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Free Speech and the ‘War on Terror’

The United States has a tragic history when it comes to the treatment of free speech issues during times of crisis. During World War I, individuals were imprisoned for long periods simply for criticizing the draft and war effort.¹ In the McCarthy era, the Court upheld a 20-year prison sentence for individuals convicted of conspiracy to advocate the overthrow of the government by teaching the works of Marx, Lenin, and Engels.² And now, during the so-called war on terror, the Court continues to follow this unfortunate history.

In a decision last June, the Court held that American citizens may be punished for advising a “foreign terrorist organization” about using international law for peaceful resolution of disputes or applying for humanitarian assistance, even if there is no proof that doing so increased the likelihood of terrorist acts.³ The Court’s decision in *Holder v. Humanitarian Law Project* was largely overlooked in the flurry of end-of-the-term decisions. But it is the first major ruling on free speech since the 9/11 terrorist attacks and is a major loss for freedom of expression.

The consolidated case, which had

been litigated for more than 12 years, involved a provision of federal law that makes it a crime to “knowingly provid[e] material support or resources to a foreign terrorist organization.”⁴ When the first of the two cases was initially filed, the definition of “material support or resources” included providing “training” or “personnel.” The law gave the secretary of state the power to designate which groups are “foreign terrorist organizations.”

Humanitarian Law Project involved two groups designated as foreign terrorist organizations. The Kurdistan Workers’ Party was founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey. The Liberation Tigers of Tamil Eelam was founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka.

Two organizations in the United States, including the Humanitarian Law Project, and six individuals (including a retired judge) brought a lawsuit in 1998, arguing that the statute was unconstitutionally vague and violated their First Amendment rights to freedom of speech and association. Some of the plaintiffs sought to advise the Kurdish group

about the use of international law and the United Nations for peaceful dispute resolution. Others wanted to advise the Sri Lankan group about how to apply for humanitarian assistance.

A federal district court in California rejected the plaintiffs’ First Amendment claims but found that the statute’s prohibition against providing “personnel” and “training” to terrorist groups was unconstitutionally vague.⁵ The Ninth Circuit affirmed,⁶ and the district court entered an injunction.

While appeals were pending, Congress enacted the USA Patriot Act, adding new provisions to the law, including the phrase “expert advice or assistance” to the definition of “material support or resources.”⁷ The plaintiffs filed a new complaint challenging these provisions, and the district court found them unconstitutionally vague as well.⁸

While that case was pending before an en banc panel of the Ninth Circuit, Congress amended the statute again, adding additional definitions to the “material support or resources” prohibition. In light of this, the Ninth Circuit returned both cases to the district court, which consolidated them and again struck down several of the statute’s provisions as unconstitutionally vague—specifically, the prohibitions against providing “training,” “expert advice or assistance” in the form of “specialized knowledge,” or “service.” The court also reaffirmed its earlier rulings regarding the plaintiffs’ First Amendment claims.⁹ The Ninth Circuit affirmed once again.¹⁰

In a 6-3 decision, the Supreme Court

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reversed. Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor dissented. Interestingly, liberal-leaning Justice John Paul Stevens joined with the majority but did not write a separate opinion.

All nine justices rejected the vagueness challenge and the reasoning of the lower courts on this issue. The Court held that the statute was sufficiently clear to give notice to a reasonable person. It found that the activities the plaintiffs sought to engage in—giving advice on the use of international law and assistance in applying for humanitarian aid—clearly fit within what was prohibited.

Chief Justice John Roberts, writing for the majority, distinguished other statutes that had been deemed void on vagueness grounds. He wrote: “We have in the past struck down statutes that tied criminal culpability to whether the defendant’s conduct was ‘annoying’ or ‘indecent’—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.’ Applying the statutory terms in this action—‘training,’ ‘expert advice or assistance,’ ‘service,’ and ‘personnel’—does not require similarly untethered, subjective judgments.”¹¹

The dissent agreed that the statute is not unconstitutionally vague. The disagreement between the majority and the dissent was whether speech, by itself, without any proof of likely harm, can be constitutionally punished as material assistance to a foreign terrorist organization.

Roberts answered this question affirmatively. He explained that the statute does not prohibit “independent advocacy.”¹² Americans can still speak out on behalf of the objectives of foreign terrorist organizations and even appeal to the United Nations on their behalf, as long as it is done independently of the organization. He wrote that “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.”¹³

Breyer’s dissenting opinion argued that the statute allows the government to punish “peaceful political advocacy” or “pure speech and association” without the need to show any likelihood of harm.¹⁴ He maintained that speech under these circumstances should not constitutionally be the basis for punishment, at least not without proof of likely harm.

A Fundamental Right

Many aspects of the *Humanitarian Law Project* decision are troubling.

First, the Court’s explicit deference to the government is at odds with the strict scrutiny analysis that is supposed to be used for content-based restrictions on speech. The majority opinion stated 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.”¹⁵ Similarly, the majority said that it “is vital in this context ‘not to substitute . . . our own evaluation of evidence

for a reasonable evaluation by the legislative branch.’”¹⁶

But whenever the government punishes speech based on the content of the message, the Court should grant no deference to the government’s decision to do so. Freedom of speech is a fundamental right, and this deference is at odds with the traditional and proper judicial role concerning fundamental rights.

Second, the Court has prescribed a specific test to be used when the issue is whether speech poses a risk of harm by promoting illegal activity. In *Brandenburg v. Ohio*, the Court held that such expression can be punished only if there is a likelihood of illegal activity and if the speech is directed at causing illegal activity.¹⁷

In *Humanitarian Law Project*, the Court found that speech could be punished without any showing that it increased the likelihood of terrorist activity. In this way, the decision is frighteningly like cases from earlier eras when speech was punished without any evidence that it was likely to cause illegal activities or other harms.¹⁸ As the dissent noted, “[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.”¹⁹

Third, whether a person can be punished for advocacy under the statute is determined by whether the speech is in



coordination with or independent of a foreign terrorist organization. Yet, the Court nowhere attempts to define what is sufficient for “coordination.” Breyer explained the chilling effect this could have on freedom of speech: “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.”²⁰ The dissent concluded that “application of the statute as the government interprets it would gravely and without adequate

justification injure interests of the kind the First Amendment protects.”²¹

In one sense, the decision in *Humanitarian Law Project* was predictable. It is one in a long series of Supreme Court decisions over the course of American history that gives great deference to the military and Congress, especially in wartime. Yet, from another perspective, the Court’s willingness to allow speech to be punished without any showing of likely harm is disturbing. There is no question of the need to fight terrorism effectively, but the case lacks evidence that anything is added to this effort by punishing people for their speech. ■

NOTES

1. See e.g. *Schenck v. U.S.*, 249 U.S. 47 (1919) (upholding a 10-year prison sentence for arguing that the draft was an unconstitutional form of involuntary servitude); *Debs v. U.S.*, 249 U.S. 211 (1919) (upholding a 10-year prison sentence for telling an audience that they are good for more than “cannon fodder”).
2. *Dennis v. U.S.*, 341 U.S. 494 (1951).
3. *Holder v. Humanitarian L. Project*, 130 S. Ct. 2705 (2010).
4. 18 U.S.C. §2339B (2006).
5. *Humanitarian L. Project v. Reno*, 9 F. Supp. 2d 1176 (C.D. Cal. 1998).
6. *Humanitarian L. Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000).
7. USA Patriot Act, Pub. L. No. 107-56, §805(a)(2)(B), 115 Stat. 272, 377 (2001).
8. *Humanitarian L. Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004).
9. *Humanitarian L. Project v. Gonzalez*, 380 F. Supp. 2d 1134 (C.D. Cal. 2005).
10. *Humanitarian L. Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2009).
11. *Humanitarian L. Project*, 130 S. Ct. at 2720 (quoting *U.S. v. Williams*, 553 U.S. 285 (2008)).
12. *Id.* at 2723.
13. *Id.*
14. *Id.* at 2735, 2740 (Breyer, J., dissenting).
15. *Id.* at 2727.
16. *Id.*
17. 395 U.S. 444, 447 (1969).
18. See cases cited at notes 1 and 2.
19. *Humanitarian L. Project*, 130 S. Ct. at 2743 (Breyer, J., dissenting).
20. *Id.* at 2733.
21. *Id.* at 2739.