AMERICAN CONSTITUTIONALISM
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Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Advocacy

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Holder v. Humanitarian Law Project, 561 U.S. ___ (2010)

The Humanitarian Law Project (HLP) is an organization "dedicated to protecting human rights and promoting the peaceful resolution of conflict by using established international human rights laws and humanitarian law." The Antiterrorism and Effective Death Penalty Act of 1996 forbade persons or groups to "knowingly provid[e] material support or resources to a foreign terrorist organization." In 1997 the secretary of state designated the Kurdistan Workers' Party and the Liberation Tigers of Tamil Eelam as foreign terrorist organizations. Members of the (HLP) wished to provide monetary aid and training to those groups to teach them how to be more effective political advocates, make greater use of international law, and petition the United Nations. They feared doing so because HLP members might be prosecuted for providing material support to a terrorist group. In 1998, the HLP filed suit in federal court asking for an injunction against any effort to prosecute them under the Antiterrorism and Effective Death Penalty Act. After more than a decade of litigation, a lower federal court granted relief. That decision was sustained by the Court of Appeals for the Ninth Circuit. Eric Holder, the attorney general of the United States, appealed to the Supreme Court of the United States.

Many prominent groups sought to influence the Supreme Court's ruling. Several prominent retired military officers, conservative public interest groups, the Anti-Defamation League, and experts on terrorism filed amicus briefs urging the Supreme Court to declare that the United States could forbid the HLP from helping terrorist groups. The brief of the retired military officers asserted,

> *The Ninth Circuit's decision, if allowed to stand, could significantly impair the federal government's ability to counter the threat to national security posed by foreign terrorist groups. Congress has determined that the threat posed by such groups is magnified by the support they have been able to garner from within the United States; it has adopted legislation designed to cut off such support. Amici believe that Congress is acting well within its powers by authorizing the imposition of criminal sanctions on those who provide material support for such groups, regardless of the form in which that support is given.*

Several peace organizations and the Victims of the McCarthy Era filed amicus briefs on behalf of the HLP. The brief for the Victims of the McCarthy Era stated,

> *AEDPA's vague ban on "assistance" and "advice" is essentially no different from the McCarthy Era attempt to root out association with and advocacy for groups unpopular with the government. Starting in the 1930s, and through the 1960s, Congress and the Executive Branch identified organizations—the Communist Party and groups identified as having ties to the Communist Party—as using illegal means, including terrorism, with the aim of overthrowing the United States Government by force and violence. The Smith Act and the Subversive Activities Control Act made it a crime to associate with these designated groups or to speak in support of these groups. These were crimes regardless of whether or not that speech or association supported or furthered the group's unlawful activities.*

The Supreme Court by a 6–3 vote ruled that the prohibition on "material support" was constitutional. Chief Justice Roberts's majority opinion maintained that national security interests justifying banned all provisions of material support to terrorist organizations, even those directed at

peaceful activities. What standard of constitutional protection did Roberts employ? Why did he believe the material support law serves vital national purposes? Why did Justice Breyer disagree? Would the Court have reached the same result had they adjudicated the case before September 11, 2001?

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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Plaintiffs claim that Congress has banned their "pure political speech." It has not. Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK [Kurdistan Workers' Party] and LTTE Liberation Tigers of Tamil Eelam], the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations. . . . Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.

The Government is wrong that the only thing actually at issue in this litigation is conduct, and therefore wrong to argue that [*United States v. O'Brien* (1968)] provides the correct standard of review. *O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech and § 2339B regulates speech on the basis of its content. Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. . . . On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

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The First Amendment issue before us is more refined than either plaintiffs or the Government would have it. It is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead whether the Government may prohibit what plaintiffs want to do—provide material support to the PKK and LTTE in the form of speech.

Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order. Plaintiffs' complaint is that the ban on material support, applied to what they wish to do, is not "necessary to further that interest." The objective of combating terrorism does not justify prohibiting their speech, plaintiffs argue, because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism.

Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. When it enacted § 2339B in 1996, Congress made specific findings regarding the serious threat posed by international terrorism. One of those findings explicitly rejects plaintiffs' contention that their support would not further the terrorist activities of the PKK and LTTE: "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."

We are convinced that Congress was justified in rejecting [plaintiff's] view. The PKK and the LTTE are deadly groups. "The PKK's insurgency has claimed more than 22,000 lives." The LTTE has engaged in extensive suicide bombings and political assassinations, including killings of the Sri Lankan President, Security Minister, and Deputy Defense Minister. . . . It is not difficult to conclude as Congress did that the "tain[t]" of such violent activities is so great that working in coordination with or at the command of the PKK and LTTE serves to legitimize and further their terrorist means. . . .

Material support meant to "promot[e] peaceable, lawful conduct" can further terrorism by foreign groups in multiple ways. "Material support" is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks. "Terrorist organizations do not maintain organizational 'firewalls' that would prevent or deter . . . sharing and

commingling of support and benefits." "[I]nvestigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts." . . .

Money is fungible, and "[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put." But "there is reason to believe that foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations." Thus, "[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives." . . .

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. . . . The material-support statute furthers this international effort by prohibiting aid for foreign terrorist groups that harm the United States' partners abroad. . . .

For example, the Republic of Turkey—a fellow member of NATO—is defending itself against a violent insurgency waged by the PKK. That nation and our other allies would react sharply to Americans furnishing material support to foreign groups like the PKK, and would hardly be mollified by the explanation that the support was meant only to further those groups' "legitimate" activities. From Turkey's perspective, there likely are no such activities. . . .

In analyzing whether it is possible in practice to distinguish material support for a foreign terrorist group's violent activities and its nonviolent activities, we do not rely exclusively on our own inferences drawn from the record evidence. We have before us an affidavit stating the Executive Branch's conclusion on that question. The State Department informs us that "[t]he experience and analysis of the U.S. government agencies charged with combating terrorism strongly suppor[t]" Congress's finding that all contributions to foreign terrorist organizations further their terrorism. . . .

That evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs. The PKK and the LTTE have committed terrorist acts against American citizens abroad, and the material-support statute addresses acute foreign policy concerns involving relationships with our Nation's allies. We have noted that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." It is vital in this context "not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch."

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[N]ational security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess. The dissent slights these real constraints in demanding hard proof-with "detail," "specific facts," and "specific evidence"—that plaintiffs' proposed activities will support terrorist attacks. That would be a dangerous requirement. In this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government. The material-support statute is, on its face, a preventive measure—it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur. The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.

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At bottom, plaintiffs simply disagree with the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization. That judgment, however, is entitled to significant weight, and we have persuasive evidence before us to sustain it. Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups' nonviolent ends.

We turn to the particular speech plaintiffs propose to undertake. First, plaintiffs propose to "train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes." Congress can, consistent with the First Amendment, prohibit this direct training. It is wholly foreseeable that the PKK could use the "specific skill[s]" that plaintiffs propose to impart, § 2339A(b)(2), as part of a broader strategy to promote terrorism. The PKK could, for example, pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks. . . .

Second, plaintiffs propose to "teach PKK members how to petition various representative bodies such as the United Nations for relief." The Government acts within First Amendment strictures in banning this proposed speech because it teaches the organization how to acquire "relief," which plaintiffs never define with any specificity, and which could readily include monetary aid. . . . Money is fungible, and Congress logically concluded that money a terrorist group such as the PKK obtains using the techniques plaintiffs propose to teach could be redirected to funding the group's violent activities.

. . . The dissent seems unwilling to entertain the prospect that training and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities. In the dissent's world, such training is all to the good. Congress and the Executive, however, have concluded that we live in a different world: one in which the designated foreign terrorist organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." . . . .

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[T]he statute does not penalize mere association with a foreign terrorist organization. As the Ninth Circuit put it: "The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. . . What [§ 2339B] prohibits is the act of giving material support. . ." . . .

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The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to "provide for the common defence." . . . We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.

JUSTICE BREYER, with whom JUSTICES GINSBURG and SOTOMAYOR join, dissenting.

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In my view, the Government has not made the strong showing necessary to justify under the First Amendment the criminal prosecution of those who engage in these activities. All the activities involve the communication and advocacy of political ideas and lawful means of achieving political ends. Even the subjects the plaintiffs wish to teach—using international law to resolve disputes peacefully or petitioning the United Nations, for instance—concern political speech. . . .

That this speech and association for political purposes is the kind of activity to which the First Amendment ordinarily offers its strongest protection is elementary. . . .

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"Coordination" with a group that engages in unlawful activity also does not deprive the plaintiffs of the First Amendment's protection under any traditional "categorical" exception to its protection. The plaintiffs do not propose to solicit a crime. They will not engage in fraud or defamation or circulate obscenity. . . Here the plaintiffs seek to advocate peaceful, lawful action to secure political ends; and they seek to teach others how to do the same. No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg* [*v. Ohio* (1969)].

Moreover, the Court has previously held that a person who associates with a group that uses unlawful means to achieve its ends does not thereby necessarily forfeit the First Amendment's protection for freedom of association. . . .Rather, the Court has pointed out in respect to associating with a group advocating overthrow of the Government through force and violence: "If the persons assembling have committed crimes elsewhere . . ., they may be prosecuted for their . . . violation of valid laws. But it is a

different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." . . .

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[E]ven if we assume for argument's sake that "strict scrutiny" does not apply, no one can deny that we must at the very least "measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment." . . . And here I need go no further, for I doubt that the statute, as the Government would interpret it, can survive any reasonably applicable First Amendment standard. . . .

The Government does identify a compelling countervailing interest, namely, the interest in protecting the security of the United States and its nationals from the threats that foreign terrorist organizations pose by denying those organizations financial and other fungible resources. I do not dispute the importance of this interest. But I do dispute whether the interest can justify the statute's criminal prohibition. To put the matter more specifically, precisely how does application of the statute to the protected activities before us help achieve that important security-related end? . . .

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. . . There is no obvious way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE, say, how to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible. It is far from obvious that these advocacy activities can themselves be redirected, or will free other resources that can be directed, towards terrorist ends. Thus, we must determine whether the Government has come forward with evidence to support its claim.

The Government has provided us with no empirical information that might convincingly support this claim. Instead, the Government cites only to evidence that Congress was concerned about the "fungible" nature in general of resources, predominately money and material goods. It points to a congressional finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." . . .

The most one can say in the Government's favor about these statements is that they might be read as offering highly general support for its argument. The statements do not, however, explain in any detail how the plaintiffs' political-advocacy-related activities might actually be "fungible" and therefore capable of being diverted to terrorist use. Nor do they indicate that Congress itself was concerned with "support" of this kind. . . .

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. . . Speech, association, and related activities on behalf of a group will often, perhaps always, help to legitimate that group. Thus, were the law to accept a "legitimating" effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First Amendment battle would be lost in untold instances where it should be won. Once one accepts this argument, there is no natural stopping place. . . .

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What is one to say about . . . arguments that would deny First Amendment protection to the peaceful teaching of international human rights law on the ground that a little knowledge about "the international legal system" is too dangerous a thing; that an opponent's subsequent willingness to negotiate might be faked, so let's not teach him how to try? What might be said of these claims by those who live, as we do, in a Nation committed to the resolution of disputes through "deliberative forces"?

. . .

Throughout, the majority emphasizes that it would defer strongly to Congress' "informed judgment." But here, there is no evidence that Congress has made such a judgment regarding the specific activities at issue in these cases. In any event, "whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open [for judicial determination] whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature." . . .

I concede that the Government's expertise in foreign affairs may warrant deference in respect to many matters, e.g., our relations with Turkey. But it remains for this Court to decide whether the Government has shown that such an interest justifies criminalizing speech activity otherwise protected by the First Amendment. And the fact that other nations may like us less for granting that protection cannot in and of itself carry the day.

. . . [T]he Court has failed to examine the Government's justifications with sufficient care. It has failed to insist upon specific evidence, rather than general assertion. It has failed to require tailoring of means to fit compelling ends. And ultimately it deprives the individuals before us of the protection that the First Amendment demands.