Licensing Scheme also provides the address where applications are to be submitted by mail. 31 C.F.R. 501.801(7).
122 See notes 1-6 and accompanying text.
123 See notes 66-79 and accompanying text.
analyze the problems posed by the licensing mechanism with regard to constitutionality and ethics.

D. Government Records on the Issuing of Licenses

General information about the issuing of licenses by the OFAC is not readily available, and courts rarely address the licensing of attorneys who seek to represent DFTOs. The most important case addressing specific licenses for lawyers is *American Airways Charters, Inc. v. Regan*. In this 1984 case, a Florida Charter Corporation, designated a Cuban national, successfully sought declaratory relief allowing an attorney to represent it. Then-Circuit Judge Ginsburg wrote for the court holding that, although the OFAC could control the payment transactions for legal services rendered, the office “lack[ed] the authority to condition the bare formation of an attorney-client relationship on advance government approval.” Importantly, this ruling came before the addition of the Material-Support Statute at issue in *Humanitarian Law Project*. The court engaged in constitutional avoidance so as not to inquire whether the statute (as it existed at the time) was constitutional, but rather held that the statute did not authorize the OFAC to trench upon the attorney-client relationship in the first place. The court

124 The author submitted a Freedom of Information Act request to discover more about the licensing of attorneys under this scheme but has yet to receive the results of this inquiry. In the course of this process, the author has learned that OFAC licenses are apparently not categorized with regard to regulated activity. Telephone conversation between author and Marshall Fields, FOIA Agent for the OFAC, January 17, 2011.

125 As of April 5, 2011, a terms and connectors search on Westlaw searching the Federal Courts database for the terms “Office /2 foreign /2 asset! /2 control /20 "specific license" /50 attorney” produced six results. None of these results discussed licensing of attorneys to represent DFTOs, but rather, to represent entities regulated by sanctions against Cuba, Libya, or Iran. Nevertheless, the sparse case law provides some background and will be discussed in this section. In 2002, the U.S. District Court for the Southern District of New York addressed a criminal prosecution of an attorney for providing material support to terrorists through his legal services without a license. The court in that case found the § 2339B unconstitutionally vague, a decision which was overturned in *Humanitarian Law Project*. U.S. v. Sattar, 272 F. Supp. 2d 348, 358 (2003).

126 746 F.2d 865 (D.C.Cir. 1984).

127 *Id.* at 868. The attorney in question met with OFAC officials and was told that a letter explaining the scope of his representation was not enough to apply for a license. The OFAC “conditioned the mere representation of a designated national on an advance application for and grant of government license.” *Id.*

128 *Id.* at 866-67.

129 *Id.* at 867.
was sure to note in so avoiding that “[t]he administrative authority asserted in this case has never been asserted on any prior occasion; the controlling legislation were we to read it as contemplating a government license prior to obtaining counsel, would trench on a right of constitutional dimension.” 130 The court was referring to the right to counsel of choice,131 a right not addressed by the Court in Humanitarian Law Project.132

The ability to contest OFAC decisions regarding specific licenses for attorneys was curtailed in the 2007 case Empresa Cubana Exp. v. U.S. Dept. of Treasury.133 There, the U.S. District Court for the District of Columbia found a political foreign policy question existed where plaintiffs brought a claim that the OFAC’s decision not to renew their law firm’s specific license to represent them violated Due Process.134 The court held that because the Constitution “commits foreign policy to the sound discretion of the political branches, and federal courts do not evaluate foreign policy decisions’ wisdom or consistency . . . [and] because no justiciable standard for evaluating OFAC’s specific licensing decisions exists” determinations regarding specific licenses are “committed to agency discretion by law.”135 This decision means that agency action to limit lawyer representation of DFTOs could be effectively unreviewable in specific instances, particularly since the foreign policy political question doctrine is arguably more applicable in the case of DFTOs.

E. Constitutional Implications of the Licensing Scheme

When applied to attorney applicants who hope to engage in expressive conduct by advising DFTOs, the Licensing Scheme serves as a prior restraint to speech. At the outset, it is

130 Id.
134 Id. at 59.
135 Id.
important to recognize that the Licensing Scheme was not designed to regulate expressive conduct. On the contrary, the OFAC utilizes a similar Licensing Scheme for both general and specific licenses.136 Such licenses are obtained by applicants who want to engage in regulated financial transactions, such as limited trade with countries subject to U.S. sanctions like Iran, Sudan, and Cuba.137 Based on the protective design in the Court’s speech jurisprudence for prior restraints on speech, it is easy to see why a licensing scheme aimed at regulating conduct that is not deemed expressive may not provide sufficient safeguards to applicants who are trying to license conduct that has been deemed expressive. This situation could have resulted from a mere oversight, or assumption that attorney representation of DFTOs would also be considered conduct.138

Whatever the reason behind the application of a licensing scheme meant to regulate conduct to speech, it poses significant problems. Two out of three prongs of the test articulated by the Supreme Court for a valid prior restraint are offended by the Licensing Scheme. In order to satisfy the first prong of the test, the government must have an important reason for licensing.139 This criteria is established by the compelling need to prevent terrorist groups from growing stronger and more powerful.140 However, the other requirements cannot be met.

In order to be constitutionally valid, the licensing entity regulating a prior restraint must be given almost no discretion.141 The Scheme makes clear who will be issuing the license: the

136 See 31 C.F.R. 501.801(1), (2).
138 This was the government’s position in Humanitarian Law Project, 130 S.Ct. at 2723.
139 Cox v. New Hampshire, 312 U.S. 569 (1941) (allowing licensing where the permit could only be denied if the area was already in use by another group).
140 See Humanitarian Law Project, 130 S.Ct. at 2724. But see Pet. Reply Brief, 30-31 (“The Government has not cited a single decision of this Court upholding a law that criminalized peaceable speech or advocacy of lawful activities, under any standard of review.”)
141 Cox, 312 U.S. at 572.
Director or Secretary is required to do so. However, the Licensing Scheme does not provide any standards by which the Director or Secretary shall determine the issuance of a license. Instead, the scheme merely provides that the licenses “may be issued, on a case-by-case basis.” Such lack of detail with regard to when licenses may and may not be issued “makes it difficult to distinguish . . . [the Director’s] legitimate denial of a permit [from her] illegitimate use of censorial power.” The Supreme Court’s jurisprudence indicates that the duty of rendering licenses for speech-related conduct should be a ministerial one, and the Licensing Scheme fails to make clear when the duty of issuing a license arises. This deficiency could render the Scheme unconstitutional when applied to attorneys who would advise DFTOs.

Finally, in order to be constitutionally valid, the Licensing Scheme should allow procedural safeguards that ensure prompt determinations and judicial review of denials. The Licensing Scheme’s inability to comply with this requirement is closely related to the lack of standards described above. However, the Licensing Scheme also fails to provide any timeline in which the Director’s decision will be rendered. Perhaps more alarming, the “effect of denial” section of the Licensing Scheme provides only that an applicant or party in interest has a right to the reasoning behind a denial. The Scheme does not provide for judicial review of decisions. These deficiencies compound the constitutional difficulty of the Licensing Scheme.

Based on this analysis, the Licensing Scheme could be an unconstitutional prior restraint on an attorney’s First Amendment right to engage in the expressive conduct of advising a DFTO. This is because it does not provide the specific criteria upon which a license determination shall

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142 31 C.F.R. 501.801(5).
143 31 C.F.R. 501.801(5).
144 31 C.F.R. 597.505.
145 City of Lakewood, 486 U.S. at 753-54.
146 Freeman, 380 U.S. at 51.
147 31 C.F.R. 501.801.
149 Id.
be assessed or provide for judicial review of denials. It is likely that these constitutional shortfalls are largely attributable to the fact that the Licensing Scheme was not designed as a prior restraint on expressive conduct because its impact on expression was not appreciated by the drafters. Beyond constitutional difficulties, the Licensing Scheme also poses significant difficulties for attorneys’ ability to comply with their ethical mandates.

F. Ethical Implications of the Licensing Scheme

There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.\(^{150}\)

Lawyer conduct is regulated separately by the states, however the American Bar Association’s Model Rules of Professional Responsibility (“Model Rules”) provide guideposts for reviewing lawyer ethics and serve as the model for lawyer regulations followed by most states.\(^{151}\) The Model Rules are used by the courts, including the Supreme Court, to give a general standard for how attorneys are expected to act.\(^{152}\) In order to live up to the Model Rules’ expectations, a lawyer must be a diligent advocate for her clients, fully explaining the legal process to them along the way.\(^{153}\) However, to be able to accept or continue representing a DFTO client, an attorney would have to pursue the licensing process described above.

\(^{150}\) Stockton v. Ford, 52 U.S. 232 (1850).

\(^{151}\) JOHNATHAN S. LYNTON & TERRY MICK LYNDALL, LEGAL ETHICS & PROFESSIONAL RESPONSIBILITY 15-16 (1994).

\(^{152}\) E.g. In Re: Primus, 436 U.S. 412, 436 n.31 (1978) (referencing the rules with regard to solicitation); Padilla v. Kentucky, 130 S. Ct. 1473, 1492 (deferring to standards of a “reasonably competent attorney” in the context of an ineffective assistance of counsel decision).

\(^{153}\) ABA MODEL RULES OF PROF’L CONDUCT, R. 1.3 (2009) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”); R. 2.1 (2009) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”); R. 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).
There are practical implications that arise with the notion of licensing an attorney so that she may give advice to a particular client. This is because an attorney-client relationship, which gives rise to the duties imposed on lawyers, begins when a client initially consults the attorney regarding legal advice.\textsuperscript{154} In other words, it rarely occurs that an attorney would approach a client seeking to help them, having already obtained a license to do so. Instead, a client would generally approach an attorney, divulging some information guarded by confidentiality, and a relationship would exist. Therefore, an attorney would be seeking licensure after already wading ankle deep into a DFTO client’s issue. These practical implications may be unavoidable if a licensing scheme is to exist, and it is fortunate that the Material-Support Statute provides that an attorney must knowingly provide advice to a DFTO before they will be held accountable for those actions.\textsuperscript{155}

Beyond the practical implications, there are serious ethical considerations that arise when the Licensing Scheme is applied to attorneys. First, in order to comply with the application process and the reporting requirements, attorneys must, in essence, violate their duty of confidentiality to their clients. Second, a more loosely-applied rule requiring pro-bono service urges attorneys to provide pro-bono representation in situations that the Licensing Scheme would require clients to pay for. All-in-all, the Licensing Scheme should be revisited to ensure that an attorney may meet her ethical obligations while comporting with federal law.

\textit{i. An Attorney’s Duty to Render Independent Professional Judgment}

Attorneys must prioritize candid treatment of their clients’ cause over virtually any other concern. Model Rule of Professional Responsibility 2.1 requires that an attorney “exercise
independent professional judgment and render candid advice.”¹⁵⁶ This rule is sometimes cited where romantic relationships threaten the ability of an attorney to see her client’s cause objectively.¹⁵⁷ Even where an attorney’s reputation is at stake, the Supreme Court has stated that the attorney must set aside those concerns in the interest of upholding his or her duty of candor to the client.¹⁵⁸ In *Richardson-Merrell, Inc. v. Kohler*, the Court, while holding that a ruling of disqualification is not immediately appealable, furthered the policy rationale that a disqualified attorney’s interest in restoring his reputation would interfere with his ability to render advice that focused on the client’s best interests instead of his own.¹⁵⁹ In essence, a lawyer’s duty is to subjugate, to the furthest extent possible, all personal desires in order to provide honest advice to the client.

When presented with the Court’s holding in *Humanitarian Law Project*, a lawyer faces a conundrum: she cannot render candid advice to her DFTO clients because she cannot do so without providing material support under the rule in that case.¹⁶⁰ However, she may perceive that her ethical duties require her to set her own interests aside. Importantly, Model Rule 2.1 goes on to allow that “[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.”¹⁶¹ Particularly at the stage in which an attorney would represent an organization in contesting its designation as a DFTO, moral, social, and political factors may loom large. To be sure, a lawyer who wants to comply with the law, as enunciated by the Court in *Humanitarian Law Project*, but who has a moral sympathy towards a DFTO and who had already established an attorney-client relationship on some level will be faced with a choice

¹⁵⁶ ABA MODEL RULES OF PROF’L CONDUCT, R. 2.1.
¹⁵⁷ E.g. In re: Ashy, 721 So.2d 859 (La. 1998).
¹⁵⁹ Id.
¹⁶¹ ABA MODEL RULES OF PROF’L CONDUCT, R. 2.1.
between her ethical duties under Model Rule 2.1 and her legal duties.\footnote{162}

\textit{ii. An Attorney’s Duty of Confidentiality}

An attorney owes her clients a duty of confidentiality.\footnote{163} Lawyers are considered “people who know how to keep secrets as much as they are regarded as litigators . . . or drafters of contracts.”\footnote{164} This requirement is steeped in over 300 years of tradition.\footnote{165} This means that a client must give informed consent before information told to the lawyer in confidence or the disclosure is so necessary to the representation that the attorney’s authorization to reveal the information is implied.\footnote{166} An attorney’s duty of confidentiality offers fundamental benefits to

\footnote{162} There is something to be said for an attorney’s interest in being able to practice in line with her ethical responsibilities. Although this “right” is not arguably not protected by the United States Constitution, courts have recognized that, on some level, a judicial system that permits lawyers to face adverse consequences because they have conformed to the rules of professional ethics would be beyond the pale. \textit{See} Weider v. Skala, 80 N.Y.2d 628 (1992) (holding that an attorney fired for reporting ethical violations in his firm could sue for wrongful discharge because such behavior would “frustrate the only legitimate purpose of the employment relationship”). \textit{But see} Jacobson v. Knepper & Moga P.C., 185 Ill.2d 372 (1998) (holding that an attorney could not maintain action against law firm for retaliatory discharge).

\footnote{163} \textit{ABA MODEL RULES OF PROF’L CONDUCT}, R. 1.6. Rule 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
(6) to comply with other law or a court order.

\textit{Id.}

\footnote{164} JEFFEREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.2.


\footnote{166} \textit{Id.}
The need for confidentiality is “tripartite,” in that 1) the adversarial system requires parties to work with lawyers to resolve disputes; 2) lawyers cannot be effective if they do not know all of the relevant facts; and 3) clients will not confide in lawyers without the requirement of confidentiality. In representing her clients, a lawyer must constantly seek to uphold the highest standard of confidentiality.

The Licensing Scheme requires that attorneys who apply for a license to represent DFTOs would be forced to divulge the name of all interested parties to the representation, in addition to “such further information as is deemed necessary to a proper determination” in order to obtain a license. Further, because the license to represent DFTOs is a specific license, attorneys would be subject to reporting requirements in which they would have to divulge information “with respect to the transaction covered by the license.” Both of these requirements implicate the duty of confidentiality.

Sometimes the mere revelation of a client’s name is sufficient to breach the duty of confidentiality. This is because the Model Rules are designed to protect clients, and when others know that the client is consulting with an attorney, that simple fact can be revealing when considered in context of what the hearer may also know. For example, if a person is in marital trouble and they are said to have “consulted with a lawyer” many people would assume that the person intends to seek a divorce. The disclosure of the concerned or interested parties to representation that is required by the Licensing Scheme is permitted at the lawyer’s discretion “to comply with . . . law.” Further, consent to reveal this information may be considered

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167 In Re: Shafer, 149 Wash. 2d at 161.
168 Id.
169 31 C.F.R. 501.801(3).
171 ABA MODEL RULES OF PROF’L CONDUCT, R. 1.6(b)(6).
implied, because it is necessary to continue representation. However, these caveats do not give rise to an obligation on the part of the attorney to disclose confidential material, but rather allow the attorney to exercise her discretion in deciding whether or not to do so. The Licensing Scheme takes away the ability to exercise such discretion because the lawyer must divulge private information, or risk prosecution under the Material-Support Statute.

The analysis of application requirements and confidentiality cannot end there. This is because it is reasonable to expect that more information would be necessary to acquire a license. Essentially, the only requirements that are expressly given by the Licensing Scheme are name and taxpayer identification code. Although the Licensing Scheme does not say so, it is reasonable to believe that for a DFTO client, as well as the name and taxpayer code of any client that would require licensure would give rise to suspicion in the eyes of the Director. This suspicion would require more information regarding the representation. Even without a detailed list of what information would be requested, it follows that the Director would be interested in the scope of representation and basic claims or defenses being pursued.

Technically, an attorney could assert that disclosure of this information would be necessary to representation, such that consent would be implied, and disclosure would be permitted, but not required under the Model Rules. On the other hand, provision of such information to an agency subject to public disclosure of its transactions like the OFAC seems to violate the principles upon which the duty of confidentiality stands. Disclosure of strategic information early in representation could arguably be detrimental to many DFTO clients’ interests.

Similarly, the reporting requirements that force attorneys to “file reports with respect to

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172 ABA MODEL RULES OF PROF’L CONDUCT, R. 1.6(a).
173 See 31 C.F.R. 501.801(3).
174 ABA MODEL RULES OF PROF’L CONDUCT, R. 1.6(a).
the transaction covered by the license, in such form and at such times and places as may be
prescribed in the license or otherwise” pose a threat to the confidentiality of the attorney-client
relationship. It is unknown what information would be disclosed in compliance with these
requirements, but the vast discretion left to the Director by the terms “in such form and at such
times and places as may be prescribed” justifies deep suspicion as to the likelihood of such
information being used in a manner adverse to the client.

iii. Limits of the Scope of Representation

While the foregoing ethical guideposts further illuminate the trouble with the Licensing
Scheme, Model Rule 1.2(d) is illustrative of why the Licensing Scheme is unnecessary. That
rule states that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that
the lawyer knows is criminal.” This rule was promulgated through the Sarbanes–Oxley
Act. The case of former attorney Lynne Stewart may be one that demonstrates the tough
choices that Model Rule 1.2(d) forces lawyers to make. Lynne Stewart was a celebrated yet
radical human rights lawyer. However, Stewart allegedly crossed the line drawn by 1.2(d) in
the course of representing Sheikh Omar Abdel-Rahman, the man accused of plotting the World
Trade Center bombings in 1993. Stewart was convicted of passing and disseminating
messages regarding Islamic Group activities to and from Abdel Rahman, specifically conveying
her client’s blessing to resume terrorist activity. The Justice Department alleged that Stewart

175 31 C.F.R. 501.801(5).
176 ABA MODEL RULES OF PROF’L CONDUCT, R. 1.2(d). The rule goes on to state that “a lawyer may
discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to
make a good faith effort to determine the validity, scope, meaning or application of the law.” Id.
179 DOJ press release Nov. 19, 2003, Superseding Indictment adds new charges against Ahmed Abdel
180 DOJ press release Nov. 19, 2003, Superseding Indictment adds new charges against Ahmed Abdel
allowed a co-conspirator in terrorist activity to pose as her translator on different prison visits with Rahman, and that on one occasion, when she heard of the kidnappings by the Abu Sayyaf terrorist group in the Philippines, she responded “good for them.” Civil rights groups have adamantly argued that these charges are fabricated and that Stewart’s prosecution was tainted by the atmosphere after September 11, 2001. However, if they are true, then this activity represents the type of activity that would fall under the purview of 1.2(d). While Stewart was automatically disbarred due to her conviction, she likely could have been disbarred based on her alleged actions.

Model Rule 1.2(d) binds attorneys—regardless of who they represent—to offer advice without furthering criminal activity. It follows that an attorney representing a DFTO could not ethically support that organization’s terror-oriented activities. While a lawyer may discuss legal consequences of any action, and is encouraged to engage in a good faith effort to fully comprehend what that law is, she may not counsel a client to violate the law. Any good-faith effort to analyze the legality of an act of terrorism will result in a one-line memo: “It’s illegal. Don’t do it.”

Attorneys are precluded from advising DFTOs in a manner that furthers their terrorist activities by Model Rule 1.2(d). They cannot ethically do so. Those who do will face disbarment. Thus, the door-and-window effect of Humanitarian Law Project and the Licensing Scheme simply impose a punitive regime on lawful attorney advice. This is the type of advice that should easily pass any constitutionally valid Licensing Scheme. This is the type of advice that is worthy of First Amendment protection. Therefore, Model Rule 1.2(d) arguably renders the

181 Id.
182 E.g. JUSTICE FOR LYNN STEWART, Who is Lynne Stewart, http://lynnestewart.org/about-lynnne/.
183 ABA MODEL RULES OF PROF’L CONDUCT, R. 1.2(d).
Licensing Scheme unnecessary as a prophylactic unless the government can show an important reason why it needs to know about a lawyer’s representation of a DFTO.

III. PROPOSED REFORM

The reforms proposed here rest on several assertions discussed throughout this Paper. The first assertion is that the Court’s jurisprudence and the nature of the attorney-client relationship would require the Court, if it were to address the free-speech value of an attorney’s choice of client, to find that this choice is expressive conduct, which is protected by the First Amendment.184 Second, the Licensing Scheme that is meant to provide an open window for attorney representation of DFTOs within the Material-Support Statute is an unconstitutional prior restraint on that expressive conduct.185 Furthermore, an attorney has an inherent duty to engage in such expressive conduct as representing controversial clients within the confines of Legal Ethics. Finally, the role of the attorney in protecting discrete and insular minorities in our society further urges reform.

Because a lawyer’s choice of client is expressive conduct, a prior restraint on such conduct must conform to certain constitutional constraints.186 A careful application of the Cohen test to attorney’s choice of clients would likely indicate that no government-imposed constraint on this speech would pass constitutional muster. However, the Court may find that if such regulation were narrowly tailored to address only those aspects of representation that were indispensible for national security purposes, the Court may approve of such a licensing scheme. Until the Court definitively rules on the free-speech protections for attorney speech, the Code should be altered so that the Licensing Scheme is a valid prior restraint, narrowly tailored to

184 See supra Part I, and accompanying notes.
185 See supra Part II, and accompanying notes.
186 See supra Part II, and accompanying notes.
address only compelling issues of national security.

For the Licensing Scheme to be considered a valid prior restraint, the information that is required to issue a license and the criteria on which license determinations shall be based must be content neutral and forthrightly delineated. Further, the task of issuing licenses must be ministerial in nature, with virtually no discretion available to the individual reviewing applications. If the licensing scheme asked attorneys to provide their own name, the client’s name, and to warrant that they would comply with Model Rule 1.2(d) during the course of their contract, and if the person reviewing applications were vested only with a ministerial duty to approve conforming applications that provided accurate names and valid warranties, such a provision may be a valid prior restraint. However, any further inquiry into the nature of services provided could be considered content specific as opposed to content neutral.

Legal ethics place further constraint on the information that a palatable licensing scheme could solicit. Importantly, the existence of Model Rule 1.2(d), so long as it has been adopted by the highest court of the state in which an attorney practices, generally negates the necessity of regulating lawyer provision of advice that would violate the law directly.187 When it comes to legal advice bearing on compliance with law, or general legal advocacy on behalf of a DFTO, the rules of confidentiality regulate the amount of information that a lawyer should disclose regarding her client’s cause.188 To be workable and protect attorneys’ ability to make strategic choices in the course of competent representation of their clients, the Licensing Scheme should not require an attorney to disclose information relating to the representation. Arguably, the attorney should not even be required to provide the name of the client.189 Instead, the Licensing Scheme could require the name of the attorney and a warranty that the attorney will conform to

187 See supra Subsection II.B.iii.
188 See supra Subsection II.B.ii.
189 See supra Subsection II.B.ii.
Model Rule 1.2(d).

Reform in this area is vital even though the Licensing Scheme might only directly affect a small number of people. Also, it is important to recognize the differences between attorneys and other professionals. This is because the notion of licensing lawyers based on whom they choose to represent could push attorney speech down the proverbial “slippery slope.” As public angst vacillates from one group to another, the temptation will exist to preclude material support in the form of legal advice to one group after another, effectively suppressing the lawyer’s role as voice box for the unheard in our society. Perhaps in the future lawyers will be forced to obtain a license before representing undocumented immigrants, communists, or radical environmentalists. If the constitutional shortcomings of this Licensing Scheme are not addressed, they could become a template for further statutory replication, an outcome which is not tolerable.

CONCLUSION

It is understandably difficult to sympathize with any person or organization who engages in terrorist activity. Despite the fact that we may not care whether the Tamil Tigers, much less the Taliban, have access to legal advice, we must understand the implications of limiting an attorney’s ability to represent whom she represents and the terms of that representation. Had such licensing schemes regulated attorney behavior in the past, prior restraints on attorneys for such subversives as Harriett Tubman, Fred Korematsu, Rosa Parks, Dalton Trumbo, or César Chavez could have been justified based on what, at the time, may have seemed like a compelling government purpose. When the nation faces turmoil, some lawyers have served to

190 Fred Korematsu was the defendant in Korematsu 319 U.S. at 432.
191 Targeted as one of the “Hollywood Ten” by the House Unamerican Activities Committee, Dalton Trumbo was a celebrated Hollywood screenwriter who was blacklisted for more than a decade throughout the McCarthy era. Blacklisted Writer Dalton Trumbo Dies, S.F. CHRON., Sep. 11, 1976, at 16.
192 This is not necessarily to argue, as Prof. Margulies puts it, that Humanitarian Law Project is “heralding
buttress American democracy—striking the balance between the government’s defensive impulse and its lofty origins. It is imperative that lawyers be allowed to continue serving this purpose without the obstacle of unconstitutional licensing throughout the War on Terror. Until Congress or the Court definitively uphold this principle, the Treasury Department should alter the Licensing Scheme so that it passes both constitutional and ethical muster.

a new McCarthyism.” Margulies, supra note 62 at 1. Prof. Margulies argues that limits on attorney representation of DFTOs is comparable to professional regulation limiting lawyers’ use of pretrial publicity. Id. I would emphasize the distinction that the licensing scheme regulates a lawyer’s choice of cause and client, and not simply the parameters she must adhere to while engaging in that representation.
APPENDIX A.

Appendix A explains what attorneys who obtain a license can do for DFTO clients under 31 C.F.R. 597.505.

**Paid Services that Can Be Provided Subject to the Licensing Scheme**
- General Compliance with U.S. Law
- Defense Representation
- Plaintiff-Side Representation
- Sanctions Proceedings Representation
- Detention-Related (Military) Proceedings
- Judicial Review of DFTO Designation

**Uncompensated Services that Can Be Provided Subject to the Licensing Scheme**
- Indigent Defense
- Other services for which "prevailing U.S. law requires access to legal counsel at public expense."

APPENDIX B.

Appendix B displays the process by which applicants may receive a license under the Licensing Scheme, pursuant to 31 C.F.R. 501.801.

1. Submit letter containing: a) names of all interested parties; b) taxpayer identification number; c) further information as deemed necessary
2. Await approval by the Director or Secretary
3. Submit follow-up reports, upon request, with respect to the transaction covered by the license.