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## THE ARLIN M. AND NEYSA ADAMS LECTURE IN CONSTITUTIONAL LAW

### THE WORLD WE LIVE IN

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September 11, 2001 marked the beginning of a new age of American law. Combating terrorism became a matter of great public urgency and as part of that endeavor we adopted a number of policies that have compromised important constitutional principles.

Many of these policies pertain to the treatment of suspected terrorists who were captured as part of the so-called “War on Terror.” Some of these prisoners have been subjected to interrogation techniques that might properly be considered torture. Some are being tried by military commissions. Still others are being held for prolonged, indefinite periods of time without being charged with a crime or allowed the writ of habeas corpus or any other means to test the legality of their imprisonment.

The challenge to our constitutional order has not been confined to the policies governing suspected terrorists in our custody. In the immediate wake of the September 11 attacks, President Bush authorized the National Security Agency (NSA) to use wiretaps without seeking court authorization.<sup>1</sup> These taps were used to monitor calls made by Americans to persons abroad suspected of having ties to al Qaeda. The existence of this program was disclosed in December 2005 and soon became the subject of great public controversy and a number of lawsuits. In January 2007,

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1. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

President Bush discontinued this program, as his Attorney General put it, as a matter of policy.<sup>2</sup> Later that year and again in 2008, President Bush obtained congressional authorization for such warrantless wiretaps,<sup>3</sup> and President Obama's Attorney General embraced the law as constitutional and declared that warrantless wiretaps are an "essential tool" in the fight against terrorism.<sup>4</sup>

The congressional grant of authority removed the conflict between the Executive's action and the 1978 Foreign Intelligence Surveillance Act. It did not, however, overcome the objection to the NSA program based on the Fourth Amendment, which requires that, as a general matter, wiretaps need to be authorized by a court. The warrant requirement seeks to curb arbitrary action of the Executive and thereby protect the privacy and communicative freedom of all Americans, most immediately journalists who often develop their stories through telephone calls to a large network of persons in the Middle East—some of whom may be thought to have ties to al Qaeda.<sup>5</sup>

This Essay focuses on a related threat to our constitutional order—the curtailment of freedom of speech in the name of fighting terrorism. Specifically, my subject is the Supreme Court's decision last June in *Holder v. Humanitarian Law Project*,<sup>6</sup> which upheld the authority of Congress to criminalize political advocacy on behalf of foreign terrorist organizations. Like warrantless wiretapping, the risk of a criminal prosecution for political advocacy—for example, an utterance by an American citizen in an American forum that a foreign terrorist organization has a just cause—poses a threat to our democracy, but the danger is greater. The risk of warrantless wiretapping inhibits speech; the risk of a criminal prosecution stops it altogether.

A focus on the *Humanitarian Law Project* decision will also enable us to assign responsibility more accurately for the debasement of the Constitution. We will be able to see more clearly than we could through an analysis of the policies governing the treatment of prisoners, or even the NSA wiretapping program, that the threat to our liberty derives not just from the unilateral excesses of President Bush, but also from policies that have been defended and continued by President Obama and embraced by the other branches of government, including the Supreme Court.<sup>7</sup> All three branches share in the responsibility for the abuses of the Constitution that we confront in this age of terror.

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2. Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1.

3. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (codified as amended in scattered sections of 50 U.S.C.) (containing 180-day sunset provision, requiring extension of Act on Feb. 2, 2008); Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 50 U.S.C.) (amending FISA of 1978 in similar manner as Protect America Act of 2007).

4. *Nomination of Eric H. Holder, Jr., Nominee to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 104 (2009).

5. See, e.g., Lawrence Wright, *The Spymaster*, NEW YORKER, Jan. 21, 2008, at 42.

6. 130 S. Ct. 2705 (2010).

7. See generally Owen Fiss, *Aberrations No More*, 2010 UTAH L. REV. 1085.

## I.

Terrorism—acts of violence in the pursuit of some political goal—is the subject of a vast panoply of criminal statutes. Killing civilians or high government officials is always illegal. Congress decided, however, that such statutes were not sufficient and a strategy was devised—first enacted in 1994, but later amended in 2001 and again in 2004—to combat organizations that nourish, support, and direct terrorist activities.<sup>8</sup> Congress hoped that isolating and starving these organizations would lessen the risk of terrorism.

The statute at issue in *Humanitarian Law Project* applies only to foreign as opposed to domestic terrorist organizations. The statute does not define the word “foreign,” but presumably it requires that the organization be based abroad and that the membership be largely constituted by foreign nationals. Some organizations that meet this requirement, such as al Qaeda, may pose threats to targets within the United States, as manifested by the attacks of 9/11. But others, such as the PKK in Turkey or the Tamil Tigers in Sri Lanka—the specific organizations involved in the case at hand—are not likely to pose such a threat because their acts of violence tend to be confined to the territories in which they are based. Congress’s interest in regulating such organizations may stem from a desire to protect individual American citizens traveling abroad who might become victims of the terrorist activities of these organizations. Or Congress may have sought to further foreign policy objectives of the United States by helping allies—such as Turkey or Sri Lanka—in their effort to combat terrorism occurring within their borders.

In pursuit of these aims, Congress established a procedure in the executive branch for designating certain organizations as “foreign terrorist organizations.”<sup>9</sup> The power to make this designation is vested in the Secretary of State, who is to make her decision on the basis of an administrative record. This record essentially consists of a compilation of information prepared by a special office within the Department of State. The Secretary of State is required to consult with the Secretary of Treasury and the Attorney General, and the administrative record may include information from their departments. The alleged terrorist organization and its members are not given any notice of this proceeding and thus do not have an opportunity to participate in the proceeding in any way.

Seven days before announcing her decision, the Secretary of State must advise a select group of congressional leaders of her intention to designate a group as a foreign terrorist organization. She must then publish her designation in the Federal Register, at which time the designation takes effect. An organization designated as a foreign terrorist organization can seek judicial review of the Secretary’s determination in the Court of Appeals for the District of Columbia, but that review is limited to determining, on the basis of the administrative record, whether the Secretary’s action is arbitrary and capricious or otherwise exceeds her authority. The Secretary may supplement the administrative record by submitting to the Court of Appeals classified

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8. 18 U.S.C. §§ 2339A, 2339B (2006). The lineage of these statutes is outlined in *Humanitarian Law Project*, 130 S. Ct. at 2712–13.

9. 8 U.S.C. § 1189 (2006).

information, which can be examined in chambers and out of the view of the attorneys for the designated organization. Otherwise, there is no evidentiary hearing in the Court of Appeals, and no opportunity for the designated organization to supplement the administrative record in any way.

The designation procedure established by Congress is the prelude to the key operative provision of the statute.<sup>10</sup> This provision bans “material support” to a designated foreign terrorist organization and subjects those who violate the ban to up to fifteen years in prison. Here it is important to note an ambiguity in the word “material.” It may mean “worldly” and thus include the provision of physical objects such as computers or mobile phones or guns or even funds. “Material” also means “important” or “significant,” and it is this meaning of the word that enables the statute criminalizing material support to reach political advocacy.

The statute lists the various ways support might be given to a designated organization and in 2004 the statute was amended to include the provision of “services” on that list.<sup>11</sup> In *Humanitarian Law Project*, the government contended that political advocacy—for example, a speech by an American citizen to a group of American citizens defending the goals of the organization—should be considered a service, and the Court, in an opinion by Chief Justice Roberts, agreed with this reading of the statute.<sup>12</sup>

Some, but not all, organizations that support terrorism operate in two different modes—one is violent and the other is peaceful or humanitarian. Members of such organizations may kill civilians or high government officials, but they may also distribute food to the needy. This duality of function does not appear to be true of al Qaeda, the principal focus of the United States’ War on Terror. It is true, however, of Hamas, Hezbollah, and the two organizations that were the specific subjects in *Humanitarian Law Project*—the PKK in Turkey, seeking autonomy and cultural rights for the Kurds, and the Tamil Tigers in Sri Lanka, recently annihilated by the Sri Lankan government, but which had for decades sought autonomy for Tamils on the island.<sup>13</sup>

A question therefore arose before the Court as to whether it should make any difference if the material support was given to the peaceful or humanitarian, as opposed to the violent, activities of the organization. Roberts read the statute as containing a universal ban on support—it makes no difference whatsoever whether the support, worldly or otherwise, is given to the organization to further its peaceful or humanitarian as opposed to its violent activities.<sup>14</sup> All support is criminally proscribed.

When the material support consists of money one can well understand Congress’s insistence on a universal ban. Money is fungible. Money given for humanitarian purposes such as for buying food might well be used to purchase arms. Even if the money is used for buying food, it would free up financial resources that might then be used for the violent activities of the organization. However, a policy of

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10. 18 U.S.C. § 2339B(a)(1).

11. *Id.* § 2339A(b)(1).

12. *Humanitarian Law Project*, 130 S. Ct. at 2721–22.

13. *See, e.g.*, Jon Lee Anderson, *Death of the Tiger*, NEW YORKER, Jan. 17, 2011, at 41.

14. *Humanitarian Law Project*, 130 S. Ct. at 2717–18.

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compartmentalization is far more plausible when the support consists of political advocacy that benefits the organization. Congress might well have been concerned with the speech that extolled the violent, but not the humanitarian, activities of the group.

In a crucial turn of the argument, the Chief Justice refused to read the statute in such a way as to allow any compartmentalization, even in the context of advocacy.<sup>15</sup> A speech extolling only the humanitarian projects of the organization or defending the justness of the organization's goals, Roberts reasoned, might lend legitimacy to the organization and thereby help it solicit funds or recruit members that might then be used to further the organization's violent activities. Roberts also maintained that Congress might have feared that exempting any speech from the criminal ban of the statute would jeopardize our relations with the foreign nation trying to suppress the organization, even if it is assumed that the support entailed in the speech was only a benefit to the organization's humanitarian activities. Turkey, for example, consumed by an all encompassing nation-building project and determined to defeat the PKK and the achievement of its separatist goals, may wish to deny any support to any of the PKK's activities, even those that are wholly peaceful. And, according to Roberts, Congress, trying to foster international cooperation with an ally such as Turkey, may wish to support that endeavor.

Although Roberts read the statute in such a way as to deny the compartmentalization of the violent and humanitarian activities of a designated organization, he did, in fact, recognize one limitation in the material support statute as it applies to political advocacy. This limitation—so central to Roberts's opinion—is premised on the distinction between independent and coordinated advocacy. Coordinated advocacy consists of advocacy that occurs in coordination with, or at the direction of, a designated terrorist organization, while independent advocacy remains a residual category—all advocacy that is not directed by, or coordinated with, a designated terrorist organization. Roberts read the statute to cover only coordinated and not independent advocacy. He insisted, "Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and [the Tamil Tigers], the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations."<sup>16</sup> The catch, however, is that in Roberts's opinion, the statute only allows individuals to engage in such advocacy if it is independent, as opposed to coordinated advocacy.

Roberts maintained that the distinction between independent and coordinated speech is implicit in the term "services"—the category of material support that brings political advocacy within the reach of the statute. I am doubtful of this reading. According to Roberts, a service to an organization is an activity done for the benefit of the organization. Yet, independent advocacy extolling the justness of an organization's claim can be as much a service to the organization—a benefit done for, or conferred on, the organization—as coordinated advocacy. What moved Roberts to make the distinction between independent and coordinated advocacy, to my mind, is not the word "services," but rather a view of the Constitution—a view that remains to be

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15. *Humanitarian Law Project*, 130 S. Ct. at 2727–30.

16. *Id.* at 2722–23.

examined. This view holds that coordinated advocacy on behalf of a foreign terrorist organization is not protected by the First Amendment.

## II.

A constitution establishes the structure of government and identifies the means by which grievances are to be aired and social changes are to be effectuated. Violence is not one of those means. There is thus no constitutional interest in protecting violence as an instrument of change and it is difficult to understand why a constitutional guarantee of freedom of speech, even one as absolute as the First Amendment, should protect speech urging others to engage in violence. However, starting in the period following World War I, and inspired by the dissents of Justices Holmes and Brandeis, the Supreme Court began to place limits on statutes that criminally proscribed the advocacy of violence. The purpose of this doctrine was not to protect the advocacy of violence in and of itself, but rather to protect criticism of society so radical or far reaching that it can only be implemented, so its proponents believe, through violent means. Radical criticism often operates, as Harry Kalven once put it, as the major premise upon which the advocacy of violence rests.<sup>17</sup>

This effort to place bounds on the censorship of the advocacy of violence had its ups and downs during the twentieth century, but reached something of a resting point in 1969 in the Supreme Court's decision in *Brandenburg v. Ohio*<sup>18</sup>—a case that, to borrow a phrase made popular in Roberts's confirmation hearing, may be a super precedent.<sup>19</sup> *Brandenburg* involved, not a foreign, but a domestic terrorist organization—the Ku Klux Klan—which held a rally on a farm in Ohio at which there was advocacy or at least talk of violence. The Court held that an Ohio criminal statute proscribing the advocacy of violence could not, consistent with the First Amendment, be applied to the Klan members as long as that advocacy was not directed “to inciting or producing imminent lawless action and [was not] likely to incite or produce such action.”<sup>20</sup> A distinction was thus drawn between incitement to violence and the general advocacy of violence, with the state censor confined to proscribing incitement.

Of course, general advocacy can lead to violence, but this contingency was seen as a risk or danger that had to be suffered in order to ensure the robustness of public debate. In that respect, as others have observed,<sup>21</sup> *Brandenburg* followed from the Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*,<sup>22</sup> which, in order to create more “breathing space” for the press, enlarged the risk of defamation that public officials must suffer. *Sullivan* required public officials seeking to recover damages for

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17. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 120 (Jamie Kalven ed., 1988).

18. 395 U.S. 444 (1969).

19. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 144–45 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) (asking Judge Roberts whether *Roe* qualified as a “super-duper precedent in light . . . of 38 occasions to overrule it”).

20. *Brandenburg*, 395 U.S. at 447.

21. See KALVEN, *supra* note 17, at 119–236.

22. 376 U.S. 254 (1964).

defamation to prove that the alleged defamatory statement was false and even more decisively that the speaker knew or had reason to know that it was false. There could be no recovery for the kinds of slips or errors inevitable in aggressive reporting or the rough and tumble of heated debate. The right of public officials to recover for damage to their reputations had to be limited, the Court reasoned, to make certain that debate on issues of public importance remains “robust, uninhibited and wide open.”<sup>23</sup>

The political advocacy at issue in *Humanitarian Law Project* cannot possibly be regarded as incitement to violence or imminent lawless action. Suppose the advocate says that the platform of the PKK is just or even that the justness of its demands entitles it to use violence. Such utterances may lend legitimacy to the PKK and help in its efforts to raise funds and to recruit members who might be willing to engage in violent action. In that way, such advocacy may be part of the causal chain that leads to violence. Yet the same could be said of the general advocacy of violence—it too makes violence more likely. However, we protect the general advocacy of violence in order to preserve the radical critique upon which it is premised. Political advocacy that benefits or is made on behalf of a designated terrorist organization should also be protected so long as it cannot be regarded as an incitement to violence.

Admittedly, under the terms of the statute, the ban on political advocacy only applies to advocacy that benefits a foreign, as opposed to a domestic, terrorist organization. It is important to understand, however, that this ban applies to speakers who are Americans addressing their fellow citizens or their representative institutions for the purpose of changing the policy of their government towards such an organization. The ban on political advocacy on behalf of foreign terrorist organizations strikes a blow to American democracy, which in our times has become, as it must, increasingly cosmopolitan and concerned with foreign nations and foreign organizations.

Roberts virtually conceded that independent advocacy supporting a designated terrorist organization is protected by the First Amendment. Trying to assure his audience, he disclaimed any intent to allow Congress to criminalize independent advocacy: “[W]e 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.”<sup>24</sup> Yet it is difficult for me to understand why an advocate loses the protection of the First Amendment because his speech is coordinated with, or even made at the direction of, a designated organization.

We may have greater respect for an individual who takes it upon himself to speak out on issues of public importance and who acquires on his own the information needed for such speeches than we would for a person who speaks at the direction of the organization and gets all his information from that organization. The independent speaker often strikes us as the more admirable person. But the democratic theory of the First Amendment—dedicated to preserving the robustness of public debate—requires that the focus be on the listeners and their needs for information and critical perspectives, not on the moral qualities of the speaker. The character of the speaker—his independence—might make a difference in the listener’s evaluation of the speech,

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23. *Sullivan*, 376 U.S. at 270–71.

24. *Humanitarian Law Project*, 130 S. Ct. at 2730.

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but while such a concern may justify requiring the speaker to disclose the nature of his tie to the organization, it does not justify an absolute ban.

Protecting the independent speaker in the way that Roberts promised might lessen the loss to democracy attributable to the ban on the coordinated speaker. As long as the independent speaker is protected, some views about the justness of the designated organization's cause, or its use of violence, might reach the public. That contingency does not, however, render the loss to democracy from a ban on coordinated speech de minimis, and in fact there is every reason to believe that the loss is substantial. Although globalization and recent advances in the technologies of communications enhance the capacity of Americans to acquire information about foreign organizations on their own, some degree of coordination or contact with these organizations still seems essential for Americans to form opinions about these organizations and the United States' policy towards them.

There is, moreover, no reason to assume that the loss arising from the ban on coordinated advocacy will—as a purely quantitative matter—be compensated for by the available independent speech. Granted, free speech doctrine has long been concerned with the availability of alternative channels of communication and has tolerated closing one channel (handing out leaflets inside a shopping center) when another appears available (handing out the leaflets at the entrance to the shopping center).<sup>25</sup> But it has never tolerated a ban on one speaker on the ground that another might take his place.

First Amendment analysis not only depends on the quality and quantity of speech at issue, but also on the danger the speech presents to society. Roberts viewed sympathetically Congress's decision to ban advocacy so long as it was coordinated on the theory that such speech might legitimate the designated organization and thus enhance its capacity to pursue violent activities.<sup>26</sup> I do not dispute the capacity of political advocacy to legitimate an organization and thus to enhance the danger of violence. My claim, rather, is that this risk of legitimation is never constitutionally sufficient to justify censorship. The First Amendment demands that the remedy be more speech, not censorship. If, however, this danger of legitimation is sufficient to justify censorship, as Roberts suggests, it is difficult to understand why it is not sufficient to justify the censorship of independent political advocacy, which also might legitimate the designated organization and its activities and set into motion a causal chain leading to violence. In terms of assessing or weighing the social danger arising from speech, there is no reason to distinguish between independent and coordinated political advocacy. Both present the same danger to society.

After ruling that the statute covered coordinated but not independent political advocacy, Roberts manifested a rare commitment to the passive virtues and gave the statute as applied to coordinated advocacy what might, at first, seem a reprieve. He suggested that what was wrong with the First Amendment claim against the ban on

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25. See generally *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972) (holding that protestors disbursing handbills within a shopping center did not have First Amendment right to do so when alternative means—the sidewalks outside—were available).

26. *Humanitarian Law Project*, 130 S. Ct. at 2729–30.



coordinated advocacy was its generality rather than its merits.<sup>27</sup> This reprieve was, in my opinion, only an illusion. Although Roberts was reluctant to say whether plaintiffs had sufficient ties to the designated organization to fall within the statutory ban, the entire opinion emphasized the distinction between coordinated and independent advocacy and was structured in such a way as to deny that coordinated advocacy is protected by the First Amendment. Indeed, he wrapped up his First Amendment analysis with this peroration:

Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups' nonviolent ends.<sup>28</sup>

At the outset of his opinion, Roberts identified the unusual procedural posture of the case. The Court was not being asked to review a criminal conviction for a violation of the statute, but rather was reviewing a request for an injunction against the enforcement of the statute. He also noted that there were two groups of plaintiffs seeking an injunction, one involving the PKK, the other the Tamil Tigers. The PKK plaintiffs, according to Roberts, alleged that, in addition to having an interest in training members of the PKK to use international law for the peaceful resolution of their disputes and to petition the United Nations for relief, they wanted to "engag[e] in political advocacy on behalf of Kurds who live in Turkey."<sup>29</sup> The other group of plaintiffs alleged that, in addition to wanting to help the Tamil Tigers present claims to international agencies for tsunami-related relief and negotiate a peace agreement with the Sri Lankan government, they wanted to "engag[e] in political advocacy on behalf of Tamils who live in Sri Lanka."<sup>30</sup> In commenting on this second branch of the case, Roberts noted, as this group of plaintiffs conceded before the Court, that the recent military defeat of the Tamil Tigers rendered moot their claims relating to the tsunami relief and peace negotiations, but not the one about political advocacy. Quoting from the plaintiffs' brief, Roberts said, "[p]laintiffs thus seek only to support the [Tamil Tigers] 'as a political organization outside Sri Lanka advocating for the rights of Tamils.'"<sup>31</sup>

The anticipatory quality of the relief plaintiffs sought raised a question of whether the case was justiciable. Should the Court address the plaintiffs' free speech claims on the merits or require them to await a criminal prosecution and then seek review of the conviction? Fully in accord with the tradition that seeks to minimize the loss of speech arising just from the risk of a criminal prosecution, Roberts concluded, "[p]laintiffs face a credible threat of prosecution and should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."<sup>32</sup> Later in the opinion, once

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27. *Id.* at 2724.

28. *Id.* at 2728–29.

29. *Id.* at 2716 (internal quotation marks omitted).

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

31. *Id.*

32. *Id.* at 2717 (internal quotation marks omitted).

the distinction between coordinated and independent advocacy was introduced and the statute was read to ban only coordinated advocacy, Roberts addressed the plaintiffs' complaint about the uncertainty of "exactly how much direction or coordination is necessary" to bring them within the reach of the statute.<sup>33</sup> Roberts then noted the generality of the plaintiffs' free speech claim against the ban on advocacy and announced that the Court would stay its hand and await the evolution of a concrete factual situation before deciding whether plaintiffs' proposed advocacy was coordinated as opposed to independent.

This line of argument reappeared near the end of the discussion of the free speech issues, after Roberts had issued a general endorsement of the statute and turned to an application of the Court's ruling to "the particular speech" that plaintiffs proposed to undertake.<sup>34</sup> In this context, he upheld the authority of Congress to criminalize coordinated speech when it consisted of training members of a terrorist organization—in particular, the PKK—to use peaceful methods of dispute resolution or to obtain relief from the United Nations. Yet he hesitated when the coordinated speech proposed by plaintiffs—in this instance, on behalf of both the PKK and Tamil Tigers—consisted of political advocacy. He never explained why, from a First Amendment perspective, political advocacy should be treated any differently from the training plaintiffs proposed to undertake. He merely said that plaintiffs' interest in political advocacy was "phrased at such a high level of generality that they cannot prevail in this preenforcement challenge."<sup>35</sup>

In saying that the plaintiffs' claim "cannot prevail," Roberts did not, from my perspective, mean to qualify his general endorsement of the statute and the necessary implication that the statutory ban on coordinated political advocacy was constitutional. Rather, he was simply refusing to tell the plaintiffs on what side of the constitutional line they fell—that is, whether plaintiffs' proposed advocacy was coordinated or independent. According to Roberts, plaintiffs "cannot prevail" in their constitutional attack on the ban on coordinated political advocacy because they "do not specify their expected level of coordination with the PKK or [Tamil Tigers] or suggest what their 'advocacy' would consist of."<sup>36</sup>

Even this limited exercise of restraint is questionable, for it contradicts the tradition, earlier recognized by Roberts and well anchored in long established doctrine,<sup>37</sup> that calls for an accelerated adjudication of free speech claims. It puts on the would-be speakers the burden of either initiating another injunctive proceeding for the purpose of obtaining clearance for their advocacy or running the risk of criminal prosecution and a sentence of up to fifteen years in jail for their advocacy. Under either alternative, speech loses.

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33. *Id.* at 2722.

34. *Id.* at 2729.

35. *Id.*

36. *Id.*

37. *Dombrowski v. Pfister*, 380 U.S. 479, 489 (1965). *See also* Owen Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

## III.

It will not be of news to anyone that the Supreme Court was divided in *Humanitarian Law Project*. What might be news is that the Court was divided 6–3 and the majority included Justices Stevens and Kennedy, often seen as friends of free speech. Neither wrote an opinion, so it is difficult to know the extent to which they subscribed to Roberts’s theory. I can imagine either one of them insisting that Roberts exercise a measure of restraint and fudge the advocacy issue.

Justice Stevens retired shortly after the decision was handed down. He was succeeded by Elena Kagan, then President Obama’s Solicitor General, who defended the material support statute before the Court, even as it applied to political advocacy. Her theory—thoroughly rejected by Roberts—was that the material support statute regulated conduct, not speech.<sup>38</sup> She insisted that the word “services” primarily covered activities performed by someone for a designated organization (for example, fixing a computer) and only incidentally regulated the kind of communicative activity in which plaintiffs wanted to engage. However, as Roberts quite properly explained, the mere fact that a statute generally regulates conduct does not insulate it from a First Amendment attack or require a less stringent standard of review when it is applied to speech.

The Solicitor General took her bearings from *United States v. O’Brien*,<sup>39</sup> which upheld a congressional statute that made it a crime to burn a draft card. Roberts disagreed. He thought that the controlling precedent was *Cohen v. California*.<sup>40</sup> The statute that *Cohen* involved—one criminalizing breaches of the peace—generally regulated conduct, not speech. Yet the Court set aside a conviction under the statute when it was used to punish political advocacy, specifically when the statute was applied to an individual who protested the Vietnam War by wearing a jacket with “Fuck the Draft” on the back. No one knows what Elena Kagan’s position might be on political advocacy now that her role has changed from advocate to Justice, though there is no particular reason to be optimistic.

The dissenting opinion in *Humanitarian Law Project* was written by Justice Breyer and this opinion was joined by Justices Ginsburg and Sotomayor. Here too, there is reason for disappointment. To his credit, Breyer brilliantly and forcefully rejected Roberts’s distinction between independent and coordinated advocacy and, in that context, properly warned of the dangers of using the legitimation rationale for either construing a congressional ban on advocacy or defending it. He also rightly feared the impact of the statute on “advocacy in *this* country directed to *our* government and *its* policies.”<sup>41</sup> Yet the space he created for such political advocacy was, in my judgment, too limited. Driven by the desire to avoid a constitutional conflict, Breyer read the statute to be applicable to political advocacy only when the speaker knows or intends that the speech will assist the designated organization in its

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38. *Humanitarian Law Project*, 130 S. Ct. at 2723.

39. 391 U.S. 367 (1968).

40. 403 U.S. 15 (1971).

41. *Humanitarian Law Project*, 130 S. Ct. at 2732 (Breyer, J., dissenting).

violent activities and that assistance is significantly likely to help the organization in carrying out such activities.

Although Breyer's position is more protective of political advocacy than Roberts's and for that reason might well be preferred, it too falls short of what the First Amendment requires—incitement to imminent lawless action and a likelihood of success. Breyer said that when the requisite knowledge is present, political advocacy on behalf of a designated organization bears “a close enough relation” to violent activities to warrant criminalization.<sup>42</sup> He cited *Brandenburg* at this point in his argument,<sup>43</sup> but that strikes me as a misreading and a misappropriation of that decision, for *Brandenburg* is predicated on the distinction between incitement and general advocacy of violence and confines the censor to prohibiting incitement. A statement that extols the PKK and its use of violence may make the PKK's violence more likely, even significantly more likely, and that may be the intention of the speaker. But without a further showing such an utterance—however detestable it may be and however close it may be to incitement—is not an incitement but rather general advocacy and thus should be treated as part of the domain of public discourse that is protected by the First Amendment.

The limited nature of Breyer's dissent did not placate Roberts. He implied that Breyer was naïve and chided him for not addressing “the real dangers at stake.”<sup>44</sup> In the context of discussing plaintiffs' interest in being allowed to train members of the designated organization to work with the United Nations, Roberts said, “[i]n the dissent's world, such training is all to the good.”<sup>45</sup> He then continued, “Congress and the Executive, however, have concluded that we live in a different world.”<sup>46</sup> In this world, foreign terrorist organizations are “so tainted” that any contribution to such an organization—even political advocacy or training members of the organization to work with the United Nations—should be criminalized.<sup>47</sup>

Of course, Breyer is as aware of the dangers of terrorism as is Roberts. He made a concession to free speech and although it is more generous than Roberts's, it is not large enough to satisfy the requirements of the First Amendment. Roberts made a distinction between independent and coordinated advocacy and, in my view, allowed Congress to criminalize coordinated but not independent advocacy. Breyer rejected the distinction between independent and coordinated advocacy, but then made another distinction—this time between the peaceful and violent activities of the designated organization. In so doing, he allowed Congress to criminalize political advocacy when the speaker knows that his advocacy will assist the organization's violent activities. Seen from this perspective, it seems fair to say that both Breyer and Roberts inhabit the

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42. *Id.* at 2740.

43. The citation was introduced by the signal “*Cf.*” *Humanitarian Law Project*, 130 S. Ct. at 2740. This signal expresses an equivocation likely to be missed by the ordinary reader of the *United States Reports*. *The Bluebook* says that “*cf.*” supports a “proposition different from the main proposition but sufficiently analogous to lend support.” *The Bluebook* continues that “[l]iterally, ‘*cf.*’ means ‘compare.’” THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 55 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

44. *Humanitarian Law Project*, 130 S. Ct. at 2729 (majority opinion).

45. *Id.*

46. *Id.*

47. *Id.*

same world and are driven by the same fear of terrorism that accounts for the other offenses to the Constitution that have been made over the past decade in the name of fighting terrorism. What is lacking from Roberts's and Breyer's opinions—and even more so from Elena Kagan's brief—is an abiding commitment to the kind of political advocacy that is of the essence of a vibrant democracy.

We have long become accustomed to sacrifices of freedom in times of war<sup>48</sup> and arguably an awareness of this tradition might temper the concerns that the *Humanitarian Law Project* decision engenders. Indeed, Roberts invoked and sought to exploit this tradition. In a coda, he quoted from the Preamble and the writings of James Madison to emphasize the need to “provide for the common defence” and to protect “against foreign danger.”<sup>49</sup> Roberts also reached back into history and made a reference to World War II when he dismissed Breyer's willingness to assume that Congress had an interest in allowing Americans to train foreign terrorist organizations to use peaceful means of dispute resolution. Roberts said that such an assumption is as plausible as assuming Congress concluded that “assisting Japan on that front might facilitate [the United States'] war effort.”<sup>50</sup>

This way of framing the issues in *Humanitarian Law Project* seems inapposite. Over the last decade, we have grown accustomed to thinking of the fight against terrorism as a war, and this has been as true for Obama's tenure as it was during Bush's. President Obama has been meticulous in avoiding the use of the phrase “War on Terror,” but he has repeatedly declared that we are at war with al Qaeda. The talk of war by both Presidents Bush and Obama stems from the fact that the military has been deployed to achieve national objectives—to capture and, if need be, target the fighters and leaders of al Qaeda. Yet this military campaign against al Qaeda does not entail the exceptional circumstances that history indicates or we ordinarily imagine when we think of war and use it to excuse or justify the adjustment of basic liberties.

For one thing, al Qaeda does not pose a threat to the survival of the nation in the way that Japan or our other enemies did in World War II.<sup>51</sup> Moreover, in contrast to other military campaigns that we have conceived of as war, there are no bounds—either geographic or temporal—to the fight against al Qaeda. Al Qaeda is an international organization that operates in secret, and as a result, all the world might be seen as a battlefield, and the battle may go on forever.<sup>52</sup> Osama bin Laden is now dead, but other leaders are likely to emerge and local cells may be able to operate on their own.

The statute at issue in *Humanitarian Law Project* reaches al Qaeda—it is one of about fifty terrorist organizations on the Secretary of State's list. But, as I mentioned before, this statute is not confined to al Qaeda, and in fact extends to such organizations as the PKK and the Tamil Tigers, which makes the talk of war and the references by Roberts to World War II seem even more strained. These organizations pose no threat

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48. See generally GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004); Harry Kalven, Jr., *Foreword: Even When a Nation Is at War*, 85 HARV. L. REV 3 (1971).

49. *Humanitarian Law Project*, 130 S. Ct. at 2731.

50. *Id.* at 2730.

51. See BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 171 (2006) (providing chart defining types of conflicts).

52. See OWEN FISS, *Imprisonment Without Trial*, in *THE DICTATES OF JUSTICE* (forthcoming 2011).

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to the survival of the United States—the threat that, above all, makes war so exceptional. Isolating and starving foreign terrorist organizations like the PKK and the Tamil Tigers may protect individual Americans traveling abroad and serve foreign policy objectives such as improving our relationship with our allies, but these ends, though surely legitimate, do not have the transcendent character of the one we usually associate with a war, and that might possibly justify sacrificing a constitutional liberty—the survival of the nation.

In addition, to treat any military campaign that might be undertaken by our allies against designated terrorist organizations such as the PKK or the Tamil Tigers as a war of the United States defies the bounded quality of a war, even more so than the military campaign against al Qaeda. These organizations may have a life as long as al Qaeda's, but even if they are annihilated, as the Tamil Tigers was, similar organizations will inevitably arise somewhere in the world. Throughout history, there has always been one group or another prepared to use violence to pursue its aims. Of course, organizations such as the PKK and the Tamil Tigers are more geographically bounded than al Qaeda, but the ban on advocacy that the Court upheld applies to any organization in the world that the Secretary of State, in her wisdom, is prepared to designate.

Under these circumstances, it is wrong to view the material support statute and its ban on political advocacy through the prism of war and to be sanguine about the Court's willingness to sacrifice our liberty by upholding it. *Humanitarian Law Project* cannot be defended, as Roberts would have it, as a temporary concession to the felt necessities of a war against an enemy that puts the very survival of the nation at risk. The ban on political advocacy that the Court sustained will, I fear, soon become a permanent feature of ordinary life in America and may even radiate out to spheres unconnected to the fight against terrorism and in that way alter the very architecture of the First Amendment.