

THE SUPREME COURT AND POLITICAL SPEECH IN THE 21ST  
CENTURY: THE IMPLICATIONS OF *HOLDER V.*  
*HUMANITARIAN LAW PROJECT*

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I. INTRODUCTION

The repression of American political dissent in the 1950s derived much of its force from the concept of guilt by association.<sup>1</sup> Even the Supreme Court of that era, which until the late 1950s did virtually nothing to rein in the loyalty investigations and purges, recognized early on that criminally prosecuting or otherwise punishing people for mere membership in or “sympathetic association”<sup>2</sup> with allegedly subversive groups was inconsistent with basic principles of personal guilt. The Court thus interpreted laws and loyalty programs that targeted political associations to require *scienter*, or knowledge of a disapproved group’s purportedly unlawful aims.<sup>3</sup> But the *scienter* requirement alone did nothing to stop the heresy hunts; it was not until 1961, when the Court also required *specific intent* to advance a group’s illegal purposes, that it imposed any meaningful limits on guilt by association.<sup>4</sup>

The all-important “specific intent” case, *Scales v. United States*, involved a criminal prosecution under the 1940 Smith Act for

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<sup>1</sup> There is a large literature on the Cold War “Red Scare.” See, e.g., DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 19 (1978); ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976* at 213–17 (2001); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998).

<sup>2</sup> Exec. Order No. 9835, 12 Fed. Reg. 1935, 1948 (Mar. 21, 1947).

<sup>3</sup> *Dennis v. United States*, 341 U.S. 494, 500 (1951); see *Garner v. Bd. of Pub. Works of L.A.*, 341 U.S. 716, 723–24 (1951); *Joint Anti-Fascist Refugee Comm. v. McGrath (“JAFRC”)*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring); *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 413 (1950).

<sup>4</sup> *Scales v. United States*, 367 U.S. 203, 229–30 (1961); *Noto v. United States*, 367 U.S. 290, 299–300 (1961).

membership in the Communist Party.<sup>5</sup> The Court affirmed the conviction, but only by reading a specific intent requirement into the Smith Act's membership clause.<sup>6</sup> Explaining the importance of limiting associational crimes to situations where the defendant specifically shares the organization's unlawful purposes, Justice John Harlan wrote for the Court that if there were a "blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired."<sup>7</sup> The Court eventually extended this specific intent requirement to noncriminal cases, striking down loyalty oaths and investigatory programs that punished people for past or present Communist Party membership, even if they supported only the peaceful and legal programs of the Party.<sup>8</sup>

Fast forward to 2010, when the Supreme Court revisited this Cold War history, but rejected its application to a contemporary form of guilt by association: the prohibition of non-tangible, speech-related "material support" to any group designated by the government as a foreign terrorist organization ("FTO").<sup>9</sup> In *Holder v. Humanitarian Law Project*, Chief Justice John Roberts's opinion for the Court declined to read a specific intent limitation into provisions of the 1996 Anti-Terrorism and Effective Death Penalty Act ("AEDPA") that criminalized providing "material support," broadly defined, to any FTO.<sup>10</sup> Propounding a meaningless distinction between

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<sup>5</sup> *Scales v. United States*, 367 U.S. 203, 205–06 (1961); see *infra* notes 44–45 and accompanying text.

The Smith Act makes it a crime to

advocate[], abet[], advise[], or teach[] the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence . . .

. . . print[], publish[], edit[], issue[], circulate[], sell[], distribute[], or publicly display[] any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . .

. . . organize[] or help[] or attempt[] to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence . . . become[] or [be] a member of, or affiliate[d] with, any such society, group, or assembly of persons, knowing the purposes thereof.

Alien Registration (Smith) Act of 1940, ch. 645, 18 U.S.C. § 2385, A490 (1948) (codified as amended at 18 U.S.C. § 2385 (2006)).

<sup>6</sup> *Scales*, 367 U.S. at 229.

<sup>7</sup> *Id.*

<sup>8</sup> See *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 605, 606 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966); *infra* notes 77–86 and accompanying text.

<sup>9</sup> *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010).

<sup>10</sup> *Id.* at 2712, 2718; see Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No.

membership in and material support to designated organizations, Roberts said that *Scales*, which concerned only membership, did not control the disposition of the case.<sup>11</sup> And he accepted the government's argument that nonviolent, nonmonetary, humanitarian aid or advice to an FTO may constitutionally be punished because it could lend the group legitimacy and thus undermine the U.S. government's foreign policy goals.<sup>12</sup> The Court reversed Ninth Circuit rulings that several elements of the material-support law were unconstitutionally vague, and dismissed the plaintiffs' and amici's First Amendment arguments with the assurance that AEDPA does not reach "independent advocacy" in support of the listed organizations.<sup>13</sup>

Was the *Holder* decision a prelude to Supreme Court acquiescence in another era of political repression comparable to the heresy hunts of the 1950s, with "terrorist" now substituted for "communist" as the demonized enemy whose threat to U.S. security is said to justify broad limits on free speech and association? Or was it a narrowly tailored and reasonable judicial acquiescence to the political judgments of the executive and Congress, affirming a law that already had built-in First Amendment protections? Or was it something in between?

This article first outlines the jurisprudential background to *Holder*: the Supreme Court's response to the repression of political dissent during the Cold War era, and its continuing protection for freedom of association.<sup>14</sup> It then reviews the twelve-year *Holder* litigation, culminating in the Supreme Court decision rejecting every constitutional challenge that the plaintiffs presented to aspects of the "material support" law.<sup>15</sup> An analysis of Chief Justice Roberts's majority opinion reveals startling lapses of logic and inattention to precedent, but it is not yet clear whether the decision

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104-132, § 302-03, 110 Stat. 1214, 1248-50 (1996) (codified as amended at 8 U.S.C. § 1189 (2006)); § 302-03, 110 Stat. at 1250-53 (codified as amended at 18 U.S.C. § 2339B (2006)). The penalties include fines and imprisonment for up to fifteen years, or both, "and, if the death of any person results," imprisonment "for any term of years or for life." *Holder*, 130 S. Ct. at 2713 (quoting 18 U.S.C. § 2339B) (internal quotation marks omitted). The AEDPA was passed a year after Timothy McVeigh and Terry Nichols bombed the federal building in Oklahoma City. See *id.*; *Terror Hits Home: The Oklahoma City Bombing*, THE FBI, <http://www.fbi.gov/about-us/history/famous-cases/oklahoma-city-bombing> (last visited Feb. 1, 2013).

<sup>11</sup> *Holder*, 130 S. Ct. at 2718.

<sup>12</sup> *Id.* at 2725.

<sup>13</sup> *Id.* at 2716, 2726, 2731.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Parts III, IV.

portends a broad rejection of the case law that emerged from the 1950s Red Scare or simply a politically driven ruling that will be essentially limited to its facts.<sup>16</sup> The final section of the article surveys reactions to the case in the broader context of the Roberts Court's First Amendment jurisprudence, and cautiously assesses the likely long-term consequences of the decision.<sup>17</sup>

## II. THE RED SCARE BACKGROUND

The Supreme Court did not seriously address First Amendment rights of political dissent until the period just after World War I, when Justice Oliver Wendell Holmes, Jr. famously announced the "clear and present danger" test for restrictions on speech; then promptly misapplied it to situations where dangers to U.S. security were neither clear nor present.<sup>18</sup> Justice Holmes soon changed his mind and urged a more strenuous application of "clear and present danger,"<sup>19</sup> but it was not until the 1930s that the Court majority began to draw lines that genuinely protected political dissent.<sup>20</sup> In *De Jonge v. Oregon*, relied on by the plaintiffs in *Holder* seven decades later,<sup>21</sup> the Court reversed a conviction for "criminal syndicalism" that was based solely on the defendant's participation in an orderly meeting held under the auspices of the Communist Party.<sup>22</sup> Mere association with a presumably subversive organization was not sufficient to strip a person of First Amendment protection, Chief Justice Charles Evans Hughes wrote

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<sup>16</sup> See *infra* Part V.

<sup>17</sup> See *infra* Part VI.

<sup>18</sup> See *Schenck v. United States*, 249 U.S. 47, 49, 52–53 (1919) (affirming criminal conviction of an anti-war protester who had circulated leaflets opposing military recruitment); *Frohwerk v. United States*, 249 U.S. 204, 205, 209–10 (1919) (affirming conviction of newspaperman for criticizing U.S. involvement in World War I); *Debs v. United States*, 249 U.S. 211, 212–13, 216–17 (1919) (affirming conviction of Socialist Party leader for statements opposing the war).

<sup>19</sup> *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (reasoning that the publication's ability to incite an uprising was too remote to justify suppression of free speech); *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (urging an interpretation that would allow the government to restrict only evil and immediately dangerous speech). At least one commentator has found evidence in Holmes's correspondence that this change of heart was due in significant part to the influence of Judge Learned Hand, who, over the course of several letters to Holmes, disagreed with the way Holmes was using the "clear and present danger" test. See Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 732–45 (1975).

<sup>20</sup> See *De Jonge v. Oregon*, 299 U.S. 353, 365–66 (1937).

<sup>21</sup> *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730–31 (2010).

<sup>22</sup> *De Jonge*, 299 U.S. at 356–58.

for the Court:

While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government, none of our decisions goes to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application . . . . The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.<sup>23</sup>

The rhetoric was powerful, but *De Jonge's* recognition of freedom of association did not survive the Cold War Red Scare. An early case, *American Communications Association v. Douds*, upheld an anti-Communist oath that the 1947 Taft-Hartley Act required of all union officers as a condition of receiving the benefits of federal labor law.<sup>24</sup> Chief Justice Fred Vinson, writing for a plurality of three Justices,<sup>25</sup> rejected First Amendment and vagueness challenges to the oath, reasoning that it was a legitimate effort by Congress to prevent political strikes that might set the stage for revolution.<sup>26</sup> He acknowledged that the breadth of the oath would raise additional questions if read “literally to include all persons who might, under any conceivable circumstances,” hold revolutionary ideas, so he interpreted the language to cover only those “persons and organizations who believe in violent overthrow of the Government as it presently exists under the Constitution as an

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<sup>23</sup> *Id.* at 363, 365.

<sup>24</sup> *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 385–86 (1950). The officer had to swear that he was “not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.” *Id.* at 386.

<sup>25</sup> *Id.* at 415. Justices Stanley Reed and Harold Burton joined Vinson's opinion; Justices Felix Frankfurter and Robert Jackson wrote separate concurrences. *Id.*

<sup>26</sup> *Id.* at 412–13 (rejecting a vagueness challenge); *see id.* at 395 (rejecting a First Amendment challenge).

objective, not merely a prophecy.”<sup>27</sup>

Vinson’s distinction between an “objective” and a “prophecy” did little to protect freedom of association. As a practical matter, it is a distinction rarely made by loyalty boards or investigators.<sup>28</sup> And the oath itself barred anyone who was a member of, or “affiliated” with, the Communist Party, regardless of state of mind.<sup>29</sup> *Douds*, the Court’s first Cold War encounter with test oaths and guilt by association, became the government’s main precedent as it defended other anti-subversive measures in the ensuing years.

The Vinson Court’s next freedom of association cases, decided in 1951, involved President Harry Truman’s 1947 executive order requiring loyalty investigations of all federal workers and directing the Attorney General to create a list of “totalitarian, fascist, communist, or subversive” organizations, membership in, affiliation with, or “sympathetic association” with which would establish a presumption of unfitness for employment.<sup>30</sup> Two groups on the list challenged the absence of due process in its creation; they prevailed at the Supreme Court on narrow grounds in *Joint Anti-Fascist Refugee Committee v. McGrath* (“*JAFRC*”),<sup>31</sup> but the government resisted any change in its operations, and the decision did nothing to stop the use of the list to punish employees and to drive designated organizations into oblivion.<sup>32</sup> The list served as a powerful engine of guilt by association for not only U.S. government agencies, but state and federal investigating committees, state and local employers, and private employers and blacklist compilers.<sup>33</sup> Only Justices William O. Douglas and Hugo Black, concurring in *JAFRC*, reached the First Amendment freedom of association issue at the heart of the case.<sup>34</sup>

Truman’s executive order had been in effect for about a year when

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<sup>27</sup> *Id.* at 407.

<sup>28</sup> See ELEANOR BONTECOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM* 220–21 (1953).

<sup>29</sup> *Douds*, 339 U.S. at 436–37 (Jackson, J., concurring in part, dissenting in part).

<sup>30</sup> Exec. Order No. 9835, 12 Fed. Reg. 1935, 1938 (Mar. 21, 1947).

<sup>31</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 124, 126, 140, 142 (1951).

<sup>32</sup> See ROBERT JUSTIN GOLDSTEIN, *AMERICAN BLACKLIST: THE ATTORNEY GENERAL’S LIST OF SUBVERSIVE ORGANIZATIONS* 62 (2008).

<sup>33</sup> *Id.*; see BONTECOU, *supra* note 28, at 110–11; CAUTE, *supra* note 1, at 18.

<sup>34</sup> See *JAFRC*, 341 U.S. at 142–43 (Black, J., concurring) (referring to the system in question as “a most evil type of censorship”); *id.* at 174–75 (Douglas, J., concurring). In dissent, Justice Reed, joined by Chief Justice Vinson and Justice Minton, argued that the First Amendment was not breached because the scope of the amendment, while broad, was subordinated by the national interest in preventing espionage and sedition. *Id.* at 199–200 (Reed, J., dissenting) (“Wide as are the freedoms of the First Amendment, this Court has never hesitated to deny the individual’s right to use the privileges for the overturn of law and order.”).

Dorothy Bailey, a personnel trainer with the U.S. Civil Service Commission, learned that her regional loyalty board had “received information” that she was or had been a member of the Communist Party, the American League for Peace and Democracy, and the Washington Committee for Democratic Action, all organizations on the Attorney General’s List.<sup>35</sup> Bailey was fired after a hearing in which she never learned the source of the accusations, denied the accusations, and presented witnesses as to her loyalty and character.<sup>36</sup> The D.C. Circuit affirmed the firing, although acknowledging that Bailey “was not given a trial in any sense of the word, and she does not know who informed upon her.”<sup>37</sup> At the Supreme Court, her appeal was considered along with the *JAFRC* case, but the results were weirdly different: by a vote of 4–4, the Justices affirmed the D.C. Circuit, with no explanation of reasons (Justice Tom Clark, the former Attorney General, did not participate).<sup>38</sup>

Justice Douglas was outraged by the outcome of *JAFRC* and *Bailey*: simultaneous disapproval of the shoddy procedures that produced the Attorney General’s list but approval of the list’s use against employees.<sup>39</sup> Bailey had been given no opportunity to contest the accusations of anonymous informers or the listing of an organization as “subversive.”<sup>40</sup> The technique of guilt by association is “one of the most odious institutions of history,” Douglas wrote.<sup>41</sup> “Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies.”<sup>42</sup>

Barely a month after *JAFRC* and *Bailey*, the Court decided what is often considered the defining case of the Cold War era: *Dennis v. United States*, affirming the Smith Act convictions of Communist Party officers for conspiring to advocate the overthrow of the government at some future time.<sup>43</sup> Guilt by association was not the

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<sup>35</sup> *Bailey v. Richardson*, 182 F.2d 46, 48–49, 50 (D.C. Cir. 1950), *aff’d*, 341 U.S. 918 (1951) (per curiam).

<sup>36</sup> *Id.* at 50.

<sup>37</sup> *Id.* at 51.

<sup>38</sup> *See* *Bailey v. Richardson*, 341 U.S. 918, 918 (1951) (noting that *Bailey* was decided on the same day as *JAFRC*); *id.* at 918; *JAFRC*, 341 U.S. at 123; *id.* at 174 (Douglas, J., concurring).

<sup>39</sup> *JAFRC*, 341 U.S. at 174.

<sup>40</sup> *Id.* at 178, 180.

<sup>41</sup> *Id.* at 178.

<sup>42</sup> *Id.* at 179.

<sup>43</sup> *Dennis v. United States*, 341 U.S. 494, 494–96 (1951) (deciding 6–2, with Justices Black and Douglas dissenting, and Justice Clark not participating).

issue here, but Chief Justice Vinson's opinion for the Court, which greatly weakened the "clear and present danger" test, did at least interpret the law to include a specific intent requirement.<sup>44</sup>

Yet the Court did not import specific intent into a typical loyalty oath imposed by the City of Los Angeles in a case decided the same day as *Dennis*, and one affecting many thousands more people: *Garner v. Board of Public Works of Los Angeles*.<sup>45</sup> In this noncriminal context, the Justices in the majority thought it sufficient to imply a *scienter*, or knowledge, requirement into the oath and accompanying affidavit that the city demanded of all employees.<sup>46</sup> The oath required them to swear that they had not within the past five years, and would not while employed by the city, advocate the forceful overthrow of the government or belong to an organization with such an aim.<sup>47</sup> The affidavit required disclosure of any past membership in the Communist Party or the Communist Political Association, the Party's alternative political identity from 1944 to 1946.<sup>48</sup> Justice Clark, writing for the majority, said the oath, affidavit, and accompanying loyalty investigations were reasonable, especially since he assumed that the city would not interpret them "as affecting adversely those persons who during their affiliation with a proscribed organization were innocent of its purpose . . . . We assume that *scienter* is implicit in each clause of the oath."<sup>49</sup>

But presuming a *scienter* requirement did nothing to diminish the severity of the loyalty programs. Whether or not past or present political associations were "knowing," they still had to be disclosed.<sup>50</sup> As more challenges to anti-subversive investigations and purges reached the Court in the early 1950s, it continued to approve them, while relying on *scienter*, but not specific intent, as a presumed protection against the evils of unbridled guilt by

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<sup>44</sup> See *id.* at 508–10 (Vinson, C.J., plurality opinion). Vinson rejected the government's argument that because one section of the Smith Act explicitly required specific intent, the other sections under which the defendants were convicted did not. *Id.* at 499.

<sup>45</sup> *Garner v. Bd. of Pub. Works of L.A.*, 341 U.S. 716 (1951).

<sup>46</sup> *Id.* at 718–19, 723–24.

<sup>47</sup> *Id.* at 718–19.

<sup>48</sup> *Id.* at 719.

<sup>49</sup> *Id.* at 723–24. Two months earlier, in a one-paragraph per curiam opinion, the Court had upheld a Maryland loyalty oath required of candidates for public office, relying on an assurance at oral argument by the state attorney general that the candidate need only swear that he or she was not "knowingly" a member of an organization attempting to overthrow the government. *Gerende v. Bd. of Supervisors of Elections*, 341 U.S. 56, 57 (1951) (per curiam).

<sup>50</sup> See *Garner*, 341 U.S. at 723.

association.<sup>51</sup>

In the late 1950s, a tenuous liberal majority on the Court, now headed by Chief Justice Earl Warren, began to impose some limits on the freewheeling scope of legislative anti-subversive investigations, Taft-Hartley oath prosecutions, and loyalty program firings.<sup>52</sup> And in 1958, in a case not involving alleged subversion but responding to the efforts of southern states to crush the civil rights movement, the Court produced a ringing affirmation of free association as a necessary component of democratic change.<sup>53</sup> Writing for the majority and citing, among other precedents, *De Jonge v. Oregon*, Justice Harlan said:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.<sup>54</sup>

Three years later came the 1961 Smith Act decision in *Scales v. United States*.<sup>55</sup> Unlike the defendants in *Dennis* and in the 1957 case of *Yates v. United States*,<sup>56</sup> which had tightened the requirements of proof in Smith Act prosecutions of Communist Party leaders, *Scales* was a prosecution for simple Party membership.<sup>57</sup> The Court, per Justice Harlan, affirmed the guilty

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<sup>51</sup> *E.g.*, *Adler v. Bd. of Educ.*, 342 U.S. 485, 486 nn.3–4 (1952) (explaining an unsuccessful challenge to New York State’s Feinberg Law, requiring comprehensive investigation of political beliefs and associations of public employees and making membership in a group listed as subversive by the state board of regents “*prima facie* evidence of disqualification”); *Wieman v. Updegraff*, 344 U.S. 183, 184–85, 191 (1952) (striking down loyalty oath required of Oklahoma public employees because it lacked a *scienter* limitation).

<sup>52</sup> *E.g.*, *Service v. Dulles*, 354 U.S. 363, 365, 388–89 (1957) (invalidating the loyalty program discharge of a foreign service officer); *Sweezy v. New Hampshire*, 354 U.S. 234, 236–37, 241, 254–55 (1957) (Warren, C.J., plurality opinion) (restricting the scope of questioning by the state attorney general about allegedly subversive teachings and Progressive Party activity); *Watkins v. United States*, 354 U.S. 178, 214–15 (1957) (restricting the scope of questioning by the House Un-American Activities Committee); *Jencks v. United States*, 353 U.S. 657, 658, 672 (1957) (reversing the conviction of a union officer for a false Taft-Hartley oath); *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 234, 246–47 (1957) (invalidating the denial of former Communist Party member’s applications for admission to the bar).

<sup>53</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 451, 460, 466 (1958) (reversing a contempt judgment against the Alabama NAACP for refusing to disclose membership lists).

<sup>54</sup> *Id.* at 460.

<sup>55</sup> *Scales v. United States*, 367 U.S. 203 (1961).

<sup>56</sup> *Yates v. United States*, 354 U.S. 298, 330–31 (1957).

<sup>57</sup> *Scales*, 367 U.S. at 205–06.

verdict because the jury was properly instructed to convict only if it found that Scales had both knowledge of the Party's illegal aims and a specific intent to bring about a revolution "as speedily as circumstances would permit."<sup>58</sup> In the companion case of *Noto v. United States*, the Court reversed a conviction for Party membership and noted in passing that "the requisite criminal intent" for the membership crime

must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes because of other and unprotected purposes which he does not necessarily share.<sup>59</sup>

The Warren Court in the early-to-mid 1960s continued to chip away at loyalty programs that turned on guilt by association. In *Cramp v. Board of Public Instruction of Orange County*, it struck down, on vagueness grounds, language in a Florida oath that required all public employees to swear they had not, and would not in the future, lend their "aid, support, advice, counsel or influence" to the Communist Party; the Court left undisturbed requirements to forswear any belief in the forcible overthrow of the government or membership in any group with such beliefs.<sup>60</sup> In *Baggett v. Bullitt* three years later, the Court found two oaths unconstitutionally vague,<sup>61</sup> without reaching the plaintiffs' freedom of association claim (Justice Clark's dissent dismissed it as "frivolous" in light of *Douds* and other precedents<sup>62</sup>).

A few weeks after *Baggett*, the Court decided *Aptheker v. Secretary of State*, invalidating a provision of the 1950 Subversive Activities Control Act that barred any Communist Party member from holding a passport.<sup>63</sup> In passing the law, Congress had used language remarkably similar to contemporary concerns about international terrorism: it found that there "exists a world Communist movement . . . whose purpose it is, by . . . espionage, sabotage, terrorism, and any other means deemed necessary, to

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<sup>58</sup> *Id.* at 220, 254–55.

<sup>59</sup> *Noto v. United States*, 367 U.S. 290, 299–300 (1961). The actual holding in *Noto* was based on the insufficiency of evidence that the Party advocated not merely the abstract idea of revolution but concrete action to that end. *Id.*

<sup>60</sup> *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 279, 286–87 (1961).

<sup>61</sup> *Baggett v. Bullitt*, 377 U.S. 360, 361, 366–68 (1964); *id.* at 384 (Clark, J., dissenting).

<sup>62</sup> *Id.* at 384.

<sup>63</sup> *Aptheker v. Sec'y of State*, 378 U.S. 500, 501–02, 514 (1964).

establish a Communist totalitarian dictatorship in the countries throughout the world.”<sup>64</sup>

The *Aptheker* decision, by Justice Arthur Goldberg, was based on the importance of the right to travel and the overbreadth of the passport ban: it punished membership without either knowledge of the group’s allegedly unlawful aims or specific intent to achieve them.<sup>65</sup> Although the law’s purpose, protection of national security, is undoubtedly compelling, Goldberg explained, there were “less drastic means” available to achieve it.<sup>66</sup> Citing *Scales* and *Noto*, Goldberg warned of “the danger of punishing a member of a Communist organization ‘for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.’”<sup>67</sup>

Two years later, in 1966, the Court finally applied the specific intent requirement to loyalty oaths. Arizona had an affirmative oath for public employees—to swear to support the U.S. and state Constitutions, to “bear true faith and allegiance” to them, and to “defend them against all enemies, foreign and domestic.”<sup>68</sup> In 1961, the state legislature enacted the Communist Control Act, which made it a crime—perjury—for anyone to take the affirmative oath while “knowingly and willfully” remaining a member of the Communist Party, “any of its subordinate organizations,” or any other group that had as “one of its purposes the overthrow of the government.”<sup>69</sup> Barbara Elfbrandt, a Tucson schoolteacher and a Quaker, challenged the oath;<sup>70</sup> Justice Douglas wrote the Court’s 1966 majority opinion striking it down as an unconstitutional exercise in guilt by association.<sup>71</sup>

The problem was that Arizona’s perjury law punished people who joined a political group without specific intent to further its illegal aims.<sup>72</sup> Quoting the recognition in *Scales* that a “blanket prohibition of association with a group having both legal and illegal aims would pose a real danger that legitimate political expression or

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<sup>64</sup> *Id.* at 508 n.8 (quoting Internal Security Act of 1950, ch. 1024, § 2, 64 Stat. 987, 987 (1950)).

<sup>65</sup> *Aptheker*, 378 U.S. at 505–11.

<sup>66</sup> *Id.* at 512–13.

<sup>67</sup> *Id.* at 512 (quoting *Noto v. United States*, 367 U.S. 290, 299–300 (1961)) (internal quotation marks omitted) (citing *Scales v. United States*, 367 U.S. 203, 229–30 (1961)).

<sup>68</sup> *Elfbrandt v. Russell*, 384 U.S. 11, 12 (1966).

<sup>69</sup> *Id.* at 13 (footnote omitted) (internal quotation marks omitted).

<sup>70</sup> *Id.* at 13.

<sup>71</sup> *Id.* at 19.

<sup>72</sup> *Id.* at 17–18 (citing *Aptheker*, 378 U.S. at 511; *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958)).

association would be impaired,”<sup>73</sup> Justice Douglas said the challenged Arizona law “suffer[ed] from an identical constitutional infirmity.”<sup>74</sup> That is,

[n]othing in the oath, the statutory gloss, or the construction of the oath and statutes given by the Arizona Supreme Court, purports to exclude association by one who does not subscribe to the organization’s unlawful ends. Here as in *Baggett v. Bullitt*, the “hazard of being prosecuted for knowing but guiltless behavior” is a reality. . . .<sup>75</sup>

. . . .

A statute touching [First Amendment] rights must be “narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.”<sup>76</sup>

By now, specific intent was well-established as a limit on the use of guilt by association. The final blow was *Keyishian v. Board of Regents*<sup>77</sup> in 1967. The culmination of the Warren Court’s gradual recognition of academic freedom as “a special concern of the First Amendment”<sup>78</sup> (the case was brought by five professors at the State University of New York at Buffalo), *Keyishian* invalidated the entire convoluted system of loyalty investigations, including a test oath, that had been created by the state’s 1949 anti-subversive Feinberg Law.<sup>79</sup>

The 5–4 *Keyishian* decision, by Justice William Brennan, turned on both vagueness and overbreadth.<sup>80</sup> Part of the Feinberg Law mandated job termination for “‘treasonable or seditious’ utterances or acts”;<sup>81</sup> another section barred employment of anyone who “advocates, advises or teaches the doctrine of forceful overthrow of government.”<sup>82</sup> Both were “susceptible of sweeping and improper

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<sup>73</sup> *Elfbrandt*, 384 U.S. at 15 (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)) (internal quotation marks omitted).

<sup>74</sup> *Elfbrandt*, 384 U.S. at 16.

<sup>75</sup> *Id.* (quoting *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964)).

<sup>76</sup> *Elfbrandt*, 384 U.S. at 18 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)).

<sup>77</sup> *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589 (1967).

<sup>78</sup> *Id.* at 603 (reversing *Adler v. Bd. of Educ.*). See MARJORIE HEINS, *PRIESTS OF OUR DEMOCRACY: THE SUPREME COURT, ACADEMIC FREEDOM, AND THE ANTI-COMMUNIST PURGE* (2013) for a discussion on the Supreme Court’s gradual recognition of academic freedom and the evolution of the *Keyishian* case.

<sup>79</sup> *Keyishian*, 385 U.S. at 591–92, 609–10.

<sup>80</sup> *Id.* at 591, 609–10 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

<sup>81</sup> *Keyishian*, 385 U.S. at 597.

<sup>82</sup> *Id.* at 599.

application,” Brennan wrote.<sup>83</sup> The law’s guilt by association provisions were equally flawed because they made Communist Party membership “prima facie evidence of disqualification” from employment.<sup>84</sup> Brennan explained that guilt by association is not an acceptable legal rule unless an individual has “a specific intent to further the unlawful aims of an organization.”<sup>85</sup> The principle was especially important in schools because “curtailing freedom of association” has a “stifling effect on the academic mind.”<sup>86</sup>

In December 1967, the Court reaffirmed the specific-intent precedents by invalidating a section of the Subversive Activities Control Act that made it a crime for a Communist Party member to be employed at a designated “defense facility”—in this case, a shipyard.<sup>87</sup> Chief Justice Warren’s opinion for the Court in *United States v. Robel* acknowledged that “[t]he Government’s interest in such a prophylactic measure is not insubstantial,” but here, “the means chosen to implement that governmental purpose . . . cut deeply into the right of association.”<sup>88</sup> The worker was forced either to

surrender[] his organizational affiliation, regardless of whether his membership threatened the security of a defense facility, or giv[e] up his job. . . .The statute quite literally establishes guilt by association alone, without any need to establish that an individual’s association poses the threat feared by the Government in proscribing it. The inhibiting effect on the exercise of First Amendment rights is clear.<sup>89</sup>

Amid the sometimes violent political turmoil of the 1960s, the Supreme Court adhered to its specific intent precedents. In *Healy v. James*,<sup>90</sup> it held that a college could not prohibit students from forming a chapter of the radical Students for a Democratic Society (“SDS”) on campus simply because others in SDS had engaged in violence.<sup>91</sup> Justice Lewis Powell wrote for the Court that guilt by association “is an impermissible basis upon which to deny First Amendment rights. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 594.

<sup>85</sup> *Id.* at 606.

<sup>86</sup> *Id.* at 607.

<sup>87</sup> *United States v. Robel*, 389 U.S. 258, 259–62 (1967).

<sup>88</sup> *Id.* at 264.

<sup>89</sup> *Id.* at 264–65 (footnote omitted).

<sup>90</sup> *Healy v. James*, 408 U.S. 169 (1972).

<sup>91</sup> *Id.* at 185–87, 195.

and goals, and a specific intent to further those illegal aims.”<sup>92</sup>

In *NAACP v. Claiborne Hardware*<sup>93</sup> ten years later, the Court vacated an injunction and award of damages against participants in a mostly peaceful civil rights boycott of white-owned businesses despite instances of unlawful threats and violence.<sup>94</sup> Writing for the Court, Justice John Paul Stevens stressed the importance of freedom of association and the need for a showing of specific-intent before it was infringed.<sup>95</sup> He quoted both *Scales* and *Noto* on the risk of impairing “legitimate political expression or association” in the absence of a specific intent requirement.<sup>96</sup>

The specific intent limitation thus was firmly established in freedom of association cases as the Cold War subsided and communism was replaced by new foreign policy concerns.<sup>97</sup> “Terrorist” became the inclusive label for a variety of armed groups around the world.<sup>98</sup> Some of them threatened American security; others were simply rebel movements against governments with which we were allied.<sup>99</sup>

### III. AEDPA AND THE *HOLDER* LITIGATION

The U.S. government began compiling lists of terrorist organizations well before the enactment of AEDPA in 1996. Insurgent groups in Bangladesh, Ethiopia, and other trouble spots were listed as terrorist in the 1970s, with the result that refugees who had once been associated with these groups were denied admission to the United States decades later.<sup>100</sup> The State Department designated the African National Congress (“ANC”) as a terrorist organization in the 1980s, at a time when the Reagan

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<sup>92</sup> *Id.* at 186 (footnote omitted) (citing *United States v. Robel*, 389 U.S. 258, 265 (1967)).

<sup>93</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

<sup>94</sup> *Id.* at 889, 933–34.

<sup>95</sup> *Id.* at 888, 919–20.

<sup>96</sup> *Id.* at 919 (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)).

<sup>97</sup> See *infra* notes 55–96 and accompanying text.

<sup>98</sup> See *infra* notes 100–03 and accompanying text.

<sup>99</sup> See *infra* notes 104–05 and accompanying text.

<sup>100</sup> See *Denial and Delay: The Impact of the Immigration Law’s “Terrorist Bars” on Asylum Seekers and Refugees in the United States*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-2page-summary-111009-web.pdf> (last visited Feb 1, 2013); Annie Sovcik, *You Might Be a “Terrorist” and Not Even Realize It!*, HUMAN RIGHTS FIRST (Feb. 6, 2012), <http://www.humanrightsfirst.org/2012/02/06/you-might-be-a-%E2%80%9Cterrorist%E2%80%9D-and-not-even-realize-it> (describing a woman denied asylum because she had worked with the Eritrean Liberation Front in the late 1970s, “during which time she was jailed and subjected to repeated torture by the Dergue regime”).

administration's foreign policy supported the apartheid regime; it was not until 2008 that the ANC—by now the governing party in South Africa—and its leader Nelson Mandela were removed from the FBI's Terrorist Watch List.<sup>101</sup> Support for terrorism, broadly defined, became a ground for exclusion from the United States under the Immigration Act of 1990.<sup>102</sup> Hamas was listed in 1995 on the Treasury Department's Specially Designated Terrorist List ("SDT"), along with other Palestinian liberation organizations.<sup>103</sup>

All of these designations were driven by the foreign policy and economic interests of the United States and its allies of the moment.<sup>104</sup> Indeed, the AEDPA, which authorizes the Secretary of State to designate FTOs based on their perceived threat to national security, defines "national security" to include "national defense, foreign relations, or economic interests of the United States."<sup>105</sup>

The AEDPA allows FTO designations based upon information from any source, with no opportunity for the group to be heard, and a provision for judicial review that is essentially illusory.<sup>106</sup> Section 303(a) of the law makes it a crime to provide a broad array of

<sup>101</sup> Removing The African National Congress from Treatment as Terrorist Organization, P.L. 110-257, § 1-3, 122 Stat. 2426, 2426-27 (2008); see also Mimi Hall, *U.S. Has Mandela on Terrorist List*, USA TODAY, May 1, 2008, at 2A; Robert Pear, *U.S. Report Stirs Furor in South Africa*, N.Y. TIMES, Jan. 14, 1989, at 3 (explaining that as late as 1989, the Defense Department considered the ANC a terrorist organization, although by that point, the State Department disagreed); Replee, *Delisting South Africa's ANC Party from Terrorist Org List*, YOUTUBE (June 27, 2008), <http://www.youtube.com/watch?v=f9yqgHSjwbU>.

<sup>102</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 601(B), 104 Stat. 4978, 5069-70 (codified at 8 U.S.C. § 1182(a)(3)(B)(iii) (2010)).

<sup>103</sup> OFFICE OF FOREIGN ASSETS CONTROL, TERRORIST ASSETS REPORT 4, 4 n.4 (2002); Nadine Rosa-Rosso, *The Left and Support for Islamist Resistance*, PALESTINIAN CHRON. (Feb. 11, 2009, 5:41 PM), [http://palestinechronicle.com/view\\_article\\_details.php?id=14818](http://palestinechronicle.com/view_article_details.php?id=14818).

<sup>104</sup> See ZACHARY LOCKMAN, *CONTENDING VISIONS OF THE MIDDLE EAST: THE HISTORY AND POLITICS OF ORIENTALISM* 229 (2004) (showing how the U.S. government defined terrorism "selectively and tendentiously"; its 1989 publication, *Terrorist Group Profiles*, included "a very wide range of groups," including leftist guerrilla movements in South America and the ANC); Michael Moran, *Terrorist Groups and Political Legitimacy*, COUNCIL ON FOREIGN RELATIONS (Mar. 16, 2006), <http://www.cfr.org/terrorism/terrorist-groups-political-legitimacy/p10159> ("U.S. officials helped justify dealings with the apartheid government by pointing to the ANC's place on the State Department's list of terrorist groups."). By the early 21<sup>st</sup> century, three former members of South American rebel guerrilla organizations had become their countries' presidents: Michelle Bachelet of Chile, José Mujica of Uruguay, and Dilma Rousseff of Brazil. Simon Romero, *Leader's Torture in the '70s Stirs Ghosts in Brazil*, N.Y. TIMES, Aug. 5, 2012, at 1.

<sup>105</sup> 8 U.S.C. § 1189 (2006). See Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L LAW 2-17 (2011), for a discussion on the problems presented by differing definitions of terrorism. See also Eric Schmitt, *U.S. Seems Set to Brand Militant Group as 'Terrorist'*, N.Y. TIMES, Sep. 1, 2012, at A6, (discussing the political considerations driving one decision).

<sup>106</sup> See 8 U.S.C. § 1189; see also *infra* notes 120-27 and accompanying text (scope of judicial review).

“material support or resources” to any designated FTO.<sup>107</sup>

“Material support” for the purpose of engaging in terrorist activity was already a federal crime,<sup>108</sup> but AEDPA added a new section to the criminal code, 18 U.S.C. § 2339B, prohibiting support even for nonviolent purposes, and regardless of whether the aim is to aid terrorism.<sup>109</sup> Section 2339B defined “material support or resources” to include “currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosive, personnel, transportation, and other physical assets, but does not include humanitarian assistance.”<sup>110</sup> There was no further elucidation of the meaning of “training” or “personnel.”<sup>111</sup>

In 1997, the Secretary of State designated thirty organizations as FTOs pursuant to AEDPA.<sup>112</sup> Among them were the Kurdistan Workers’ Party or Partiya Karkeran Kurdistan (“PKK”), and the Liberation Tigers of Tamil Eelam (“LTTE”).<sup>113</sup> The PKK, as the federal district court in *Holder* found, is “the leading political organization representing the interests of the Kurds in Turkey”;<sup>114</sup> its goal is self-determination for the Kurds and its work includes political organizing, advocacy, and “diplomatic activity around the world.”<sup>115</sup>

It organizes political forums, international conferences, and cultural festivals outside Turkey to bring attention to the plight of the Kurds there. It publishes and distributes newspapers and pamphlets championing the Kurds’ cause and denouncing human rights violations. It provides social services and humanitarian aid to Kurds in exile, has established a quasi-governmental structure in areas of Turkey under its control, and defends the Kurds from alleged Turkish human rights abuses.<sup>116</sup>

Similarly, the LTTE was at the time of its FTO designation a

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<sup>107</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 303, 110 Stat. 1214, 1250 (codified as amended at 18 U.S.C. § 2339A).

<sup>108</sup> 18 U.S.C. § 2339A (2006).

<sup>109</sup> 18 U.S.C. § 2339B (2006).

<sup>110</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 120005, 108 Stat. 1796, 2022 (1994).

<sup>111</sup> *Id.*

<sup>112</sup> *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1205, 1207 (C.D. Cal. 1998), *aff’d*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001) [hereinafter *Humanitarian I*].

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1207.

<sup>115</sup> *Id.* at 1207–08.

<sup>116</sup> *Id.* at 1208.

liberation movement whose goal was “achieving self-determination for the Tamil residents of Tamil Eelam, the Northern and Eastern provinces of Sri Lanka.”<sup>117</sup> The organization fought “human rights abuses and discriminatory treatment by the Sinhalese, who have governed Sri Lanka since the nation gained its independence from Great Britain in 1948.”<sup>118</sup> The LTTE engaged in political organizing, aided “Tamil refugees fleeing from the Sri Lankan armed forces,” and provided social services, including orphanages, through “a quasi-governmental structure in Tamil Eelam.”<sup>119</sup>

The LTTE sought judicial review of the Secretary of State’s FTO designation, but although the statute seems to allow full judicial oversight,<sup>120</sup> the court declined to question the critical element of the Secretary’s decision: whether the group threatened national security.<sup>121</sup> Indeed, it was unable to do so, for as the court ruefully observed: “[N]othing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization’s activities.”<sup>122</sup> Thus, although an appellate decision ordinarily sets out the facts,

[w]e will not, cannot, do so in these cases. The information recited is certainly not evidence of the sort that would

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<sup>117</sup> *Id.* at 1209.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* By the time the case reached the Supreme Court, the LTTE had been defeated militarily, but it “continue[d] to exist as a political organization outside Sri Lanka advocating for the rights of Tamils.” Opening Brief for Humanitarian Law Project at 11 n.5, *Holder v. Humanitarian Law Project, et al.*, 130 S. Ct. 2705 (2009) (Nos. 08-1498, 09-89).

<sup>120</sup> 8 U.S.C. § 1189(c)(3) (2004) provides:

The Court shall hold unlawful and set aside a designation, amended designation, or determination in response to a petition for revocation the court finds to be—

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
- (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court . . . ; or
- (E) not in accord with the procedures required by law.

*Id.*

<sup>121</sup> *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 23 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000) (“[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, ‘decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilit[ies] and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.’” (quoting *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948))).

<sup>122</sup> *People’s Mojahedin*, 182 F.3d at 19.

normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.<sup>123</sup>

The court noted the similarity of the case to *JAFRC*,<sup>124</sup> on which the petitioners relied for their argument that the designation procedure violated their due process rights.<sup>125</sup> But “[a] foreign entity without property or presence in this country has no constitutional rights,” the court ruled, “under the due process clause or otherwise.”<sup>126</sup> And their statutory rights were illusory because “we are not competent to pass upon the Secretary’s national security finding”; thus, “[f]or all we know, the designation may be improper because the Secretary’s judgment that the organization threatens our national security is completely irrational, and devoid of any support. Or her finding about national security may be exactly correct. We are forbidden from saying.”<sup>127</sup>

In March 1998, a coalition of groups and individuals that had been providing humanitarian support and training in nonviolent conflict resolution to the PKK and LTTE filed suit to challenge aspects of the section 2339B material support ban.<sup>128</sup> The lead plaintiff was the Humanitarian Law Project (“HLP”), a nonprofit organization headquartered in Los Angeles and dedicated to advancing human rights law and the peaceful resolution of armed conflicts.<sup>129</sup> Plaintiff Ralph Fertig, an administrative judge, was its president.<sup>130</sup> The HLP had consultative status at the United Nations, participated in meetings of the UN Commission on Human Rights, conducted fact-finding missions, and published reports on human rights violations in Turkey, Mexico, and elsewhere.<sup>131</sup> Since 1991, the district court found, the HLP and Judge Fertig had worked with the PKK to advocate on behalf of the Kurds in Turkey, including protests of summary executions by the government,

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<sup>123</sup> *Id.* The court decided the LTTE’s petition in tandem with that of the People’s Mojahedin. *Id.* at 18–19.

<sup>124</sup> *See supra* text accompanying notes 31–38.

<sup>125</sup> *People’s Mojahedin*, 182 F.3d at 22.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 23.

<sup>128</sup> *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1180, 1184 (C.D. Cal. 1998), *aff’d*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001) [hereinafter *Humanitarian II*].

<sup>129</sup> *Humanitarian I*, 9 F. Supp. 2d 1205, 1208 (C.D. Cal. 1998), *aff’d*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

widespread use of arbitrary detentions and torture, and destruction of about 2400 Kurdish villages.<sup>132</sup> They had “assisted and trained some PKK members in using humanitarian law and international human rights law and in seeking a peaceful resolution of the conflict in Turkey.”<sup>133</sup>

The other plaintiffs were five organizations and one individual, Dr. Nagalingam Jeyalingam, who sought to advance “the human rights and well-being of the Tamils in Sri Lanka.”<sup>134</sup> The organizations, Tamil groups in the United States, wanted to provide humanitarian aid by soliciting and making “donations of cash, clothing, food, including prepared food for infants, and educational materials, to the LTTE.”<sup>135</sup> Dr. Jeyalingam had the same goals, as he “believe[d] that the LTTE play[ed] a crucial role in providing humanitarian aid, social services, and economic development to the Tamils in Sri Lanka.”<sup>136</sup> “But for the AEDPA,” the district court found, “Dr. Jeyalingam would support the lawful and non-violent activities of the LTTE” by providing food, clothing, school supplies, assistance with agricultural and industrial development, funds for the legal costs of its challenge to the Secretary of State’s FTO designation, and “money to [aid] the LTTE’s work in providing medical and rehabilitative assistance to Tamil victims of landmine explosions.”<sup>137</sup>

The plaintiffs made three legal claims.<sup>138</sup> First, they said that section 2339B violates the First Amendment rights to free speech, to freedom of association, “and to petition the government for a redress of grievances because [it] criminalize[s] . . . material support . . . without a specific intent to further [an] organization’s unlawful ends.”<sup>139</sup> Second, the Secretary of State’s discretionary authority to designate FTOs invites impermissible viewpoint discrimination; and third, the statutory terms “material support and resources” and “foreign terrorist organization” are unconstitutionally vague.<sup>140</sup> At this point, their attack was not limited to the ban on training and personnel; they also wanted to make financial contributions to the

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1208–09.

<sup>134</sup> *Id.* at 1209.

<sup>135</sup> *Id.* at 1210.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Humanitarian II*, 9 F. Supp. 2d 1176, 1184, 1184 (C.D. Cal. 1998), *aff’d*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001)

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1184–85.

groups' humanitarian activities.<sup>141</sup>

The federal district court rejected their first two arguments. With respect to First Amendment freedom of association and specific intent, the court chose to apply only intermediate scrutiny to section 2339B under the test established by the Supreme Court in *United States v. O'Brien*<sup>142</sup> for laws that regulate conduct but have an incidental effect on speech.<sup>143</sup> *O'Brien* was the applicable standard, according to the district court, because the material support ban was content-neutral and "unrelated to the suppression of a particular message or idea."<sup>144</sup> The court also rejected the "arbitrary and discriminatory enforcement" argument because of judicial deference to foreign-policy judgments of the executive.<sup>145</sup>

But the district court did find the terms "training" and "personnel" to be impermissibly vague, in violation of both the First Amendment and the Fifth Amendment's Due Process Clause.<sup>146</sup> It recited the well-established tripartite justification for the vagueness doctrine: "(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on 'arbitrary and discriminatory enforcement' by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms."<sup>147</sup> Of these, "perhaps the most important factor" was whether the law in question "threaten[ed] to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."<sup>148</sup> The court found "training" and "personnel" too vague to

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<sup>141</sup> *Id.* at 1186.

<sup>142</sup> *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). *O'Brien* examined the case of an American citizen convicted under a federal statute for burning his draft card on the steps of a Boston courthouse. *Id.* at 369–70. In an opinion authored by Chief Justice Warren, the Court held that *O'Brien's* conviction did not violate the First Amendment, as the government's interest in ensuring the smooth functioning of the draft, part of the Congressional power to raise and maintain armies, outweighed the individual interest in the symbolic speech of burning a draft card to protest the war. *See id.* at 382.

<sup>143</sup> *Id.* at 376–77; *Humanitarian II*, 9 F. Supp. 2d at 1187.

<sup>144</sup> *Humanitarian II*, 9 F. Supp. 2d at 1187; *O'Brien*, 391 U.S. at 377 (stating that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

<sup>145</sup> *Humanitarian II*, 9 F. Supp. 2d at 1198–99, 1202.

<sup>146</sup> *Id.* at 1201, 1203.

<sup>147</sup> *Humanitarian II*, 9 F. Supp. 2d at 1201 (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998)).

<sup>148</sup> *Humanitarian II*, 9 F. Supp. 2d at 1201–02 (quoting *Vill. of Hoffman Estates v.*

put people of ordinary intelligence on notice of what was illegal, and granted a preliminary injunction severing these terms from the statute and barring the attorney general and the secretary of state from enforcing them against any of the plaintiffs.<sup>149</sup>

The Court of Appeals for the Ninth Circuit affirmed in a short opinion that basically agreed with the district court on all counts.<sup>150</sup> Writing for the court, Judge Alex Kozinski distinguished such precedents as *Claiborne Hardware* as “situations where people are punished ‘by reason of association alone’”;<sup>151</sup> by contrast, he said, the plaintiffs here were free to become members of and advocate in support of the listed groups;

[they could even] praise the groups for using terrorism as a means of achieving their ends. What AEDPA prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.<sup>152</sup>

Kozinski also rejected the plaintiffs’ argument that the exceptions in section 2339B for medicine and religious materials undercut the government’s claim that any aid to terrorists ends up furthering their unlawful goals. Congress, he wrote,

is entitled to conclude that respect for freedom of religion militates in favor of allowing religious items to be donated to foreign organizations, even though doing so may incidentally aid terrorism . . . [I]t could also rationally decide that the humanitarian value of providing medicine to such organizations outweighs the risk that the medicine would be sold to finance terrorist activities. Congress is entitled to strike such delicate balances without giving up its ability to prohibit other types of assistance which would promote terrorism.<sup>153</sup>

Of course, an exception for religion is also a variety of content discrimination, ordinarily a trigger for strict scrutiny of a law that

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Flipside, *Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)).

<sup>149</sup> *Humanitarian I*, 9 F. Supp. 2d 1205, 1214 (C.D. Cal. 1998); *Humanitarian II*, 9 F. Supp. 2d at 1203–05.

<sup>150</sup> *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137–38 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

<sup>151</sup> *Id.* at 1132, 1133 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982)).

<sup>152</sup> *Humanitarian Law Project*, 205 F.3d at 1132, 1133.

<sup>153</sup> *Id.* at 1136 n.4.

touches on speech, but Kozinski did not address this concern.<sup>154</sup> And ironically, the religious exemption would presumably allow Islamic jihadist materials to be supplied to terrorist groups.<sup>155</sup>

At this point in the *Holder* litigation, the September 11, 2001 attacks on the World Trade Center intervened.<sup>156</sup> Six weeks later, Congress passed the USA PATRIOT Act, which among many other things amended AEDPA to add “expert advice or assistance” to the list of what constituted “material support” to designated terrorist organizations.<sup>157</sup> The plaintiffs filed a second complaint challenging the addition; in early 2004, the district court again rejected most of their arguments, but found “expert advice or assistance,” like “training” and “personnel,” to be impermissibly vague.<sup>158</sup> The cases were consolidated and the district court entered partial summary judgment for the plaintiffs; the Ninth Circuit affirmed in part and reversed in part, then granted rehearing *en banc*.<sup>159</sup> In December 2004, three days after the *en banc* oral argument, Congress enacted the Intelligence Reform and Terrorism Prevention Act (“IRTPA”), further amending AEDPA.<sup>160</sup> The Ninth Circuit vacated its judgment in light of the intervening legislation, and remanded to the district court for further proceedings.<sup>161</sup>

IRTPA was, among other things, an effort to remedy the vagueness of the terms “personnel,” “training,” and “expert advice

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<sup>154</sup> See *id.* at 1135 (asserting that strict scrutiny does not apply because the restriction’s goal is to prevent aid from reaching terrorist groups, not to prevent expression).

<sup>155</sup> See *id.* at 1135–36.

<sup>156</sup> See Robert William Canoy, Jr., Note, *Think Before You Speak: Holder v. Humanitarian Law Project—The Terrorists Stole My Freedom of Speech!*, 31 MISS. C.L. REV. 155, 155 (2012) (indicating that the terrorist attacks of September 11th were influential in the policies enacted that were at issue in the *Holder* case).

<sup>157</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. 107–56, § 805, 115 Stat. 272, 377 (2001) (codified at 18 U.S.C. § 2339A(b) (2006)); Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1137 (C.D. Cal. 2005), *aff’d*, 509 F.3d 1122 (9th Cir. 2007), *amended by* 552 F.3d 916 (9th Cir. 2009), *aff’d in part, rev’d in part sub nom.* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010). Section 810 of the USA PATRIOT ACT added a penalty of life in prison “if the death of any person results” from a violation of the material support law. USA PATRIOT ACT § 805, 115 Stat. at 272 (codified at 18 U.S.C. § 2339A(a)).

<sup>158</sup> Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1201–04 (C.D. Cal. 2004).

<sup>159</sup> Humanitarian Law Project v. Reno, No. CV 98-1971, 2001 U.S. Dist. LEXIS 16729, at 38 (C.D. Cal. Oct. 2, 2001), *aff’d in part and rev’d in part sub nom.* Humanitarian Law Project v. Dep’t of Justice, 352 F.3d 382 (9th Cir. 2003), *rehearing granted by* Humanitarian Law Project v. Dep’t of Justice, 382 F.3d 1154, 1155 (9th Cir. 2004).

<sup>160</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108–458, § 6603, 118 Stat. 3638, 3762 (2004).

<sup>161</sup> Humanitarian Law Project v. Dep’t of Justice, 393 F.3d 902, 903 (9th Cir. 2004).

or assistance.”<sup>162</sup> It specified that “personnel” meant the provision of “1 or more individuals . . . to work under [a] terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization.”<sup>163</sup> “Training” meant “instruction or teaching designed to impart a specific skill, as opposed to general knowledge”; and “expert advice or assistance” meant “scientific, technical or other specialized knowledge.”<sup>164</sup> IRTPA also added a new ban to the definition of material support: provision of any “service.”<sup>165</sup> And it added a *scienter* (but not a specific intent) requirement: “To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity, . . . or that the organization has engaged or engages in terrorism.”<sup>166</sup> Finally, IRTPA gave the Secretary of State discretionary power to grant exemptions from the material support ban.<sup>167</sup>

In 2005, the district court entered summary judgment, adhering to its previous ruling that no specific intent is constitutionally required under section 2339B, thus again rejecting the plaintiffs’ freedom of association claim.<sup>168</sup> But the court held that “training” was still unconstitutionally vague, as were “service” and “expert advice and assistance”; “personnel,” however, was not.<sup>169</sup>

Amending “training” to distinguish between “specific skill” and “general knowledge” only muddied the waters, according to the court: the term was still “not sufficiently clear so that persons of ordinary intelligence can reasonably understand what conduct the statute prohibits.”<sup>170</sup> Moreover, the “training” ban “encompasses protected speech and advocacy, such as teaching international law . . . or how to petition the United Nations to seek redress for human rights violations.”<sup>171</sup> Likewise, the court found “expert advice or assistance” unconstitutionally vague because it “could be construed

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<sup>162</sup> *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2715 (2010) (indicating that three days after oral argument was held on Dec. 14, 2004, Congress amended the statute); see 18 U.S.C. § 2339B(h), (j) (2006).

<sup>163</sup> *Id.* § 2339B(h).

<sup>164</sup> *Id.* § 2339A(b)(2)–(3).

<sup>165</sup> *Id.* § 2339A(b)(1).

<sup>166</sup> *Id.* § 2339B(a)(1).

<sup>167</sup> *Id.* § 2339B(j).

<sup>168</sup> *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1142–43, 1155 (C.D. Cal. 2005), *aff’d*, 509 F.3d 1122 (9th Cir. 2007), *amended by* 552 F.3d 916 (9th Cir. 2009).

<sup>169</sup> *Id.* at 1149.

<sup>170</sup> *Id.* at 1150.

<sup>171</sup> *Id.*

to include First Amendment protected activities,” including “the same protected activities that ‘training’ covers, such as teaching international law . . . or how to petition the United Nations.”<sup>172</sup>

As for “services,” like “training” and “expert advice or assistance,” the court found it “easy to imagine protected expression that falls within the bounds of the term.”<sup>173</sup> The government’s effort to define “services” as taking action “*for the benefit of another*” only made matters worse, because its lawyers had previously conceded that the plaintiffs “could freely engage in ‘human rights and political advocacy *on behalf of* the PKK and the Kurds before any forum of their choosing.”<sup>174</sup> The government’s “contradictory arguments on the scope of the prohibition only underscore[d] the vagueness.”<sup>175</sup> As with “training” and “expert advice or assistance,” the court found that “service” failed to meet “the enhanced requirement of clarity for statutes affecting protected expressive activities and imposing criminal sanctions.”<sup>176</sup>

But “personnel” was no longer vague, said the district court, because IRTPA specifically limited it to the provision of “one or more individuals . . . to work under [a] terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization.”<sup>177</sup>

The case went back to the Ninth Circuit, with yet another attorney general now as the lead defendant.<sup>178</sup> In *Humanitarian Law Project v. Mukasey*, the court repeated its adherence to the *O’Brien* standard (without actually mentioning the case).<sup>179</sup> That is, according to the court, AEDPA’s ban on “material support or resources” was “not aimed at interfering” with expression; therefore, First Amendment overbreadth was “more difficult to show.”<sup>180</sup> In any event, the law’s suppression of protected speech was not substantial when compared its “plainly legitimate applications.”<sup>181</sup> The absence of a specific intent limitation did not render the law

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<sup>172</sup> *Id.* at 1151.

<sup>173</sup> *Id.* at 1152 (quoting *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1138 (9th Cir. 2009)).

<sup>174</sup> *Humanitarian Law Project*, 380 F. Supp. 2d at 1152 (citation omitted).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (quoting 18 U.S.C. § 2339B(h) (2006)) (internal quotation marks omitted).

<sup>178</sup> *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 n.\* (9th Cir. 2009), *aff’d in part and rev’d in part*, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

<sup>179</sup> *See id.* at 932.

<sup>180</sup> *Id.* at 931 (quoting *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2009)) (internal quotation marks).

<sup>181</sup> *Mukasey*, 552 F.3d at 931–32.

unconstitutional because

“[a]s amended, section 2339B(a) does not proscribe membership in or association with the terrorist organizations, but seeks to punish only those who have provided “material support or resources” to a foreign terrorist organization with *knowledge* that the organization was a designated foreign terrorist organization, or that it is or has engaged in terrorist activities or terrorism.”<sup>182</sup>

The court of appeals found this *scienter* requirement “eliminate[d] any due process concerns” and “decline[d] Plaintiffs’ invitation to extend the holding in *Scales*.”<sup>183</sup>

As to vagueness, the panel again agreed with the district court. AEDPA’s ban on providing “personnel” was no longer vague because IRTPA had clarified that it did not apply to advocacy that was “*entirely independent*” of foreign terrorist organizations.<sup>184</sup> But the ban on providing “training” was void for vagueness “[b]ecause we find it highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international bodies . . . one is imparting a ‘specific skill’ or ‘general knowledge.’”<sup>185</sup> And since there was no statutory definition of the term “service,” it presumably included “expert advice or assistance”; both of these were also vague.<sup>186</sup> Like the district court, the Ninth Circuit applied a heightened vagueness test because of the First Amendment implications, noting, for example, that advice “on how to lobby or petition representative bodies such as the United Nations” or training in how to use humanitarian and international law are forms of First Amendment-protected expression.<sup>187</sup> At the

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<sup>182</sup> *Id.* at 926.

<sup>183</sup> *Id.* As if recognizing the tenuousness of its distinction between membership and support, the Ninth Circuit (per judge Harry Pregerson) acknowledged in a footnote that “[a]lthough section 2339B(a) does not punish mere membership, the statute does prohibit the paying of membership dues.” *Id.* at 926 n.5 (citing *Reno*, 205 F.3d at 1134). The court of appeals also rejected the argument that the new provision giving the Secretary of State discretion to permit certain kinds of support to FTOs was an unconstitutional licensing scheme. *Mukasey*, 552 F.3d at 932.

<sup>184</sup> *Id.* at 923 (quoting 18 U.S.C. § 2339B(h) (2006)).

<sup>185</sup> *Mukasey*, 552 F.3d at 929 (citing *Reno*, 205 F.3d at 1138).

<sup>186</sup> *Mukasey*, 552 F.3d at 930 (citing *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1152 (C.D. Cal. 2005)).

<sup>187</sup> *Mukasey*, 552 F.3d at 930–31 (citing *Gonzales*, 380 F. Supp. 2d at 1152). However, the appeals court found the portion of the “expert advice or assistance” definition that referred to “scientific” and “technical” knowledge was not vague: “[u]nlike ‘other specialized knowledge,’ which covers every conceivable subject, the meaning of ‘technical’ and ‘scientific’ is reasonably understandable to a person of ordinary intelligence.” *Mukasey*, 552 F.3d at 930 (citations omitted).

Supreme Court, the government would argue, successfully, that the court of appeals had erroneously conflated vagueness (essentially a due process concern) and overbreadth (a First Amendment doctrine).<sup>188</sup>

Cross-petitions were filed, and the Supreme Court granted certiorari on September 30, 2009.<sup>189</sup>

#### IV. *HOLDER* AT THE SUPREME COURT

The government's Supreme Court strategy was, first, to emphasize that this was an as-applied, not a facial vagueness challenge.<sup>190</sup> Since the plaintiffs had consistently used the terms training, service, and expert advice or assistance to describe their own conduct, the lawyers argued, they could hardly argue that the law was vague as applied to them.<sup>191</sup> Its application to anybody else was not a question before the Court.<sup>192</sup>

Second, the government reiterated its position that AEDPA is "a regulation of conduct, only incidentally affecting speech," and is therefore subject to intermediate rather than strict First Amendment scrutiny.<sup>193</sup> The law easily survived such scrutiny because it was "narrowly tailored" to advance the "important" government interest in stopping all aid to designated FTOs.<sup>194</sup> Congress had found that terrorist groups "are so tainted by their

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<sup>188</sup> See Brief for the Respondents at 42–43, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2009) (Nos. 08-1498, 09-89); Reply Brief for the Respondents at 1–2, *Holder*, 130 S. Ct. at 2705 (Nos. 08-1498, 09-89).

<sup>189</sup> *Holder v. Humanitarian Law Project*, 130 S. Ct. 48 (2009).

<sup>190</sup> Brief for the Respondents, *supra* note 188, at 18–19; Reply Brief for the Respondents, *supra* note 188, at 5.

<sup>191</sup> Reply Brief for the Respondents, *supra* note 188, at 5–6. The government eventually did make one concession on vagueness. Responding to the plaintiffs' contention that "the government offers three dramatically different definitions" of 'service,'" the Justice Department attempted to clarify:

The government's principal position is that the term "service" refers to "an act done for the benefit or at the command of another." Under this definition, the terrorist organization's command or behest is not a necessary element. . . .

. . . .  
If, however, this Court finds that the government's preferred reading of "service" (as including "acts done for the benefit of another") could sweep in independent advocacy . . .

then the Court should limit the term 'service' to acts done at the command or behest of a foreign terrorist organization to further its goals and objectives.  
Reply Brief for the Respondents, *supra* note 188, at 22, 25 (quoting Reply Brief for Humanitarian Law Project et al. at 12, *Holder*, 130 S. Ct. at 2705 (Nos. 08-1498, 09-89); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1226 (3d College ed. 1993)) (other citations omitted).

<sup>192</sup> See Reply Brief for the Respondents, *supra* note 188, at 5–6.

<sup>193</sup> Brief for the Respondents, *supra* note 188, at 15.

<sup>194</sup> *Id.*; Reply Brief for the Respondents, *supra* note 188, at 27.

criminal conduct that any contribution to such an organization facilitates that conduct”<sup>195</sup>—that is, military and nonviolent support are “fungib[le],” and contributions to “ostensibly legitimate activities” can “free[] an equal sum that can then be spent on terrorist activities.”<sup>196</sup>

But it was questionable whether this “fungibility” argument applied to non-financial assistance.<sup>197</sup> So the government suggested another rationale. Even “seemingly benign” forms of support, such as legal or communications advice, “bolster[] a terrorist organization’s efficacy and strength in a community, thus undermining this nation’s efforts to delegitimize and weaken these groups.”<sup>198</sup> According to the government, preventing activities that might “legitimize” a designated FTO was thus a sufficient government interest to satisfy the *United States v. O’Brien* test.<sup>199</sup> If this seemed a straightforward acknowledgment that aspects of the “material support” ban were aimed at suppressing speech that dissented from U.S. foreign policy, the government finessed the problem by warning the Court not to “attempt to second guess” the judgment of Congress and the executive, especially in matters of “sensitive national security and foreign affairs,” which required “a heightened degree of deference” to the political branches.<sup>200</sup>

In urging application of the *O’Brien* standard, which assumes that a challenged law is content-neutral, the government lawyers also had to justify AEDPA’s exemption for medicine and religious materials.<sup>201</sup> The distinction had “nothing to do with the content of any speaker’s message,” they argued—even though “religious” is obviously a content-based category.<sup>202</sup> Congress’s purpose was not to discriminate, they said; it merely found that “certain forms of assistance are not fungible, and so will not inevitably aid the activities of terrorist organizations that endanger American lives

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<sup>195</sup> Brief for the Respondents, *supra* note 188, at 54 (quoting Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (1996)) (internal quotation marks omitted).

<sup>196</sup> Brief for the Respondents, *supra* note 188, at 54, 55 (quoting H.R. REP. NO. 104-383, at 81 (1995)) (internal quotation marks omitted).

<sup>197</sup> Brief for the Respondents, *supra* note 188, at 54–56.

<sup>198</sup> *Id.* at 56 (citing *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008)).

<sup>199</sup> Brief for the Respondents, *supra* note 188 at 52, 56 (citing Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2009)) (other citations omitted).

<sup>200</sup> Brief for the Respondents, *supra* note 188 at 56 (citing *Reno*, 205 F.3d at 1136).

<sup>201</sup> Reply Brief for the Respondents, *supra* note 188, at 34 (citing 18 U.S.C. § 2339A(b)(1) (2006)).

<sup>202</sup> *Id.*

and interests. Or Congress was entitled to determine that the humanitarian value of some forms of aid outweighs the interests supporting their prohibition.”<sup>203</sup>

The government continued to press a distinction between “joining or affiliating with a group” and providing it with a “service.”<sup>204</sup> The plaintiffs remained “free to join or affiliate with the PKK or LTTE,” it said.<sup>205</sup> Thus, *Scales* did not apply and there was no need either to read a specific intent requirement into the law or to strike it down for lack of one.<sup>206</sup>

Finally, the government lawyers accused the plaintiffs of, in essence, simply disagreeing with U.S. foreign policy:

Petitioners broadly claim that training terrorist organizations in peacemaking and human rights advocacy will not undermine national security. But they conceded before the lower courts that Congress could constitutionally prohibit any and all forms of support to al Qaeda—presumably because such aid does pose a security danger. Petitioners’ position thus amounts to a claim that Congress may not extend the material support statute to additional terrorist organizations, including the PKK and LTTE. The basis for that claim . . . has nothing to do with the statute’s supposed vagueness, content-discrimination, or associational effects. Rather, it is grounded in petitioners’ policy judgment about aid to al Qaeda as compared with aid to other terrorist organizations.<sup>207</sup>

The plaintiffs’ lawyers countered all these arguments by highlighting the breadth of the “material support” ban.<sup>208</sup> Government lawyers had said it would be a “crime . . . to submit an amicus brief in federal court, to petition Congress or the United Nations for legal reform, or even to speak to media, for the benefit of a designated organization, as well as to teach such an organization human rights advocacy or English.”<sup>209</sup> The ban was not only too broad; its “legitimizing” rationale was a blatant effort to suppress dissent. At oral argument before the Ninth Circuit, the Justice

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<sup>203</sup> *Id.*

<sup>204</sup> Brief for the Respondents, *supra* note 188, at 41 n.9.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 60.

<sup>207</sup> Reply Brief for the Respondents *supra* note 188, at 37–38 (citations omitted).

<sup>208</sup> Opening Brief for Humanitarian Law Project, et al., *supra* note 119, at 3–4 (quoting 18 U.S.C. § 2339B (2006)).

<sup>209</sup> Opening Brief for Humanitarian Law Project, et al., *supra* note 119, at 2 (citations omitted).

Department lawyer had explained, “[w]e do not want U.S. persons to be assisting terrorist organizations in making presentations to the U.N., to television, to a newspaper. . . . Congress wants these organizations to be radioactive.”<sup>210</sup> He argued that helping an FTO in any way “adds to the good will and the standing of the organization.”<sup>211</sup> Lead attorney David Cole and his co-counsel contended that this frankly viewpoint discriminatory purpose, and the law’s direct suppression of speech and association, trigger strict First Amendment scrutiny.<sup>212</sup>

They also, of course, defended the court of appeals’ rulings on vagueness.<sup>213</sup> Examples from the now-lengthy litigation record included the government’s attempted distinction between “specific skill” and “general knowledge” for purposes of the ban on training—teaching geography to FTO members would be permissible because it is “general knowledge,” but teaching the “political geography of terrorist organizations” would not, because it is a “specific skill.”<sup>214</sup> Similarly, according to the government, advocacy “on behalf of” an FTO was permissible, but advocacy “for the benefit of” the organization was not.<sup>215</sup> And the difference between “specialized” and “general” knowledge, for purposes of the “expert advice and assistance” ban, posed the same dilemmas.<sup>216</sup> With respect to “personnel,” the law’s exemption of “‘entirely independent’ activity” still left questions as to “the vast gray area between complete control and complete independence, encompassing myriad forms of coordination, collaboration, consultation, and communication” with

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<sup>210</sup> *Id.* at 13, 49 n.26 (quoting Oral Argument at 39:20, 34:30, Humanitarian Law Project v. U.S. Dep’t of Justice, 352 F.3d 382 (9th Cir. 2003) (Nos. 02-55082, 02-55083), available at [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000004505](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004505) (internal quotation marks omitted).

<sup>211</sup> Opening Brief for Humanitarian Law Project, et al., *supra* note 119, at 49 n.26 (quoting Oral Argument, *supra* note 212, at 34:30) (internal quotation marks omitted).

<sup>212</sup> Opening Brief for Humanitarian Law Project, et al., *supra* note 119, at 7–8, 20 (citing H.R. REP. NO. 104-383, at 43, 44 (1995)). Indeed, the plaintiffs’ brief argued that the proper standard was set by *Brandenburg v. Ohio*, which allows the suppression of speech only if it is “intended and likely to produce ‘imminent lawless action.’” Opening Brief for Humanitarian Law Project, et al., *supra* note 119, at 54 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969) (per curiam)) (citing *Hess v. Indiana*, 395 U.S. 105, 108–09 (1973)).

<sup>213</sup> Opening Brief for Humanitarian Law Project, et al., *supra* note 119, at 15.

<sup>214</sup> *Id.* at 27 (quoting Oral Argument at 49:00, Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134 (9th Cir. 2005) (Nos. CV98-1971ABCRCX, CV03-6107ABCRCX), available at [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000004506](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004506)) (internal quotation marks omitted).

<sup>215</sup> Opening Brief for Humanitarian Law Project, et al., *supra* note 119, at 28 (internal citations omitted) (internal quotation marks omitted).

<sup>216</sup> *Id.* at 29 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–49 (1991)) (internal quotation marks omitted).

designated groups.<sup>217</sup>

Finally, Cole and his co-counsel pressed their avoidance argument: all the constitutional problems would go away if, as in *Scales*, the Court would read a specific intent requirement into AEDPA.<sup>218</sup>

*Amicus curiae* briefs on both sides dramatized the political dimensions of the case.<sup>219</sup> The most striking, on behalf of the Carter Center, Christian Peacemaker Teams, and seven other human rights organizations, detailed how the broad ban on nonmonetary forms of “material support” would cripple peace initiatives.<sup>220</sup> Among these initiatives was the Carter Center’s monitoring of elections in Lebanon and the Palestinian Territories, which necessarily required meetings with members of Hezbollah and Hamas—both designated FTOs, and both direct participants in the electoral process.<sup>221</sup> Former President Jimmy Carter had worked on such observation teams.<sup>222</sup>

The Carter Center also wanted “to launch a project to teach peaceful conflict resolution in universities in Gaza through the formation of a student ‘parliament,’ where students could come to voice concerns and be trained to adjudicate disputes.”<sup>223</sup> But the Carter Center was unsure whether this program would be a crime “if at least some of the students participating [were] known or [were] likely to be members of Hamas or other designated FTOs.”<sup>224</sup> Other examples of mediation and peacemaking in Africa, the Middle East, Latin America, and Asia filled the Center’s brief, which argued that “[t]his work, by necessity, requires meeting with all sides to a conflict.”<sup>225</sup>

Another brief, from thirty-two “Victims of the McCarthy Era,” was an effort to remind the Court of the historical costs of guilt by

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<sup>217</sup> Opening Brief for Humanitarian Law Project, et al., *supra* note 119, at 36 (quoting 18 U.S.C. § 2339B(h) (2006)).

<sup>218</sup> Opening Brief for Humanitarian Law Project, et al., *supra* note 119, at 22 (citing *Scales v. United States*, 367 U.S. 203 (1961)).

<sup>219</sup> See Brief Amicus Curiae of the Carter Center, et al. in Support of Humanitarian Law Project, et al. at 2–4, 6, *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705 (2010); Brief Amici Curiae of Center for Constitutional Jurisprudence and Center for Law and Counterterrorism in Support of Petitioners/Cross-Respondents at 2–3, *Holder*, 130 S. Ct. at 2705 (Nos. 08-1498, 09-89).

<sup>220</sup> See Brief Amicus Curiae of the Carter Center, et al., *supra* note 219, at 1–6.

<sup>221</sup> *Id.* at 15–16, 19–20.

<sup>222</sup> *Id.* at 19.

<sup>223</sup> *Id.* at 14.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 3–6, 15, 19–20, 22–27.

association.<sup>226</sup> This group of elderly radicals or their relatives included H. Chandler Davis, who had been fired from the University of Michigan in 1954 after refusing to cooperate with the House Un-American Activities Committee, Henry Foner, one of four left-wing brothers who were blacklisted from teaching at New York City schools and colleges, and Beth Lamont, widow of the philosopher and activist Corliss Lamont, who had been cited for contempt of Congress and denied a passport during the Red Scare.<sup>227</sup> The brief argued that without the specific intent standard of *Scales*,<sup>228</sup> *Elfbrandt*,<sup>229</sup> and *Keyishian*,<sup>230</sup> AEDPA amounted to a “blanket prohibition on association,” with a “chilling effect . . . reminiscent of the McCarthy Era.”<sup>231</sup>

There were five amicus briefs on the government’s side; all made arguments at least as political as those of the McCarthy Era victims.<sup>232</sup> The Anti-Defamation League focused on the threat

<sup>226</sup> Brief of Amici Curiae Victims of the McCarthy Era, in Support of the Humanitarian Law Project, et al. at 1, *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705 (2009) (Nos. 08-1498, 09-89).

<sup>227</sup> *Id.* at 18 (describing relevant persons in appendix d, f, j, k).

<sup>228</sup> *Scales v. United States*, 367 U.S. 203, 229 (1961).

<sup>229</sup> *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966).

<sup>230</sup> *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 607 (1967).

<sup>231</sup> Brief of Amici Curiae Victims of the McCarthy Era, In Support of Humanitarian Law Project, et al., *supra* note 226, at 10–11, 19. The University of Michigan later established an Academic Freedom Lecture Fund in honor of Davis and two other professors who were unjustly fired. *Academic Freedom Lecture Fund*, UNIV. OF MICH., <http://www.umich.edu/~aflf/history.html> (last visited Feb. 1, 2013). Two other briefs were filed in support of the plaintiffs. See Brief of the Constitution Project and the Rutherford Institute as Amici Curiae in Support of Respondents/Cross-Petitioners [hereinafter Brief of the Constitution Project], *Holder*, 130 S. Ct. at 2705 (Nos. 08-1498, 09-89); Brief for Academic Researchers and the Citizen Media Law Project as Amici Curiae in Support of Respondents/Cross-Petitioners [hereinafter Brief for Citizens Media Law Project], *Holder*, 130 S. Ct. at 2705 (Nos. 08-1498, 09-89). Two legal think tanks, the Constitution Project and the Rutherford Institute, argued that the AEDPA’s bans on “service,” “training,” “expert advice,” and “personnel” should be severed from the statute as “unconstitutionally overbroad. Brief of the Constitution Project, *supra*, at i, 14–15. Indeed, “[i]t is doubtful that any law of the United States has so expansively limited citizens’ rights to speech and association since the Alien and Sedition Acts of 1798.” *Id.* at 4. A group of journalists and academic researchers expressed fears that their interviews and other contacts with rebel groups would run afoul of the “vague and amorphous” provisions of section 2339B. Brief for Citizens Media Law Project, *supra*, at 1.

<sup>232</sup> See Brief of Amicus Curiae the Anti-Defamation League in Support of Petitioners, *Holder*, 130 S. Ct. at 2705 (Nos. 08-1498, 09-89); Brief of John D. Altemburg, Maj. Gen. US Army (Ret.), et al. as Amici Curiae In Support of Petitioners/Cross-Respondents, *Holder* 130 S. Ct. at 2705 (Nos. 08-1498, 09-89); Brief of Amicus Curiae Center on the Administration of Criminal Law in Support of Eric H. Holder, Jr., Attorney General, et al., *Holder*, 130 S. Ct. at 2705 (Nos. 08-1498, 09-89); Brief of Amicus Curiae Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues in Support of Petitioners, *Holder*, 130 S. Ct. at 2705 (Nos. 08-1498, 09-89); Brief Amici Curiae of Center for Constitutional Jurisprudence and Center for Law and Counterterrorism in Support of Petitioners/Cross-

posed by Hamas to Israel.<sup>233</sup> A group of retired military officers, joined by four nonprofits, argued—in contradiction to the government—that since the plaintiffs had now abandoned their claim of a right to contribute money and supplies to FTOs, much of the peaceful support they envisioned would not be a crime.<sup>234</sup> A brief from two national security-oriented think tanks, co-authored by John Yoo,<sup>235</sup> was the most passionately ideological, asserting:

Our terrorist enemy infiltrates agents across our borders, covertly provides them with money and assistance, and then launches surprise attacks on innocent civilians. American troops are fighting on battlefields abroad, yet the court below has undercut the reasonable efforts of government to deny aid and support to the enemy at home. . . . If the Court adopts the view of the Ninth Circuit—that it is possible to donate to “good” parts of a terror organization without benefiting the “bad”—then we will reach “the brink of a precipice of absurdity.”<sup>236</sup>

It was clear at the oral argument on February 23, 2010 that most of the Justices understood the question at the heart of the case: whether the government can restrict freedom of speech and association on the theory that any assistance to an FTO, even if intended to end violence, ultimately enhances the group’s legitimacy and aids terrorism.<sup>237</sup> They also understood that the government’s distinction between joining or meeting with an organization

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Respondents, *supra* note 219.

<sup>233</sup> Brief of Amicus Curiae the Anti-Defamation League in Support of Petitioners, *supra* note 232, at 3, 25–31.

<sup>234</sup> Brief of John D. Altenburg, Maj. Gen. US Army (Ret.), et al. as Amici Curiae In Support of Petitioners/Cross-Respondents, *supra* note 232, at 5–6, 12–13, 17.

<sup>235</sup> Brief Amici Curiae of Center for Constitutional Jurisprudence and Center for Law and Counterterrorism in Support of Petitioners/Cross-Respondents, *supra* note 219 (noting Yoo was of counsel on the cover). Yoo was the main author of legal memos seeking to justify torture of war prisoners during the presidency of George W. Bush. See Memorandum from John Yoo, on Military Interrogation of Alien Unlawful Combatants Held Outside the United States, U.S. Dept’t of Justice, Office of Legal Counsel 81 (Mar. 14, 2003), [https://www.aclu.org/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](https://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf). In 2012, the Ninth Circuit Court of Appeals dismissed an attempt by Jose Padilla to sue Yoo for authorizing sleep deprivation, isolation, and other “tactics” while Padilla was being held without charges as a suspected enemy combatant. The Ninth Circuit did not endorse Yoo’s conduct, stating only that the court could not “say that any reasonable official in 2001-03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture.” See *Padilla v. Yoo*, No. 09-16478, slip op. at 34 (9th Cir. May 2, 2012).

<sup>236</sup> Brief Amici Curiae of Center for Constitutional Jurisprudence and Center for Law and Counterterrorism in Support of Petitioners/Cross-Respondents, *supra* note 219, at 10, 27 (quoting *AT&T Corp. v. Hulteen*, 556 U.S. 701, 727 (2009) (Ginsburg, J., dissenting)).

<sup>237</sup> See Transcript of Oral Argument at 6, *Holder*, 130 S. Ct. at 2705.

(permitted by the statute) and giving it “material support” was murky if not meaningless.<sup>238</sup> Justice Samuel Alito asked then-Solicitor General Elena Kagan, arguing for the government, “how someone could be a member . . . without providing a service to the organization? . . . Simply by lending one’s name as a member,” for example, or “[i]f you attended a meeting and you helped to arrange the chairs in advance or clean up afterwards, you’d be providing a service.”<sup>239</sup> Justice Antonin Scalia joined in: “I would have guessed that you are providing a service or personnel when you make yourself a member.”<sup>240</sup> Kagan replied that Congress could have gone farther and banned membership, but instead limited the law to “material support.”<sup>241</sup>

Justice Ruth Bader Ginsburg likewise pressed Kagan on the distinction between joining or meeting with an FTO, on the one hand, and providing it with various forms of non-tangible support, on the other: “I don’t understand the line between meeting with these terrorist organizations, discussing things with them, and instructing them on how they can pursue their goals through lawful means.”<sup>242</sup> Kagan agreed that “there may be some hard cases that are at the borderline,” but said “[t]his is not one of them.”<sup>243</sup> The original complaint in the case showed the “extensiveness . . . of the services that they wish to offer to these foreign terrorist organizations and the value that those services are going to give those foreign terrorist organizations.”<sup>244</sup> So, Justice Ginsburg said, “you can be a member, you can attend meetings, you can discuss things, but . . . there’s a certain point at which the discussion must stop, right? . . . The communications are censored.”<sup>245</sup> Kagan agreed: “The discussion must stop when you . . . go over the line into giving valuable advice, training, support to these organizations.”<sup>246</sup>

But, Justice Stephen Breyer said, “petitioning the United Nations—and that’s what you are teaching them—does not . . . seem to me to be something that reasonably you would think was going to aid them in their unlawful objectives, but for the realm of ideas.”<sup>247</sup>

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<sup>238</sup> *Id.* at 18–20.

<sup>239</sup> *Id.* at 40–41.

<sup>240</sup> *Id.* at 41.

<sup>241</sup> *Id.* at 41–42.

<sup>242</sup> *Id.* at 43.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 44.

<sup>245</sup> *Id.* at 53.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 42.

Since “[Congress was] aware of the problem of First Amendment rights,” why interpret the law in a way that restricts them?<sup>248</sup> In other words, helping a terrorist organization expound its ideas is a form of free speech. Kagan did not exactly answer the question, but repeated her main argument: that any resources given to an FTO are fungible.<sup>249</sup>

Arguing for the plaintiffs, David Cole made clear that the plaintiffs had dropped any claim of a right to give financial aid; their arguments were now limited to “pure speech.”<sup>250</sup> Responding to Justice Sonia Sotomayor’s reminder that “one of your stated aims . . . is to teach them how to get aid for tsunami relief,” Cole replied, “that claim has been mooted because the LTTE . . . no longer has [a] role in Sri Lanka. So what’s left . . . has nothing to do with money.”<sup>251</sup> And although Congress found that financial support is fungible, that finding pertained to “financial and material resources,” not pure speech.<sup>252</sup>

Chief Justice Roberts begged to differ, focusing now not on fungibility but on the other justification for the ban on peaceful humanitarian services—legitimizing a group that the government condemns. “Let’s say you have the Nazi Party,” Chief Justice Roberts proposed, “and you are talking about advice or speech on some purely mundane issue [like] how to run a hospital, but the government decides that anything that legitimizes the Nazi Party . . . promotes that group’s terrorist activities.”<sup>253</sup> Putting aside the question of treason in time of war, Chief Justice Roberts said, “I meant to hypothesize a group that the government could reasonably determine should not be supported in any way . . . because it [will] legitimize[]” the regime.<sup>254</sup>

Cole seized on the First Amendment implications of granting the government power to suppress speech on such a theory: by that logic, “[*T*he *New York Times*, *Washington Post*, and the *L.A. Times*, all of whom have published op-eds by Hamas spokespersons . . . [are] all criminals.”<sup>255</sup> Although the plaintiffs were not newspaper editors, “it’s the same sort of support.”<sup>256</sup> Justice Anthony Kennedy

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<sup>248</sup> *Id.*

<sup>249</sup> *See id.* at 42–43.

<sup>250</sup> *Id.* at 63; *see id.* at 1–6.

<sup>251</sup> *Id.* at 63.

<sup>252</sup> *Id.* at 63–64.

<sup>253</sup> *Id.* at 8.

<sup>254</sup> *Id.* at 9.

<sup>255</sup> *Id.* at 13–14 (emphasis added).

<sup>256</sup> *Id.* at 14.

fought the analogy: “I thought [Fertig] wants to meet with the people. *The New York Times* didn’t meet with Hamas to tell them how great their editorial was.”<sup>257</sup> But Cole rejoined: “[I]t’s not about whether you meet with them . . . [but] whether you coordinate[d] with them, and they’ve certainly coordinated with the Hamas spokesperson in editing and . . . publishing. . . . [T]hat would be providing a service.”<sup>258</sup>

Justice Scalia headed off this set of hypotheticals: “It depends what ‘coordinating’ means, doesn’t it? And we can determine that in the next case. . . . This is an as-applied challenge”;<sup>259</sup> hence, according to Scalia, hypotheticals were irrelevant. Scalia argued, moreover, that the theory of the legislation was to get rid of terrorist organizations; even helping Hamas with its hospitals, he thought, supports the organization.<sup>260</sup> He asked Cole: “[w]hy isn’t that . . . reasonable?”<sup>261</sup> Cole replied: “That is precisely the argument that the United States made to this Court in *Scales*,” and quoted from the government’s *Scales* brief fifty years before: “Active membership can be proscribed ‘even though the activity be expended along lines not otherwise illegal, since active support of any kind aids the organization in achieving its own illegal purposes.’”<sup>262</sup> The Court in *Scales* rejected that argument, Cole said, because it leads to the punishment of lawful speech.<sup>263</sup>

The oral argument was almost entirely consumed with these First Amendment questions. Even the Justices who plainly supported the government were dubious about using the *O’Brien*<sup>264</sup> standard of intermediate scrutiny, rather than First Amendment strict scrutiny. Justice Alito bluntly asked Kagan how she could even argue “that training and providing advice is not speech?”<sup>265</sup> Chief Justice Roberts expressed concern that the government’s brief was “all about *O’Brien*. I’m not sure you have an answer to whether or not strict scrutiny is satisfied.”<sup>266</sup> Kagan apologized for the oversight, pointed to the portion of her brief outlining the government

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<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 14–15.

<sup>259</sup> *Id.* at 15.

<sup>260</sup> *Id.* at 17.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* (quoting Brief for Government on Reargument at 23, *Scales v. United States*, 376 U.S. 203 (1959) (No. 8) (emphasis added)).

<sup>263</sup> Transcript of Oral Argument, *supra* note 237, at 18.

<sup>264</sup> *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

<sup>265</sup> Transcript of Oral Argument, *supra* note 237, at 45.

<sup>266</sup> *Id.*

interests served by the law, and suggested that if the Court chose to apply strict scrutiny, a remand would be appropriate, because none of the lower courts “has ever actually gone off on that ground.”<sup>267</sup> Cole agreed.<sup>268</sup> Thus, by the end of the oral argument, a remand seemed likely, in which the government would have to meet the demanding strict scrutiny test. There was no mention at oral argument of the plaintiffs’ contention that the Secretary of State’s discretion to grant exemptions from the material support ban constituted an unconstitutional licensing scheme, and relatively little time was spent on vagueness.

## V. THE SUPREME COURT SPEAKS

As it turned out, there was no remand for further proceedings to consider strict scrutiny.<sup>269</sup> Although the Supreme Court’s 6–3 decision, issued on June 21, 2010, rejected the *O’Brien* test, it went ahead and decided the First Amendment question under a form of scrutiny that Chief Justice Roberts’s opinion vaguely called “a more demanding standard” than the one described in *O’Brien*.<sup>270</sup> The word “strict,” which Roberts had used during oral argument,<sup>271</sup> appeared nowhere in the opinion.<sup>272</sup>

Applying this “more demanding standard,” Chief Justice Roberts did not, however, make any real effort to determine whether banning the challenged aspects of “material support” would in fact accomplish the government’s undisputed and urgent interest in fighting terrorism, no less that it was a narrowly tailored means of doing so.<sup>273</sup> He never used the phrase “less restrictive alternative,” the usual language for strict scrutiny analysis—that is, whether the government’s compelling objective can be achieved in a way that imposes a lesser burden on First Amendment rights.<sup>274</sup> Instead, he

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 62.

<sup>269</sup> *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2731 (2010).

<sup>270</sup> *Id.* at 2705, 2712, 2724 (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)) (internal quotation marks omitted). See *Johnson*, 491 U.S. at 403 (“If the State’s regulation is not related to expression, then the less stringent standard we announced in *United States v. O’Brien* for regulations of noncommunicative conduct controls.”) (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)). Roberts saved this First Amendment analysis for the last part of his opinion; here, I discuss it first.

<sup>271</sup> See *supra* text accompanying notes 264–68.

<sup>272</sup> See *Holder*, 130 S. Ct. at 2705–31; see, e.g., *id.* at 2724 (noting that Roberts uses the word “rigorous” instead when describing the level of scrutiny required).

<sup>273</sup> See *id.* at 2734–36 (Breyer, J., dissenting).

<sup>274</sup> See, e.g., *Ashcroft v. ACLU*, 535 U.S. 564, 572 (2002); see also *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *City of Houston v. Hill*,

deferred to Congress's 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."<sup>275</sup> The PKK and the LTTE "are deadly groups," Roberts went on, citing an affidavit submitted by the State Department: "It is not difficult to conclude . . . that the 'taint' of [their] violent activities is so great that working in coordination with them or at the command of the PKK and LTTE serves to legitimize and further their terrorist means."<sup>276</sup>

Chief Justice Roberts emphasized that the executive branch, like Congress, is entitled to deference because the case "implicates sensitive and weighty interests of national security and foreign affairs."<sup>277</sup>

For example, the Republic of Turkey . . . 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.<sup>278</sup>

Thus, it seemed, the U.S. interest in supporting its allies of the moment satisfied the "more demanding scrutiny" test.

Roberts then embarked on further speculations:

It [was] wholly foreseeable that the PKK could use the 'specific skill[s]' that plaintiffs propose to impart 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. A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt.<sup>279</sup>

The Chief Justice noted that none of this meant

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482 U.S. 451, 459 (1987).

<sup>275</sup> *Holder*, 130 S. Ct. at 2710 (quoting Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (1996)) (internal quotation marks omitted).

<sup>276</sup> *Holder*, 130 S. Ct. at 2725 (quoting Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. at 1247).

<sup>277</sup> *Holder*, 130 S. Ct. at 2727.

<sup>278</sup> *Id.* at 2726–27.

<sup>279</sup> *Id.* at 2729 (citations omitted).

that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. . . . In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.<sup>280</sup>

Thus, although the government's argument about "legitimizing" terrorist groups, and the Court's deference to the political branches, would apply equally to independent advocacy and to domestic groups, Roberts explicitly narrowed the First Amendment holding. It does not apply to independent speech or to aid given to domestic groups.

After this, disposing of the plaintiffs' freedom of association claim was short work: any burden on the associational right was "justified for the same reasons that we have denied plaintiffs' free speech challenge."<sup>281</sup> The McCarthy era cases, with their specific intent requirement, were inapposite because "the statute does not penalize mere association with a foreign terrorist organization"; it only prohibits material support.<sup>282</sup> Roberts made no mention of the Justices' recognition at oral argument that the distinction between membership and "personnel" or "services" is illusory—no mention of Justice Alito's example of a member setting out chairs for a meeting.<sup>283</sup> Not having any real answer to Justice Alito's example of the chairs or Justice Ginsburg's concern about where a permissible discussion with an FTO might cross the line into forbidden service, training, or advice, Chief Justice Roberts simply ignored the problem.<sup>284</sup>

Largely on the same reasoning, he also rejected the plaintiffs' "avoidance" argument: that the constitutional concerns could be resolved by interpreting section 2339B to require specific intent.<sup>285</sup> Such a construction was not required because *Scales*, *Keyishian*,

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<sup>280</sup> *Id.* at 2730.

<sup>281</sup> *Id.* at 2731.

<sup>282</sup> *Id.* at 2730.

<sup>283</sup> See *supra* text accompanying notes 237–41.

<sup>284</sup> See *Holder*, 130 S. Ct. 2705 at 2705–31.

<sup>285</sup> *Id.* at 2717.

and like cases dealt with membership, not services or advice.<sup>286</sup> In addition, section 2339B set forth “the necessary mental state for a violation”: not specific intent, but merely knowledge that the organization is a designated FTO or engages in terrorism.<sup>287</sup> Other sections of the law explicitly require specific intent; section 2339B does not.<sup>288</sup>

Finally, Chief Justice Roberts’s opinion for the Court reversed the Ninth Circuit ruling that the terms “training,” “service,” and “expert advice or assistance” are unconstitutionally vague.<sup>289</sup> He emphasized that this was an as-applied challenge: “We consider whether a statute is vague as applied to the particular facts at issue, for [a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.”<sup>290</sup> Although “a more stringent vagueness test” applies when a law interferes with free speech or association,<sup>291</sup> “perfect clarity and precise guidance have never been required.”<sup>292</sup> Despite the heightened vagueness test in First Amendment cases, Roberts agreed with the government that the Ninth Circuit had improperly “merged plaintiffs’ vagueness challenge with their First Amendment claims, holding that portions of the material-support statute were unconstitutionally vague because they applied to protected speech—regardless of whether those applications were clear.”<sup>293</sup> Thus, even to the extent a heightened vagueness standard applied, “a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under

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<sup>286</sup> *Id.* at 2718.

<sup>287</sup> *Id.* at 2717.

<sup>288</sup> *Id.* at 2717–18. As examples of sections requiring specific intent, the Court cited section 2339A(a) which “establish[es] criminal penalties for one who ‘provides material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out, a violation of’ statutes prohibiting violent terrorist acts” and section 2339C(a)(1) which sets out

criminal penalties for one who “unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out” other unlawful acts. Congress enacted § 2339A in 1994 and § 2339C in 2002 . . . [y]et . . . did not import the intent language of those provisions into § 2339B, either when it enacted § 2339B in 1996, or when it clarified § 2339B’s knowledge requirement in 2004.

*Id.* at 2717–18.

<sup>289</sup> *Id.* at 2719.

<sup>290</sup> *Id.* at 2718–19 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)).

<sup>291</sup> *Hoffman Estates*, 455 U.S. at 499.

<sup>292</sup> *Holder*, 130 S. Ct. at 2719 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)) (internal quotation marks omitted).

<sup>293</sup> *Holder*, 130 S. Ct. at 2719.

the Due Process Clause of the Fifth Amendment for lack of notice.”<sup>294</sup> “[A] Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression.”<sup>295</sup>

The statutory terms were not “wholly subjective,” Chief Justice Roberts said.<sup>296</sup> Congress had even added narrowing definitions, so that

“‘training’ means instruction or teaching designed to impart a specific skill, as opposed to general knowledge . . . ‘expert advice or assistance’ means advice or assistance derived from scientific, technical or other specialized knowledge . . . .”

. . . .

. . . Providing material support that constitutes “personnel” is defined as knowingly providing a person “to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization.”<sup>297</sup>

Likewise, “‘service’ . . . refers to concerted activity, not independent advocacy. . . . We think a person of ordinary intelligence would understand that independently advocating for a cause is different from providing a service to a group that is advocating for that cause.”<sup>298</sup>

Chief Justice Roberts acknowledged:

Of course, the scope of the material-support statute may not be clear in every application. But the dispositive point here is that the statutory terms are clear in their application to plaintiffs’ proposed conduct, which means that plaintiffs’ vagueness challenge must fail. . . .

. . . In fact, plaintiffs themselves have repeatedly used the terms ‘training’ and ‘expert advice’ throughout this litigation to describe their own proposed activities, demonstrating that these common terms readily and naturally cover plaintiffs’ conduct.”<sup>299</sup>

Justice Breyer’s dissent, joined by Justices Ginsburg and

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 2719 (citing *Williams*, 553 U.S. at 304; *Hoffman Estates*, 455 U.S. at 495); see also *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 929 (9th Cir. 2009).

<sup>296</sup> *Holder*, 130 S. Ct. at 2720.

<sup>297</sup> *Id.* at 2720–21 (citations omitted) (quoting 18 U.S.C. §§ 2339A(b)(2), 2339A(b)(3), 2339B(h) (2006)).

<sup>298</sup> *Holder*, 130 S. Ct. at 2721, 2722 (quoting 18 U.S.C. § 2339B(a)(1) (2006)).

<sup>299</sup> *Holder*, 130 S. Ct. at 2720–21 (citations omitted).

Sotomayor, agreed with the majority on vagueness but strenuously disagreed on the First Amendment.<sup>300</sup> The plaintiffs wanted to engage in core political speech—“using international law to resolve disputes peacefully or petitioning the United Nations, for instance.”<sup>301</sup> The government had not come close, Justice Breyer said, to meeting its burden under strict scrutiny, or indeed under any First Amendment standard, of showing that its broad interpretation of the law would advance its compelling interest in fighting terrorism.<sup>302</sup>

Accordingly, Justice Breyer interpreted AEDPA not to cover “First-Amendment-protected pure speech and association,” unless there is specific intent—that is, unless an individual “knows or intends that those activities will assist the organization’s unlawful terrorist actions.”<sup>303</sup> As in *Scales*, he said, a person does not lose First Amendment protection because he coordinates with a group that has both unlawful and lawful aims.<sup>304</sup> “Not even the ‘serious and deadly problem’ of international terrorism can require automatic forfeiture of First Amendment rights.”<sup>305</sup>

Breyer protested the shambles that Roberts had made of “more demanding” First Amendment scrutiny.<sup>306</sup> First of all, he said, the standard for judging laws that criminalize pure speech is strict scrutiny—nothing less.<sup>307</sup> That is, the Court must “determine whether the prohibition is justified by a ‘compelling’ need that cannot be ‘less restrictively’ accommodated.”<sup>308</sup> But even if strict scrutiny did not apply, “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.’”<sup>309</sup> Roberts’s majority opinion did neither.<sup>310</sup>

Certainly, Breyer acknowledged, the government interest is

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<sup>300</sup> *Id.* at 2731, 2732 (Breyer, J., dissenting).

<sup>301</sup> *Id.* at 2732.

<sup>302</sup> *Id.* at 2734–35.

<sup>303</sup> *Id.* at 2740.

<sup>304</sup> *Id.* at 2733 (citing *Scales*, 367 U.S. at 229).

<sup>305</sup> *Holder*, 130 S. Ct. at 2733 (quoting note to 18 U.S.C. § 2339B (2006)).

<sup>306</sup> *Holder*, 130 S. Ct. at 2734 (quoting *id.* at 2724 (majority opinion)).

<sup>307</sup> *Id.* (Breyer, J., dissenting).

<sup>308</sup> *Id.* (citing *Ashcroft v. ACLU*, 535 U.S. 564, 572–79 (2002); *Houston v. Hill*, 482 U.S. 451, 458–59 (1987); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118–19 (1991); *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 540 (1980); *First Nat. Bank v. Bellotti*, 435 U.S. 765, 786 (1978)).

<sup>309</sup> *Holder*, 130 S. Ct. at 2734 (quoting *United States v. Robel*, 389 U.S. 258, 268, n.20 (1967)).

<sup>310</sup> *See Holder*, 130 S. Ct. 2705 (majority opinion).

compelling, but, “precisely how does application of the statute to the protected activities before us” advance that interest?<sup>311</sup> The government’s answers—“fungibility” and “legitimacy”—were both flawed.<sup>312</sup> As to fungibility:

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.<sup>313</sup>

The government provided “no empirical information that might convincingly support this claim.”<sup>314</sup> Instead, the government cited congressional statements of concern about the fungible nature of resources in general, meaning money and material goods.<sup>315</sup> And the affidavit of a State Department official likewise focused only on monetary contributions that were “redirected’ to terrorist ends or, even if spent charitably, [served to] ‘unencumber[] *funds* raised from other sources” that could then be used to facilitate terrorism.<sup>316</sup>

That left the “legitimizing” rationale as the only credible justification for criminalizing nonmonetary aid in the form of human rights training and assistance. But, Justice Breyer pointed out,

[s]peech, 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 ‘legitimizing’ 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. . . . The argument applies as strongly to ‘independent’ as to ‘coordinated’ advocacy.<sup>317</sup>

The rationale also contravened “critically important First Amendment case law,” in particular the cases decided in the 1960s and protecting “those who joined the Communist Party intending only to further its peaceful activities.”<sup>318</sup> Indeed, Breyer said, both

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<sup>311</sup> *Id.* at 2734 (Breyer, J., dissenting).

<sup>312</sup> *Id.* at 2735–36.

<sup>313</sup> *Id.* at 2735.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* (quoting Declaration of Kenneth R. McKune at 134, 136, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010)) (emphasis added) (internal quotation marks omitted).

<sup>317</sup> *Holder*, 130 S. Ct. at 2736.

<sup>318</sup> *Id.* at 2736–37.

the government and the majority opinion recognized the dire First Amendment implications of the “legitimizing” argument by specifying that AEDPA does not forbid all expression that might help the credibility of a terrorist group, including “membership,” “peaceably assembling . . . for lawful discussion,” and “independent advocacy.”<sup>319</sup>

Justice Breyer attacked the political speculations in the majority opinion—that the PKK might use humanitarian and international law to “bu[y] time, . . . lulling opponents into complacency,” or “use its new information about ‘the structures of the international legal system . . . to threaten, manipulate, and disrupt.’”<sup>320</sup>

What is one to say about these arguments—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?<sup>321</sup>

Justice Breyer was “not aware of any case in this Court”—including the “Communist Party cases decided during the heat of the Cold War—in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it . . . buy negotiating time for an opponent who would put that time to bad use.”<sup>322</sup>

## VI. THE FALLOUT AND THE FUTURE

*The New York Times*—one among many critics of the Court’s decision in *Holder*—began its editorial by noting that forty-three years before, “when the nation lived in fear of Communist sympathizers and saboteurs, the Supreme Court said that even the need for national defense could not reduce the First Amendment rights of those associating with American Communists.”<sup>323</sup> But, the article continued:

[I]n the first case since the Sept. 11, 2001, attacks to test free speech against the demands of national security in the age of

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<sup>319</sup> *Id.* at 2736 (quoting Brief for Respondents at 13, 61, 66, *Holder*, 130 S. Ct. at 2705 (Nos. 08-1498, 09-89)) (internal quotation marks omitted).

<sup>320</sup> *Holder*, 130 S. Ct. at 2738 (quoting *id.* at 2729 (majority opinion)).

<sup>321</sup> *Holder*, 130 S. Ct. at 2738 (Breyer, J., dissenting).

<sup>322</sup> *Id.*

<sup>323</sup> Editorial, *A Bruise on the First Amendment*, N.Y. TIMES, June 22, 2010, at A26.

terrorism, the ideals of an earlier time were eroded and free speech lost. By preserving an extremely vague prohibition on aiding and associating with terrorist groups, the court reduced the First Amendment rights of American citizens.<sup>324</sup>

The *Times* urged Congress to repair the damage by writing the standard of specific intent into the law.<sup>325</sup>

A scholarly critic of the decision contrasted the Roberts Court's loose First Amendment scrutiny in *Holder* with its considerably more demanding analysis in the 2010 *Citizens United* case,<sup>326</sup> which invalidated a federal ban on corporate and union expenditures in election campaigns.<sup>327</sup> Noting "a striking divergence between the Court's magnanimous gestures of broad deference to elected actors in the national security domain and its beady-eyed skepticism in the campaign finance context,"<sup>328</sup> law professor Aziz Huq sought to examine the nature of the difference and the possible reasons for it.<sup>329</sup>

First, Huq said, in *Holder* "a general claim about comparative institutional competence was as pivotal for the Court as any of the specific justifications offered for § 2339B."<sup>330</sup> But the Court's deference to Congress and the executive branch went beyond "the compelling interest in 'combating terrorism' directed toward the United States" and included "the distinct, foreign-affairs related government interest in maintaining cordial relations with countries such as Turkey and Sri Lanka."<sup>331</sup> This part of *Holder* reflected "a surprising inattention to the comparative strength of state interests that range from preventing terrorist attacks in the United States to maintaining good relations with states around the Indian Ocean."<sup>332</sup>

Second, Huq observed:

The most obvious discontinuity between the campaign finance and material support cases is their divergent approaches to the factual predicates for the different laws at issue. Canonical accounts of strict scrutiny emphasize the

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<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

<sup>327</sup> *Id.* at 913.

<sup>328</sup> Aziz Z. Huq, *Preserving Political Speech From Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 29 (2012).

<sup>329</sup> *Id.* at 16–17.

<sup>330</sup> *Id.* at 21.

<sup>331</sup> *Id.* at 24 (quoting *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010)) (citing *id.* at 2726).

<sup>332</sup> Huq, *supra* note 328, at 25.

close attention courts are supposed to pay to the factual indicia of narrow tailoring, and contrast it with the looser search for “substantial evidence” that typifies intermediate tiers of scrutiny.<sup>333</sup>

And while the Court in *Citizens United* made a big point about the lack of specific evidence that the corporate expenditure ban actually served the government’s interests,<sup>334</sup> *Holder* used a decidedly “light touch in examining the government’s justifications.”<sup>335</sup>

If the Court’s “divergent approaches to factual scrutiny” actually rested on “some implicit hierarchy” of government interests, Huq said, “then it is at the very least incumbent on the Justices to explain how they have prioritized different policy goals, and to defend that judgment explicitly. The Roberts Court has offered no such explanation.”<sup>336</sup> Moreover, reliance on the executive branch’s expertise should have

raise[d] libertarian red flags given the possibility of both good and bad actors at the helm of the state. . . . The Court accounts for the pros of political control of security matters but ignores the long history of constitutional rights violations premised on perceived foreign threats. It also takes no account of incumbent politicians’ potent incentives to manipulate security concerns for partisan gain.<sup>337</sup>

In sum, *Holder* “reflect[ed] an implicit normative judgment about policy priorities related to political speech that is only half-aired for public inspect[ion].”<sup>338</sup>

Huq’s analysis highlighted a general tendency on the Roberts Supreme Court—its different approach to different sorts of First Amendment cases.<sup>339</sup> A study by a fellow at the Brennan Center for Justice found that “in its first five years, from 2006 until 2011, the Roberts Court” decided in favor of First Amendment free speech, press, assembly, and association claims in ten out of twenty-nine

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<sup>333</sup> *Id.* at 23 (footnotes omitted) (quoting *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 208 (1997)).

<sup>334</sup> See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 910–11 (2010).

<sup>335</sup> Huq, *supra* note 328, at 23 (citing *Holder*, 130 S. Ct. at 2739 (Breyer, J., dissenting)).

<sup>336</sup> Huq, *supra* note 328, at 26.

<sup>337</sup> *Id.* (footnote omitted).

<sup>338</sup> *Id.* at 29. For another law review critique, see Canoy, Jr., *supra* note 156, at 155, 155 (“[A]rgu[ing] that the *Holder* interpretation of § 2339B, which was intended to hamper terrorism, is doing something far more costly—reducing Americans’ right to freedom of speech.”).

<sup>339</sup> See Huq, *supra* note 328, at 29.

cases.<sup>340</sup> Six of the ten struck down campaign finance laws.<sup>341</sup> Three others were “slam-dunk[s]”: cases involving bans on violent video games, picketing at funerals, and films depicting cruelty to animals that were decided by votes of 7–2 or 8–1 and involved no conflict in the circuits.<sup>342</sup> At the same time, the study found, “the conservative majority has shown itself willing to disregard free speech claims by, inter alia, government employee whistleblowers, humanitarian aid organizations, and . . . unions.”<sup>343</sup> It was difficult to explain the differences other than as a matter of the Justices’ political preferences.<sup>344</sup>

Of all the Roberts Court’s First Amendment decisions, *Holder* is the one whose reasoning rests most explicitly on political considerations. The decision not only defers unquestioningly to political judgments of the legislative and executive branches, but it speculates about additional foreign policy justifications for the breadth of the “material support” ban.<sup>345</sup> And it accepts the government’s politically-driven argument that peaceful, humanitarian speech and association can be criminalized because such activity might legitimize groups that the U.S. government seeks to make “radioactive.”<sup>346</sup>

This was the essence of the case. The government, for reasons of foreign policy, wishes to suppress any sort of support to designated FTOs—including, as Justice Breyer noted at oral argument, support in “the realm of ideas.”<sup>347</sup> But government policy should always be open to dispute—it has been wrong before, the Reagan

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<sup>340</sup> Monica Youn, *The Roberts Court’s Free Speech Double Standard*, ACSBLOG (Nov. 29, 2011), <http://www.acslaw.org/acslblog/the-roberts-court’s-free-speech-double-standard>.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* The “slam-dunks” were *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2732 (2011) (striking down law restricting violent video games); *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011) (ruling that picketing near funerals is First Amendment-protected); and *United States v. Stevens*, 130 S. Ct. 1577, 1582 (2010) (striking down law criminalizing animal cruelty videos). The tenth case upheld a commercial speech claim by striking down a Vermont law that barred disclosure of doctors’ prescription practices to pharmaceutical marketers. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659, 2672 (2011).

<sup>343</sup> Youn, *supra* note 340.

<sup>344</sup> *See id.*; *see also* LEE EPSTEIN & JEFFERY A. SEGAL, A (BRIEF) REPORT ON THE ROBERTS COURT AND FREE SPEECH 6 (Dec. 22, 2011), *available at* <http://epstein.usc.edu/research/RobertsFreeSpeech.pdf>; Adam Liptak, *Study Challenges Supreme Court’s Image as Defender of Free Speech*, N.Y. TIMES, Jan. 8, 2012, at A25.

<sup>345</sup> *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726–29 (2010).

<sup>346</sup> Opening Brief for Humanitarian Law Project, et al., *supra* note 119, at 49 n.26 (quoting Oral Argument, *supra* note 212, at 34:30) (internal quotation marks omitted); Oral Argument, *supra* note 212, at 34:43, *available at* [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000004505](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004505).

<sup>347</sup> Transcript of Oral Argument, *supra* note 237, at 42.

administration's support of the apartheid regime in South Africa being only one of many examples.<sup>348</sup> As Justice Breyer's dissent pointed out, the "legitimizing" rationale would justify suppression of independent advocacy as well as direct advice and assistance to designated FTOs.<sup>349</sup>

Fortunately, the statute protects independent advocacy, as the Court in *Holder* acknowledged.<sup>350</sup> The Court emphasized the narrowness of its holding, and although the decision was a blow, in practical terms, to humanitarian and peacemaking efforts—it may have limited impact as a First Amendment precedent.<sup>351</sup>

In a 2012 article, David Cole focused on the narrowness of the holding to suggest that the decision may not, in fact, do wide-ranging harm to freedom of speech and association.<sup>352</sup> He identified three limits in Chief Justice Roberts's majority opinion: "(1) the law leaves unregulated independent advocacy; (2) the speech in question related to foreign affairs and national security; and (3) the law governed only speech in coordination with foreign organizations, not domestic groups."<sup>353</sup> Although "[t]he Court did not attempt to explain why, as a doctrinal matter, these features might make a difference to its analysis," and although "none of the Court's three 'distinguishing' factors" was sufficient to justify the decision as a matter of constitutional law, Cole concluded that

reading the decision to require the presence of all three factors would do the least damage to First Amendment freedoms going forward and mark the least disruption with established First Amendment precedents. On such a reading, the decision would not support the validity of a prohibition on independent advocacy, speech coordinated with a domestic group, or speech that did not threaten national security.<sup>354</sup>

As Cole says, these distinctions are not principled ones, but as a practical matter, they should limit the precedential reach of the

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<sup>348</sup> See, e.g., Pear, *supra* note 101, at L3 (noting the disagreement between the Pentagon and the State department over the Pentagon's classification of the African National Congress as a terrorist organization).

<sup>349</sup> *Holder*, 130 S. Ct. at 2736 (Breyer, J., dissenting).

<sup>350</sup> *Id.* at 2722 (majority opinion).

<sup>351</sup> See *id.* at 2730.

<sup>352</sup> See David Cole, *The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 150 (2012).

<sup>353</sup> *Id.* at 149.

<sup>354</sup> *Id.* at 149–50.

case.<sup>355</sup>

Cole noted that one court had already declined a government invitation to ban advocacy coordinated with a domestic organization that it had labeled as terrorist.<sup>356</sup> In a 2011 case, the Ninth Circuit held that such an interpretation of anti-terrorist law (there, President George W. Bush's Executive Order 13,224, issued shortly after September 11, 2001) would violate the First Amendment because the government had not shown that banning speech coordinated with a domestic entity—whose assets had already been frozen—was necessary to further the compelling interest in preventing terrorism.<sup>357</sup> Government agents had raided the offices of the Al Haramain Islamic Foundation in Oregon (“AHIF”) and seized its assets.<sup>358</sup> Before its terrorist designation, AHIF had had co-sponsored events with the Multicultural Organization of Southern Oregon (“MCASO”), a local nonprofit seeking “to promote understanding and appreciation between cultures.”<sup>359</sup> Both organizations filed suit challenging the executive order and its implementing regulations, insofar as they prohibited continued coordination between the two.<sup>360</sup>

The Ninth Circuit did not think that *Holder* required it to uphold the part of the executive order that prohibited “making ‘any contribution of . . . services to or for the benefit of’” organizations designated as terrorist.<sup>361</sup> On the contrary, the court said, “[i]n response to the dissent’s argument [in *Holder*] that there is no natural stopping place for the legitimacy concern,” Chief Justice Roberts, in the majority opinion, responded that “Congress has settled on just such a natural stopping place: The statute reaches only material support coordinated with or under the direction of a

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<sup>355</sup> *See id.* at 171.

<sup>356</sup> *Id.* at 150.

<sup>357</sup> *Id.*; *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 660 F.3d 1019, 1023, 1054 (9th Cir. 2011) (noting that President George W. Bush’s Executive Order 13,224 was issued shortly after September 11, 2001).

<sup>358</sup> *Al Haramain*, 660 F.3d at 1026.

<sup>359</sup> *Id.* at 1028.

<sup>360</sup> *Id.* at 1027–28. Executive Order 13,224 was issued pursuant to the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. §§ 1701–07 (2006), and authorizes the Treasury Department to identify “specially designated global terrorists” and seize their assets. *Id.* at 1023; *see* Exec. Order No. 13,224, 66 Fed. Reg. 49,079, 49,079–80 (Sept. 23, 2001) (enumerating Treasury Department powers pursuant to Section 1(d) of the executive order). The court in *Al Haramain* affirmed the terrorist designation and the district court’s rejection of a due process claim, but reversed the dismissal of First and Fourth Amendment claims. *See Al Haramain*, 660 F.3d at 1054–55.

<sup>361</sup> *Al Haramain*, 660 F.3d at 1048.

designated foreign terrorist organization.”<sup>362</sup> Since AHIF was a domestic organization, *Holder* did not apply.<sup>363</sup> Using strict scrutiny, the Ninth Circuit found that banning MCASO’s coordinated activities with AHIF was not necessary to further the compelling interest in national security.<sup>364</sup>

Another interesting post-*Holder* case is *Hedges v. Obama*.<sup>365</sup> Seven writers and activists, including Daniel Ellsberg and Noam Chomsky, brought a facial vagueness and overbreadth challenge to section 1021 of the National Defense Authorization Act for Fiscal Year 2012,<sup>366</sup> which “affirm[ed] . . . the authority of the President . . . to detain covered persons” pursuant to an earlier law, the Authorization for Use of Military Force (“AUMF”).<sup>367</sup> “Covered persons” meant, in pertinent part, anyone “who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners.”<sup>368</sup> The plaintiffs, who had met with groups labeled as terrorist (among them the PKK, Hamas, and Al Qaeda) in the course of their activism, research, and reporting, feared that they could be summarily detained under this law and, surprisingly, the government lawyers did not contradict them.<sup>369</sup> The district court believed that in the absence of an assurance from the government, and in view of broad and vague terms in the law such as “substantially supported” and “associated forces,” the plaintiffs’ fears were not unreasonable.<sup>370</sup> Since their research, interviews, and reports were protected by the First Amendment, the court granted first a preliminary and then a permanent injunction

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<sup>362</sup> *Id.* at 1049–50 (quoting *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726 (2010)) (internal quotation marks omitted).

<sup>363</sup> *Al Haramain*, 660 F.3d at 1051–52.

<sup>364</sup> *See id.* at 1051–52. The court noted that the “legitimizing” rationale was “not particularly strong” because “an organization may advocate vigorously on behalf of the designated entity so long as that advocacy is independent. We see only a small difference, for purposes of determining the legitimizing effect, between a vigorous independent advocacy campaign and a coordinated advocacy campaign.” *Id.* at 1053.

<sup>365</sup> *Hedges v. Obama*, 2012 U.S. Dist. LEXIS 130354 \*1 (S.D.N.Y. Sept. 12, 2012).

<sup>366</sup> *Id.* at \*1, \*3–4; *see* National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81, §1021(b)(2), 125 Stat. 1298, 1562 (2011).

<sup>367</sup> § 1021(b)(2), 125 Stat. at 1562. The AUMF, passed a week after September 11th, authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” Authorization for Use of Military Force, Pub. L. 107–40, § 2(a), 115 Stat. 224, 224 (2001).

<sup>368</sup> § 1021(b)(2), 125 Stat. at 1562.

<sup>369</sup> *See Hedges*, 2012 U.S. Dist. LEXIS 130354 at \*4–5, \*20–22.

<sup>370</sup> *Id.* at \*6–7 (internal quotation marks omitted).

barring any implementation of section 1021(b)(2) (the definitional provision of the detention law), not just against the plaintiffs, but against anybody.<sup>371</sup>

In its preliminary injunction ruling, the *Hedges*<sup>372</sup> court acknowledged that the law had “a plainly legitimate sweep.”<sup>373</sup> But because the government “could not represent that plaintiffs’ expressive and associational conduct does not bring them within the ambit of the statute,” they had “a more than plausible claim” of First Amendment harm, and “[w]hen a statute encroaches on rights guaranteed by the First Amendment, facial challenges are allowed.”<sup>374</sup> Applying strict scrutiny, the court found the plaintiffs had a likelihood of success on the merits of their First Amendment claim.<sup>375</sup>

There was also a likelihood of success on the vagueness challenge, in part because section 1021, unlike the law under review in *Holder*, had no *mens rea* requirement, even though its provision for “indeterminate military detention” made it “sufficiently akin to a criminal statute to be treated as such.”<sup>376</sup> Criminal laws usually require some level of intent, but here, somebody “could fall within the definition of ‘covered person’ under § 1021 without having either intentionally or recklessly known that he or she was doing so.”<sup>377</sup> Moreover, it was unclear what was meant by “associated forces” or “substantially” supporting such forces.<sup>378</sup> In *Holder*, by contrast, the Supreme Court found that AEDPA was not vague “because of the very definitions and the knowledge requirement that are missing” from section 1021.<sup>379</sup>

*Hedges* may be an anomaly, and at this writing, its fate on appeal is unknown.<sup>380</sup> Clearly, the court was annoyed at the refusal of the

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<sup>371</sup> *Id.* at \*136.

<sup>372</sup> *Hedges v. Obama*, 2012 U.S. Dist. LEXIS 68683, \*82 (S.D.N.Y. May 16, 2012) (issuing a preliminary injunction enjoining enforcement of section 1021(b)(2)).

<sup>373</sup> *Id.* at \*58.

<sup>374</sup> *Id.* at \*59 (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)).

<sup>375</sup> *Hedges*, 2012 U.S. Dist. LEXIS 68683 at \*63.

<sup>376</sup> *Id.* at \*65–66.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at \*67–69.

<sup>379</sup> *Id.* at \*69 (citing *Holder v. Humanitarian Service*, 130 S. Ct. 2705, 2719–20 (2010)).

<sup>380</sup> The case was clarified by *Hedges v. Obama*, 2012 U.S. Dist. LEXIS 78867, \*3 (S.D.N.Y. June 6, 2012). A permanent injunction was granted by *Hedges v. Obama*, 2012 U.S. Dist. LEXIS 130354, \*4 (S.D.N.Y. Sept. 12, 2012). A stay and motion was granted by *Hedges v. Obama*, Nos. 12-3176(L), 12-3644, 2012 U.S. App. LEXIS 19880, \*1 (2d Cir. Sept. 17, 2012). In October 2012, the Court of Appeals for the Second Circuit decided that the ban on indefinite detention could not become effective until there is a decision on the Obama

government lawyers to assure that the political and journalistic activities of the plaintiffs would not subject them to military detention.<sup>381</sup> But the fact is that section 1021 does have vague, undefined terms, that it does arguably include First Amendment protected activity, and that it lacks any specific intent or even *scienter* requirement. *Hedges* shows at the very least that lower courts will not automatically defer to the government when organizations labeled “terrorist” are involved, and that some of them will construe *Holder* narrowly.

## VII. CONCLUSION

“Modern First Amendment doctrine . . . was formulated in response to the excesses of the McCarthy era,” David Cole reflected in an article shortly after the decision in *Holder*,<sup>382</sup> “[b]ut when the Court allows unsupported speculation about ‘terrorism’ and disapproval of a speaker’s viewpoint to justify making advocacy of human rights a crime, we appear to be repeating history rather than learning from it.”<sup>383</sup>

Is history in fact doomed to repeat itself? As the government lawyers often pointed out during the whole course of the *Holder* litigation, no lower court judge accepted the plaintiffs’ historically-based argument that after a lamentable period of judicial acquiescence in guilt by association, the Supreme Court in *Scales* recognized that specific intent to further the unlawful aims of an organization should be a necessary predicate to punishment.<sup>384</sup> And six members of the Supreme Court similarly dismissed the historical analogy.<sup>385</sup>

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administration’s appeal. *Hedges v. Obama*, No. 12-cv-331 (2d Cir. Oct. 2, 2012). At oral argument in the Second Circuit on February 6, 2013, the government now urged dismissal of the case on the ground that none of the plaintiffs had a “real-world risk of being detained.” Colin Moynihan, *Court Urged to Reverse a Ruling on Terror*, N.Y. TIMES, Feb. 7, 2013, at A16.

<sup>381</sup> *Hedges*, U.S. Dist. LEXIS 68683 at \*40–43.

<sup>382</sup> David Cole, *The Roberts Court vs. Free Speech*, 57 N.Y. REV. BOOKS 80, 81 (Aug. 19, 2010).

<sup>383</sup> *Id.*

<sup>384</sup> Brief for the Respondents, *supra* note 188, at 64; Reply Brief for the Respondents, *supra* note 188, at 10–11, n.1; *see also* Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1143–44 (C.D. Cal. 2005) (holding that *Scales* is distinguishable from the facts of case at hand), *aff’d*, 509 F.3d 1122 (9th Cir. 2007), *amended by* 552 F.3d 916 (9th Cir. 2009), *aff’d in part, rev’d in part sub nom.* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1131–32 (9th Cir. 2007) (holding that *Scales* is distinguishable from the facts of the case at hand), *amended by* 552 F.3d 916 (9th Cir. 2009), *aff’d in part, rev’d in part sub nom.* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

<sup>385</sup> *Holder*, 130 S. Ct. at 2712, 2718.

On the other hand, the majority opinion was explicitly narrow.<sup>386</sup> In contrast to the attacks in the 1950s on anyone who joined, supported, or sympathized with the U.S. Communist Party or any of its affiliated organizations, *Holder* does not sanction punishment of associations with domestic groups.<sup>387</sup> And perhaps most important for purposes of sustaining the dissent so essential to democracy, *Holder* does not affect independent advocacy in support of FTOs; this, again, presents a marked contrast with the repression of the Cold War era.<sup>388</sup>

But although lower courts and even the Supreme Court may adhere to the limits of *Holder*, the fact remains that six Justices were willing to defer to speculations by government officials about the “fungibility” of non-monetary aid, and to approve the government’s goal of suppressing speech and association that might help legitimize groups identified, for foreign policy reasons, as terrorist. This does not bode well for future Supreme Court cases in which asserted, but unproven, government interests in foreign policy or national security are weighed against First Amendment rights. Unless one of the five Justices who voted with the majority and are still on the Court<sup>389</sup> experiences a jurisprudential epiphany, we will have to await a change in personnel before the Court is likely to return to its earlier, more skeptical view of government foreign policy justifications for infringements on free speech and association.

In the last analysis, public opinion may play the decisive role. As more Americans begin to understand the ways in which the government exploits our understandably panicked reaction to the word “terrorism,” judges may begin to take a more measured and skeptical view of executive branch arguments that suppressing speech and association is necessary to maintain national security.

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<sup>386</sup> *Id.* at 2730.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 2721.

<sup>389</sup> Justice Stevens has since retired; he was replaced by Elena Kagan in October 2010. *Obama Chooses Elena Kagan for Supreme Court*, CNN.COM (May 12, 2010), <http://www.cnn.com/2010/POLITICS/05/10/scotus.kagan/index.html>.