The Material Support Statute: Strangling Free Speech Domestically?

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Introduction

The September 11, 2001 terrorist attacks on the World Trade Center and Pentagon evidenced the beginning of a "new age of American law,"[1] fundamentally changing United States counterterrorism priorities and the way law enforcement officers handle terrorist threats.[2] The attacks not only threatened the American psyche, but also put the world on notice that America was not invincible; extremist groups were well-organized and prepared to directly attack the United States on its own territory.[3]

Immediately following the 9/11 attacks, the Department of Justice (DOJ) pledged to protect America using every existing legal and law enforcement tool, with then U.S. Attorney General John Ashcroft stating, "We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America."[4] A significant shift in U.S. counterterrorism policy began to take place, with the focus moving away from the customary prosecution of terrorist suspects and toward the *prevention* of terrorist attacks.[5] In so doing, statutes, such as the "material support" law,[6]

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1 Owen Fiss, *The World We Live In*, 83 Temp. L. Rev. 295, 295 (2011).

2 Bradley A. Parker, Note, *Material Support and the First Amendment: Eliminating Terrorist Support by Punishing Those with No Intention to Support Terror?*, 13 N.Y. City L. Rev. 291, 291 (2010); Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 Harv. J. on Legis. 1, 26-27 (2005).

3 Parker, *supra* note 2, at 291-92.

4 *Id.* at 292 (quoting U.S. Attorney Gen. John Ashcroft, Prepared Remarks for the US Mayors Conference (Oct. 25, 2001), *available at* http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm).

5 *Id.* (citing Chesney, *supra* note 2, at 26-27) (emphasis added).

were broadly reinterpreted and used as tools to target individuals suspected of supporting terrorism.[7] However, as one scholar notes, with this new broadened focus, a number of these U.S. counterterrorism policies began to "compromise[ ] important constitutional principles."[8]

This Comment focuses on the threat to one of our strongest constitutional principles—the First Amendment and freedom of speech—as we continue to fight terrorism abroad. Specifically, this Comment discusses the Supreme Court's decision in *Holder v. Humanitarian Law Project*,[9] which addressed the First Amendment "for the first time in the context of the war on terror."[10] In this landmark case, the Supreme Court upheld Congress' ability to criminalize political support on behalf of foreign terrorist organizations.[11] The plaintiff, the non-profit organization, Humanitarian Law Project, wanted to provide training and advice to the lawful, nonviolent activities of two designated foreign terrorist organizations, and thus challenged 18 U.S.C. § 2339B, which criminalizes "knowingly provid[ing] material support or resources to a foreign terrorist organization,"[12] for violating its free speech rights under the First Amendment.[13] In a six-to-three decision, the Supreme Court rejected the plaintiff's argument, holding that the government can block speech and other forms of advocacy supporting a foreign terrorist organization, even if the aim is to support such group's humanitarian actions.[14]

In this ruling, the majority deferred to the government's articulation of national security interests and, at the same time, left many

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6 The statute makes it a crime to provide "material support" to any foreign organization that the Secretary of State has designated as a "terrorist organization." 18 U.S.C. § 2339B (2006). Material support has a broad definition and can include money, services, aid, training, or political advocacy. *Id.*

7 *See* Parker, *supra* note 2, at 291-92.

8 Fiss, *supra* note 1, at 295.

9 Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

10 Amanda Shanor, *Beyond* Humanitarian Law Project*: Promoting Human Rights in a Post-9/11 World*, 34 SUFFOLK TRANSNAT'L L. REV. 519, 520 (2011).

11 *See Humanitarian Law Project*, 130 S. Ct. at 2711; Fiss, *supra* note 1, at 296.

12 18 U.S.C. § 2339B(a)(1) (2006).

13 *Humanitarian Law Project*, 130 S. Ct. at 2713-14 (2010) ("Plaintiffs claimed that they wished to provide support for the humanitarian and political activities of [the foreign terrorist organizations] in the form of monetary contributions, other tangible aid, legal training, and political advocacy . . . .").

14 *Id.* at 2710-11, 2731.

issues open.[15] Of interest to this Comment, the Court failed to address whether Congress may criminalize providing material support to "quasi-domestic,"[16] rather than purely foreign, designated terrorist groups. This issue was recently litigated in *Al Haramain Islamic Foundation, Inc. v. U.S. Department of Treasury*, where an Oregon non-profit corporation with headquarters in Saudi Arabia brought an action against the Departments of Treasury and Justice, challenging its designation as a terrorist organization.[17]

This Comment argues that the federal material support statute, as applied to quasi-domestic terrorist organizations, is unconstitutional in light of the Free Speech Clause of the First Amendment. The statute regulates speech of those working with quasi-domestic terrorist organizations—organizations that do not present the same sort of problems that arise with purely foreign terrorist organizations.[18] Therefore, courts must follow the lead of the Ninth Circuit Court of Appeals, which found a similar statute's content-based prohibitions on speech a violation of the First Amendment,[19] and Congress should amend the statute with respect to quasi-domestic organizations, potentially revising the definition of "knowing" to protect the speech rights of domestic humanitarian groups.

Part I of this Comment details the doctrinal history behind *Humanitarian Law Project*, elaborating on the Court's decision and discussing its implications for United States law on speech and association with groups that engage in both violent and non-violent political activity. Part II discusses issues that the Court left open, particularly in light of the Ninth Circuit's opinion in *Al Haramain*, and explains how these open issues should be resolved.

I. BACKGROUND

The language of the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting

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15 Shanor, *supra* note 10, at 532-38.

16 For purposes of this Comment, a quasi-domestic organization refers to a branch of an organization that is located within the United States but has direct ties to a larger or more complex foreign organization. *See, e.g.*, Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965 (9th Cir. 2012).

17 *Al Haramain*, 686 F.3d at 970; Shanor, *supra* note 10, at 534 (citing Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 660 F.3d 1019, 1023-24 (9th Cir. 2011)).

18 *See infra* Part II.B.

19 *See Al Haramain*, 686 F.3d at 997, 1001.

the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to assemble, and to petition the Government for redress of grievances."[20] Although the Amendment encompasses many freedoms, the Court often finds itself struggling over the regulation of speech.[21] In the ever-present "quest to protect the homeland," lawmakers, too, wrestle with how to "free their constituents from the grip of terror" and adhere to the Constitution.[22] During times of war, in particular, the courts often permit "government suppression or punishment of [contentious groups] and their advocacy."[23]

Although *Humanitarian Law Project* was the first case in which the Supreme Court tackled the regulation of free speech through the lens of the "war on terror," the case, in some ways, asked a question that the Supreme Court had already decided years ago.[24] In the 1930s, "the [Supreme] Court struck down a collection of laws that triggered penalties on association with groups that engaged in both violent and non-violent political activities."[25] Section A of this Part examines the doctrinal history behind *Humanitarian Law Project*, including the Communist Party Cases. Section B details several groundbreaking First Amendment cases, such as *Brandenburg v. Ohio*,[26] which now serves as a protector for all political advocacy.[27] Section C reviews 18 U.S.C.A. § 2339B, known as the material support statute, which criminalizes "knowingly provid[ing] material support or resources to a foreign terrorist organization."[28] Section D reviews the facts, procedures, and opinions in *Humanitarian Law Project*. Finally, Section E discusses *Al Haramain* and its domestic implications.

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[20] U.S. CONST. amend. I.

[21] Lawrence R. Baca, Column, *First Amendment in the News*, 57-MAY FED. LAW. 1, 3 (2010).

[22] Erich Ferrari, Comment, *Deep Freeze: Islamic Charities and the Financial War on Terror*, 7 SCHOLAR 205, 208 (2005).

[23] David Goldberger, *Protecting Speech We Hate*, 32 LITIG. 40, 40 (2006).

[24] Shanor, *supra* note 10, at 520, 524.

[25] *Id.* at 525.

[26] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[27] *See infra* Part I.B.

[28] 18 U.S.C. § 2339B(a)(1) (2006).

A. *Doctrinal History and the Communist Party Cases*

One of the earliest cases demonstrating the judiciary's failure to protect First Amendment rights in a time of war was the prosecution of anti-Federalist Congressman Matthew Lyon, who was charged with speaking out against Federalist President John Adams in violation of the Sedition Act of 1798.[29] The Act made it a crime to "print . . . or publish . . . false, scandalous, or malicious . . . writings against the government of the United States."[30] Passed by Congress against the "shadow of worries" about a possible war between the United States and France, the judicial response to Lyon's case reflected this rationale.[31] At trial, Supreme Court Justice William Patterson, riding circuit, showed little interest in protecting the First Amendment and instead "instructed the jurors that they must find Lyon guilty if his statements were uttered with the intent to . . . bring [President Adams] into disrepute."[32]

Congress again attempted to regulate political speech in a time of national stress—namely World War I and the threat of communism[33]—via an amendment to the Espionage Act of 1917, which made it a crime to utter language "intended to bring the form of government of the United States . . . into contempt, scorn, contumely, or disrepute."[34] In a case challenging the Act, the Supreme Court deferred to Congress and upheld the conviction and jailing of two defendants who distributed a single-page leaflet urging men accepted for military service not to serve.[35] The Court held that although the defendants may have been "within their constitutional rights" during "ordinary times," this was, instead, a time of war.[36] Speech that could hinder the nation's war efforts was punishable in wartime.[37] Specifically, the Court held that the defendant's speech was punishable

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29 Goldberger, *supra* note 23, at 40.

30 Goldberger, *supra* note 23, at 40 (quoting Sedition Act of 1798, ch. 74, §2, 1 Stat. 596 (expired 1801)).

31 *Id.*

32 *Id.* (internal quotation marks omitted).

33 Robert Plotkin, *First Amendment Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623, 627 (1996).

34 Act of May 16, 1918, Pub. L. No. 65-150, ch. 75, 40 Stat. 553 (repealed 1921).

35 Schenck v. United States, 249 U.S. 47, 53 (1919).

36 *Id.* at 52.

37 *Id.*

because it could frustrate the nation's military recruiting service by encouraging men not to serve.[38] Thus, the First Amendment was pushed to the side to make way for national security priorities.[39]

Although the amendment to the Espionage Act was repealed in 1921, the Smith Act,[40] passed in 1940, again attempted to prescribe limits on the First Amendment by making it a crime to advocate on behalf of, or organize with, organizations whose goal was to overthrow the government.[41] During this time, Congress found that the Communist Party was an international terrorist organization, concluding that the party's purpose was "to establish a Communist totalitarian dictatorship in the countries throughout the world" by "treachery, deceit . . . terrorism, and any other means deemed necessary."[42] Congress contended that any and all support to the Communist Party, *no matter the purpose*, furthered the Communist Party's violent purposes.[43] Expanding on this, Congress asserted that even though certain support to the Communist party may in fact be legal, "active support of any kind aids the organization in achieving its own illegal purposes."[44]

The first Smith Act indictment was filed in July of 1948 against members of the Communist Party of the United States.[45] In *Dennis v. United States*, the defendants were charged with conspiring to advocate the forcible overthrow of the government, and the Supreme Court upheld their convictions against a constitutional challenge to the Act.[46] In upholding the Smith Act, the Court emphasized the fact

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[38] *Id.*

[39] *See infra* Part II.A.

[40] Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385 (2000)). The Alien Registration Act is commonly referred to as the "Smith Act" because it was drafted by Congressman Howard W. Smith. *See* Joshua Azriel, *Five Years After the 9/11 Terrorist Attacks: Are New Sedition Laws Needed to Capture Suspected Terrorists in the United States?*, 6 CONN. PUB. INT. L.J. 1, 13 (2006).

[41] Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 10-12 (1991).

[42] The Communist Control Act of 1954, ch. 886, 69 Stat. 775; Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 5 (1961).

[43] Shanor, *supra* note 10, at 525-26 (emphasis added).

[44] *Id.* (quoting Brief for the United States on Reargument at 23, Scales v. United States, 367 U.S. 203 (1961) (No. 1), 1959 WL 101542 at *23).

[45] United States v. Foster, 80 F. Supp. 479 (S.D.N.Y. 1948). Due to poor health, Foster was never tried. *See* Rohr, *supra* note 41, at 18-19. The remaining defendants, including Eugene Dennis, were convicted and appealed their convictions in *Dennis v. United States*, 341 U.S. 494 (1951). *See id.*

[46] Rohr, *supra* note 41, at 18-19.

that as mere members of the Communist party, the defendants were part of a large, organized conspiracy that stood ready to strike on the command of its leaders.[47] "If the ingredients of the reaction are present," stated the Court, "we cannot bind the Government to wait until the catalyst is added."[48] Similar conspiracy prosecutions followed in the "early-to-mid-1950s."[49]

B. *First Amendment Victories and* Brandenburg v. Ohio

Victories on fundamental First Amendment grounds eventually came in multiple cases, which succeeded in invalidating a collection of laws, such as the Smith Act.[50] In *De Jonge v. Oregon*, for example, the defendant was charged with assisting in a meeting, which "was called under the auspices of the Communist Party."[51] In its decision, the Supreme Court did not question Congress' findings on the Communist Party or the actuality of the communist threat[52] but nonetheless struck down portions of the Smith Act.[53] The Court held that "[t]he holding of meetings for peaceable political action cannot be proscribed."[54] Merely assisting in a communist-run meeting could not brand that individual as a criminal.[55] "Under the Court's analysis, meetings could not be prohibited even if they were conducted . . . [by] a group that also had violent ends, regardless of whatever legitimating effect that the meetings might have."[56] The Court noted:

> If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation

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47 *Dennis*, 341 U.S. at 510-11.

48 *Id.* at 511.

49 Rohr, *supra* note 41, at 18.

50 Shanor, *supra* note 10, at 525.

51 De Jonge v. Oregon, 299 U.S. 353, 357 (1937).

52 Shanor, *supra* note 10, at 526 (citing Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 5-6 (1961)).

53 *De Jonge*, 299 U.S. at 365.

54 *Id.*

55 *Id.*

56 Shanor, *supra* note 10, at 526-27 (citing De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

> in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.[57]

The Court went even further in protecting the First Amendment in its landmark decision, *Brandenburg v. Ohio*, which held that the constitutional guarantee of free speech does not permit a State to proscribe speech that advocates criminal conduct, unless it is both *intended* and *likely to produce* imminent lawless action.[58] In *Brandenburg*, a leader of the Ku Klux Klan made a speech at a Klan rally, which promoted the taking of vengeful actions against the government if the government did not stop suppressing the white race.[59] The speech led to Brandenburg's conviction under an Ohio criminal syndicalism law, which made it illegal to advocate "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[60] Although "*Brandenburg* did not directly involve questions of national security, the Supreme Court's opinion articulated constitutional standards that theoretically supersede the tepid First Amendment standards applied in *Dennis* and other leading cases of earlier days."[61]

The Supreme Court's per curiam opinion held that the syndicalism law violated Brandenburg's First Amendment right to free speech, stating that

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[62]

The Court reasoned that "[t]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action" and therefore "[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its

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57 *De Jonge*, 299 U.S. at 365.
58 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
59 *Id*. at 444-46.
60 *Id.* at 444-45.
61 Goldberger, *supra* note 23, at 41.
62 *Id.* at 447.

condemnation speech which our Constitution has immunized from governmental control."[63] Today, as one scholar notes, "*Brandenburg* stands as a high-water mark of First Amendment protection for all political advocacy, including that which is extremely provocative, offensive, or inflammatory."[64]

C. *The History of Criminalizing "Material Support"*

Since September 11, 2011, the federal material support statute and, specifically, 18 U.S.C. § 2339B, has been at the center of the DOJ's efforts to prosecute terrorism.[65] Originally enacted following the Oklahoma City bombing in 1995, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) attempted to eliminate the financing of terrorist organizations.[66] Congress hoped that by "isolating and starving these organizations," the threat of terrorism would diminish.[67] Section 2339B of the AEDPA reflected a recognition of "the fungibility of . . . material support. Allowing an individual to supply funds, goods, or services to [a terrorist] organization . . . helps defray the costs . . . of running the [organization's] ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities."[68]

Prior to 9/11, federal prosecutors rarely charged individuals under Section 2339B.[69] The fact that the statute was a congressional reaction to a national security threat suggests that it may have been more of a political tool rather than a practical tool for law enforcement.[70] However, following the 9/11 attacks, the USA PATRIOT Act of 2001[71] and

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63 *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).

64 Goldberger, *supra* note 23, at 42.

65 CHARLES DOYLE, CONG. RESEARCH SERV., TERRORIST MATERIAL SUPPORT: A SKETCH OF 18 U.S.C. 2339A AND 2339B (2010), *available at* http://www.fas.org/sgp/crs/natsec/R41334.pdf.

66 Antiterrorism and Effective Death Penalty (AEDPA) Act of 1996, Pub. L. No. 104-132, §§ 101-108, 110 Stat. 1214, 1217-26 (1996).

67 Fiss, *supra* note 1, at 297.

68 DOYLE, *supra* note 65, at 1-2 (quoting H.R. Rep. No. 104-383, at 81 (1995)).

69 *See* Parker, *supra* note 2, at 297.

70 *Id.*

71 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

the Intelligence Reform and Terrorism Prevention Act of 2004[72] amended Section 2339B in an attempt to make it a more realistic law enforcement instrument.[73] The amendments by both Acts (1) increased the maximum term of imprisonment; (2) added "'expert advice or assistance' to forms of proscribed material support or resources"; and (3) amended and clarified definitions of "material support or resources," as well as "training," "personnel," and "expert advice."[74]

Furthermore, Congress clarified Section 2339B's knowledge requirement. Section 2339B prohibits "knowingly" providing material support.[75] It then specifically describes the type of knowledge that is required: "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 . . . ."[76] Thus, the necessary mental state for a violation of Section 2339B is knowledge about the organization's connection to terrorism; specific intent to further the organization's terrorist goals is not required.[77]

> In its present form, Section 2339B outlaws: (1)(a) attempting to provide, (b) conspiring to provide, or (c) actually providing (2) material support or resources (3) to a foreign terrorist organization (4) knowing that the organization (a) has been designated a foreign terrorist organization, or (b) engages, or has engaged, in "terrorism" or "terrorist activity.[78]

Over thirty individuals have been charged under this version of the statute, including alleged "sleeper cells" in Detroit, Seattle, Portland, and Lackawanna, New York.[79] "The most well-known use of the material support statute was the prosecution of John Walker Lindh,"

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72 Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603, 118 Stat. 3638 (2004) (amended 2004).

73 DOYLE, *supra* note 65, at 2; *see also* Parker, *supra* note 2, at 297.

74 DOYLE, *supra* note 65, at 2.

75 18 U.S.C. § 2339B(a)(1) (2006).

76 *Id.*

77 Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 680-81 (2009).

78 DOYLE, *supra* note 65, at 2.

79 Ed Carpenter et al., *The Tools of Counterterrorism: Material Support Statute*, PBS FRONTLINE (Oct. 16, 2003), http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/tools.html#material.

an American citizen captured in Afghanistan and accused of attending a training camp run by Al Qaeda.[80]

D. *The Decision in* Holder v. Humanitarian Law Project

From the start, the precise meaning of Section 2339B and "material support or resources" proved controversial.[81] Soon after the enactment of Section 2339B, groups seeking to provide support to the lawful, peaceful activities of two designated terrorist organizations sought an injunction to prohibit the enforcement of the criminal ban against them.[82] At issue in *Humanitarian Law Project* were the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).[83] Both groups are considered ethnic minorities within their respective regions and have been subject to "substantial discrimination and human rights violations."[84] Both groups have also waged military campaigns and committed multiple terrorist attacks against the Turkish and Sri Lankan governments.[85] For purposes of this litigation, the Court determined that that PKK and LTTE were dual-purpose organizations, meaning that they possess "both lawful social and political goals as well as unlawful violent ones."[86]

Humanitarian Law Project (HLP), a California-based, non-governmental organization (NGO), sought to advance such lawful goals as engaging in advocacy on behalf of the Kurds, training members of the PKK on how to peacefully resolve disputes, and teaching PKK members how to petition international bodies, such as the United Nations, for relief."[87] HLP argued that criminalizing this type of training and support via Section 2339B—whether it was with or on behalf of a designated terrorist group—violated their First Amendment right to free speech, among others.[88] Specifically, HLP argued that their work was "political speech; that the material support law imposes a content-based regulation of speech; [and] that the Constitution prohibits a content-based regulation of political speech that urges lawful

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80 *Id.*
81 DOYLE, *supra* note 65, at 4.
82 *Id.* at 1.
83 Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2713 (2010).
84 Shanor, *supra* note 10, at 521.
85 *Humanitarian Law Project*, 130 S. Ct. at 2713.
86 Shanor, *supra* note 10, at 521.
87 *Humanitarian Law Project*, 130 S. Ct. at 2716.
88 *Id.* at 2714.

goals, particularly where, as here, there was no intent to further the unlawful ends of the group."[89]

The Supreme Court upheld the statute's constitutionality as applied to the plaintiffs' desired conduct, however, developing three rationales.[90] As a threshold matter, the Court held that the specific intent to further the organizations' terrorist goals was not a requirement to violate the statute, but rather general knowledge about the organizations' connections to terrorism sufficed.[91] Applying the first rationale, the Court held that "[m]oney is fungible;" when a terrorist organization receives support for peaceful ends, it enables the organization to free up funds for other, more violent ends.[92] This rationale applies even if the support itself is not fungible, such as the type of training and support HLP intended to engage in.[93] Applying the second rationale, the Court held that material support "help[s] lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks."[94] Finally, applying the third rationale, the Court held that "[p]roviding foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies."[95] The Court noted that the Republic of Turkey was actively at war with one of the organizations and "would hardly be mollified by the explanation that the support was meant only to further those groups' 'legitimate' activities."[96] The Court concluded by noting that their opinion was limited to the case at hand, and future applications of the material support statute might not survive First Amendment scrutiny.[97]

Justice Breyer, who read his dissent from the bench, was joined by Justices Ginsburg and Sotomayor.[98] The dissent forcefully disagreed with the majority's First Amendment conclusions, stating that the government had not made a sufficiently strong showing to justify the criminal prosecution of those who wanted to support the lawful

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89 Shanor, *supra* note 10, at 522.
90 *Humanitarian Law Project*, 130 S. Ct. at 2724-27.
91 *Id.* at 2717.
92 *See id.* at 2725.
93 *See id.* at 2726 n.6.
94 *Id.* at 2725.
95 *Id.* at 2726.
96 Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2726 (2010).
97 *Id.* at 2730.
98 *Id.* at 2731 (Breyer, J., dissenting).

activities of designated terrorist organizations.[99] Justice Breyer noted that "this speech . . . is the *kind* of activity to which the First Amendment ordinarily offers its strongest protection . . . ."[100] Furthermore, "the First Amendment protects advocacy even of *unlawful* action so long as that advocacy is not 'directed to inciting or producing *imminent lawless action* and . . . *likely to incite or produce* such action,'" which was not the case here, according to the dissenting justices.[101] Justice Breyer turned to *De Jonge* and the Communist Party Cases, arguing that the Court had previously held that persons who associate themselves with groups that use unlawful means to achieve their ends do not thereby forfeit their rights under the First Amendment, and there are no exceptions during wartime.[102]

While recognizing the threat of terrorism, the dissent argued that the government did not demonstrate how prohibiting the teaching of the use of international law to peacefully resolve disputes, for example, would help achieve the nation's security interest.[103] In discussing this issue, Justice Breyer rejected the fungibility conclusion, finding that the government had not provided an empirical basis for this assertion.[104] Justice Breyer also rejected the proffered "legitimacy" justification, noting that the statute allows many other types of speech that would also lend legitimacy to the terrorist organizations, for example independently advocating on behalf of a terrorist organization.[105] The dissent reasoned that if the legitimacy argument was accepted without qualifications, there would be no natural stopping place.[106]

Finally, Justice Breyer criticized the majority's adoption of a general intent mens rea requirement to save the statute's constitutionality, arguing that the Court should have remanded the case rather than apply this requirement.[107] Justice Breyer read the material support statute as criminalizing First Amendment protected speech only when the defendant knew or intended that his activities would assist the

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[99] *Id.* at 2732.

[100] *Id.*

[101] *Id.* at 2733 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

[102] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2733 (2010) (Breyer, J., dissenting).

[103] *Id.* at 2734.

[104] *Id.* at 2735.

[105] *Id.* at 2736.

[106] *Id.*

[107] *Id.* at 2742.

organization's unlawful terrorist actions.[108] This reading, therefore, would protect those engaged in pure speech and association, while not protecting those who purposefully intended to help terrorism.[109]

E. *Al Haramain Islamic Foundation, Inc. v. U.S. Department of Treasury and Domestic Implications*

In upholding the authority of Congress to criminalize political advocacy on behalf of foreign terrorist organizations, the Supreme Court in *Humanitarian Law Project* did not address whether Congress could criminalize "material support" for peaceful purposes with a quasi-domestic, rather than purely foreign, designated group.[110] In fact, the Court expressly limited its holdings to the particular facts of the case, stating that "[w]e . . . do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations."[111] This issue was recently litigated in *Al Haramain Islamic Foundation, Inc. v. U.S. Department of Treasury*.[112] Section 1 of this Part reviews the background, facts, and procedure in *Al Haramain*. Section 2 analyzes the Ninth Circuit's decision.

1. Facts

In *Al Haramain*, plaintiff Al Haramain Islamic Foundation, Oregon (AHIF-Oregon) challenged its "designation as a terrorist organization, and the associated freezing of its assets," and brought suit against the United States Department of the Treasury Office of Foreign Assets Control (OFAC), as well as the Department of Justice.[113] Plaintiff Multicultural Association of Southern Oregon (MCASO), a community-based organization that seeks to support multiculturalism, joined this suit, challenging Section 2(a) of Executive Order 13,224,[114]

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108 Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2740 (2010) (Breyer, J., dissenting).

109 *See id.*

110 *See id.* at 2730 (majority opinion).

111 *Id.*

112 Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965 (9th Cir. 2012).

113 Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1239 (D. Or. 2008) *aff'd in part and rev'd in part*, 686 F.3d 965 (9th Cir. 2012).

114 Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

which barred it from providing services to designated terrorist entities such as AHIF-Oregon.[115]

AHIF-Oregon's claim arose out of the President George W. Bush's actions under the International Emergency Economic Powers Act (IEEPA), which states that the President may declare a national emergency to "deal with any unusual or extraordinary threat, which has its source in whole or substantial part outside the United States."[116] After declaring a national emergency, the President may:

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property subject to the jurisdiction of the United States.[117]

Shortly after the events of 9/11, President Bush declared a national emergency under IEEPA, stating that "grave acts of terrorism" and the "continuing and immediate threat of future attacks" on the United States "constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States."[118] By this executive order, President Bush authorized the Secretary of the Treasury to designate entities as Specially Designated Global Terrorists (SDGT) who "assist in, sponsor, or provide financial, material, or technological support" to terrorist groups.[119] The President also delegated authority to the Secretary of Treasury to "block contributions of funds, goods or services" to a designated list of individuals and entities.[120]

AHIF, the parent organization of AHIF-Oregon, is a Saudi Arabian-based charity that is described by the Treasury Department as "one of the principal Islamic NGOs providing support for the al Qaida network and promoting militant Islamic doctrine worldwide."[121] For

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115 *Al Haramain*, 686 F.3d at 970.
116 *Al Haramain*, 585 F. Supp. 2d at 1239 (quoting 50 U.S.C. § 1701(a) (2006)).
117 *Id.* at 1240 (quoting 50 U.S.C. § 1702(a)(1)(B) (2006)).
118 *Id.* (quoting Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001)).
119 *Id.* (quoting Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001)).
120 *Id.* (quoting Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001)).
121 *Id.* at 1241.

example, AHIF was involved in planning the attacks against the U.S. Embassies in Kenya and Tanzania in 1998 and the government believes Osama bin Laden may have provided financial support in founding an AHIF branch in Albania.[122] "Between 2002 and 2004, pursuant to its authority under [the executive order], the Secretary of Treasury designated AHIF offices in Afghanistan, Albania, Bangladesh, Bosnia-Herzegovina, the Comoros Islands, Ethiopia, Indonesia, Kenya, the Netherlands, Pakistan, Somalia, and Tanzania" as SDGTs.[123]

AHIF-Oregon, a nonprofit incorporated in Oregon in 1997, specified that its foundation "stands against terrorism, injustice, or subversive activities in any form, and shall oppose any statement or acts of terrorism. [AHIF-Oregon] believes such conduct is contrary to Islamic principles."[124] However, based on a federal investigation, OFAC designated AHIF-Oregon as a SDGT, freezing its assets and property.[125] Because Executive Order 13,224 blocks the contributions of funds, goods, or services to SDGTs, the community-based organization MCASO was no longer able to sponsor events and conduct other activities in coordination with AHIF-Oregon.[126] Because of this bar, MCASO argued that Executive Order 13,224 violated MCASO's First Amendment rights since it prohibited the organization from working with AHIF-Oregon.[127] The district court rejected MCASO's claim and granted summary judgment to OFAC.[128]

2. Ninth Circuit Decision

For purposes of First Amendment analysis, the Ninth Circuit stated that it saw no difference between the relative section of Executive Order 13,224 and the material support statute at issue in *Humanitarian Law Project*.[129] Accordingly, the Ninth Circuit analyzed *Al*

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122 Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1241 (D. Or. 2008), *aff'd in part and rev'd in part*, 686 F.3d 965 (9th Cir. 2012).

123 *Id.*

124 *Id.* at 1243.

125 *Id.* at 1245.

126 Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 975 (9th Cir. 2012).

127 *Id.* at 995.

128 *Id.* at 975.

129 Section 2(a) of Executive Order 13,224 and the statutory provision at issue in *Humanitarian Law Project* both prohibit the provision of "services" to an entity that has been desig-

Haramain using the framework set out by the Supreme Court in *Humanitarian Law Project*.[130] The court noted that although both cases involved the proposed provision of services to a designated terrorist entity, the facts of *Al Haramain* were distinguishable in two significant ways.[131]

First, in *Humanitarian Law Project*, the plaintiffs proposed to conduct "coordinated advocacy" with designated foreign terrorist entities, but only specified their activities in very general terms.[132] Because the plaintiffs failed to specify their proposed activities, the Court ruled that their pre-enforcement challenge could not proceed.[133] In *Al Haramain*, however, the case did not arise from a pre-enforcement challenge; therefore, MCASO could specify, in some detail, the activities in which it wished to engage.[134] Second, there was a significant difference in the nature of the designated entities at issue. "The entities in [*Humanitarian Law Project*] were wholly foreign, whereas AHIF-Oregon is, at least in some respects, a domestic organization."[135] To the Ninth Circuit, this difference significantly changed the analysis.[136]

The Ninth Circuit then looked to the different rationales articulated in the *Humanitarian Law Project* opinion.[137] First, the court held that the *Humanitarian Law Project* rationale regarding "fungible money" had little force with respect to MCASO's proposed activities.[138] "To the extent that coordinated advocacy with MCASO could free up AHIF-Oregon's assets for sinister purposes, AHIF-Oregon ha[d] no assets available."[139] Because OFAC had frozen all of AHIF-Oregon's assets, the court held this was a nonissue.[140] Additionally, despite AHIF being a larger, international organization, MCASO

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nated, albeit under different statutory authorities, by the executive branch as a terrorist organization. *See id.* at 995 (citing Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001)).

130 *See id.*

131 *Id.* at 998.

132 Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 998 (9th Cir. 2012).

133 *Id.*

134 *Id.*

135 *Id.*

136 *See id.*

137 *Id.*

138 Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 999 (9th Cir. 2012).

139 *Id.*

140 *Id.*

sought to advocate with AHIF-Oregon only.[141] In contrast to *Humanitarian Law Project*, where there was a "clear possibility of freeing up assets," here, the link was much more tenuous.[142]

Next, the Ninth Circuit considered the *Humanitarian Law Project* legitimacy rationale,[143] and found that it applied with equal force in *Al Haramain*.[144] "MCASO's coordinated advocacy with AHIF-Oregon would increase that organization's legitimacy, which could aid its ability . . . to recruit members."[145] This type of advocacy, therefore, could theoretically aid the larger AHIF organization.[146] In spite of this reasoning, the court noted that this legitimacy rationale was not "particularly strong" because MCASO could still *independently* advocate on behalf of AHIF-Oregon.[147] A "vigorous independent advocacy campaign" could create the same legitimizing effect as a coordinated advocacy campaign.[148]

Finally, the Ninth Circuit held that the *Humanitarian Law Project* foreign policy rationale[149] had little force with respect to *Al Haramain*.[150] First, the court held that *Al Haramain* was distinguishable from *Humanitarian Law Project* because MCASO only sought to assist AHIF-Oregon, the *domestic* branch of AHIF.[151] Second, OFAC only provided evidence of past conduct by other branches of AHIF- rather than AHIF-Oregon-as indication of a potential strain on United States' relationships with its allies.[152]

Based on the three-part test in *Humanitarian Law Project*, the Ninth Circuit held that although the Supreme Court's rationale in that

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141 *Id.*

142 *Id.*

143 In the context of foreign terrorist organizations, the Court in *Humanitarian Law Project* found that material support provides legitimacy to these organizations, helping them expand and raise money, which therefore facilitates more terrorist attacks. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2725 (2010).

144 Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 999-1000 (9th Cir. 2012).

145 *Id.* at1000.

146 *See id.*

147 *Id.*

148 *Id.*

149 The Court's foreign policy rationale in *Humanitarian Law Project* explains that providing material support in any form furthers terrorism by straining the United States' relationships with its allies. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2726 (2010).

150 *Al Haramain Islamic Found., Inc.*, 686 F.3d at 1000.

151 *Id.*

152 *Id.*

case applied to AHIF-Oregon, it applied much more narrowly.[153] As a result, the court found that Executive Order 13,224 and OFAC's content-based prohibitions on speech were a violation of the First Amendment.[154]

II. ANALYSIS

The Supreme Court should clarify the constitutional limits on Congress' power to forbid American citizens from advocating on behalf of or directly participating in quasi-domestic organizations that the government deems a threat to national security. The Ninth Circuit's rationale using *Humanitarian Law Project*'s three-part test is the best interpretation of the material support statute in regard to quasi-domestic terrorist organizations and takes the first step toward correcting some of the First Amendment violations in *Humanitarian Law Project*. Section A of this Part analyzes several First Amendment concerns following the *Humanitarian Law Project* decision. Section B discusses how the Ninth Circuit's decision in *Al Haramain* helps alleviate these concerns domestically. Finally, Section C suggests and analyzes possible solutions that could preclude further constitutional challenges to the material support statute.

A. *First Amendment Concerns After* Humanitarian Law Project

There are many aspects of the *Humanitarian Law Project* holding that are troubling with respect to the First Amendment. First, and as the dissent noted, the majority of the Supreme Court found that the Communist Party Cases were inapposite.[155] In the Communist Party Cases, the Supreme Court held that the holding of meetings for peaceful, political purposes could not be proscribed, even if held by groups that had "violent ends."[156] HLP therefore argued to the Court that their support of the PKK and LTTE was "like support for the Communist Party, whose membership was made criminal during the Cold War under statutes the Court [later] found to violate the First Amend-

153 *Id.*

154 *Id.* at 1001.

155 Shanor, *supra* note 10, at 527 (citing Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010)).

156 *Id.* at 526 (citing De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

ment."[157] The material support statute ran afoul of the Communist Party line of cases, then, by criminalizing the mere fact of HLP's association with two groups the government deemed terrorist.[158]

The Court disagreed, however, distinguishing the Communist Party Cases in two ways. At oral argument, Justice Scalia first looked to the *type* of organization at issue, stating:

> "it's very unrealistic to compare these terrorist organizations with the Communist Party. Those cases involved philosophy. . . . [The Communist Party was] a philosophy . . . of extreme socialism. . . . I don't think that . . . any of these terrorist organizations represent such a philosophical organization. . . ."[159]

However, at the time, Congress had found that the Communist Party was not a purely philosophical organization and was instead "an international criminal conspiracy directed by our enemy to overthrow us through terrorism."[160] Thus, this 'organization type' distinction may not be as unrealistic as Justice Scalia suggested.

Next, in the Court's written opinion, the Court distinguished the Communist Party Cases by noting that the material support statute "does not prohibit being a member of [a] designated group;" rather, it prohibits "the *act* of giving material support."[161] Because HLP only wanted to do the latter, the Court held that the Communist Party Cases were inapplicable.[162] But, it is not clear how the Court's rationale effectively distinguishes this line of precedent. For example, in *De Jonge*, the defendant was not charged with merely being a member of the Communist Party.[163] Instead, he was charged with *assisting* in a communist-run meeting.[164] Likewise, in *Brandenburg*, the defendant was not charged with being a member of the Ku Klux Klan; instead, he was charged with promoting the taking of vengeful action against

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157 Charles A. Shanor, *Terrorism, Historical Analogies, and Modern Choices*, 24 EMORY INT'L L. REV. 589, 602 (2010) (citing Transcript of Oral Argument at 20-21, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (No. 08-1498)).

158 Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730 (2010).

159 Transcript of Oral Argument at 20-21, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

160 Shanor, *supra* note 157, at 602 (quoting Transcript of Oral Argument at 21, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (No. 08-1498)).

161 *Id.* (emphasis added).

162 *Id.*

163 *See* De Jonge v. Oregon, 299 U.S. 353, 357 (1937).

164 *Id.* at 357.

the government.[165] In *De Jonge* and *Brandenburg*, the Court held that the criminalization of these acts violated the First Amendment: assisting in a meeting or abstractly promoting the use of violence could not brand those individuals as criminal.[166] In so doing, the Court did not limit its discussion to mere membership in a group with violent ends but instead, looked at the defendants' acts of support.[167] It is therefore hard to see how the acts HLP hoped to engage in, namely, training members of the PKK and the LTTE on how to peaceably resolve disputes and petition the United Nations for relief, are at all distinguishable from the Communist Party Cases.[168]

Thus, instead of relying on First Amendment precedent and using the Communist Party membership analogy, the Court focused on the "precise language of the [material support] statute, the specifics of the material support provided, and the purposes of Congress in outlawing support of the sort provided to the PKK [and LTTE] by HLP."[169] The Court's holding in *Humanitarian Law Project* is noteworthy because the Supreme Court appeared to sub silentio overrule the Communist Party Case precedents, at least with respect to supporting foreign terrorist organizations.[170]

Second, the Supreme Court in *Humanitarian Law Project* did not apply the standard developed in *Brandenburg*, where the Court prescribed a "specific test to be used when the issue is whether speech poses a risk of harm by promoting illegal activity."[171] In *Brandbenburg*, the Court held that speech that promotes illegal activity can only be punished if the speech is directed at inciting illegal activity and is likely to incite or produce such action; *specific intent* is required.[172] However, in *Humanitarian Law Project*, the Court held that general intent sufficed.[173] Speech could be criminalized without any showing that it incited or produced terrorist activity.[174] As one scholar noted, "the decision is frighteningly like cases from earlier

165 Brandenburg v. Ohio, 395 U.S. 444, 444-46 (1969).

166 *De Jonge*, 299 U.S. at 365; *Brandenburg*, 395 U.S. at 448.

167 *De Jonge*, 299 U.S. at 365; *Brandenburg*, 395 U.S. at 448.

168 *Humanitarian Law Project*, 130 S. Ct. at 2716.

169 *Id.*

170 Shanor, *supra* note 10, at 528.

171 Erwin Chemerinsky, *Free Speech and the "War on Terror"*, 47-JAN TRIAL 54, 55 (2011) (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

172 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

173 *See* Chemerinsky, *supra* note 171, at 55.

174 *Id.*

eras when speech was punished without any evidence that it was likely to cause illegal activities or other harms."[175]

Third, in *Citizens United v. Federal Election Commission*—decided in the same term as *Humanitarian Law Project*—the Court came to the *opposite* conclusion as *Humanitarian Law Project* regarding to the First Amendment.[176] In *Citizens United*, a non-profit corporation challenged the constitutionality of certain provisions of the McCain-Feingold Act, which regulates the financing of political campaigns.[177] The issue was whether Congress could constitutionally prohibit a corporation from spending general corporate funds "to advocate for, oppose, or otherwise communicate about a candidate for public office."[178] In deciding that Congress could *not* prohibit the "speech" of a corporation, the Court interpreted the law as nothing more than an attempt "to silence entities whose voices the Government deems to be suspect."[179] The Court went on to state that "the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."[180]

Thus, there is tension between *Humanitarian Law Project* and *Citizens United*.[181] The strong support for political speech in *Citizens United* vanished in *Humanitarian Law Project*, and was replaced by "repeated statements of considerable judicial deference to the political branches' decisions . . . ."[182] While some scholars note that the two cases can be distinguished on subject matter,[183] others are "appalled by the self-contradictory inconsistencies in approaches, especially . . . on the question of deference to Congress and the President."[184]

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175 *Id.*

176 *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

177 *Id.* at 886.

178 Patricia Millett et al., *Mixed Signals: The Roberts Court and Free Speech in the 2009 Term*, 5 CHARLESTON L. REV. 1, 10 (2010).

179 *Citizens United*, 130 S. Ct. at 898.

180 *Id.* at 902 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784-85 (1978)).

181 *See* Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, 986 (2011).

182 Millett, *supra* note 178, at 21; *see also* Gora, *supra* note 181, at 986 (noting the inconsistent approaches taken by the two opinions and musing that "Al Qaeda should incorporate and gain protection in the Supreme Court by a vote of 8-1").

183 Millett, *supra* note 178, at 21-23.

184 Gora, *supra* note 181, at 986.

B. *The Ninth Circuit's Ruling in* Al Haramain *is Correct and Reestablishes Bright-Line First Amendment Rules Domestically*

By distinguishing *Humanitarian Law Project* from *Al Haramain* geographically, the Ninth Circuit made an important, and correct, distinction between quasi-domestic and purely foreign terrorist groups.[185] Quasi-domestic terrorist organizations do not present the same sorts of problems as foreign terrorist organizations, and thus a different standard should apply.[186] Not only are the links between domestic organizations and foreign terrorist organizations more attenuated, but the ability of domestic organizations to free up resources abroad is more speculative.[187] In addition, because Americans are not furnishing support to terrorist groups abroad, foreign policy and diplomatic concerns are lessened.[188] Because of this geographic distinction, the Ninth Circuit correctly held that the *Humanitarian Law Project* rationale and ruling did not apply with equal force to the quasi-domestic terrorist organization found in *Al Haramain,* and therefore, Executive Order 13,224 was unconstitutional as applied.[189]

Because the Ninth Circuit found that the holding in *Humanitarian Law Project* did not apply with the same force domestically,[190] the court's ruling in *Al Haramain* has now reestablished First Amendment bright-line rules first found in the Communist Party Cases and *Brandenburg*, at least with respect to quasi-domestic terrorist organizations.[191] These precedents are material to challenges regarding speech to and advocacy of quasi-domestic groups. For example, similar to *De Jonge*, where the defendant was charged with supporting a meeting of the Communist Party, defendant MCASO in *Al Haramain* simply wanted to coordinate activities and conduct events with a domestic-designated terrorist organization.[192] In finding that the government violated the First Amendment rights of AHIF-Oregon and MCASO,

185 *See supra* Part I.E.

186 *See* Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 998-1001 (9th Cir. 2012).

187 *Id.* at 998-99.

188 *Id.* at 1000.

189 *See id.* at 1000-01.

190 *Id.*

191 *See supra* Part I.B.

192 *Compare* De Jonge v. Oregon, 299 U.S. 353, 357 (1937), *with* Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 975 (9th Cir. 2012).

the Ninth Circuit's ruling mirrored the Supreme Court's decision in *De Jonge*, which held that meetings could not be prohibited even if conducted by a group that had violent, as well as non-violent, ends.[193] Similarly, in *Brandenburg*, the Supreme Court stated that the "mere abstract teaching . . . [of] a resort to force and violence, is not the same as preparing a group for violent action."[194] Applying this reasoning to *Al Haramain*, the Ninth Circuit was correct in finding a First Amendment violation: MCASO's desired conduct would not incite or produce violence, and thus was protected speech.

Therefore, by finding this key geographic distinction, the Ninth Court has reestablished long-standing precedent that holds that speech can *only* be regulated and punished if an increased probability of unlawful activity is shown.[195]

C. *Recommendations*

Although the Ninth Circuit in *Al Haramain* did not rule directly on the constitutionality of the material support statute, the court saw no difference between Section 2339B and the corresponding section of Executive Order 13,224, which it found to be in violation of the First Amendment.[196] Thus, a serious challenge to the constitutionality of Section 2339B, as applied to a quasi-domestic organization, may soon arise. To preclude such a challenge and therefore preserve the statute's constitutionality, Congress should (1) provide for an explicit exemption for those providing material support to quasi-domestic terrorist organizations or (2) revise the intent element of Section 2339B to safeguard the speech rights of domestic humanitarian groups.

Instead of a general intent requirement, First Amendment protected speech should be criminalized "only when [a] defendant knows or intends that [his] activities will assist the organization's unlawful

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193 *Compare De Jonge*, 299 U.S. at 365 ("Notwithstanding [the objectives of the Communist Party], the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that party."), *with Al Haramain*, 686 F.3d at 1000-01 ("[W]e address a domestic branch of an international organization with little evidence that the pure-speech activities proposed by MCASO on behalf of the domestic branch will aid the larger international organization's sinister purposes. In these circumstances, we hold that [the statute's] content-based prohibitions on speech violate the First Amendment.").

194 Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (citing Noto v. United States, 367 U.S. 290, 297-98 (1961)).

195 *Cf. id.* at 447 (holding that speech may be regulated only if it is likely to incite or produce violence or lawless action).

196 *See Al Haramain*, 686 F.3d at 1000-01.

terrorist actions."[197] Under this reading, "those who engage in pure speech . . . ordinarily protected by the First Amendment" would remain protected, alleviating the free-speech concerns raised after *Humanitarian Law Project*.[198] At the same time, the government's compelling interest in combating terrorism would still be achieved, as defendants who purposely intend to aid terrorists would be prosecutable.[199] Furthermore, this reading would likely withstand a First Amendment challenge and pass the *Brandenburg* test, which prohibits imminent lawless action that is likely to incite or produce such lawless action.[200] A defendant who purposely acts to support terrorist ends, at a minimum, aids in inciting a terrorist act.[201]

The material support statute's history also supports this reading. In enacting Section 2339B, Congress was primarily interested in ending material support that "took the form of fungible donations of money or goods."[202] Congress hoped to lessen the threat of terrorism by "isolating and starving [terrorist] organizations."[203] The Chairman of the Senate Committee on the Judiciary told the Senate, "I am convinced we have crafted a narrow but effective designation provision which meets these obligations *while safeguarding the freedom to associate*, which none of us would willingly give up."[204] As Justice Breyer pointed out in dissent,[205] Section 2339B says, "Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment of the Constitution of the United States."[206] Based on these reasons, Congress should amend Section 2339B to preclude a successful challenge to the material support statute's constitutionality.

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197 Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2740 (2010) (Breyer, J., dissenting).

198 *See id.*

199 *See id.*

200 *See id.*; Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

201 *See Holder*, 130 S. Ct. at 2740 (Breyer, J., dissenting).

202 *Id.* at 2741; *see also* DOYLE, *supra* note 65, at 1.

203 Fiss, *supra* note 1, at 297.

204 *Holder*, 130 S. Ct. at 2742 (Breyer, J., dissenting) (quoting 142 CONG. REC. S3360 (daily ed. Apr. 16, 1996) (statement of Sen. Orrin G. Hatch) (emphasis added)).

205 *Id.*

206 18 U.S.C. § 2339B(i) (2006).

CONCLUSION

In times of national stress, the United States government has often sought to punish individuals and organizations based on association with those designated as enemies, even if such association was through constitutionally protected speech and activities.[207] Section 2339B could recreate an environment that fosters criminal penalties for free speech and association, which existed during the Sedition Act era and Communist Party Cases.[208] However, American society now recognizes that the Communist Party Case era was a disgraceful period in American legal history, fueled by a national security crisis and characterized by widespread abuses of legislative power.[209] It is vital, then, that Congress and the courts follow the lead of the Ninth Circuit in finding that, with respect to domestic-designated terrorist organizations, Section 2339B violates the First Amendment.

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207 *See supra* Part I.B.
208 *See supra* Part I.C-D.
209 *See supra* Part I.B.