

Humanitarian Law Project and the Supreme Court's Construction of Terrorism

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I. INTRODUCTION

In June 2010, the Supreme Court issued its decision in *Holder v. Humanitarian Law Project* (“HLP”), upholding the constitutionality of 18 U.S.C. § 2339B (“§ 2339B”), the criminal ban on providing material support to designated foreign terrorist organizations (“FTOs”).¹

The opinion, which represents the culmination of a lengthy legal dispute, generated immediate commentary for its contribution to First Amendment jurisprudence² because it sustained the criminalization of providing material support in the form of speech, whether through “training,” “expert advice or assistance,” “service,” and “personnel” to an FTO, even when the support was intended for peaceful purposes, such as petitioning the United Nations for relief or engaging in political advocacy on the FTO’s behalf.³ The focus on the First Amendment implications of the decision is understandable, given the high stakes involved; a conviction under the statute can, in regular circumstances, garner up to fifteen years in prison, with a life sentence possible for material support that can be tied to any actual loss of life.⁴

In addition to the constitutional significance of the opinion, *HLP* marks the first time the Supreme Court has delved into a lengthy discussion of what it believes counts as terrorism.⁵ Prior Supreme Court opinions, whether before or after September 11,

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

2. See, e.g., *Leading Cases—Freedom of Speech and Expression—Material Support for Terrorism*, 124 HARV. L. REV. 179, 259 (2010); Editorial, *A Bruise on the First Amendment*, N.Y. TIMES, June 22, 2010, at A26; Editorial, *The Supreme Court Goes Too Far in the Name of Fighting Terrorism*, WASH. POST, June 22, 2010, at A18; Joanne Mariner, *Talking to Terrorists: The Worst U.S. Supreme Court Decision of the Term*, FINDLAW (July 7, 2010), <http://writ.news.findlaw.com/mariner/20100707.html>; *What Counts as Abetting Terrorists*, ROOM FOR DEBATE BLOG (June 21, 2010, 3:21 PM), <http://roomfordebate.blogs.nytimes.com/2010/06/21/what-counts-as-abetting-terrorists/?scp=2&sq=humanitarian%20law%20project&st=cse> (online discussion on the implications of the Supreme Court’s opinion featuring David Cole, Andrew R. McCarthy, Richard C. Epstein, Stephen I. Vladeck, Robert Chesney, and Diane Marie Amann).

3. *Humanitarian Law*, 130 S. Ct. at 2708 (internal quotation marks omitted) (quoting 18 U.S.C. § 2339B (2006)).

4. 18 U.S.C. § 2339B(a)(1) (2006) (“Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.”).

5. See *Humanitarian Law*, 130 S. Ct. at 2712–27.

2001, tended to consider terrorism as a tactic that nations or groups hostile to the United States engaged in, without further defining what activities qualified under the term. Stated differently, the Supreme Court had never before discussed its perceptions of what constitutes terrorism, preferring instead to place limits on “terrorist activity,” without elaborating much further.⁶ *HLP* allowed the Court to reveal how it perceived and envisioned “terrorism” and a “terrorist group.”⁷ It also moved the discussion beyond characterizing terrorism as a mere tactic to viewing acts of politically motivated violence as defining every aspect of an FTO, thereby delegitimizing any action or activity in which the FTO might engage.⁸ In other words, the fact that a group uses impermissible violence serves to define its every action and goal as illegitimate, regardless of how far removed from violence some of those actions are and notwithstanding the perceived justness of the group’s cause.

For the Supreme Court to provide a detailed discussion of the contours of what makes up material support for a terrorist group is perhaps unsurprising, but that it only did so for the first time in June 2010 underscores the novelty of the decision. By defining material support to such a degree, however, the Court entered into a debate concerning whether allowing the government wide latitude to define the groups that threaten the United States directly and/or indirectly creates what appears to be an unresolvable tension with the First Amendment.⁹ The majority opinion in *HLP* represents one view on the nature of a designated FTO, which demonstrates how the tactic of terrorism has overwhelmed the discussion of the legitimacy of any non-state political actor, no matter the context in which any violence perpetrated by that actor occurs. Furthermore, the Court affirmed the constitutionality of the ban on providing material support in the form of speech on a theory that such support contributes to a group’s “legitimacy,” with no connection to violence or an FTO’s illegal goals being necessary.¹⁰ Leaving aside the designation of groups said to harm the United States, the majority opinion indicates that the government’s prerogatives in designating a group that has

6. *See infra* Parts II–III.

7. *Humanitarian Law*, 130 S. Ct. at 2725–30.

8. *See id.* at 2729–30.

9. *See id.* at 2730–31.

10. *Id.* at 2710–11; *see also infra* Part IV.E.2–3.

not and does not seek to directly harm the United States outweigh the First Amendment rights of the individual citizen hoping to aid a foreign entity.¹¹

Finally, the opinion embraces both the theories and evidence that the government presented as to how terrorist groups operate without challenging the validity of these theories in any way.¹² In light of the proof offered in the *HLP* litigation and when juxtaposed with the facially plausible claim that assisting an FTO in advocating for its cause by peaceful means can deter violence, requiring the government to present additional, direct evidence to support its contentions about the nature of terrorist groups should not be considered too far-fetched or onerous. While it is perhaps unrealistic to think that Congress will reconsider revising any aspect of § 2339B in the current political climate, the government should be required to make a greater showing linking material support to violence, lest § 2339B remain constitutionally infirm and politically rigid, capable only of condemning a group in its entirety, with no prospect of ever returning from FTO status.¹³ Further, a ban on material support to an FTO in the form of speech should necessitate stronger proof that the FTO is an actual threat to national security, not merely a “foreign policy interest.” The two issues are not the same.

This Article places *HLP* and the Supreme Court’s encounters with the concept of “terrorism” in historical context, and then discusses the *HLP* decision in light of that history. In so doing, the Article demonstrates how the Supreme Court’s construction of terrorism has evolved from that of a mere tactic used by subnational groups to an existential threat that must be combated, regardless of group or cause, at least rhetorically. *HLP* marks the first time the Supreme Court has given judicial imprimatur to the idea that “money is fungible,” i.e., that any and all funds that go to a terrorist organization, regardless of its purpose—violent, political, or charitable—constitute material support to a banned FTO.¹⁴ However, the Court did not stop there, ruling that material support that takes the form of speech could be banned because it provides

11. See *Humanitarian Law*, 130 S. Ct. at 2710–11.

12. See *id.* at 2724–26.

13. For an in-depth discussion of this point, see Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 566–76 (2011).

14. *Id.* at 579 (quoting *Humanitarian Law*, 130 S. Ct. at 2725) (internal quotation marks omitted).

legitimacy to an FTO, which can only serve to strengthen its resolve to fight.¹⁵ This Article explains that while the government has an interest in stopping American citizens and residents from providing support that leads to violence, a criminal ban on support that bestows only legitimacy, with no link to violent activity, cannot stand when an FTO's quarrel is not with the United States. Such a stance constitutes an impermissible prior restraint on speech in violation of the First Amendment.

Part II of this Article analyzes the Supreme Court's encounters with what could be termed "terrorism" in the pre-9/11 era, when it was considered merely a tactic that had not yet risen to the level of an existential threat. Part III discusses the Supreme Court's terrorism-related jurisprudence in the wake of 9/11, in which the specter of al-Qaeda-type terrorism informed and influenced the Court's effort to balance national security concerns with civil liberties. Part IV of this Article introduces § 2339B and the circumstances under which it was passed, explaining that § 2339B reflects the transformative role that terrorism began to play on the national stage. Part IV also discusses the stages of the *HLP* litigation up through the Supreme Court's opinion, criticizing the Court's deferential position vis-à-vis the government. The Article concludes by arguing that the Court's analysis of § 2339B does not comport with the First Amendment, given its overly broad construction of terrorism that reaches beyond violence to political disputes with which the United States has no connection.

II. PRE-9/11 TERRORISM JURISPRUDENCE

A review of the Supreme Court's consideration of what constitutes "terrorism" throughout history reveals, in a rather straightforward manner, general disapproval of "terrorist" tactics. However, in the period between the turn of the twentieth century and the advent of the era of the airplane hijacking, terrorism, despite being legally impermissible, was considered to be a mere tactic, and not a type of existential threat to American civilization. As a tactic, therefore, it was essentially understood to be the use of violence by non-state actors to compel a change in the policy of the ruling authorities. Later, in the several decades before 9/11, the Court

15. *Humanitarian Law*, 130 S. Ct. at 2710–11.

made various statements regarding the generalized threat of terrorism, but still considered the threat remote and foreign.

A. The First Appearance of “Terrorism”

The first appearance of the term “terrorism” in a Supreme Court opinion occurred in a dispute arising over the suspension of habeas corpus in certain Philippine provinces during the period of the United States’ occupation of the country in the wake of the Spanish-American War.¹⁶ The governing authorities had argued that suspension was warranted owing to the “state of insecurity and *terrorism* among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers.”¹⁷ The conditions that gave rise to this determination had their root in a local rebellion against American rule, and the occupying authorities felt the need to stigmatize their adversaries for challenging that rule by violence.¹⁸ In couching the call for a suspension of habeas corpus as a method to combat terrorism, the U.S. authorities’ use of the phrase “terrorism” was intended to convey a sense of particularly acute violence that demanded strong and rapid state action. The purpose of such a characterization probably formed part of an effort to delegitimize the group in question—in this case, a group of Filipino rebels resisting the United States’ presence in the country. This approach obviously resonates with the modern strategy of employing the terrorist label to delegitimize one’s opponent. It is also of note that the label of “terrorism” was applied to an indigenous, non-state actor fighting

16. *See generally* Fisher v. Baker, 203 U.S. 174 (1906).

17. *Id.* at 179–80 (emphasis added).

18. *See id.* at 179.

Whereas certain organized bands of ladrones exist in the provinces of Cavite and Batangas, who are levying forced contributions upon the people, who frequently require them, under compulsion, to join their bands, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands, and are therefore terrifying the law-abiding and inoffensive people of those provinces; and

Whereas these bands have, in several instances, attacked police and constabulary detachments, and are in open insurrection against the constituted authorities; and

Whereas it is believed that these bands have numerous agents and confederates living within the municipalities of the said provinces

Id.

against what it must have perceived as a malevolent foreign occupation, while United States officials in the Philippines assuredly viewed the *ladrones* as criminals resisting lawful authority.¹⁹ Ultimately, the petition was dismissed on technical and mootness grounds, given that the suspension of habeas corpus was revoked the day the petition was filed.²⁰

B. Criminal Syndicalism

The term “terrorism” next reappeared in a Supreme Court opinion in a decidedly domestic context—that of a radical labor union organizing in the period following World War I. On the same day in 1927, the Supreme Court decided *Whitney v. California*²¹ and *Burns v. United States*,²² both of which upheld the constitutionality of California’s criminal syndicalism statute. Along with twenty-two other states, California had passed a criminal syndicalism law in an effort to criminalize the activities of the Industrial Workers of the World (the “IWW” or “Wobblies”), who had opposed the United States’ involvement in World War I by, inter alia, encouraging workers to decrease industrial production in service of the war effort.²³ Under the statute, anyone who “[o]rganize[d] or assist[ed] in organizing, or [was] or knowingly bec[a]me a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism . . . [was] guilty of a felony and punishable by imprisonment.”²⁴ Criminal syndicalism was defined as

19. *See id.*

20. *See id.* at 181–82; *see also* Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1570 n.181 (2007).

21. 274 U.S. 357 (1927). *Whitney* is a seminal decision in the area of free-speech, with Justice Brandeis’s concurring opinion occupying a vaunted place in the First Amendment pantheon; Professor Vincent Blasi has called it “arguably the most important essay ever written, on or off the bench, on the meaning of the [F]irst [A]mendment.” Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 668 (1988). *See also* Ashutosh A. Bhagwat, *The Story of Whitney v. California*, in CONSTITUTIONAL LAW STORIES 407-08 (Michael C. Dorf ed., 2004).

22. 274 U.S. 328 (1927).

23. *See* Blasi, *supra* note 21, at 653–56.

24. *Whitney*, 274 U.S. at 360 (quoting section 2 of California’s Criminal Syndicalism Act) (internal quotation marks omitted).

any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful [sic] and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of *terrorism* as a means of accomplishing a change in industrial ownership or control or effecting any political change.²⁵

Therefore, “terrorism” was not defined in the statute. Rather, it was merely one of the enumerated tactics that was outlawed when directed at “accomplishing a change in industrial ownership or control or effecting any political change.”²⁶ This appears to be the first time the Supreme Court considered a statute with such a stated purpose. However, despite the novelty of the statute’s phraseology, one can glean some idea of what is meant by “terrorism” when considering the other methods listed in the criminal syndicalism law: crime; sabotage, which the statute defines as “willful and malicious physical damage or injury to physical property”; and “unlawful acts of force and violence.”²⁷ The serious nature of these other methods listed in the criminal syndicalism law illustrates that the statute likely contemplated that a charge of “terrorism” would only be supportable by fairly egregious actions.

This relevant statutory context underscores why it is somewhat surprising that the Supreme Court in *Whitney* upheld a conviction for terrorism in a case where the actions of the convicted were far afield from the activities for which the statutory language seemingly contemplated the imposition of criminal liability. Anita Whitney was charged with violating California’s statute based on her participation in the founding convention of the Communist Labor Party of California, a grouping of individuals who broke off from the Socialist Party based on their desire to join the Communist International.²⁸ The Supreme Court characterized the Party’s aim as one of political action geared to overthrow capitalism based on the belief that “the capture of political power . . . by the revolutionary working class [would] be of tremendous assistance to the workers in their struggle

25. *Id.* at 359–60 (emphasis added) (quoting section 1 of California’s Criminal Syndicalism Act) (internal quotation marks omitted).

26. *Id.*

27. *Id.* at 360.

28. *See id.* at 364–65; *see also* Blasi, *supra* note 21, at 657–58.

of emancipation.”²⁹ Ironically, while the California branch of the Communist Labor Party adopted a platform of direct action and strikes, at the convention Whitney herself had advocated for a less radical program of change via electoral politics.³⁰

Ultimately, the Court acknowledged the state of California’s legitimate police power to pass the Criminal Syndicalism Act, reasoning that it had been structured to combat actions “inimical to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means.”³¹ Terrorism was but one tactic, nebulously undefined though it was, that organizations like the IWW or the Communist Labor Party adopted in the service of their aims: namely, changing significant aspects of how the United States was governed. The structural threat posed by what Anita Whitney stood for, not the tactics she employed—which were decidedly non-violent, after all—was the object of the Act, and the political climate of the day ensured her conviction on that basis. After all, *Whitney* is best remembered for Justice Brandeis’s concurring opinion applying the clear and present danger test to invalidate Whitney’s conviction on the basis that no “immediate serious violence was to be expected or was advocated,” nor did “the past conduct furnish[] reason to believe that such advocacy was then contemplated.”³² During the first part of the twentieth century, radical labor unions were considered so illegitimate by state and federal government that even nonviolent speech could be equated to violence in service of such groups. It would not be until 1969 that the Supreme Court overturned *Whitney*, finding the similarly worded Ohio Criminal Syndicalism Act unconstitutional insofar as it criminalized advocacy and assembly to promote political reform.³³

Like the petitioner in *Whitney*, the petitioner in *Burns v. United States* had also been convicted under California’s Criminal

29. *Whitney*, 274 U.S. at 364–65.

30. See Blasi, *supra* note 21, at 657–58.

31. *Whitney*, 274 U.S. at 371.

32. *Id.* at 376 (Brandeis, J., concurring); see also Lyrrisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 814 (“At its core, Justice Brandeis’ opinion envisions a body of informed citizens engaging in a rational exercise in self-governance.”).

33. See *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (distinguishing between mere advocacy and unlawful “incitement to imminent lawless action”).

Syndicalism Act.³⁴ The *Burns* petitioner's actions leading to his conviction were taken in Yosemite National Park, which, by act of Congress, was subject to the laws of California; the petitioner's actions were not otherwise prohibited by federal law.³⁵ Specifically, he was charged with "assist[ing] in organizing, and . . . knowingly bec[oming] a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism," namely, the IWW.³⁶ The main focus of the opinion concerned the construction of the term "sabotage" under the statute.³⁷ Under the Court's analysis, "sabotage" is directly linked to "terrorism," both of which can be carried out by destruction of property, not simply by harming individuals.³⁸ Critically, the opinion links attempt to bring about some sort of industrial or political reform with sabotage and terrorism. Despite these linkages, however, terrorism remained a nebulous and unclear term—perhaps deliberately so—that was used in service of a movement within government to stamp out the threat posed by radical labor unions, chief among them the IWW. The real threat was not the tactic of terrorism, but the perceived unnerving nature, to the ruling classes, of the IWW's goal of redefining socio-economic relations within the United States.³⁹ The fact that most

34. *See* 274 U.S. 328, 330 (1927).

35. *Id.* at 330–31.

36. *Id.*

37. *See id.* at 333 (giving as examples of sabotage "injuring machinery[,] . . . putting emery dust in lubricating oil, damaging materials[,] . . . scattering foul seed in fields, driving tacks and nails in grape vines and fruit trees to kill them, using acid to destroy guy wires holding up the poles provided to support growing vines, putting pieces of wire and the like among vines to destroy machines used to gather crops, scattering matches and using chemicals to start fires to destroy property of employers").

38. *See id.* at 335 ("The advocating of the malicious commission of such acts is to teach and abet sabotage—physical damage and injury to physical property; it also is to teach and abet crime and unlawful methods of terrorism.").

39. *See* Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927*, 85 OR. L. REV. 649, 652 (2006) ("In the late 1910s and early 1920s, almost half of American states and territories enacted criminal syndicalism laws that essentially criminalized any sort of challenge to industrial capitalism. These laws did this under the guise of criminalizing advocacy of 'political or industrial change' by means of 'sabotage,' 'terrorism,' and other criminal conduct. In practice, it mattered little that the targets of these laws seldom, if ever, actually advocated such conduct as means of social change, or that key terms in the statutes, like sabotage, were only vaguely and ambiguously defined. What mattered instead was the ability to use these laws to outlaw the advocacy of social change itself, a purpose for which the statutes' ambiguities were well-suited and its targets' legal innocence was irrelevant." (footnotes omitted)).

individuals charged under criminal syndicalism statutes rarely constituted a threat did not prevent the vigorous enforcement of these statutes. *Whitney* and *Burns* thus demonstrate the Court's willingness to countenance outlawing advocacy when the existential, as opposed to tangible, threat is perceived to be real.⁴⁰

C. From World War II Through the Cold War

The theme of a threat to American national security persisted in the Supreme Court's continued exposure to, and analysis of, the term "terrorism." In 1946, the Court decided *Duncan v. Kahanamoku*, a case involving a challenge to the constitutionality of military tribunals established by the state of Hawaii to try civilians in the wake of the attack on Pearl Harbor of December 7, 1941.⁴¹ Although the Court recognized that the Hawaiian Organic Act allowed the governor of Hawaii to declare martial law, the Court did not go so far as to permit the governor to replace the state's normal court system with military tribunals.⁴²

The term "terrorism" appears only once in *Duncan*, and, for that matter, only in Justice Burton's dissent, not in the majority opinion.⁴³ Justice Burton objected to the Court's failure to defer to the executive branch on matters such as emergency decisions in wartime, e.g., administering Hawaii in the wake of Pearl Harbor, a situation he described as grim.⁴⁴ Based on a review of the Court's previous opinions, this appears to be the first time that a member of the Court uses the term "terrorism" specifically in the context of international war. However, here the act of war that violated

40. See, e.g., Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 664, 729 (2009) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1971)) (noting that "*Whitney* had been 'thoroughly discredited'" by the Supreme Court in *Brandenburg*, and highlighting the view that *Whitney* was one of a series of "bad decisions motivated by fear and paranoia").

41. See 327 U.S. 304, 307 (1946).

42. See *id.* at 315–17; see also Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 85.

43. See *Duncan*, 327 U.S. at 341 (Burton, J., dissenting).

44. See *id.* at 340–42 ("Military attack by air, sea and land was to be expected. The complete disregard of international law evidenced by the first attack and *the possible presence on the Islands of many Japanese collaborators gave warning that the enemy's next move might take the form of disastrous sabotage and terrorism among civilians*. The extraordinary breach of international law evidenced by the attack made it essential to take extraordinary steps to protect the Islands against subversive action that might spring from deeply laid plans as secret, well aimed, and destructive as the original attack." (emphasis added)).

international law was the attack on Pearl Harbor, which could have led, depending on what the Japanese had been able to accomplish by way of subsequently occupying Hawaii, to terrorism and sabotage engulfing the Hawaiian Islands themselves.⁴⁵ Even so, terrorism, while certainly an evocative term, played a decidedly minor and derivative role in the opinion, particularly when compared with the attack on Pearl Harbor. In this instance, terrorism was a tactic that an enemy state, with its conventional armed forces, could employ to accomplish its hostile goals. Regardless, terrorism, ordinarily described as a tactic used by non-state movements to achieve their ends, was in this instance tied directly to the actions of imperial Japan during World War II. In Justice Burton's view, this state of affairs—the attack on Pearl Harbor and its aftermath—would warrant greater deference to legislative and executive branches, even if such deference were to permit the suspension of habeas corpus and imposition of martial law.⁴⁶

Throughout the early stages of the Cold War, the Supreme Court made numerous decisions concerning the activities of accused members of the Communist Party in the United States.⁴⁷ In those decisions, the Court referred to terrorism as a tactic that communists engaged in and advocated, both in the United States and abroad, to achieve their desired political changes. For example, in *American Communications Ass'n v. Douds*, a decision sustaining the constitutionality of loyalty oaths for union members, the Court referred to the Communist Party's "un-American" methods that had been "imported" by American Communists:

Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. It would be incredible naïveté to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power. In not one of the countries it now dominates was the Communist Party chosen by a free or

45. *See id.*

46. *See id.* at 338–39.

47. *See, e.g.*, *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964); *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Lerner v. Casey*, 357 U.S. 468 (1958); *Yates v. United States*, 354 U.S. 298 (1957); *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232 (1957); *Galvan v. Press*, 347 U.S. 522 (1954); *Dennis v. United States*, 341 U.S. 494 (1951); *Am. Comm'ns Ass'n v. Douds*, 339 U.S. 382 (1950).

contestible [sic] election; in not one can it be evicted by any election. The international police state has crept over Eastern Europe by deception, coercion, *coup d'état*, *terrorism* and assassination. Not only has it overpowered its critics and opponents; it has usually liquidated them.⁴⁸

The Court thus included terrorism in a list of means that the Communist Party employed to establish police states in Eastern Europe. The Court classified terrorism as but one tactic among many that Communists might choose from to accomplish their illicit goals, which were antithetical to the United States' foreign and domestic policy.⁴⁹

Similarly, in *Dennis v. United States*, the Court considered the constitutionality of the Smith Act, under which the petitioners were convicted of conspiring to utilize the Communist Party in the United States to advocate for the violent overthrow of the U.S. government.⁵⁰ In upholding the statute and the convictions, the Court noted that the purpose of the Smith Act was “to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism.”⁵¹ Again the Court demonstrated its willingness to restrict certain activities and expressions in the interest of protecting the government from change by violent and subversive means. The *Dennis* holding was a novelty, however, in that it construed the Smith Act as allowing prosecution even when the advocacy of violent overthrow of the government was not imminent,⁵² let alone realistic. However, consistent with *Douds*'s reasoning, underlying the prosecution was the axiom that terrorism was a tool that the Communist Party had historically used to further its illegal political goals.

48. *Am. Commc'ns Ass'n*, 339 U.S. at 429 (third emphasis added).

49. *See id.* (noting that American Communists have structured themselves according to Communist Party principles, resorting to “[v]iolent and undemocratic means” to accomplish their goals, even though “this country offers them and other discontented elements a way to peaceful revolution by ballot” (emphasis omitted)).

50. *See Dennis*, 341 U.S. at 495–97.

51. *Id.* at 501.

52. *See id.* at 510. The Court began to back away from the *Dennis* ruling in 1957 when it held that advocating for beliefs, as opposed to action, could not give rise to criminal liability. *See Yates v. United States*, 354 U.S. 298 (1957); *see also Healy, supra* note 40, at 663–64.

Interestingly, Justice Jackson's concurring opinion discusses the Smith Act's origins as a tool engineered to combat anarchism.⁵³ Justice Jackson distinguishes anarchism from Communism, describing anarchism as a philosophy advocating "extreme individualism and hostility to government and property . . . to be achieved by violent destruction of all government."⁵⁴ Unlike Communism, however, the anarchism exhibited in the case involved "sporadic and uncoordinated acts of terror [that] were not integrated with an effective revolutionary machine."⁵⁵ This type of terrorism, as opposed to the more organized and politically coordinated activity associated with Communism, was random and took the form of riots, assassinations, and attacks on state officials.⁵⁶ Thus it seems that, at least in Justice Jackson's view, terrorism can also undergird a movement for the violent eradication of government and organized society altogether, and it does not have to correspond to a movement to take over the country.⁵⁷

In *Galvan v. Press*, the Court considered the constitutionality of the petitioner's conviction under the Internal Security Act of 1950, which "required deportation of any alien who at the time of entering the United States, or at any time thereafter, was a 'member' of the Communist Party."⁵⁸ Despite the government's failure to establish the petitioner's knowledge of the Party's violent aims,⁵⁹ the Court sustained both the constitutionality of the statute and petitioner's conviction under it.⁶⁰ The Court deferred to Congress's determination that the Party had espoused ideals that were of such a threat to the U.S. government as to justify deportation of any alien who was a member of the Party.⁶¹ Specifically, the Court found most persuasive Congress's finding that Communism was "a world-wide revolutionary movement," aimed at "establish[ing] a Communist

53. *Dennis*, 341 U.S. at 562 (Jackson, J., concurring).

54. *Id.*

55. *Id.*

56. *See id.* at 562–63.

57. *See id.* at 564.

58. *Galvan v. Press*, 347 U.S. 522, 525 (1954).

59. *See id.* at 532–33 (Black, J., dissenting) (noting that the petitioner was to be deported "without proof or finding that petitioner knew that the party had any evil purposes or that he agreed with any such purposes that it might have had").

60. *See id.* at 529–32 (majority opinion).

61. *See id.*

totalitarian dictatorship” through the use of “treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary.”⁶² Because immigration matters typically involve policy determinations made by the political branches of government, the Court concluded that membership in an organization advocating revolution by unlawful activity, including acts of terrorism, was sufficient to permit the deportation of that organization’s non-citizen members.⁶³

While adjudging the legality of the various Cold War-era anti-Communism statutes, the Court often struck the theme of giving deference to the political branches.⁶⁴ In *Communist Party of United States v. Subversive Activities Control Board*, the Court considered the constitutionality of the registration requirements under the Subversive Activities Control Act of 1950 (“SACA”).⁶⁵ SACA mandated that all “Communist-action organizations” register with the Attorney General.⁶⁶ The Court upheld SACA’s constitutionality, again making reference to Congressional findings and accepted definitions of Communism that included the word “terrorism.”⁶⁷ Much like the cases discussed above, “terrorism” appears alongside “treachery, deceit, infiltration . . . espionage [and] sabotage” as a tool employed by the Communist Party to aid in the overthrow of governments and establishment of a Communist dictatorship.⁶⁸

62. *Id.* at 529 (citing the Internal Security Act of 1950).

63. *See id.* at 531–32.

64. *See* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1376 (2009).

65. *See* *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 8 (1961) (“A Communist-action organization is defined by § 3(3) as (a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and (b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title.” (quoting Subversive Activities Control Act of 1950, Pub. L. No. 831, 64 Stat. 987 (repealed 1993)) (internal quotation marks omitted)).

66. *Id.*

67. *Id.* at 5, 56, 104; *see also id.* at 140 (Black, J., dissenting).

68. *Id.* at 5, 56, 104 (majority opinion); *id.* at 140 (Black, J., dissenting).

The Cold War-era Communist cases, concerned as they were with an organization that employed, inter alia, terrorism in service of its hostile goals, did not exhibit limitless deference to the government in its battle against Communism. For example, by the beginning of the 1960s, the Court drew what appeared to be a clear line between advocacy and action, with the former protected and the latter criminalized.⁶⁹ Further, the Court recognized that one could be a member of a group perceived as hostile to the United States, such as the Communist Party, without violating the law. In *Scales v. United States*, the Court drew a distinction between an active member of the Communist Party, who shared in the group's beliefs and ideals and worked toward enacting them, and a passive member, who did not engage in any specific conduct toward fulfilling the group's illegal goals.⁷⁰ Mere membership, without more, the Court reasoned, was insufficient to give rise to criminal liability.⁷¹ Then, as now, one can be a member of a terrorist group, provided that membership does not entail any direct activity on behalf of the group towards fulfilling its illegal ends.

This Cold War-era decision has played an important role in terrorism prosecutions post 9/11. Consequently, parties attacking the constitutionality of § 2339B's ban on providing material support to designated FTOs have relied heavily on *Scales* to bolster their position in challenges based on both the First and Fifth

69. See *Noto v. United States*, 367 U.S. 290, 297–98 (1961) (“We held in *Yates*, and we reiterate now, that the mere abstract teaching of Communist theory, including the 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. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.”).

70. 367 U.S. 203, 224–28 (1961).

71. See *id.* at 227–28 (“It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that ‘act’ alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing. It may indeed be argued that such assent and encouragement do fall short of the concrete, practical impetus given to a criminal enterprise which is lent for instance by a commitment on the part of a conspirator to act in furtherance of that enterprise. A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever.”).

Amendments, but those challenges have met with little success to date.⁷²

D. Domestic Terrorism and the Ku Klux Klan

Not all of the Supreme Court's jurisprudence concerning terrorism has dealt with threats that could be ascribed to foreign elements in some form or another. Historically, in considering legislative efforts to combat the phenomenon of racist violence that the Ku Klux Klan ("KKK") represented in the wake of the Civil War, members of the Court have recognized that such violence could be properly described as "terrorism." For example, in *United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott*, decided in 1983, the Court construed the applicability of 42 U.S.C. § 1985(3)⁷³ to a lawsuit brought by a company and its employees who had been beaten by union members protesting the company's hiring policies.⁷⁴ The Court narrowly held that private conspiracies that admittedly violate the terms of § 1985(3) do not give rise to a cause of action, as only conspiracies involving a state or intended to influence the activity of the state are covered.⁷⁵ The dissent, while agreeing that the first section of the statute covers actions by state officials, disagreed as to the scope of the second section and argued that it intentionally created substantive rights against private parties who conspire to deprive others of their legal rights.⁷⁶

Pointedly, Justice Blackmun's dissent remarked that § 1985 was commonly referred to as the "Ku Klux Klan Act," a point the majority did not raise.⁷⁷ The dissent further stated that the KKK's campaign of murder and mob violence against those who disagreed with their political views in the Reconstruction Era had served as the impetus for the passage of the Act.⁷⁸ The dissent also alleged that the

72. See Said, *supra* note 13, at 581 n.223 (citing cases supporting this point in the Fifth Amendment context); see *infra* notes 170–72 (citing cases supporting this point in the First Amendment context).

73. 42 U.S.C. § 1985(3) (2006) (creating a cause of action for victims of conspiracies designed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws").

74. See 463 U.S. 825, 827–28 (1983) [hereinafter *United Brotherhood*].

75. See *id.* at 830, 833.

76. See *id.* at 839–40 (Blackmun, J., dissenting).

77. *Id.*

78. See *id.* at 850–51.

goals of the KKK's campaign were to remove Republican politicians from office and replace them with sympathetic Democrats, or, in the alternative, to undermine the authority of those Republican officials by engaging in mob violence.⁷⁹ The dissent characterized these activities as "terrorism," which was often directed at African Americans in the post-antebellum South.⁸⁰ A subsequent decision on the constitutionality of a Virginia statute criminalizing cross-burning echoed Blackmun's description of the KKK's goals and methods, albeit by referring to the group as imposing a "reign of terror."⁸¹

Like the Court's use of the term "terrorism" in the prosecutions of Communists and anarchists under various state criminal syndicalism statutes, Blackmun's dissent in *United Brotherhood* refers to terrorism as politically motivated violence engineered to bring about a change in government or policy.⁸² Therefore, by 1983, the concept of what constituted terrorism had already acquired generally understood contours. Nonetheless, unlike the defendants in those earlier state criminal syndicalism statute cases, who were prosecuted for their advocacy of groups with illegal goals that might engage in terrorism, the KKK actively pursued political change through violence. However, by the time of the *United Brotherhood* decision, the Court had already addressed this discrepancy by finding the criminal syndicalism statutes at the heart of the earlier prosecutions unconstitutional.⁸³

E. Terrorism in New Contexts

The Supreme Court's use of the term "terrorism," first occurring in the context of the American occupation of the Philippines, and obtaining greater frequency in the conflict with communism (and anarchy) both before and after the Cold War, while continually

79. *See id.*

80. *Id.* at 851 n.15 ("Negroes frequently were the objects of this terrorism . . .").

81. *Virginia v. Black*, 538 U.S. 343, 353 (2003). Of course, this was not the first time the Supreme Court used the phrase "reign of terror" to describe the KKK's activities in the post-Civil War period. *See, e.g.*, *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 722 (1989); *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983).

82. *United Brotherhood*, 463 U.S. at 850–51 n.15 (The Klan's goal was to overthrow Republican Reconstruction policies both by terrorizing local supporters of those policies in order to place sympathetic Democrats in office, and when that failed by supplanting the authority of local officials directly with mob violence.").

83. *See Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

being recognized as an apt description of the KKK's violent activities, acquired a greater universality of use in subsequent and diverse situations. This in turn reinforced the notion that terrorism is a tactic used by a wide range of groups—from across the political spectrum—in furtherance of their goals.

In an opinion concurring in the denial of certiorari to an individual convicted of conspiring to riot, advocating criminal anarchy, and conspiring to engage in such advocacy, Justice Stewart wrote to delineate his view of what constitutes an overt act in furtherance of a conspiracy.⁸⁴ The defendant was “a self-acknowledged Marxist” resident of Harlem who had been charged in connection with an attempt to conduct an armed revolt against the police. He argued that the overt acts underpinning the charges against him lay in speeches he had given, i.e., protected advocacy under the First Amendment, and as such could not rise to the level of an overt act,⁸⁵ a view shared only by Justice Douglas.⁸⁶ Justice Stewart agreed in theory with Justice Douglas, but argued that the defendant had been charged with the overt acts of forming a group “under the direction of ‘block captains’ and with the assistance of ‘terrorist bands,’ equipped with Molotov cocktails that Epton himself [had] explained how to use,” activities that could not make a “serious claim to constitutional protection.”⁸⁷ While Justice Stewart’s mention of terrorism is brief, clearly he believed that armed action against the police geared at spreading anarchy qualified as terrorism under the general definition of the term.

For the most part, however, despite the homegrown threat that the KKK and other isolated situations represented, in the decades before 9/11 the Supreme Court tended to define terrorism as a threat emerging abroad. In an opinion denying tax-exempt status to not-for-profit private schools that engaged in religiously motivated racial discrimination, the Court remarked that were it to hold otherwise, “a band of former military personnel might well set up a school for intensive training of subversives for guerilla warfare and terrorism in other countries” and qualify as a tax-exempt educational

84. *See Epton v. New York*, 390 U.S. 29, 30 (1968) (Stewart, J., concurring in the denial of certiorari).

85. *People v. Epton*, 227 N.E.2d 829, 831–34 (N.Y. 1967).

86. *See Epton*, 390 U.S. at 30–34 (Douglas, J., dissenting from the denial of certiorari).

87. *Id.* at 30, n.† (Stewart, J., concurring in the denial of the certiorari).

institution.⁸⁸ Thus, the Court made a clear link between terrorism and conflicts taking place abroad. Additionally—although perhaps unintentionally—the Court mentioned terrorism and guerilla warfare in the same breath, thereby associating terrorism with non-state actors waging war against foreign regimes. One year later, the Court reiterated this version of what constituted terrorism in a case challenging the Cuban Assets Control Regulations.⁸⁹

Thus, prior to September 11, 2001, terrorism was principally associated with violence taking place abroad and committed by foreign entities.

Nevertheless, that is not to say that terrorism was never conceived of as a more generalized threat in Supreme Court opinions before September 11, 2001. All along, it was clear that Americans could be the victims of foreign terrorism, as the Court's opinion regarding a personal injury action filed by passengers of the *Achille Lauro* cruise ship, hijacked in the Mediterranean in 1985, demonstrated.⁹⁰ In addition to archetypal terrorist activity (e.g., hijacking), the Supreme Court acknowledged that terrorism is a more nebulous concept that can lurk as a generalized fear. For example, in *United States v. Sokolow* the Court held that while individual factors in a Drug Enforcement Administration ("DEA") profile did not constitute reasonable suspicion for an arrest, the combination of factors did amount to reasonable suspicion.⁹¹ In

88. *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 n.18 (1983). To bolster its point, the Court noted that "Fagin's school for educating English boys in the art of picking pockets" would also qualify for tax-exempt status under a different analysis, thereby categorizing terrorism with completely illegitimate criminal activity. *Id.* (citing *Green v. Connally*, 380 F. Supp. 1150, 1160 (D.D.C. 1971)). Justice Rehnquist's dissenting opinion, while obviously disagreeing with the holding, rejected the idea that his reading of the law would bestow tax-exempt status on either a terrorist school or a pickpocket academy. *See id.* at 619 (Rehnquist, J., dissenting).

89. *See Regan v. Wald*, 468 U.S. 222, 243 (1984) (citing with approval that "[i]n the opinion of the State Department, Cuba, with the political, economic, and military backing of the Soviet Union, has provided widespread support for armed violence and terrorism in the Western Hemisphere").

90. *See Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 496 (1989) (noting that the ship was "hijacked by terrorists").

91. *See United States v. Sokolow*, 490 U.S. 1, 3 (1989) (noting that the factors that the DEA had relied on were that "(1) he paid \$2,100 for two airplane tickets from a roll of \$20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his

dissent, Justice Marshall took issue with the factors making up the profile, specifically the “sole behavioral detail” the DEA relied on in making the assessment that the defendant fit the profile of a drug courier—nervousness in an airport.⁹² Justice Marshall criticized this position by noting that “[w]ith news accounts proliferating of plane crashes, near collisions, and *air terrorism*, there are manifold and good reasons for being agitated while awaiting a flight, reasons that have nothing to do with one’s involvement in a criminal endeavor.”⁹³ In his view, behaving nervously in an airport is not a legitimate factor toward establishing reasonable suspicion for criminal investigatory purposes, since the threat of terrorism, *inter alia*, may cause travelers to be on edge.⁹⁴ As applied here, terrorism is more than just a threat to people abroad caught in foreign conflicts, and can strike any traveler, anywhere, and at any time, a natural result of an era in which airline hijacking is used as a tool to make a political point.

But despite Justice Marshall’s articulation of a generalized, existential threat of terrorism, there is evidence of certain assumptions about what terrorism represents. By way of example, in a case considering the applicability of the First Amendment to a boycott arranged by court-appointed lawyers seeking increased compensation for their representation of indigent defendants, Justice Brennan opined in dissent: “If a boycott uses economic power in an unlawful way to send a message, it cannot claim First Amendment protection from the antitrust laws, any more than a terrorist could use an act of violence to express his political views and then assert immunity from criminal prosecution.”⁹⁵ This example is instructive in that it is based on the same assumption about terrorism that we have seen articulated time and again by the Supreme Court, namely that it is an illegal act of violence engineered with a political goal in mind. What is perhaps novel about this statement is its presumption that terrorists should be tried as criminals.

While this may be a legitimate view as to how best to hold perpetrators of illegal political violence accountable, it does raise the

luggage”).

92. *Id.* at 15 (Marshall, J., dissenting).

93. *Id.* (emphasis added).

94. *See id.*

95. *FTC v. Super. Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 448 n.7 (1990) (Brennan, J., dissenting).

question of what other powers the government may claim when responding to the threat of terrorism. Where terrorism was once simply perceived as one tool employed among many others by identifiable groups specifically hostile to the United States, there developed a more generalized fear of the phenomenon, whether directed at American targets or not, which did not limit the government's options for combating it to merely criminal trials. As a result of a growing awareness of terrorism as a transnational tactic, the powers that the government accrued became more explicitly defined and expanded.

These powers expanded in many dimensions, starting well before 9/11. Beginning in the late 1960s, when general social upheaval in the United States coincided with frequent airplane hijackings, the government responded by mandating suspicionless searches of individuals at airports, courts, and government buildings.⁹⁶ Courts repeatedly upheld these searches despite various Fourth Amendment challenges to the practice.⁹⁷ Accordingly, airline hijackings and attacks on government buildings decreased markedly.⁹⁸ The Supreme Court came to understand that tactics like using hidden devices to surreptitiously record conversations with terrorist suspects were legitimate tools that did not violate one's privacy under the Fourth Amendment.⁹⁹

As terrorism began to develop into a phenomenon that more Americans understood, via news reports on airplane hijackings and political upheavals worldwide, the Supreme Court was confronted with the task of managing the legal response to the phenomenon. In so doing, the Court began to take a wider view of terrorism's scope and potential for harm, both in the United States and abroad. While not yet rising to the level of a worldwide existential threat to free societies everywhere, the Court's characterization of terrorism in these new contexts foreshadowed post-9/11 developments.

96. See Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 850–55 (2010) (outlining the historical context that gave rise to suspicionless searches).

97. See *id.* at 852–55.

98. See *id.*

99. See *United States v. White*, 401 U.S. 745, 770 n.3 (1971) (Harlan, J., dissenting).

F. Terrorism as a Basis for Heightened Punishment

Additionally, the Court also began to articulate a rationale as to why terrorist crimes could warrant heightened punishment. In 1978, when it declared the death sentence for the rape of an adult woman unconstitutional, the majority in *Coker v. Georgia* did not comment on the fact that Georgia's death penalty statute provided for capital punishment in cases of airplane hijacking, even where there was no loss of life.¹⁰⁰ While this observation may initially seem unremarkable, given that the constitutionality of the death sentence for air hijacking was not under consideration by the Court, the majority's holding did not go without comment. In dissent, Chief Justice Burger worried that the ruling would have far-reaching consequences:

We cannot avoid taking judicial notice that crimes such as airplane hijacking, kidnaping, and mass terrorist activity constitute a serious and increasing danger to the safety of the public. It would be unfortunate indeed if the effect of today's holding were to inhibit States and the Federal Government from experimenting with various remedies—including possibly the imposition of the penalty of death—to prevent and deter such crimes.¹⁰¹

Thirty years later, the Court addressed Justice Burger's concern more closely. In 2008, while the Court expanded on *Coker's* ruling and held the death penalty unconstitutional for the rape of a child, the majority expressly limited the applicability of its holding:

Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken.¹⁰²

The common theme across opinions rendered thirty years apart is that terrorism is a public safety offense that affects not only individual victims but the state itself, and concomitantly its well-

100. *See* 433 U.S. 584, 592 (1977).

101. *Id.* at 621 (Burger, C.J., dissenting). Chief Justice Burger also wrote that *Coker's* ruling "casts serious doubt upon the constitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, e.g., treason, airplane hijacking, and kidnaping." *Id.*

102. *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008).

being and sense of security. Because of its far-reaching consequences, which affect not only specific victims, terrorist crimes could warrant a death sentence even where no loss of life occurs, something that the Supreme Court has ruled out in the “ordinary” crime context.¹⁰³

Indeed, as early as 1990, the Supreme Court acknowledged the expanding legislative and jurisdictional bases for combating the phenomenon of terrorism occurring abroad, in deference to the heightened threat that terrorism had come to represent.¹⁰⁴ With this growing recognition of the existence of a lurking, foreign, and poorly understood threat came the understanding that the specter of terrorism would justify deviations from the norm in more and more cases. In 1997, a 5-4 decision holding unconstitutional the Brady Act’s requirement that states conduct background checks and impose other procedures on potential handgun purchasers engendered a spirited dissent by Justice Stevens.¹⁰⁵ In arguing that the Brady Act provision in question was constitutional, the dissent explained that certain national emergencies, such as the nation’s “epidemic of gun violence,” warranted and justified a heightened federal response.¹⁰⁶ Justice Stevens also listed other examples of situations warranting use of heightened national emergency powers by the Congress and the President, which included “[m]atters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist.”¹⁰⁷

Two assumptions are inherent in this statement. First, terrorism may rise to the level of a national emergency that implicates the exercise of greater powers by the political branches of government. Justice Stevens does not go so far as to outline specific types of terrorism or situations that would justify such a response, but rather simply notes that the possibility exists. Second, an actual terrorist

103. Incidentally, the air hijacking provision of Georgia’s death penalty statutes remains in place to this day. See *Death Penalty for Offenses Other Than Murder*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/article.php?&did=2347> (last visited Oct. 4, 2011). Georgia is one of only two states to hold out the possibility of capital punishment for such a crime. See *id.*

104. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 280–81 n.4 (1990) (Brennan, J., dissenting) (citing numerous statutes that expand criminal jurisdiction over acts committed abroad, including, e.g., 18 U.S.C. § 2331).

105. See *Printz v. United States*, 521 U.S. 898, 939 (1997) (Stevens, J., dissenting).

106. *Id.* at 940 (citation omitted).

107. *Id.*

attack need not occur to activate these heightened powers—the mere *threat* of an attack suffices. While this may not seem like a great distinction, it underscores the preventative role that the government can play in stopping terrorism before it occurs and foreshadows a tack the government would later take. Indeed, the idea of preventative prosecution of terrorist crimes became a central focus of the government’s counterterrorism strategy post-9/11—in sharp contrast to the previous focus of punishing individuals for acts already committed.¹⁰⁸

G. Terrorism and Immigration

I. AADC v. Reno

In the immigration context, where the Supreme Court maintains a historically deferential position regarding the actions of the political branches, preventative deportation (to say nothing of exclusion) of those suspected of terrorist sympathies has been explicitly recognized. In *Reno v. American-Arab Anti-Discrimination Committee* (“AADC”), the Court ruled that immigrants in deportation proceedings may not advance claims that they have been targeted because of their unfavorable political views: “an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.”¹⁰⁹ Specifically, individuals who were targeted for deportation because of their alleged affiliation with the Popular Front for the Liberation of Palestine, a terrorist group, were not entitled to argue that they were being targeted because of their unpopular political views, while others engaging in exactly the same activity on behalf of less controversial groups avoided deportation proceedings.¹¹⁰ In the words of Professor Gerald Neuman,

108. See DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE* 26–28, 102 (2007); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Threat of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 430 (2006).

109. 525 U.S. 471, 488 (1999). The ruling itself was somewhat surprising, given that the Supreme Court denied review of the selective enforcement First Amendment challenge. See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION* 51 (3d ed. 2006).

110. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491–492 (1999) (“When an alien’s continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.”).

[t]he general lesson of *AADC* is that so long as an alien is deportable, she is not entitled to know why she was chosen for deportation, and (with a possible exception for especially “outrageous” reasons, which do not include mere First Amendment objections) the reason is irrelevant to enforcement of removal.¹¹¹

Presumably, in the normal course of affairs, therefore, politically motivated targeting of those suspected of links with terrorist groups can proceed, except in those “rare” cases where the government’s conduct is “outrageous,” although the Supreme Court has yet to confront such a situation.

2. *Zadvydas v. Davis*

However, while selective prosecution claims are notoriously difficult to prove in any context,¹¹² the Supreme Court’s ruling in *Zadvydas v. Davis*¹¹³ (another immigration-related decision) reinforces the unique nature of a terrorism link. In *Zadvydas* (an opinion released only a few months before the September 11, 2001 attacks), the Court held that the indefinite detention of otherwise deportable aliens would raise “serious constitutional concerns.”¹¹⁴ As a result, in those cases where there is no realistic prospect of deportation beyond a “reasonable” period of six months, it becomes presumptively less and less reasonable to continue to confine the alien.¹¹⁵ Stated another way, “an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.”¹¹⁶ Part of the rationale behind the *Zadvydas* ruling lay in the fact that indefinite detention of deportable aliens in such circumstances may end up being permanent.¹¹⁷

111. Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 630 (2006).

112. See *Wayte v. United States*, 470 U.S. 598, 608 (1985) (noting that a successful selective prosecution claim must allege that the decision to prosecute “had a discriminatory effect and that it was motivated by a discriminatory purpose”); see also *United States v. Armstrong*, 517 U.S. 456, 468 (1996) (applying a “rigorous standard for the elements of a selective-prosecution claim”).

113. 533 U.S. 678 (2001).

114. *Id.* at 682.

115. *Id.* at 701.

116. *Id.*

117. See *id.* at 691.

But the *Zadvydas* majority made sure to articulate an exception to its reasonableness analysis on the issue of the detention of deportable aliens when the specter of terrorism arose. Specifically, the Court remarked: “[W]e [do not] consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”¹¹⁸ This statement leaves open the possibility that aliens linked to terrorism, but facing no realistic prospect of removal from the United States, can be held for an indefinite period, even if that period is potentially permanent. The statement is also prescient, albeit unintentionally. While the members of the Supreme Court, like the rest of American society, had no idea what was to transpire a few months later in New York City and Washington, D.C., they would soon be asked to rule on the constitutionality of the indefinite detention of aliens identified as terrorists hostile to the United States.

The idea of a terrorist exception to various constitutional guarantees was not limited to the immigration context. In the 2000 decision *City of Indianapolis v. Edmond*, the Supreme Court invalidated a roadblock scheme enacted by the Indianapolis police department whose primary purpose was stopping the possession of and traffic in illegal narcotics.¹¹⁹ Because a roadblock constituted a seizure for Fourth Amendment purposes, the police needed some level of individualized suspicion to pull over motorists for “detect[ing] evidence of ordinary criminal wrongdoing.”¹²⁰ In an interesting parallel to the analysis in *Zadvydas*, a case that is otherwise entirely unrelated, the Court noted that because a roadblock is a type of seizure, it must be “reasonable” per the requirements of the Fourth Amendment.¹²¹ So, just as the detention of a noncitizen pending deportation was presumptively unreasonable after six months, the erection of a roadblock for general crime-control purposes, without individualized suspicion, was also presumptively unreasonable.

118. *Id.* at 696.

119. *See* *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

120. *Id.* at 38, 41.

121. *Id.* at 40.

However, the Court, in dicta, also noted that certain emergencies would allow the authorities to make use of a general roadblock where no individualized suspicion was present; specifically, “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.”¹²² Therefore, just as *Zadvydas* recognized that the government may have a constitutionally legitimate interest in indefinitely holding a terrorist for national security purposes, *Edmond* likewise recognized the constitutional legitimacy of roadblocks to prevent imminent terrorism. Unlike *Zadvydas*, though, which did not articulate what sort of threat the terrorist might pose, the language in *Edmond* pointedly spoke about an exception in cases of a direct, impending attack within the United States.

A review of the decisions cited so far reveals that in the few decades preceding 9/11, terrorism had become a more pressing concern to society at large. Where once the Communist Party and, to a lesser extent, the KKK, dominated the Court’s discussion of terrorism, and the Court simply viewed terrorism as a mere tactic, the more recent discourse has come to internalize the notion of terrorism as a lurking, existential threat, principally foreign in nature. Further, in many situations where the government may otherwise be constrained in its actions by the Constitution, the immediate threat of a terrorist attack will allow for deviations from the general norm. Here the message is clear, albeit unstated: the terrorism that the Supreme Court hypothesizes about targets the United States. This message was made more explicit in the Court’s post-9/11 jurisprudence.

III. POST-9/11 TERRORISM JURISPRUDENCE

Post-9/11, Supreme Court Justices continued to highlight that the presence of a suspected terrorist or the potential of a terrorist

122. *Id.* at 44. Incidentally, the Foreign Intelligence Surveillance Court of Review used this language in support of its ruling permitting the government’s use of wiretaps geared at detecting terrorist activity, even where no emergency existed and the likelihood of harm was not “imminent.” *In re Sealed Case*, 310 F.3d 717, 745–46 (FISA Ct. Rev. 2002); *see also* Simmons, *supra* note 96, at 908–09 (criticizing the FISA Court’s decision as leading to a slippery slope, given that it “inexplicably equat[es] ‘emergency’ with ‘threat’” as a basis for its ruling).

attack would justify exceptions to general constitutional principles in a number of areas. However, the critical factor underpinning these opinions was the existence of a direct threat to the United States in some form or another.

A. Terrorism's Impact on Ordinary Criminal Cases

This position was articulated in cases from the Court's ordinary criminal procedure jurisprudence. For instance, Justice Stevens, in dissenting from a decision holding that an officer's decision to shoot a fleeing suspect was a reasonable application of force, noted that the use of deadly force to prevent the escape of a felon is only constitutionally permissible where the officer has probable cause to believe the suspect, if permitted to flee, would pose a threat of serious harm to the officer or others, and where, if possible, the officer had issued the suspect a warning.¹²³ Specifically, he noted that the use of deadly force was unreasonable because in this case the suspect had not threatened the officer, was apparently not armed, and was not fleeing from a violent crime.¹²⁴ Justice Stevens remarked, however, that his position might have changed if the suspect were "the kind of dangerous person—perhaps a terrorist or an escaped convict on a crime spree—who would have been a danger to the community if he had been allowed to escape."¹²⁵ The dissent's underlying thematic rationale is a familiar one: a terrorist poses a concrete threat to the public if not apprehended. Given the nature of the harm he or she might inflict if at large, deadly force can be employed more readily to subdue such a person than with a less dangerous criminal.

A similar analytic logic was also applied in *Illinois v. Caballes*, a 2005 decision involving a motorist who had been stopped for a traffic violation by a police officer.¹²⁶ While the officer who had pulled Caballes over was issuing him a traffic citation, another officer who heard the report of the stop over the radio arrived on the scene and subjected the car to a search by a narcotics-detection dog, which revealed large quantities of marijuana.¹²⁷ The Supreme Court held

123. *See* *Brosseau v. Haugen*, 543 U.S. 194, 203–04 (2004) (Stevens, J., dissenting).

124. *See id.* at 204–05.

125. *Id.* at 207 n.5.

126. *See* 543 U.S. 405, 406–07 (2005).

127. *See id.* at 406.

that the use of the dog did not violate the Fourth Amendment, even though the officers had no individualized suspicion that Caballes was in possession of anything illegal: “A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”¹²⁸

Justice Souter dissented, arguing that the use of the dog constituted an unlawful search and seizure where there was no reasonable and articulable suspicion.¹²⁹ However, he also recognized that certain situations may justify the use of detection dogs, even where no individualized suspicion exists.¹³⁰ The key factor was the degree of risk that each particular case posed to the public at large:

I should take care myself to reserve judgment about a possible case significantly unlike this one. All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion. Suffice it to say here that what is a reasonable search depends in part on demonstrated risk. Unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk.¹³¹

In a separate dissenting opinion, Justice Ginsburg echoed the above sentiment, noting that, according to *Edmond*, a situation giving rise to an “immediate” danger, such as an imminent terrorist attack or the presence of explosives, could justify an otherwise illegal search and seizure.¹³² The critical distinction lies in the difference between “the general interest in crime control and more immediate threats to public safety.”¹³³

While Justices Ginsburg and Souter made their remarks several years after 9/11, their statements resonate with several that were made by members of the Supreme Court in the few decades immediately preceding 9/11, when terrorism became a more pressing concern to society at large. The various exceptions to rules,

128. *Id.* at 410.

129. *See id.* at 410, 414 (Souter, J., dissenting).

130. *See id.* at 417 n.7.

131. *Id.*

132. *Id.* at 424–25 (Ginsburg, J., dissenting).

133. *Id.* at 424.

constitutional or otherwise, suggested by Ginsburg, Souter, and other members of the Supreme Court, only make sense and retain salience when one construes them as necessary to protect Americans from the possibility of an attack. So when members of the Court reference terrorism in their opinions, they are generally referring to direct attacks on Americans. Because this dynamic is at the heart of the Court's modern terrorism jurisprudence, it remains uncontroversial in its force as an argument. Who would not want the government to exercise greater discretion when the citizenry is faced with a terrorist attack?

But while the Supreme Court's deliberations on the matter of terrorism have focused on attacks on Americans, the question of terrorism aimed at foreign countries and populations has not been adequately addressed. The Court's analytical dynamic regarding terrorism has typically involved an examination of whether an exception should apply to the given rule when there is a possibility of an attack against America. More often than not, the answer is yes, but with respect to terrorism taking place abroad against foreign targets, the Court has not provided a ready answer.

B. Post-9/11 War on Terror Cases

Since 9/11, the Supreme Court has had several occasions to address one specific issue engendered by the U.S. response to those attacks: What type of review is available to those individuals captured abroad whom the military suspects of being an "enemy combatant" in the service of al-Qaeda or the Taliban? These decisions have guided the development of what Professor Baher Azmy calls "a new common law of habeas," which has emerged as a result of the government's efforts to try suspected al-Qaeda and Taliban fighters in military commissions.¹³⁴ More importantly, these decisions suggest that the Court has now adopted a conceptualization of terrorism that views it as an existential threat to American civilization. Throughout the five major opinions in this area, *Rumsfeld v. Padilla*,¹³⁵ *Rasul v. Bush*,¹³⁶ *Hamdi v. Rumsfeld*,¹³⁷ *Hamdan v. Rumsfeld*,¹³⁸ and

134. Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010).

135. 542 U.S. 426 (2004).

136. 542 U.S. 466 (2004).

137. 542 U.S. 507 (2003).

Boumediene v. Bush,¹³⁹ terrorism is linked to attacks on the United States.¹⁴⁰ While not stated explicitly, the implication of these rulings is that the war on terrorism is really concerned with groups that target the United States. Even so, habeas cannot be suspended for those active in such groups. Despite the fact that the individuals detained as enemy combatants at the U.S. naval base in Guantanamo Bay, Cuba are accused of posing a direct threat to the United States, the Court, over impassioned dissent,¹⁴¹ eventually held that they are entitled to habeas corpus hearings in federal court to challenge the status of their detention.¹⁴²

IV. *HOLDER V. HUMANITARIAN LAW PROJECT*—DESCRIBING A WORLD WHERE TERRORISM IS THE ENEMY, NOT ANY ONE GROUP

In *Holder v. Humanitarian Law Project* (“HLP”), the Supreme Court, in an opinion authored by Chief Justice Roberts, upheld the constitutionality of 18 U.S.C. § 2339B, the criminal prohibition on providing material support to designated Foreign Terrorist Organizations (“FTOs”), against various First and Fifth Amendment challenges.¹⁴³ The opinion marked the culmination of a “complicated” jaunt through the lower federal courts, spanning some twelve years.¹⁴⁴ Despite the lengthy procedural history, the unusual nature of the action—a civil suit seeking a pre-enforcement

138. 548 U.S. 557 (2006).

139. 553 U.S. 723 (2008).

140. *See, e.g., id.* at 797–98 (“Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.”).

141. *See id.* at 827–28 (Scalia, J., dissenting) (“The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.”).

142. *See id.* at 798 (majority opinion).

143. *See* 130 S. Ct. 2705, 2712 (2010).

144. *Id.* at 2716. In addition to the dispute over § 2339B, the *Humanitarian Law* plaintiffs brought a second suit, which was ultimately dismissed, to enjoin the government from declaring the groups “Specially Designated Global Terrorists,” a designation that functions similarly to FTO status, but derives from an Executive Order issued under the authority of the International Emergency Economic Powers Act (IEEPA). *Humanitarian Law Project v. U.S. Dep’t of Treas.*, 578 F.3d 1133, 1138 (9th Cir. 2009).

review of the use of a federal criminal statute—necessitated a finding by the Supreme Court that the plaintiffs “faced a credible threat of prosecution,” thereby constituting a justiciable case or controversy under Article III of the United States Constitution.¹⁴⁵

A. Section 2339B

Section 2339B, enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA)¹⁴⁶ by Congress in 1996 in the wake of the 1995 Oklahoma City bombing and a series of roughly contemporaneous suicide bombing attacks in the Middle East, was crafted to fill a gap left open by § 2339A, which was passed in 1994.¹⁴⁷ To respond to the perceived problem of terrorist groups raising money under the cover of humanitarian aid, § 2339B effectively closed any existing loophole, forbidding material support to an FTO for whatever reason—humanitarian, violent, or otherwise.¹⁴⁸ In support of § 2339B, Congress made an explicit finding that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”¹⁴⁹ The statute does not require that any material support be linked to a violent act, and a conviction can bring a sentence of up to fifteen years in prison (or

145. See *Humanitarian Law*, 130 S. Ct. at 2717 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)) (internal quotation marks omitted) (“Based on these considerations, we conclude that plaintiffs’ claims are suitable for judicial review (as one might hope after 12 years of litigation).”).

146. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

147. 18 U.S.C. § 2339A (2006) (criminalizing the provision of material support to politically motivated act of violence). Section 2339A(6)(1) defines material support or resources as

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials

Id.; see also Said, *supra* note 13, at 556.

148. See Said, *supra* note 13, at 556.

149. § 301, 110 Stat. at 1247 (making a finding, inter alia, that certain foreign terrorist groups raised funds for violent activity in the United States under humanitarian pretenses). This finding has been cited with approval by many courts reviewing the statute, including the Supreme Court in *HLP*. See Said, *supra* note 13, at 577 n.200 (citing cases).

life if a death occurs on account of the support),¹⁵⁰ although the use of consecutive sentences to punish multiple convictions is not unheard of in § 2339B prosecutions.¹⁵¹

The power to designate an FTO lies with the Secretary of State, who, in consultation with the Attorney General and the Secretary of the Treasury, may designate a group provided it (1) is foreign; (2) has engaged in “terrorism” or “terrorist activity”;¹⁵² and (3) “threatens the security of United States Nationals or the national security of the United States.”¹⁵³ While the “security of United States nationals” is clear enough, the relevant statute defines

150. 18 U.S.C. § 2339B(a)(1) (“Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.”).

151. See *United States v. Al-Moayad*, 545 F.3d 139, 145, 159 (2d Cir. 2008) (overturning § 2339B convictions and sentences of forty-five and seventy-five years on account of cumulative and prejudicial errors at trial); *United States v. Hammoud*, 381 F.3d 316, 354 (4th Cir. 2004) (upholding a 155-year sentence), *vacated*, 543 U.S. 1097 (2005); Jason Trahan, *5 Dcery Jail Terms in Holy Land Foundation Case*, DALL. MORNING NEWS, May 28, 2009 (State and Regional News); Press Release, Dep’t of Justice, Mohamad Youssef Hammoud Sentenced to 30 Years in Terrorism Financing Case (Jan. 27, 2011), *available at* <http://www.justice.gov/usao/nw/press/hammoudsentence.html>; Press Release, Fed. Bureau of Investigation, Federal Judge Hands Down Sentences in Holy Land Foundation Case (May 27, 2009), *available at* <http://dallas.fbi.gov/dojpressrel/pressrel09/dl052709.htm>.

152. “Terrorist activity” is defined as follows:

[T]he term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

- (I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.
- (IV) An assassination.
- (V) The use of any—
 - (a) biological agent, chemical agent, or nuclear weapon or device, or
 - (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),
 with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
- (VI) A threat, attempt, or conspiracy to do any of the foregoing.

8 U.S.C. § 1182(a)(3)(B)(iii).

153. *Id.* § 1189(a)(1), (d)(4).

“national security” as the far murkier “national defense, foreign relations, or economic interests of the United States.”¹⁵⁴ An FTO may seek judicial review of its status in the D.C. Circuit within thirty days of being so designated.¹⁵⁵ Although to date no designation has been overturned, the court has twice remanded designation decisions to the Secretary of State, with instructions to convene a hearing and allow the FTO’s representatives challenging the group’s status greater access to any unclassified information relied upon in making the designation.¹⁵⁶ The D.C. Circuit has so far refused to review the Secretary’s determination that an FTO threatens the security of U.S. nationals or American national security, effectively insulating that type of political decision from judicial review.¹⁵⁷

This is a critical point in any discussion of the government’s response to terrorism. While the previous sections of this Article have highlighted the Supreme Court’s encounters with terrorism, both international and domestic, and explained that the Supreme Court has settled on a generalized understanding of the phenomenon as being politically motivated violence against civilian targets, other legislative and prosecutorial efforts to tackle the problem have been rooted in an American nexus. This may be because, in the cases before the Supreme Court, Americans had either been directly targeted or directly harmed and, on that basis, the Supreme Court would recognize exceptions to constitutional doctrine. Dissimilarly, in the FTO designation-debate context, FTOs with no direct quarrel with the United States are forbidden from making arguments related to their particular cause and how it should not be perceived as inimical to American interests. Section 2339B therefore equates the threat to national security with the more nebulous threat to U.S.

154. *Id.* § 1189(d)(2).

155. *See id.* § 1189(c)(1).

156. *See* People’s Mojahedin Org. of Iran v. Dep’t of State, 613 F.3d 220, 231 (D.C. Cir. 2010) (remanding while leaving the designation intact); *Chai v. Dep’t of State*, 466 F.3d 125, 134 (D.C. Cir. 2006) (upholding the designation); *Nat’l Council of Resistance of Iran v. Dep’t of State*, 373 F.3d 152, 159–60 (D.C. Cir. 2004) (upholding the designation); *People’s Mojahedin Org. of Iran v. Dep’t of State*, 327 F.3d 1238, 1245 (D.C. Cir. 2003) (upholding the designation); *32 Cnty. Sovereignty Comm. v. Dep’t of State*, 292 F.3d 797, 799–800 (D.C. Cir. 2002) (upholding the designation); *Nat’l Council of Resistance of Iran (NCRI) v. Dep’t of State*, 251 F.3d 192, 209 (D.C. Cir. 2001) (remanding while leaving the designation intact); *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 20 n.3, 24–25 (D.C. Cir. 1999) (upholding the designation).

157. *See People’s Mojahedin*, 182 F.3d at 23; *see also* Said, *supra* note 13, at 562–63.

foreign relations or economic interests, accordingly imbuing the counterterrorist paradigm with a broader and more politicized framework.

B. The Plaintiffs

This dynamic was reflected in the facts of the *HLP* litigation. The plaintiffs, two U.S. citizens and six domestic organizations, wished to provide material support to two designated FTOs: the Partiya Karkeran Kurdistan (PKK), a Kurdish separatist group at war with the Republic of Turkey, and the Liberation Tigers of Tamil Eelam (LTTE), a group that was ultimately defeated by the Sri Lankan army in April 2009 after a decades-long struggle to establish a Tamil homeland in that island republic.¹⁵⁸ While it was beyond dispute that both groups engaged in politically motivated violence against civilians, the plaintiffs expressed their desire to provide financial support, specialized training, and engage in political advocacy on behalf of the groups' political and humanitarian goals.¹⁵⁹ Given the likelihood of prosecution if they were to go forward with their plans to provide the support noted above, they moved for a preliminary injunction on three grounds: (1) § 2339B violated the freedom of speech and association guarantees of the First Amendment because it failed to require that the government prove a specific intent on the part of the accused to support the illegal goals of an FTO, (2) § 2339B was unconstitutionally vague, and (3) the Secretary of State's unreviewable authority of FTOs invited impermissible viewpoint discrimination.¹⁶⁰ The *HLP* litigation ultimately produced eight written opinions between the District Court and the Court of Appeals.¹⁶¹

158. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2713–14 (2010); Jon Lee Anderson, *Death of the Tiger: Sri Lanka's Brutal Victory over its Tamil Insurgents*, NEW YORKER, Jan. 17, 2011, at 41 (detailing the defeat of the LTTE). One of the plaintiffs was a retired administrative law judge who had set up the Humanitarian Law Project, a human-rights NGO enjoying consultative status with the United Nations. See *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1188–89 & n.1 (C.D. Cal. 2004). This status, which renders the group “available for consultation at the request of the [UN],” derives from its ability to “make occasional and useful contributions to the work of the [UN].” E.S.C. Res. 1996/31, U.N. Doc. E/RES/1996/96, at Part III ¶ 24 (July 25, 1996).

159. *Humanitarian Law*, 130 S. Ct. at 2714.

160. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1184–85 (C.D. Cal. 1998).

161. See *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2009), *aff'd in*

C. Specific Intent

Throughout the *HLP* litigation, both the District Court and the Ninth Circuit rejected the plaintiffs' First Amendment challenges, and refused to read a specific intent requirement into the statute.¹⁶² The theory underpinning not only this ruling, but § 2339B itself, is that “money is fungible”; i.e., funds sent to an FTO for humanitarian purposes can free up money to purchase weapons, and therefore a § 2339B defendant need not have a specific intent to further violence when providing material support, given the danger inherent in such activity.¹⁶³ In a subsequent ruling, the Ninth Circuit spelled out that the *mens rea* requirement for § 2339B liability is a defendant's knowledge that an FTO had been designated or that it had committed violent acts amounting to terrorism.¹⁶⁴ In December 2004, Congress codified this standard in the Intelligence Reform and Terrorism Prevention Act.¹⁶⁵

part, rev'd in part, remanded by 130 S. Ct. 2705 (2010); *Humanitarian Law Project v. U.S. Dep't of Justice*, 393 F.3d 902 (9th Cir. 2004); *Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003), *vacated on reh'g en banc*, 393 F.3d 902 (9th Cir. 2004); *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000); *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134 (C.D. Cal. 2005), *aff'd in part, rev'd in part, remanded by* 130 S. Ct. 2705 (2010); *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004); *Humanitarian Law Project v. Reno*, 2001 U.S. Dist. LEXIS 16729 (C.D. Cal. 2001), *aff'd in part, rev'd in part*, 352 F.3d 382 (2003); *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d at 1176.

162. *See* *Humanitarian Law Project v. Reno*, 205 F.3d at 1133–34; *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d at 1196–97. To date no litigant has been successful on a similar First Amendment challenge to § 2339B. *See, e.g.*, *United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004), *vacated*, 543 U.S. 1097 (2005).

163. *See* *Humanitarian Law Project v. Reno*, 205 F.3d at 1136 (“[A]ll material support given to such organizations aids their unlawful goals. Indeed, as the government points out, terrorist organizations do not maintain open books. Therefore, when someone makes a donation to them, there is no way to tell how the donation is used. Further, as amicus Anti-Defamation League notes, even contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts. We will not indulge in speculation about whether Congress was right to come to the conclusion that it did. We simply note that Congress has the fact-finding resources to properly come to such a conclusion. Thus, we cannot say that AEDPA is not sufficiently tailored.”).

164. *See* *Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d at 402–03.

165. *See* 18 U.S.C. § 2339B(a)(1) (2006) (as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, 118 Stat. 3638); *Humanitarian Law Project v. Mukasey*, 552 F.3d at 925 (“In December 2004, Congress passed IRTPA that revised AEDPA to essentially adopt our reading of AEDPA § 2339B to

By the time the issue reached the Supreme Court, the plaintiffs had narrowed their argument to a specific intent requirement only where the material support provided was limited to speech, thereby hoping to avoid urging the Court to rule on issues of constitutional law.¹⁶⁶ The Court rejected this position as well, finding that, as an initial matter, Congress “plainly” spelled out the mens rea standard as requiring knowledge only.¹⁶⁷ In the Court’s view, this position was fortified by the fact that Congress included a specific intent requirement in § 2339A (the ban on providing material support in aid of violent acts) and § 2339C (providing funds for unlawful terrorism-linked crimes), but neglected to do so both in passing § 2339B in 1996 and in amending it in 2004.¹⁶⁸ As for the plaintiffs’ argument that a specific intent requirement should be read into the statute when the material support takes the form of speech, the Court remarked that “[t]here is no basis whatever in the text of §2339B to read the same provisions in that statute as requiring intent in some circumstances but not others,” and as a result declined what it considered to be an invitation to judicially revise the statute.¹⁶⁹

Finally, the Court rejected the plaintiffs’ reliance on *Scales v. United States*, which held that an individual could not be convicted under the membership provisions of the Smith Act unless he possessed a specific intent to bring about the group’s illegal goals, i.e., the overthrow of the United States government.¹⁷⁰ In the majority’s view, the key point of distinction was that *Scales* dealt with a ban on mere membership, while § 2339B focuses squarely on conduct.¹⁷¹ The Court also pointed out how the holding in *Scales* “relied on both statutory text and precedent that had interpreted closely related provisions of the Smith Act to require specific intent,” as opposed to the distinctions in § 2339A–C.¹⁷²

include a knowledge requirement.”).

166. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717–18 (2010).

167. See *id.* at 2717.

168. See *id.* at 2717–18.

169. *Id.* at 2718.

170. See *id.* (citing *Scales v. United States*, 367 U.S. 203, 211 (1961)).

171. See *id.*; see also Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 84–85 (2005) (voicing a similar point).

172. *Humanitarian Law*, 130 S. Ct. at 2718.

The Supreme Court's ruling rejected the idea that a specific intent requirement was the culmination of a long, yet unsuccessful battle in litigation and print waged on many fronts and led by Professor David Cole, counsel for the *HLP* plaintiffs for the duration of the action.¹⁷³ While much could be said about the Court's holding on this point,¹⁷⁴ what is most noteworthy is the brevity of the Court's analysis, which is rooted in a strict distinction based on form, not substance. Unelaborated, the distinction itself appears artificial and unconvincing; are there not situations where membership represents a stronger show of support for a group's violent goals than providing "material support" in all its manifestations for the political and humanitarian missions of an FTO?¹⁷⁵ In dissent, Justice Breyer crafted a careful argument in support of the plaintiffs' position, relying on the difference between material support in the true sense of the word and material support as speech or association.¹⁷⁶ In addition to previous First Amendment jurisprudence and canons of statutory construction, the dissent also

173. See Said, *supra* note 13, at 582–84 nn.228–33 and accompanying text.

174. See *id.* at 582–93.

175. See David H. Pendle, Comment, *Charity of the Heart and Sword: The Material Support Offense and Personal Guilt*, 30 SEATTLE U. L. REV. 777, 801–02 (2007) ("But it is possible that even seemingly harmless aid could have the effect of bolstering the organization's reputation, which could thereby indirectly strengthen its ability to carry out terrorist attacks. However, by permitting membership, comparable reputational benefits could have accrued to the Communist Party through increasing the number of its official supporters. But the *Scales* Court determined that this 'sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing' was still too tenuous a relationship with the underlying substantive illegal conduct to justify imposing guilt without individual culpability. Similarly, any moral encouragement an FTO obtains from receiving training in international law, from knowing that the children under its control are being educated and fed, or from rejoicing that the wrongs its ethnic group has suffered at the hands of its government are being publicized internationally, is not sufficiently related to the promotion of international terrorism to justify imposing personal guilt on those who provided such support. This type of humanitarian conduct has neither the intent nor the substantive effect of strengthening international terrorism. Even if the donor knows the recipient is a designated FTO, a donation of this sort falls far short of some 'significant action' in support of the 'criminal enterprise.' In fact, unlike the defendant's membership in *Scales*, which was held to be constitutionally protected, this type of humanitarian conduct may even fall short of a 'mere . . . expression of sympathy with the alleged criminal enterprise.' With this form of support, the donor may actually intend that the organization renounce its illegal objectives and pursue strictly nonviolent goals. Or the donor may want nothing to do with the objectives of the FTO, but merely intend to assist people who live under the FTO's control in a time of need. Thus, the causal connection between the conduct and the crime, if existent, is weak." (alteration in original) (footnotes omitted) (quoting *Scales v. United States*, 367 U.S. 283 (1961))).

176. *Humanitarian Law*, 130 S. Ct. at 2739–42 (Breyer, J., dissenting).

noted the multiple and consistent examples in the legislative history of § 2339B indicating that nothing in its provisions should contradict the rights to freedom of speech and association.¹⁷⁷ The Court dismissed these concerns with nary a mention in this portion of its opinion, although it did engage with them more fully in its discussion of the First and Fifth Amendment challenges.¹⁷⁸

D. Vagueness

At the district court level, the plaintiffs successfully argued that the prohibition against providing material support in the form of “training,” “expert advice or assistance,” “service,” and “personnel” was unconstitutional under the vagueness doctrine of the Fifth Amendment’s Due Process Clause.¹⁷⁹ On appeal, the Ninth Circuit upheld the plaintiffs’ argument with respect to “training,” “expert advice or assistance,” and “service,” but rejected it as to “personnel.”¹⁸⁰ The Court first criticized the Ninth Circuit for confusing the vagueness analysis by importing aspects of First Amendment overbreadth doctrine to rule on an entirely hypothetical situation.¹⁸¹ Specifically, the Ninth Circuit had based its ruling in part on the government’s assertion that § 2339B prohibited the filing of an amicus brief on behalf of an FTO, an activity in which the plaintiffs had not asserted they wished to engage.¹⁸² Given the speculative nature of the argument, the Court found that the Ninth Circuit’s reasoning risked rendering both the vagueness and overbreadth doctrines redundant, and proceeded to conduct what it considered to be the proper vagueness analysis.¹⁸³

The plaintiffs, wishing to support the PKK, expressed their desire to carry out several types of activities that would be banned under § 2339B, namely, “(1) ‘train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes’; (2) ‘engag[ing] in political advocacy on behalf of Kurds

177. *See id.*

178. *Id.* at 2718–31 (majority opinion).

179. *Id.* at 2714–16.

180. *Id.* at 2716 (citing *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 929–31 (9th Cir. 2009), *aff’d in part, rev’d in part and remanded sub nom. Humanitarian Law*, 130 S. Ct. 2705).

181. *Id.* at 2719.

182. *See id.*

183. *See id.* at 2719–22.

who live in Turkey’; and (3) ‘teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief.’”¹⁸⁴ The LTTE plaintiffs had originally articulated several types of support but, because of the LTTE’s military defeat at the hands of the Sri Lankan army, limited their position to supporting the LTTE “as a political organization outside Sri Lanka advocating for the rights of Tamils.”¹⁸⁵

The Court rejected the vagueness challenges to all four terms. With respect to whether material support included “training” and “expert advice or assistance,” the Court found that the terms were clear as applied to what the plaintiffs proposed to do.¹⁸⁶ In response to the plaintiffs’ arguments (and illustrative hypothetical examples) that the terms would prohibit far too much activity, the Court was unmoved: “Plaintiffs do not propose to teach a course on geography, and cannot seek refuge in imaginary cases that straddle the boundary between ‘specific skills’ and ‘general knowledge.’”¹⁸⁷ The failure to articulate concrete activities that the plaintiffs wished to perform doomed their challenge to these two terms.

With respect to the meaning of “personnel,” the Court found the statute to be clear in its prohibition; working under the direction of an FTO or running its affairs constituted the illegal provision of material support in the form of “personnel.”¹⁸⁸ The Court relied on the fact that § 2339B permitted independent advocacy on behalf of an FTO in support of its goals, provided there was no relationship linking the individual and the group.¹⁸⁹ Similarly, this rationale applied to “service,” as “a person of ordinary intelligence would understand that independently advocating for a cause is different

184. *Id.* at 2716 (alteration in original) (quoting *Mukasey*, 552 F.3d at 921 n.1).

185. *Id.* (quoting Opening Brief for Humanitarian Law Project, et al. at 11 n.5, *Humanitarian Law*, 130 S. Ct. 2705 (No. 09-89)) (noting that the desire to help the LTTE present claims for tsunami-related aid to international relief agencies and provide legal advice on negotiating peace agreements with the government of Sri Lanka were moot due to the group’s eviction from the country).

186. *Id.* at 2720–21.

187. *Id.* at 2721 (citing *Parker v. Levy*, 417 U.S. 733, 756 (1974)).

188. *Id.* This reasoning mirrors, to a certain extent, the Court’s ruling and rationale in *Citizens United v. Federal Election Commission*, decided the same term as *Humanitarian Law*, which held that corporations have a First Amendment right to engage in advocacy on behalf of a given political candidate or cause, on the condition that they do so independently. *See* 130 S. Ct. 876, 908–13 (2010).

189. *See Humanitarian Law*, 130 S. Ct. at 2721.

from providing a service to a group that is advocating for that cause.”¹⁹⁰ The chief weakness of this argument lies in its seeming lack of concern for the results of such independent advocacy. If FTOs are “so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct,”¹⁹¹ there is a legitimate question as to why it should make any difference whether the contribution—in this case, advocacy—came independent of the group, as long as the contribution provides a tangible benefit.

This criticism also holds true for the Court’s negative construction of the types of “service” the plaintiffs wished to provide as too hypothetical, mirroring the same reasoning it applied with respect to “training” and “expert advice or assistance.”¹⁹² Where the plaintiffs questioned whether § 2339B delineated how to distinguish between illegal coordination and independent action, the Court deemed their concerns as “entirely hypothetical,” since they described “their intended advocacy only in the most general terms” without detailing how they might coordinate their activities with the FTOs in question.¹⁹³ In making these statements, the Court expressly noted what the plaintiffs intended to do. But for § 2339B’s prohibitions, the plaintiffs would “offer their services to advocate on behalf of the rights of the Kurdish people and the PKK before the United Nations and the United States Congress”,¹⁹⁴ “write and distribute publications supportive of the PKK and the cause of Kurdish liberation”; and “advocate for the freedom of political prisoners in Turkey.”¹⁹⁵ The Court then dismissed the pre-enforcement challenge on the basis that it would require “sheer

190. *Id.* at 2722.

191. *Id.* at 2724 (quoting Anti-Terrorism and Effective Death Penalty Act of 1996, § 301(a)(7), Pub. L. No. 104-32, 110 Stat. 1247).

192. *See id.* at 2722.

193. *Id.* (quoting plaintiffs’ reply brief, Reply Brief for Humanitarian Law Project, et al. at 14, *Humanitarian Law*, 130 S. Ct. 2705 (No. 09-89), as asking, “Would any communication with any member be sufficient? With a leader? Must the relationship have any formal elements, such as an employment or contractual relationship? What about a relationship through an intermediary?”).

194. *Id.* (quoting Opening Brief for Humanitarian Law Project, et al. at 10–11, *Humanitarian Law*, 130 S. Ct. 2705 (No. 09-89)).

195. *Id.* (quoting Joint Appendix at 59, *Humanitarian Law*, 130 S. Ct. 2705 (No. 09-89), 2009 WL 3877534, at *59).

speculation” as to whether “activities described at such a level of generality” would constitute a “service” under the statute.¹⁹⁶

In characterizing the challenge as speculative and not presenting a concrete factual situation, the Court stretched in its interpretation of what the plaintiffs were proposing to do. Namely, it does not take too much speculation, if any at all, to figure out what the plaintiffs intended to accomplish if they were released from § 2339B’s expansive terms. In advocating before the United States Congress, they would be trying to get the PKK removed from the FTO list. If they went before the United Nations, they would be trying to garner international legitimacy “for the cause of Kurdish liberation.” Likewise, liberating political prisoners in Turkey is a specific activity that does not require too much conjecture in order to surmise its ultimate goal. But even if those activities are too general, and it is fair to say that reasonable interpretations may vary, especially considering the unknown nature of what the plaintiffs would propose to do before Congress or the United Nations, it is hard to see how “writ[ing] and distribut[ing] publications supportive of the PKK and the cause of Kurdish liberation” is speculative, since it speaks to a direct and concrete activity. The plaintiffs’ vagueness challenge raised the issue of whether distributing PKK literature (or propaganda) violates § 2339B. That point seems clear and specific, and the Supreme Court should have answered the question, even in the pre-enforcement context.

But beyond even these particular points, Chief Justice Roberts’s opinion on the matter of vagueness comes off as a bit rigid in its interpretation of what the plaintiffs were asking. It seemed relatively clear that the challenge to the term “service” encompassed an inquiry into whether the plaintiffs could try to garner support for an FTO in the United States, as long as they did not endorse or further violence. Characterizing these issues as speculative, when there was at least one unambiguous example given—distributing literature—seems like a stretch. While the Court may have wished to avoid ruling on the plaintiffs’ vagueness challenge, choosing to cloak its holding in a reluctance to indulge speculation strains credulity because the plaintiffs made their position clear. They wanted to garner support in the United States and at the United Nations for what they perceived to be the just goals of the FTOs in question, but

196. *Id.*

eschew any support or effort that could result in violence. The way organizations generally do that is via well-known and well-worn forms of advocacy: lobbying government officials, garnering popular support by distributing literature and holding informational sessions, etc. While it is true that the plaintiffs did not spell out in detail the exact activities they contemplated, by requiring them to do so the Court seems to be formalistically insisting on their jumping through somewhat contrived hoops.¹⁹⁷

E. First Amendment Challenges—Freedom of Speech

The Court next turned to the plaintiffs' First Amendment challenges to § 2339B, arguing that its provisions violated their rights to freedom of speech and association. Chief Justice Roberts' majority opinion devoted much greater attention to the freedom of speech challenge than it devoted to the freedom of association challenge.¹⁹⁸ And in so doing, the Court returned to some of the themes articulated earlier in the opinion and elaborated on several of the theoretical and factual bases it used to support its conclusions.

1. Standard of review

The first issue the Court had to work out was the type of scrutiny with which it should review § 2339B. The Court remarked that both the plaintiffs and the government had taken "extreme positions" on the issue of speech and chastised both parties for their respective stands.¹⁹⁹ In response to the plaintiffs' argument that § 2339B bans "pure political speech," the Court directly disagreed, relying on reasoning it had employed earlier in the opinion to distinguish between speech, which is allowed, and material support, which is banned.²⁰⁰ The Court also rejected the government's

197. In dissent, Justice Breyer takes issue with the majority's characterization of the plaintiffs' proposed activities as "lacking specificity," and would have remanded the matter to the lower courts to examine in detail what activities might demand declaratory and injunctive relief. *Id.* at 2742–43 (Breyer, J., dissenting).

198. Compare *id.* at 2722–30 (majority opinion) (discussing freedom of speech), with *id.* at 2730–31 (discussing freedom of association).

199. *Id.* at 2722.

200. *Id.* at 2722–23 ("Under the material-support statute, plaintiffs may say anything they wish on any topic. . . . Congress has prohibited 'material support,' which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign

argument that what was really in dispute in the case was conduct, not speech, finding unpersuasive the stance that intermediate scrutiny should apply, as § 2339B was not analogous to a statute criminalizing the burning of one's draft card.²⁰¹ Consequently, although the Court determined that § 2339B targeted conduct, because the plaintiffs desired to "communicat[e] a message" of specialized knowledge to the FTOs, the Court determined that speech was at issue and concluded that "more rigorous scrutiny" should therefore apply.²⁰² Interestingly, the Court did not use the term "strict scrutiny."²⁰³

2. *The issue and subsequent analysis*

In rejecting both positions, the Court reformulated the issue at hand in pursuit of the following inquiry: "whether the Government may prohibit what plaintiffs want to do—provide material support to the PKK and LTTE in the form of speech."²⁰⁴ At first, the Court noted, the plaintiffs did not dispute the validity of the government's interest in combating terrorism.²⁰⁵ Within this general counterterrorism paradigm then, the plaintiffs tried to distinguish their proposed support from what the statute should target. They argued that "combating terrorism does not justify prohibiting their speech . . . because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism."²⁰⁶

How the Court responded to this position allows for a lengthier analysis of the assumptions and findings upon which it relied.

groups that the speaker knows to be terrorist organizations." (footnote omitted)).

201. *See id.* (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

202. *Id.* at 2724 (likening the case to *Cohen v. California*, 403 U.S. 15, 16, 18–19 (1971), in which a law barring disturbing the peace received strict scrutiny because the conduct at issue consisted of wearing a jacket displaying an obscenity).

203. *See* William D. Araiza, *Citizens United, Stevens, and Humanitarian Law Project: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 831 (2011), available at <http://ssrn.com/abstract=1717049> (noting that the Court recites the formula for strict scrutiny without using the term, preferring instead "more demanding scrutiny").

204. *Humanitarian Law*, 130 S. Ct. at 2724.

205. *See id.* What is noteworthy is that the Court recognizes the open-ended nature of the government's interest; the concern is fighting terrorism, presumably wherever it may occur and regardless of target, not merely terrorism against the United States. *See id.*

206. *Id.* (citing Opening Brief for Humanitarian Law Project, et al. at 51–52, *Humanitarian Law*, 130 S. Ct. 2705 (No. 09-89)).

Deeming the inquiry into whether FTOs separate their legitimate activities from violence as “an empirical question,” the Court began by citing Congress’s finding that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct.”²⁰⁷ The import of this point was to demonstrate Congress’s stated belief that any aid to an FTO furthers violence, no matter its direct use. Coupled with Congress’s repeal of a provision in § 2339A that allowed for humanitarian aid to individuals unconnected to violence, the Court concluded that peaceful assistance, whether monetary or otherwise, was not allowed under the statute.²⁰⁸

3. *Material support providing “legitimacy”*

When Chief Justice Roberts’s opinion cited the evidence in support of this position, his argument began to lose its bearings. It made reference to an affidavit that a State Department official had submitted at the outset of the *HLP* litigation in 1998 that was included in the record before the Supreme Court.²⁰⁹ On the basis of what was a twelve-year-old declaration, the Court went beyond the familiar “money is fungible” argument to state that material support, no matter what guise it takes, “frees up other resources within the organization that may be put to violent ends.”²¹⁰ Specifically, the Court highlighted that material support allows FTOs to derive “legitimacy” and that such “legitimacy . . . makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.”²¹¹

Confusingly, in support of its position on the illegality of promoting “legitimacy,” the Court cited only four sources suggesting that money is fungible, and that terrorist organizations—in general—are not known for erecting institutional “firewalls” to prevent commingling of funds between their nonviolent and violent

207. *Id.* (quoting Anti-Terrorism and Effective Death Penalty Act of 1996, § 301(a)(7), Pub. L. No. 104-32, 110 Stat. 1247); *see also supra* note 150.

208. *See Humanitarian Law*, 130 S. Ct. at 2725.

209. *See* Joint Appendix, *Humanitarian Law*, 130 S. Ct. 2705 (No. 09-89); William D. Araiza, *Justice Stevens and Constitutional Adjudication: The Law Beyond the Rules*, 44 LOY. L.A. L. REV. (forthcoming 2011) (manuscript at 39 n.272), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758021.

210. *Humanitarian Law*, 130 S. Ct. at 2725.

211. *Id.*

wings.²¹² In addition to the affidavit submitted by the State Department official, the sources cited included a book by a former Treasury Department official on the FTO Hamas, as well as the amicus brief of the Anti-Defamation League, which also used the example of Hamas as a group commingling funds between its political and violent wings.²¹³

That the government cited such a limited number of sources in support of its position on the illegality of promoting legitimacy is troubling on several levels.

First, after the billions of dollars that the government has spent on fighting a war on terror in the last ten years, was there no better official statement available than an affidavit dating from 1998? Surely the government could have produced something more up-to-date in support of its assertions about the PKK and LTTE's financial structure. After all, much has changed in the realities facing both the PKK and the LTTE since 1998,²¹⁴ and those changed realities and how they might have affected the structure of the two groups should be reflected in the official record. It is of concern that in assessing what the government considers a potential threat to national security, it saw fit to rely on outdated information, and the Court went along with that position accordingly.²¹⁵

Second, the only other group mentioned is Hamas, which is problematic in two ways, one quantitative, another qualitative. As to the former point, out of forty-nine banned FTOs,²¹⁶ the Court uses this single example. In dealing with the phenomenon of subnational or non-state actors engaging in violence for political purposes, can the example of one group serve as a model for all? Phrased differently, even assuming the validity of the argument in the case of Hamas, does the argument that Hamas commingles funds mean that

212. *Id.* at 2725–26.

213. *See id.*

214. *See* Anderson, *supra* note 158 (detailing military defeat of LTTE in 2009); Craig S. Smith & Sebnem Arsu, *European Court Urges Turkey to Grant Kurdish Leader a New Trial*, N.Y. TIMES, May 13, 2005, at A5 (noting that PKK leader Abdullah Ocalan was captured by Turkish forces in 1999, tried and convicted of treason, and is serving a life sentence in Turkey).

215. Indeed, the majority complains about the dissent's insistence on more specific evidence and detail than that cited in the record, and notes that to require the government to make a greater showing would be "dangerous." *Humanitarian Law*, 130 S. Ct. at 2727–28.

216. Office of the Coordinator for Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, <http://www.state.gov/s/ct/rls/other/des/123085.htm> (last visited Oct. 7, 2011) (listing forty-nine groups as FTOs).

all of the groups on the FTO list do so? When combating armed threats, it would pay to have more precise information on which to base a conclusion than the assertion of interested parties to a litigation speaking as to one group. The implication here is that all terrorist groups operate the same way and are to be treated as such because nothing they say or do can be considered legitimate, regardless of their cause or ultimate goal. On the qualitative point, the example of Hamas is telling. Neither the PKK nor the LTTE, the two FTOs at the heart of the *HLP* litigation, are Islamist groups, whereas Hamas, an Arabic acronym of its formal name, the Islamic Resistance Movement, is.²¹⁷ While the choice of Hamas as the sole nonparty FTO may have been coincidental, when significant sections of officialdom and the populace view anyone who is Muslim with suspicion,²¹⁸ coupled with the centrality of al-Qaeda as the chief enemy in the war on terror, introducing an Islamist group here is a neat trick. Because al-Qaeda is not a good example, as it has only a violent wing,²¹⁹ bringing up one of the other detested Islamist bogeymen is a way of diverting attention from the specific examples of the PKK and LTTE to underscore the most unnerving and misunderstood aspects of the war on terror.²²⁰ Suggested, but not

217. The name “Hamas,” which means “zeal” in Arabic, derives from the first letter of each of the three Arabic words in its formal name—Harakat (Movement) al-Muqawama (Resistance) al-Islamiyya (Islamic). See Khaled Hroub, *HAMAS, A BEGINNER’S GUIDE* (2d ed. 2010).

218. See, e.g., Samuel G. Freedman, *A Dispiriting Time for Muslims on Capitol Hill*, N.Y. TIMES, Mar. 12, 2011, at A16 (discussing hearings in the House of Representatives geared at studying the problem of “the radicalization of American Muslims”); Spencer Ackerman, *New Evidence of Anti-Islam Bias Underscores Deep Challenges for FBI’s Reform Pledge*, WIRED.COM, <http://www.wired.com/dangerroom/2011/09/fbi-islam-domination/all/1> (highlighting the use of anti-Muslim materials in FBI counterterrorism training courses); see also Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833 (2011) (arguing that law enforcement agencies rely too heavily, and often erroneously, on religious speech by Muslims in America as evidence of terrorist associations).

219. See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 14 (2003) (“An organization like Al Qaeda may present a special case, for it does not appear to have legal purposes at all. Unlike, say, the Irish Republican Army, the Palestinian Liberation Organization, or the ANC, groups with political agendas that use violent means among many others, Al Qaeda appears to do little more than plot, train for, and conduct terrorism. But if that is the case, we do not need guilt by association. It ought to be relatively simple to establish that when an individual affirmatively supports Al Qaeda, he intends to support its terrorist ends, because Al Qaeda has few if any other ends.”); see also *United States v. Warsame*, 537 F. Supp. 2d 1005, 1015 (D. Minn. 2008) (“Al Qaeda is not a political advocacy group.”).

220. Indeed, a focus on Hamas also informs an amicus brief submitted on behalf of

stated outright, is that support for the PKK or LTTE is just like support for America's Islamist enemies in the war on terror.

In dissent, Justice Breyer challenged the accuracy of the assertion that material support promoting legitimacy can be outlawed, pointing out that it is not at all clear how advocacy and petitioning the United Nations are fungible in the same way as money, food, or computer training.²²¹ In his view, “[t]he Government has provided us with no empirical information that might convincingly support this claim.”²²² He noted that all the evidence before the Court—the State Department affidavit and the legislative history—did not contemplate material support as taking the guise of peaceful political advocacy.²²³ Indeed, § 2339B itself contains language that suggests that it will not infringe on the First Amendment.²²⁴ Justice Breyer also argued that “there is no natural stopping place” for the Court’s characterization of legitimacy as illegal under the statute, when offered without qualification.²²⁵ Critically, it is “inordinately difficult” to understand when “the chain of causation” extends beyond material support in the form of speech that promotes a group’s legitimacy to actually furthering violent activity.²²⁶

In addition to pointing out the inconsistency of the Court’s ruling with its First Amendment jurisprudence that permits membership in groups like the Communist Party, which was dedicated to overthrowing the government, Justice Breyer also criticized the distinction between independent advocacy of an FTO, which is permitted, and advocacy conducted in coordination with an

individuals supporting the government in the *Humanitarian Law* litigation. See Brief of Amicus Curiae Scholars et. al. in Support of Petitioners, *Humanitarian Law*, 130 S. Ct. 2705 (No. 09-89); see also Peter Margulies, *Advising Terrorism: Hybrid Scrutiny, Safe Harbors, and Freedom of Speech* 20–21, 31 n.204, 34–35 (Roger Williams Univ. Legal Studies, Paper No. 101), available at <http://ssrn.com/abstract=1777371> (arguing that Hamas manipulates international law and its benign activities to further its terrorist goals, although acknowledging that the sources used by the Court to support these allegations “lack[ed] the independence and reliability of scholarly work”).

221. See *Humanitarian Law*, 130 S. Ct. at 2735 (Breyer, J., dissenting).

222. *Id.*

223. See *id.* at 2735–36.

224. See *id.* (“Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment.” (citing 18 U.S.C. § 2339B(i) (2006))).

225. See *id.* at 2726 (majority opinion).

226. See *id.*

FTO, which is prohibited.²²⁷ When discussing matters such as training in international law, Justice Breyer took issue with the majority's contention that an FTO could make use of international law to negotiate in bad faith while simultaneously rearming and rededicating itself to its terrorist mission.²²⁸ Specifically, such a position goes too far, because it "would automatically forbid the teaching of any subject in a case where national security interests conflict with the First Amendment."²²⁹ Justice Breyer also challenged the evidence the Court relied on in making an assertion that it applied to all terrorist groups, irrespective of their particular cause or context.²³⁰

Underpinning the divergence of views between the majority and dissent is a fundamental disagreement as to what the First Amendment is supposed to protect. The majority's position is rooted in a clear line that begins with Congress declaring that terrorist groups are so tainted that any support for them constitutes support for violence. Once the Secretary of State declares that a group is an FTO, the group becomes so toxic and irredeemable that any coordinated activity that contributes to the nebulous quality of legitimacy is illegal. Arguments about the justness of the FTO's cause are rejected as justification for terrorism, and any attempts to encourage the FTO to eschew violence are viewed as naïve ruses intended to allow a group to continue its violent mission surreptitiously. Once the government has spoken, the First Amendment rights of citizens must yield to the FTO determination. By contrast, the dissent actually holds out the possibility that speech-related activities on behalf of an FTO can have a positive effect, regardless of how the government has characterized the group. Implicitly, the dissent's position seems to recognize that an FTO might one day constitute a legitimate governing party in a foreign country (if the history of decolonization is any guide), such that advocating on its behalf deserves some protection, although furthering its violent ends is not permitted.

227. *See id.* at 2737 (Breyer, J., dissenting).

228. *See id.* at 2737-38.

229. *Id.* at 2738.

230. *See id.* ("[T]he only evidence the majority offers to support its general claim consists of a single reference to a book about terrorism, which the government did not mention, and which apparently says no more than that at one time the PKK suspended its armed struggle and then returned to it.").

In advancing this position, the majority relies on the paramount concern of national security.²³¹ But national security is too much of an open-ended concept. Consider that the Court cited with favor the government's efforts to build alliances with allied foreign nations to combat terrorism.²³² It noted that the PKK is waging a violent campaign against the Republic of Turkey, "a fellow member of NATO," which "would hardly be mollified by the explanation that the support was meant only to further those groups' 'legitimate activities.'"²³³ The Court remarked that the plaintiffs are simply disagreeing with the "considered judgment of Congress and the Executive" as to what constitutes material support, and therefore their First Amendment rights should be subordinated when the government seeks to prevent "imminent harms" and promote "national security."²³⁴

But national security presumably has at its heart the idea of a direct threat to the United States and its citizens, and whatever one's opinion about any given FTO, the PKK and the LTTE are not actively engaged in conflict with the United States. That the Court chose to nonetheless assert that national security was the basis for its opinion suggests that it had adopted a new construction of terrorism. Perhaps the Court, in making the national security argument, recognized the inherent weakness in its position, since it then played an alarmist card: "If only good can come from training our adversaries in international dispute resolution, presumably it would have been unconstitutional to prevent American citizens from training the Japanese Government on using international organizations and mechanisms to resolve disputes during World War II."²³⁵ While the Court's earlier jurisprudence referred to terrorism as one tactic among many, and later on recognized the existential nature of a general terrorist threat, this statement represents the

231. *See id.* at 2727 (majority opinion) ("This litigation implicates sensitive and weighty interests of national security and foreign affairs.").

232. *See id.* at 2726–27.

233. *Id.* Interestingly, the Court did not state what it believed to be the government's interest in allying with the government of Sri Lanka, the LTTE's antagonist. *See id.*

234. *Id.* at 2728.

235. *Id.* at 2730. This point may serve more than one purpose, of course. Professor William Araiza notes that this observation, coupled with Justice Stevens' point about Tokyo Rose's purported First Amendment rights in *Citizens United* (two "strikingly similar analogies"), signifies that "at least in some cases, rigid rules simply do not make good sense." Araiza, *supra* note 209, at 37.

Court coming as close as it can to stating that terrorism—regardless of target and place—is the enemy.

The implications of this statement are quite broad. After all, while the government may wish to support Turkey in its struggle with the PKK and “weighty” national interests may be involved, it is disingenuous to suggest that providing material support to the PKK in the form of speech is the same as providing the same to an opponent with which the United States is at war. In other words, the threat to Americans of aiding Japan during World War II is not the same as the threat represented by the PKK successfully establishing a Kurdish state in eastern Turkey. Where First Amendment rights might be curtailed because of actual national security concerns in the former scenario, the same argument in the latter scenario is much more attenuated. While the government may wish to strongly ally itself with Turkey, and can, as it has, accordingly offer military aid and cooperation, as well as criminalize the provision of aid that furthers violence, curtailing the First Amendment rights of citizens goes a bit too far when it reaches into nebulous areas like providing “legitimacy.” There is no “imminent harm” to Americans (and arguably anybody) in the type of speech-related support the plaintiffs wished to offer the PKK and LTTE.²³⁶

Analogizing to the Fourth Amendment, the Supreme Court allows for constitutional protections to be relaxed when there is a direct threat to the United States. According to *Edmond*, the Court would presumably allow police authorities to set up a roadblock to conduct warrantless and suspicionless searches of motorists to stop a terrorist attack in the United States. Situating the same concern in the First Amendment context, a statute curtailing speech rights would need to respond directly to some sort of immediate threat that concerns the United States and its citizens, not merely via an alliance with a foreign nation the government wishes to further. After all, the government may decide one day to change its position on any given conflict, even the Turkey-PKK dispute, having calibrated that the national interest is best served by making such a change. It is much harder to imagine that the government would

236. In this position, the United States arguably has outstripped other democracies dealing with advocacy for terrorist groups, in that those other nations have only restricted speech rights for individuals articulating positions antagonistic directly to the nation in question. See Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT’L SECURITY J. 1 (2011).

change its position on trying to stop any and all attacks on the United States.

To the extent that there was real doubt about the overriding concern behind § 2339B, consider the following example from the oral argument in *HLP*. In response to Justice Sotomayor's concern that Congress did not intend to target all possible specialized training, like teaching someone how to play the harmonica, then Solicitor General Kagan responded by saying that "there are not a whole lot of people going around trying to teach Al-Qaeda how to play harmonicas."²³⁷ Perhaps this is a fair point to make if the focus is on groups targeting the United States. But it seems that the government exploited the conceptual ambiguity inherent in fighting terrorism between all groups that practice illegal political violence and those that target the United States. Where steps against the latter could include suppressing material support in the form of speech for national security reasons, it is much harder to justify such a position when the United States is not a party to a conflict with the former. After all, there is a real question of what, if any, harm might befall an American citizen, and if the answer is none, then the rationale behind banning material support in the form of speech to a group not targeting the United States is unpersuasive. Given the fact that under the law all politically motivated violence carried out by non-state actors is presumptively terroristic,²³⁸ allowing the government to operate on a theory of banning material support that enhances "legitimacy" chills First Amendment rights significantly.

The *HLP* majority opinion concluded by finding that § 2339B did not violate the plaintiffs' right to freedom of association.²³⁹ Individuals are free to be members of, or advocate independently on behalf of, a group, but the Court drew a distinction between membership and material support.²⁴⁰ As Professor David Cole has argued, § 2339B has effectively rendered meaningless the right of association with an FTO; while technically one can still legally be a member of such a group, virtually any action on its behalf, such as paying membership dues, violates the law.²⁴¹ The stigma of being

237. Transcript of Oral Argument at 47–48, *Humanitarian Law*, 130 S. Ct. 2705 (2010) (No. 09-89).

238. Said, *supra* note 13, at 570–76.

239. See *Humanitarian Law*, 130 S. Ct. at 2730–31.

240. See *id.*

241. See David Cole, *Terror Financing, Guilt by Association, and the Paradigm of*

designated an FTO, with its status of engaging in no redeeming or legitimate activities, has removed First Amendment protections to the point where mere speech on behalf of a group runs afoul of § 2339B. Not only does the Court's First Amendment jurisprudence not compel such a result when national security is not directly implicated; it actually rejects it. That the Court did not rule otherwise is problematic and should change.²⁴²

V. CONCLUSION

The *HLP* Court's construction of § 2339B and the threat posed by terrorism is far-reaching. Not only is humanitarian aid to an FTO banned, regardless of what a lack of aid might mean for people in areas under an FTO's control, but now expressions of solidarity such as working within a group for peaceful change are not allowed. Arguments rooted in justice or human rights about a given conflict are not permitted when made on behalf of an FTO, regardless of its position on violence against Americans. Where once terrorism was a mere tactic that the Supreme Court took into account in its construction of the law, now it is a force with which our society is at war, to the point where the government will fight its occurrence even in quarrels that have nothing to do with the United States. While the Court did point out, toward the end of the *HLP* opinion, that it is not "say[ing] that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny," it is hard to imagine such an application in light of the *HLP* analysis set forth above. The logical implication of *HLP* is that terrorism is now an existential threat to the United States wherever it occurs, and—as long as the government has designated an organization as an FTO—that existential threat must be thwarted, even to the detriment of the First Amendment.

Prevention in the "War on Terror," in COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 242 (Bianchi & Keller eds., 2008).

242. See David Cole, *Chewing Gum for Terrorists*, N.Y. TIMES, Jan. 3, 2011, at A21. In addition to criticizing the *Humanitarian Law* Court's ban on material support as speech, Professor Cole also recommends sensibly that the material support law be revised to allow for genuine humanitarian aid in times of war or natural disasters. See *id.*