

debate forum



CENSORING OUR SPEECH: A SLIPPERY SLOPE

By Rana Odeh

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) outlaws providing material support or resources to any group, including the non-violent activities of a group, that has been classified by the State Department as a "terrorist organization." In 1998 after the first complaint was filed, Judge Audrey Collins of the federal district court in Los Angeles deemed the Act unconstitutionally vague.

As the case was in the process of being appealed, the USA PATRIOT Act was passed in 2001 which added a ban on "expert advice or assistance" to the material support statute. In 2003, Judge Collins ruled that these new provisions were also unconstitutionally vague. The Court of Appeals affirmed Judge Collins' ruling and also ruled that in conformity with the constitution, "no one could be convicted under that statute without knowledge of a group's illegal activities or knowledge that the group was designated as a terrorist organization by the government." Congress then passed the Intelligence Reform and Terrorism Prevention Act (IRTPA) which added among other things a knowledge requirement of the sort the panel had mandated. The law prohibits providing not only material support, but also four more ambiguous sorts of help: "training," "personnel," "service" and "expert advice or assistance."

Doesn't that sound clear and straightforward? I don't know about you, but I can think of a million peaceful activities that would fall under "training," "personnel," "service" and "expert advice or assistance." As Supreme Court Justice Sonia Sotomayor suggested, "the law might sweep too broadly by making, say, harmonica instruction a crime because it involves specialized training."

This law creates a very slippery slope that allows the government to prosecute individuals based on vague interpretations of the law. The State Department has too much discretionary power to label groups, organizations or individuals as terrorist, and this law is vague enough to incriminate individuals based on any form of communication with the said groups. Last week, the U.S. Supreme Court began hearing the case *Holder v. Humanitarian Law Project* filed by the Center for Constitutional Rights on behalf of six organizations and two individuals whose lawful political and humanitarian activities have been made illegal by the IRTPA. One of the plaintiffs in the case, Ralph D. Fertig, is a retired lawyer and member of the Kurdistan Workers Party (PKK) find peaceful ways to protect the rights of the Kurds living in Turkey, by filing human rights claims at the UN in Geneva on their behalf. Mr. Fertig was helping the PKK resolve their dispute with the Turkish government through peaceful political negotiations. His expert advice was purely used for peaceful purposes and was not intended to promote violence in any way shape or form. His organization is now incapable of doing its humanitarian work because of the government's

broad interpretation of the law.

The case also involves a group of plaintiffs who sought to provide medical assistance to the victims of the 2004 tsunami in the areas that were hardest hit but happen to be under the control of the Liberation Tamil Tigers of Eelam (LTTE) in Sri Lanka. The doctors' aid was strictly humanitarian, but the American government prohibited any medical assistance to the areas under the LTTE control despite the fact that there were many innocent civilians in need of help.

Solicitor General Elena Kagan defended the law at issue in the case, which bars providing material support to terrorist organizations, as "a vital weapon in this nation's continuing struggle against international terrorism."

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Even seemingly benign help is prohibited, Ms. Kagan said.

The First Amendment, free speech, is the first thing that needs to be protected in a free society. A free and democratic society cannot exist without free speech. Passing a law that could be so vaguely interpreted and could prohibit non-violent communication, attacks the very definition of free speech. Even in a time of war when we feel pressured to restrict freedom of speech for the sake of national security, we need to stick to our values and uphold the fundamental rights that maintain a free society.

In 1969 the Supreme Court ruled in *Brandenburg v. Ohio* that freedoms of speech and press constitutionally protect an individual or group from punishment for advocacy of force or of law violation, except where such advocacy incites imminent lawless action (violence) and is likely to incite or produce such action. The first amendment was extremely powerful in *Brandenburg's* (Ku Klux Klan member) case; it would be a crime to let our freedom of speech dwindle away in the case of humanitarian aid and peaceful advocacy. If the Supreme Court takes away a portion of our freedom, we will progressively lose our power, humanity and unity. Soon enough we will be silenced by our own hypocritical government out of fear of being incriminated, or even worse, being labeled as a terrorist simply at the government's convenience.

It is not fair to blame the struggling Sri Lankan citizens for being governed by a "terrorist" group, and it is brainless to prohibit peaceful support that finally offers a non-violent resolution to an ongoing issue involving an abused population that the U.S. considers violent and dangerous.

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THE BILL OF RIGHTS IS NOT A SUICIDE PACT

By David H. Landon



This week's Debate Forum tackles an issue which makes writing this week's column a balancing test between vigorously defending freedom of speech (which is the side of the issue where my gut first takes me) and the need to recognize that there are individuals and organizations that are actively trying to bring about the destruction of capitalism, our country, and, in fact, all of western thought. The freedom of speech is at the very foundation of our democratic society. Even so, as Supreme Court Justice Robert Jackson so eloquently stated in his dissent in *Terminiello v. Chicago*, if the Court did not "temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."

Foreign Terrorist Organizations (FTOs) are foreign organizations that are designated by the Secretary of State in accordance with Section 219 of the Immigration and Nationality Act (INA). At the present time the list includes some 45 foreign organizations. The list includes groups like: HAMAS (Islamic Resistance Movement); Hezbollah (Party of God); Islamic Jihad Group; al-Qaeda; Revolutionary Armed Forces of Columbia (FARC); Popular Front for the Liberation of Palestine (PFLP); and of course the plaintiffs in last week's Supreme Court hearing, the Liberation Tigers of Tamil Eelam (LTTE) and the Kurdistan Workers' Party (PKK).

These FTOs are very bad tempered people. They are not the kind of folks you would want to spend any serious time with. Even the career bureaucrats at Foggy Bottom agree that these groups are bad news and their threats need to be taken seriously. Last week the Supreme Court listened to oral arguments in the case of *Holder v. Humanitarian Law Project*, No. 08-1498. In that case the Court heard arguments about the limits of free speech when that speech provides valuable advice to a terrorist group. The plaintiffs in this case are supporters of two groups that the State Department has designated as For-

“THIS WAR WILL REQUIRE OUR PATIENCE LIKE NO OTHER WAR IN TERMS OF ITS DURATION, AS IT IS LIKELY TO LAST A GENERATION.”

ign Terrorist Organizations, the Liberation Tigers of Tamil Eelam and the Kurdistan Workers' Party. The plaintiffs in each instance want to give assistance to these organizations regarding benign and nonviolent issues that affect these organizations. The crux of their argument is that the prohibition against providing "material support or resources" violates their free speech rights under the constitution.

In order to properly weigh the effects of the prohibitions complained about by these plaintiffs, we must understand the historical track of free speech during a time of war. Throughout our history, during times of war and national stress, there have been limits placed on free speech as they relate to providing assistance to an enemy of

the United States. Restrictions of civil liberties enacted in 1798, during the Civil War, World War I, World War II and the Cold War were all eliminated either by judicial decision or legislative and executive action once the conflict was over. In the present case, the war is the war against Islamic fundamentalism which we in this country finally acknowledged in the days after 9/11. The challenge for civil liberties in this instance will be that this war will not be over in a four-year time block. This war will require our patience like no other war in terms of its duration, as it is likely to last a generation. That means maybe 20 years of restricting some speech.

While our immediate concerns are not with the Kurdistan Workers' Party, which is trying to unite the Kurdish areas of Turkey, Iraq, Syria and Iran, or with the Liberation Tigers attempting to create their own separate country in Sri Lanka, the principal of not providing "material support" to a terrorist organization is the same as if it were al-Qaeda that these plaintiffs were attempting to help. This support can in fact be easily distinguished from a free speech issue. There is really no free speech restriction from arguing on behalf of these organizations if you believe their cause is just. You are in fact free to say anything in support and to lobby anybody so long as it is done independently of the banned group.

The activity turns criminal when advocacy becomes direct advice to one of these groups. According to the relevant statute, it is unlawful for a person in the United States to knowingly provide "material support or resources" to a designated FTO. The law is one of common sense and really doesn't restrict free speech in a traditional sense. It simply says that you can't help a terrorist organization further its cause. Some argue that to give advice to Hamas or Hezbollah on how to build housing for their people is a humanitarian matter and should not be restricted. We are a compassionate people and

we always try to help when there is suffering no matter where it is found. But the cold reality is that these terrorist groups are making decisions on spending priorities that place weapons ahead of food, housing and medicine for the people living under their control. When an American trains Hezbollah on how to build a house, or donates materials to build a house directly to Hamas, as benign as that sounds, it frees up additional money for these groups to build more bombs and purchase more missiles.

There are legitimate charities that bring assistance to the innocent people affected by policies of these terror organizations. In turn, there is not even a humanitarian argument to justify directly assisting these groups. The Supreme Court should overrule the attempts by these plaintiffs to weaken the laws as they affect assistance to terror organizations. The Bill of Rights is not a suicide pact.

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