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THE KOJO NNAMDI SHOW

"MATERIAL SUPPORT" FOR TERRORIST GROUPS

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GUESTS

ADAM LIPTAK
Reporter, *The New York Times*

ANTHONY S. BARKOW
Executive Director, Center on the Administration of
Criminal Law, New York University School of Law

ROBERT MALLEY
Middle East and North Africa Program Director;
International Crisis Group; Former Special Advisor to
President Clinton for Arab-Israeli Affairs
(1998-2000)

DAVID D. COLE
Professor of Law, Georgetown University Law Center

JONATHAN WINER
Senior Vice President, APCO Worldwide; former Deputy
Assistant Secretary of State for International Law
Enforcement

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"MATERIAL SUPPORT" FOR TERRORIST GROUPS

(1:32 p.m.)

MR. NNAMDI: From WAMU 88.5 at American University in Washington, welcome to *The Kojo Nnamdi Show*, connecting your neighborhood with the world.

Consider the following story of free speech and the fight against terrorism. A small California human rights organization wants to provide legal advice to a Kurdish militant group in Turkey. The advice seems innocuous enough. They want to steer them on a path toward a peace process and train them to bring a case before the United Nations. In fact, it might end up diffusing a long and bloody insurrection by bringing two parties to the negotiating table.

Trouble is that Kurdish militant group is a foreign terrorist organization at least according to the U.S. State Department. Any advice or assistance could be considered material support for terrorism putting that American organization in legal jeopardy. Last month the U.S. Supreme Court heard arguments in the case of *Holder vs. Humanitarian Law Project*.

This hour we're exploring free speech and the fight against terror and whether it makes sense to engage groups designated as terror organizations. Joining us by telephone is Anthony Barkow. He's executive director of the Center on the Administration of Criminal Law at the New York University Law School.

He's also a former assistant U.S. attorney in the Southern District of New York, where he prosecuted terror cases. He filed a brief in support of the government's position in the Supreme Court case *Holder vs. Humanitarian Law Project*.

Tony Barkow, thank you for joining us.

MR. BARKOW: Thanks for having me. I'm happy to be here.

MR. NNAMDI: In our studio is Robert Malley. He's Middle East and North Africa Program director with the International Crisis Group. He's a former special advisor to President Clinton for Arab-Israeli Affairs. The International Crisis Group and other human rights

organizations filed briefs in support of the Humanitarian Law Project in the recent Supreme Court case.

Robert Malley, thank you for joining us.

MR. MALLEY: Pleasure to be here.

MR. NNAMDI: And Adam Liptak is with us. He's the Supreme Court reporter for the *New York Times*. Adam, good to have you back.

MR. LIPTAK: Hello, Kojo.

MR. NNAMDI: Over the last few years the Supreme Court has grappled with this balance of civil liberties and the fight against terror. This case raises new questions about free speech. Tell us about *Holder vs. Humanitarian Law Project*, Adam.

MR. LIPTAK: It's a federal law that says you can't give material support to terrorist organizations. The State Department has designated about 30 groups as terrorist organizations. And I think most people would agree that certain kinds of support are really problematic and wouldn't have a problem with making them a crime.

If you give them money, they can use that money for anything even if your goal is give them money for peaceful purposes. If you help them figure out how to make bombs, nobody would dispute that that's the kind of material support that Congress could well want to make a crime.

The question in this case is whether some vague and more and more of this terms are too vague or present First Amendment problems. So Congress has also prohibited training, personnel, service, or expert advice and assistance.

And the case you started by talking about really involves people who -- I think everyone would concede on its face is perfectly benign kinds of help. They want to help people mediate their disputes. They want these groups to appeal to the U.N. to solve problems in Turkey and elsewhere. They want to perhaps represent the group in the Supreme Court and file the friend-of-the-court brief in the Supreme Court.

And the government's position is that even that

kind of help crosses the line is material support. The notion is that the government wants to make these groups radioactive. And any kind of help to them, even benign help, even help consisting purely of speech is a crime.

MR. NNAMDI: (800)433-8850 is the number to call if you'd like to join the conversation. Do you think it's possible to provide support to the charitable wing of a group like Hamas without supporting its terror activities? Is it possible to give legal advice? Do you think that's different than giving money? (800)433-8850. You can go to our website kojoshow.org to offer your opinion or maybe ask a question there.

Tony Barkow, you've actually prosecuted terror cases in federal court. And you filed a brief in support of the government's position on this issue. Please explain.

MR. BARKOW: That's right. You know, Adam described the case before the Supreme Court exactly right. The issue in that case as it's been described, and as it's been raised before the court is about vagueness. But in my opinion, the statute actually is not vague. When you look at the terms that it uses like training, expert advice, money, those kinds of terms are actually quite clear.

I think the real issue that opponents of the statute have is its breadth. The statute is very broad. And the purpose is to prohibit any kind of assistance whatever the motivation that would be given to a foreign terrorist organization or in other context, that conspiracy to kill and commit terrorist acts. And so the congressional purpose here was to basically prohibit anybody from contributing anything regardless of their motive.

And that's a very broad statute. But I think that the opponent's claims really boil down to problems about the breadth of the statute. I think that the courts that have found problems with the statute, although they sometimes talk about it as a vagueness problems, they're really concerned about the breadth of the statute.

And to me, you know, I recognize this is a broad statute. There might be problematic applications in particular cases. But there are mechanisms in the judicial system and in a criminal justice system that can screen out those problematic applications and maybe over the course of the show I can talk about it more.

But I think that there haven't been applications to activity like the activity in this case before the court. The plaintiff in this case brought their own declaratory judgment action seeking to preclude prosecution. They weren't, in fact, prosecuted.

And so I think that there is an issue here with the statute of this breadth. And it could be applied in a way that could pose problems and could perhaps even pose in its scope, constitutionally protected activity. But there are mechanisms to stop that and there are mechanisms to screen out those problematic applications. And so I think that the breadth of the statute has -- is curtailed in some ways.

MR. NNAMDI: Robert Malley, the International Crisis Group and other human rights organizations spent a lot of time trying to analyze conflicts. You say the term material support is problematic.

MR. MALLEY: Well, I'm not a lawyer. I was a lawyer. And I would urge any listener not to take my legal advice. I don't want to really talk in legal terms. I want to talk in policy terms and the work I do and the International Crisis Group does, and a number of other organizations, Carter Center Human Rights Watch that co-signed this brief.

The International Crisis Group deals with conflicts everywhere. And so we have to talk to the parties that are engaged in conflict. And if we want to be useful, we also have to tell them what we think they ought to do to be in compliance with international standards and the conflict. Or if they participate in elections, how to conduct the elections in a way that would be free and fair as I did with President Carter in both Lebanon and Palestine.

And in both cases we had to deal with movements that are labeled -- that are considered terrorist organizations. That's what this is about. And the legal debate is, one, the policy question is whether it makes sense to have some form of engagement for non-officials, for NGOs, non-governmental organizations, to have some form of engagements with movements that have real support, real resonance, and real practical impact in the arenas in which they evolve.

I mean, in the case of Hamas it's an organization that won their parliamentary elections. So to say that we can't talk to them and we can't try to both explain U.S. policy, hear what they say, and then perhaps try to change their views both of the U.S. and of their actions and the kind of the activities they engage in, I think that would be a mistake.

I'm not sure who would be isolating whom if we were to decide that people like -- organizations like my own or like the Carter Center could not reach out and try to influence those groups and learn more from them.

MR. NNAMDI: You've met with members of Hezbollah and Hamas both of which are on the U.S. government list. How do these meetings typically work?

MR. MALLEY: Well, I mean, you know, they work as I assume many of these meetings do -- first of all, I'm very careful not to breach any of the lines that our lawyers tell us not to breach. So we can't give them -- we can't offer them anything in terms of any material good or even assistance.

But they are, you know, a number of these organizations have not had much contact with the West. They don't -- they have their own stereotypes about the United States, about its policy, and how it's being made. So it is really an exchange of views in which, at the outset nobody's views is necessarily changed.

But we have discussions about foreign policy, U.S. policy, discussions about their own actions. And I've had countless meetings with Hamas and Hezbollah leaders including last week in which I tried to do my best to explain to them why U.S. policy is what it is and what -- why they should -- they need to change their approach if they want to be able to be part of a different international landscape.

You know, I would just add one thing, if we learnt one lesson from the Bush administration years is that making policy on the basis of ignorance, on the basis of cutting ourselves off from certain entities is not the wisest way to reach the right answer.

And so having these exchange and meeting with them and often having quite contentious meetings with them in which we could express our disagreements quite strongly

is one way for us to learn and to be wise in how we make our own policy and perhaps in the ideal case to shape their own views, because these movements are neither monolithic nor are they static.

MR. NNAMDI: What do you think, (800)433-8850, should American activists be able to work with militant groups to bring them to the negotiating table, (800)433-8850. You can also send us a tweet at Kojo Show.

Adam Liptak, Tony Barkow, this issue looks very different depending on which group we're talking about. It may make sense if we're talking about a group like -- about a group like, old al Qaeda in Iraq or Lashkar-e-Taiba, the group that sponsored the Mumbai siege.

But the pattern looks different with other groups. What if we're talking about disaster aid to Sri Lanka after the tsunami and the affected areas were controlled by the Tamil Tigers which is on the list of terrorist groups.

MR. LIPTAK: The government's theory and the Solicitor General Elena Kagan put it very well is that all aid is aid. She said, Hezbollah builds bombs, Hezbollah also builds homes. When Congress -- what Congress decided was when you help Hezbollah build homes, you're helping Hezbollah build bombs. That's the entire theory she said.

So any support to these organizations, even support that will go directly to help the victims with tsunami, the government says, has the effect of freeing up resources for that group to do bad things. I wanted to respond to a point Tony made about --

MR. NNAMDI: Sure.

MR. LIPTAK: -- about vagueness. And I think it's largely correct, but even the chief justice of the United States looked at the statute of the argument and said about expert advice. One of the things you're prohibited from giving.

He said I don't know sitting down that I could tell whether some kinds of conversation with a group are expert advice or not. So if Robert were to meet with some of the groups he meets with, and they were to make a point

that he would think would be an interesting thing that ought to be part of the American conversation, and say, you know what, maybe you should try to get the *New York Times* to publish that in an op-ed. It's not clear to me whether that's the kind of expert advice that crosses the line.

MR. NNAMDI: Care to comment on that because this seems to be the opportunity, Tony Barkow, that you can talk about how this stuff can be screened out. If indeed, those people who feel that the law is overly broad if someone wants to give aid to victims of the tsunami in Sri Lanka in an area controlled by the Tamil Tigers, how does one go about doing that without running afoul of the law?

MR. BARKOW: Right. Yeah, I certainly don't dispute that at the margins there are difficult cases and there might be cases, or it would be difficult to determine whether the statute would cover it or not. And I guess -- I think that was the impulse behind Chief Justice Robert's comment of the argument, which I intended -- honestly I was a little surprised that he said that.

But I do think at the margins, there are difficult cases, but there are mechanisms in the criminal justice system that screen out applications that are problematic. As an initial matter that the group, the recipient has to be on the list, and the secretary of state has to decide to put them on the list, so that's one screening mechanism.

The second screen is that the Justice Department and the prosecutors need to make a considered judgment of whether someone should actually be criminally prosecuted in a particular case.

And although the briefing and the argument in the Humanitarian Law Project raised a lot of potentially troubling hypothetical -- and even the facts of that case itself may have been at the margin, as I said, that person wasn't prosecuted. And I think that we don't have a great deal of evidence that prosecutors have been exercising their discretion in a way that is troublesome in this area.

What the main challenges are, in my knowledge, to this statute is it has a chilling effect, but there actually haven't been as many problematic applications as the hypothetical might suggest and the opponents of the

statute might suggest.

So once you get past those screens and the prosecutor does decide to bring a prosecution, within the prosecution itself there are various mechanisms, some more obvious than others. The jury obviously has to decide whether to convict. The jury can be instructed that they can't convict if the activity that was being engaged and is protected activity, protected by the First Amendment or amounting to mere advocacy.

The judge had many points on -- along the spectrum at which he or she can screen and dismiss the case at the -- there can be a motion to dismiss the indictment when it's first filed. Cases have been dismissed at that point. There can be motions to dismiss at the close of the evidence, at the close of the government's case.

There are appeals. There is also a licensing provision in the statute whereby an organization can seek advance approval for the provision of material support. They can petition the secretary of state and the secretary of the state, with the concurrence of the attorney general, can say that you can engage in this activity and won't be prosecuted if you do it.

And there is also the mechanism that Ralph Fertig in Humanitarian Law pursued, which is seeking a declaratory judgment action that he is protected from prosecution. So all these different mechanisms provide the possibility to the legal system, which screen out problematic applications. And I don't know that we've seen a lot of problematic applications.

Because as I said, I think the objections really seem to go to the breadth of the statute, the groups that are on the list, and that's been raised by some of your comments and questions already, Kojo.

And you know those are real issues and they're policy issues. But when you're looking at the legal ramifications of this, I think that it's a broad statute, but it can be constrained at various stages in the process.

MR. NNAMDI: Here is Steven in Bethesda, Maryland. Steven, you're on the air, go ahead please.

STEVEN: Yeah, my name is Steven. I led a delegation to Gaza and the West Bank and Damascus, and we met with leading Hamas officials. We met with leading Hezbollah officials, and my point would be very much what one of your speakers talks about is, we found they're very business like.

Hamas did want a free -- want a free and fair election. And if we're going to have peace between Israel and the Palestinians, we can't just assume that Hamas is going to go away. We should be talking with them to try to change their approach. And in talking to the leader of Hamas, there was very much negotiating possibilities. And by simply writing off a group as a terrorist organization, we write off the possibility of a diplomatic solution.

Particularly also, it means that a lot of people will not have the courage to speak to these people, because they're scared stiff about prosecution. So we are closing our diplomatic options when we should be opening them. George Mitchell, when he --

MR. NNAMDI: Was it a concern of yours when you met with officials from Hamas and Hezbollah that you were running afoul of the material support law?

STEVEN: Sure, absolutely. But I did it anyway -
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MR. NNAMDI: You are concerned.

STEVEN: But my point would be with George Mitchell when he --

MR. NNAMDI: You were meeting --

STEVEN: -- Ireland. When he was in Ireland, they had the military wing of the IRA that they didn't speak to. When they had the political wing that they did, you could do the same thing with Hamas.

MR. NNAMDI: Allow me to read to you a tweet, Steven that we got from Haifa. "Isn't this a First Amendment issue? I can't threaten or advice to commit crime but out of sight of that, isn't my right to speech protected? Isn't this, Adam Liptak, a free speech issue also?"

MR. LIPTAK: Well that is the question -- that is the way that the Humanitarian Law Project and Ralph Fertig could frame the issue. The lower courts went off on vagueness, but they very much think this a First Amendment issue, and that's the argument the Supreme Court heard, and we might well get an answer from them sometime around June.

MR. NNAMDI: We're going to take a short break. Steven, thank you for your call.

You too can call us (800)433-8850, should American activists be able to work with militant groups to bring them to the negotiating table? Do you see advice as material support? (800)433-8850 or go to our website, kojoshow.org, ask a question, make a comment there. You can send us a tweet at Kojo Show. I'm Kojo Nnamdi.

(Intermission)

MR. NNAMDI: Welcome back to our conversation on the law which makes it a crime to provide material support for terrorist organizations. We're talking with Robert Malley. He is Middle East and North Africa program director with the International Crisis Group and the former special advisor to President Clinton for Arab-Israeli Affairs. The Crisis Group and other human rights organizations filed briefs in support of the Humanitarian Law Project in the recent Supreme Court case on this issue.

Adam Liptak is a Supreme Court reporter with the *New York Times*, and Anthony Barkow is executive director of the Center on the Administration of Criminal Law at New York University School of Law. He filed a brief in support of the government's position in the Supreme Court case *Holder versus Humanitarian Law Project*.

The Obama administration and the Bush administration both argued you can't send money to a group like Hamas for its charitable work. Even if you wanted to go to hospitals, you can't know where it's going to go, and any dollar they don't necessarily spend on hospitals can end up being used for militant activity.

Tony Barkow, care to comment?

MR. BARKOW: I mean, you hit the nail on the head. That's the issue with all of this type of support, fungibility. And money is the most obvious if you give Hamas a \$100,000 to set up a hospital that's a \$100,000 -- and they maybe engaged in legitimate activities in the Gaza Strip. But that's a \$100,000 that they don't have to spend on the hospital and then can be use to launch terrorist attacks.

And even in some of the more difficult potential -- potentially more difficult areas, things are still fungible. Justice Sotomayor raised the point of the argument and she asked well, what if you contribute medical training or something like expert advice on how to give medical care to someone in a hospital; doesn't that --? And with the purpose that, you know, you want to treat sick and injured people, what if a terrorist or someone who carried out an attack then later got treated there.

The argument is that all of these resources are fungible. And even if your intention in giving them to these organizations is benign, they still can and sometimes are used to support the violent missions of some of these dual purpose organizations.

And I think that the real issue here is who should decide this? Should it be the government, the duly elected government, the secretary of state, a member of the executive? Or should it be the disparate groups that analyze the situation and want to provide aid?

And that's a policy question. I'm a lawyer. I'm not a policy analyst in this area. And that is a question, but what Congress and the executive have decided is that it should be the government that decides and not each of these individual people or organizations that want to contribute.

MR. NNAMDI: So where would you fall Robert Malley, if in fact you're not making a material contribution of any kind, you're not giving money, you're simply trying to facilitate dialogue with these organizations, where would you see that falling?

MR. MALLEY: As I said, I'm not going to comment on the legal question. But on the policy question, I think, that really should be not only allowed but to some extent --

MR. NNAMDI: Advocated.

MR. MALLEY: -- encouraged. This is not a matter of fungibility. If the Carter Center, if International Crisis Group or Human Rights Watch talks to any of these groups about a hearing to international laws of war, human rights standards, how to run a fair election, how to issue complaint, if you believe you've been cheated in an election, those things are not fungible. Those are the kinds of things might -- and I don't want to sound either overly optimistic or overly naïve, but they might over time influence an organization.

Let's remember that these organizations, as I said, are not monolithic. For the most part, they haven't been exposed to the West. And there is a debate within the movements about whether engagement with the West and trying to evolve makes sense or not. And we play in that -- we hurt ourselves if we disallow these kinds of conversation to take place because you strengthen those who are the more militant and hard-line. And these movements can evolve.

Let's, you know, the PLO, the Palestine liberation Organization, 20-30 years ago we would be having this discussion about that organization. And look today, as a result of a number of contexts, it took place through the intermediary of non-governmental organizations talking to the PLO, talking to Yasser Arafat at the time about what -- how the PLO could meet the standards that the United States has set forth. But over time, the PLO evolved and is now a partner in the peace negotiations rather than being the party that's opposed to them.

MR. NNAMDI: Big question here, Adam Liptak. If you give legal advice, some of which we've just been hearing from Rob about, is that aiding the other things that a terrorist organization might be doing?

MR. LIPTAK: That was the question that the justices found the hardest, for sure. The Solicitor General did say that if the organization is being prosecuted, it would have a constitutional right to a lawyer. But if it merely wanted to voluntarily participate in the legal process, if Hamas wanted to file a brief in this very case that we're talking about, if it wanted to file a Friend of the Court brief and get a lawyer to do

that on behalf of it, and appearing at Supreme Court and give its views about this very question that we've been talking about, the lawyer in question would be plainly committing a crime, the Solicitor General said. And that was a response that the Justices had trouble with.

MR. NNAMDI: On to Dale in Columbia, Maryland. Dale, you're on the air, go ahead please.

DALE: How're doing Kojo?

MR. NNAMDI: I'm well.

DALE: I've been listening to your show. I just -- I have a comment. And it may sound biased, it may sound bigoted, if I meant to, but history is due to repeat itself. And if you look back at history, every time we deal with a group like this and we try to go to the table, we try to negotiate, and we make, you know, excuses for things and give them things, it always comes back and bites us.

The PLO was a prime example. Your guest stated, you know, that they're actually helping us in the war on terror, and yet Palestine has its own inherent problems and is actually, in most of the government standards, harboring terrorists still and exporting terrorists. So I find that statement laughable.

If you go back to World War II, we gave Hitler a bunch of stuff and look what happened with that. You can go back even further. There's all kinds of examples. And I'm not trying to be a racist or bigoted or anything else. I'm just pointing out, you know, there comes a time when you say you either do it or else, because we keep giving them stuff they're going to keep taking it.

MR. NNAMDI: Here is Robert Malley.

MR. MALLEY: Well, and I would dispute the narrative of history. I mean, I think if we look at -- I mentioned the PLO, forget about the PLO. The ANC, the South African National Congress --

MR. NNAMDI: African national Congress.

MR. MALLEY: They fought against apartheid, was considered a terrorist organization. Sinn Fein and IRA, in Northern Ireland were considered terrorist organizations. Of course, there are cases where it doesn't work, and we have to enter these talks with eyes wide open. And I always say when I -- because I go out with my colleagues, we can't assume that because they talk nice that they mean nice, so that if we're convincing that they're going to be persuaded.

But I think, at a minimum, we have to understand that if we don't engage, if we don't try to inform them and learn about them, we will be at a disadvantage. You know, we're not going to -- how can we isolate movements such as the ones that I've mentioned that have greater popular support than their opponents do in some -- in several cases.

So it's not -- we are not punishing them by not talking to them. We're punishing ourselves. It's a big difference when officials talk to them. And I have not -- we are not here talking about whether the United States as a government needs to talk to these movements.

We are talking whether private individuals can -- should and can talk to them. Which is one way, perhaps, to pave the way for more productive talks or perhaps -- perhaps we'd come out of this conversation and tell administrations officials, "By the way, we don't think the time is right to talk to them," but how could you reach a judgment if you have no contact with them whatsoever?

MR. NNAMDI: Dale, thank you very much for your call. Joining us now by telephone is Jonathan Winer who is senior vice president with APCO Worldwide. He is a former deputy assistant secretary of state for International Law Enforcement. He joins us by telephone. Jonathan Winer, thank you for joining us.

Jonathan, can you hear me? I can't hear you yet. Well, maybe we'll get back to Jonathan Winer later.

MR. WINER: -- here.

MR. NNAMDI: Oh, are you there now, Jonathan?

MR. WINER: I'm here and I've been here and happy to be on the show and to talk with you all.

MR. NNAMDI: I'm glad you could join us. You heard us talking about the Irish Republican Army, the Palestine Liberation Organization, even the African National Congress; all considered terrorists at some point.

Since the late 1990s, the U.S. State Department has maintained a list of foreign terrorist organizations, some three dozen or so, abroad. Where does this list come from and how does it work?

MR. WINER: Well, in the end, the President of the United States decides what is a terrorist group and what isn't. I mean he is the commander-in-chief and the various national security laws make that his designation in consultation with his chief ministers, like the secretary of state and the secretary of the treasury and the attorney general, and consultation with the intelligence communities.

What's been fascinating to me as I'm listening to this, we should be able to talk to them or not talk to them is -- it maybe a great policy for us to talk to all these people, it maybe a terrible policy.

But you also have to get into the question of who should decide. Should every citizen be free to make those decisions for themselves? One would love to see that in a world of perfect human rights and civil liberties. Or should the President of the United States be able to make that decision, if so, how far can it go?

What I'd like to do for the sake of thinking about this is to substitute the word Osama bin Laden for Hamas or for the ANC. Because conceptually, it's the very same thing. So should any American be free to go talk to Osama and conduct their own sets of diplomatic activities about Osama or not. If not, who should have the right to make that decision? Should that be the president or should it be a judge, or should it be a panel of judges or citizens groups? I'm asking these questions in a -- partly in a Socratic fashion because I think it's quite clear it has to be the president.

MR. NNAMDI: Well, this question actually came up in the Supreme Court case itself. Adam Liptak.

MR. LIPTAK: Well, I guess my response to that would be that the theory of the First Amendment is that at least where we're talking about pure speech, and at least when we're talking about the kinds of advice that are benign on their face, would seem to powerfully indicate that that ought to be the individual citizen's right. And the theory of the First Amendment is not that the government gets to decide what I can say.

MR. NNAMDI: Well, we've actually got somebody who argued this case before the Supreme Court. Joining us by telephone now, he is David Cole. He is a professor of law at Georgetown University Law Center. He represented the Humanitarian Law Project in recent Supreme Court arguments. David Cole, thank you for joining us.

MR. COLE: Thanks for having me.

MR. NNAMDI: Tell us about why the Humanitarian Law Project is bringing this case.

MR. COLE: Well, it came to me about more than a decade ago after the material support law had been passed that was part of the Antiterrorism and Effective Death Penalty Act. And after the Kurdistan Workers Party in Turkey had been designated under this law, this LA-based human rights group came to me and said, look, we've been working with the Kurds for years.

We've been trying to protect their human rights. We've been encouraging them to use peaceful avenues to protect their human rights. For example, helping them bring human rights complaints in Geneva, petitioning Congress for legal reform, writing articles and the like. But all of this now would appear to make us terrorist criminals, because it could be interpreted as material support.

Congress defined "material support" so broadly, that our activities might land us in jail for 15 years. And so we think we have a right to do this. But we don't want to risk going to jail for 15 years. And so we went to court to try to establish that they, indeed, have that right. And that was, as I say, 12 years ago.

MR. NNAMDI: Adam Liptak, you interviewed Ralph Fertig, the advocate who is responsible for this case. Tell us a little bit about him.

MR. LIPTAK: He is 79 years old, has a long and distinguished career in the civil rights movement, was a freedom rider in Alabama, when he told me that in 1961 in Selma he had all of his ribs broken. Nobody disputes that his goals are purely to try to find peaceful ways to resolve matters.

He is a retired lawyer now, former administrative law judge, teaches social work at a university in California. And thus presents sort of a pure case of someone who really wants to use speech for positive goals to assist organizations that have been called terrorists by the United States.

MR. NNAMDI: David, Tony, this case would come -- could come down to definitions. I'd like to hear both of you on this. First you, David, what does a word like "training" mean?

MR. COLE: Well, that's a great question, Kojo. And in fact, one of the grounds upon which we have prevailed in this case up to now is that no one can possibly know what the mean -- what the word "training" means. The courts below held it unconstitutional when it was undefined in the original statute, and then Congress sought to define it.

And the way they defined it was they said, well, "training" consists of imparting specific skills, not general knowledge. So that now in order to decide whether, for example, telling the Kurdistan Workers Party how to advocate before Congress, you have to decide whether, you know, telling them that there is two Houses of Congress and that they both of them have to act together to pass a law, is general knowledge or is that a specific skill.

The government said, well, you could teach them geography in the sense of going over to Sri Lanka. We also represent groups that wanted to help the LTTE in Sri Lanka. You could teach them -- go to Sri Lanka and tell them that Sri Lanka is an island nation off of coast of India. But if you -- if they asked you, well, what's the colonial background of Sri Lanka and how does that affect the

current conditions in Sri Lanka, that would be a specific skill, and that would be a criminal activity.

That's the problem. How do -- how does anyone draw a line between general and specific, and if you make a mistake in drawing that line, 15 years in jail.

MR. NNAMDI: The Antiterrorism and Effective Death Penalty Act of 1996 makes it a crime to provide, as we were saying, material support to groups. The State Department designates the foreign terrorist organizations, including training and personnel. This law was later amended by the USA Patriot Act to include expert advice or assistance and service. But I'd like to hear you on the "training" word, Tony Barkow.

MR. BARKOW: Sure. "Training" is defined, as David said it was in the statute. It used to just be training, and now it's defined further to relate to the specific skill/general knowledge distinction. But it's basically what people understand training to be in their everyday life. It's teaching someone how to do something that they don't know how to do.

And it's now been further defined that it has to be about something that is specifically skill-oriented as opposed to something that everybody knows. And I think that's a concept that people understand in their day-to-day existence. And it's no more vague than many of the other criminal statutes on the books which have been upheld against vagueness challenges.

For example, you can't engage in a scheme or artifice to fraud, you can't engage in an unlawful restraint of trade. These are broad statutes. These are -- this is broad language, and this statute is broad too. But I think people understand the difference between knowing how to do something and not knowing how to do something, and that's the kind of -- the essence of training.

You teach someone how to do something that they don't know how to do. And you know, I don't dispute -- and I've said before -- that the facts in the humanitarian law case are a very powerful set of facts for David's client and for his case. But there are a lot of other powerful

sets of facts against which the statute actually has been applied in a criminal context.

For example, John Walker Lindh. There were the people who trained al-Qaeda members how to engage in combats, how to get immigration documents to reenter the United States, the 2008 attacks in Mumbai, India. These are other people against whom the statute actually has been applied, and these are pretty clear applications.

And there are definitely cases at the margins where it gets harder to determine the exact scope of the statute, and then there are mechanisms to screen some of those out.

MR. NNAMDI: Adam, could the court carve out an exception to this law to allow for, say, peace advocacy?

MR. LIPTAK: The Supreme Court does whatever it wants. There are many, many ways this case could go off. And the court came at it from lots of angles. I was, though, reminded by what Tony just said of a question from Justice Stevens to the government's lawyer saying, now, you can't be serious here. You're not going to prosecute Ralph Fertig, are you?

And he expected, I think, the answer that Tony's line of reasoning would suggest, well, of course not. We're not going to go after this guy. He is -- you know, he's 79 years old. He is wanting to do things that nobody really thinks is a bad thing. And all Elena Kagan, the government lawyer, would say was, well, it's a matter of prosecutorial judgment. Trust the prosecutors.

MR. NNAMDI: We're going to take a short break. When we come back, we'll continue this conversation on the law making it a crime to provide material support for terrorist groups. If you've called, stay on the line, we'll try our best to get to your call. Or you can send us a tweet @kojoshow. I'm Kojo Nnamdi.

(Intermission)

MR. NNAMDI: We were talking about the law making it a crime to provide material support for terrorist groups with Tony Barkow. He is executive director of the Center on the Administration of Criminal Law at New York

University School of Law, who filed a brief in support of the government's position in the Supreme Court case, *Holder v. Humanitarian Law Project*.

David Cole is a professor of law at Georgetown University Law Center. He represented the Humanitarian Law Project in that recent Supreme Court case. Robert Malley is Middle East and North Africa Program director with the International Crisis Group. He is a former special advisor to President Clinton for Arab-Israeli affairs. And the International Crisis Group filed briefs -- filed a brief in support of the Humanitarian Law Project.

Adam Liptak is the Supreme Court reporter with the *New York Times*. And Jonathan Winer is senior vice president at APCO Worldwide, a former deputy assistant secretary of State for international law enforcement. Jonathan, we got this posting on our website @kojoshow.org. "Even more troubling than the issues raised by the broadness of the material support law are the underlying issues relating to designation.

"The process, an even more troubling system operated by the Treasury Department, does not provide an organization with any meaningful right to defend itself, or to see the evidence on which the designation is based. In addition to Hamas, there have been many other less-well-known organizations that have been designated with no clear basis in this regard.

"I went over the list of terrorist groups on the State Department list, and even though there are some groups who are very well-known, I had no idea who some of the more obscure groups were. Is it possible that I could accidentally support a bad group?" Jonathan, are we confusing disagreements about who should be on this list with whether there should be a list at all?

MR. WINER: I think they're two separate issues, but they are both very important issues. One question is who should decide? Well, that's one question. The next question is, what should the criteria be for who decides, and how much evidence should there have to be? And the next question goes to notice, right to be heard, right to challenge.

And when I was in the U.S. government, we were

constantly struggling with the last two issues. The "who decides" was always the President or the secretary of the Treasury on this whole broad range of issues; Treasury on financial sanctions, the President on the overall designation of a terrorist group. Then you get to who is part of the group and the -- how the sanction should be handled, and finally these questions of process.

The European Union has recently, in some very important cases, said unless you give people the right to be heard, we can't go along with the process that exists. Now, my own view is that its critical function for national security of the United States and for the world to be able to immobilize the assets of really serious bad people who are engaged in a very, very dangerous activity to every individual security.

It's also tremendously important to have some process in place after that initial action, by which people have the ability to challenge the system. And getting that exactly right is not something that's happened here; it's something that is a work in progress. And it hasn't been gotten exactly right. I think the authority is tremendously important.

I think the protections are tremendously important too. And they're still being worked through. Because if you require a full judicial process, legal proceedings, everybody being represented, all evidence are out in the open, you're going to have a very, very difficult time with some of these terrorist asset freeze cases.

MR. NNAMDI: We got an e-mail from someone who says -- who asks, "Where I can find the official list of terrorist organizations?" Jonathan?

MR. WINER: U.S. Treasury OFAC, O-F-A-C. If you type in OFAC list or OFAC SDN, which means specially designated nationals or specially -- SDT -- specially designated terrorist, you will get that list in an instant. And all the banks in the United States, all the financial institutions are constantly checking transactions against those lists, because the last -- it's illegal for them to do it too. And they certainly don't want people getting caught inadvertently.

MR. NNAMDI: Robert Malley, is it a concern of yours that rigid enforcement of this law, the material

support law, could end up discouraging terrorists from putting down their weapons?

MR. MALLEY: Well, that's making quite a connection. I'm not sure, Kojo, that that's what it would do. I do think that it might discourage people. It could have a chilling effect, as David said and others have said in their briefs and in the argument, for people whose job - - or who want as a -- who would like to go and try to convince them to lay down their arms or at least to abide by the laws of war, to abide by human rights standards, to engage in non-violence activity.

And that's -- really the concern is that it might chill some of those people who, you know, Tony spoke about cases on the margins. I'm not sure how much they are on the margins. And we're talking about training in non-violence or training in adherence to human rights standards or giving advice as to how these organizations can meet the demands of the United States or others in the international community.

So to that extent, I think it's impoverishing the ability of people to try to influence these groups. If they do, in fact, feel chilled out of the fear of prosecution, that's really the question.

MR. NNAMDI: David Cole, where is all of this heading, in your view?

MR. COLE: Well, I don't know -- well, I think only the Supreme Court can tell us that. But let me pick up on two issues. One is there's a question about the margins. This was written so broadly that it encompasses lots of people who -- I don't think anybody thinks of as on the margin. The *New York Times*, the *Washington Post*, and the *L.A. Times* all in the last 2 years have published op-eds by Hamas spokespersons.

Under this law, they're all guilty of providing material support to a terrorist group, because they provided a service by publishing that op-ed on behalf of Hamas. And any coordinated speech with one of these groups, the government says, is a prohibited service. President Jimmy Carter, who was on the same amicus brief that the International Crisis Group filed, went to Lebanon to monitor their elections.

And one of the things he does -- and when he does

that, he goes and talks to all of the parties and tells them, you know, from his expertise as an election monitor, what are the appropriate procedures and what should you look out for in terms of a fair election. He did that with Hezbollah. He's providing expert advice to Hezbollah. Should he be prosecuted as a terrorist? That's how broad this law is written.

And the second point I just want to -- I want to pick up on is this notion about how these groups get designated and what the process is, because I'm also involved in a case there of a group in Toledo, Ohio. A Muslim charity which had its assets frozen 4 years ago, not based on any finding of illegality, not based on any court proceeding whatsoever, but simply on an assertion by the Department of the Treasury that they're investigating the group, not that they've committed anything wrong, but they're investigating the group.

And on the basis of that, they froze their assets, shut down the charity. It's now been 4 years. There's never been a finding of wrongdoing. There's never been any kind of judicial determination. There's never been any fair opportunity for the group to defend itself. So we are -- we have constitutional problems both on the end of how we designate and what process we provide, and on the end of very, very broadly criminalizing U.S. citizens' activities that in any way is coordinated with or speaks to one of these groups.

MR. NNAMDI: Tony Barkow, would you argue that we should err on the side of security?

MR. BARKOW: Well, I think -- and that is certainly a relevant question. Any rule that we pass in law is going to be over- or under-inclusive. And in this particular area, this law has struck the balance to err on the side of national security over First Amendment associational rights. And I think that in this area when you're dealing with international terrorism, when you're dealing with foreign entities, that's a reasonable balance to strike.

I acknowledge that there are potentially problematic applications to the statute. There are provisions in the statute that attempt to carve those out. The statute states that -- and the Congress stated its intent not to prohibit independent advocacy. I don't think that the publication of an op-ed piece by one of these

organizations would fall within the statute.

But I understand the issue that once you can posit -- and David is really good at this -- posit hypotheticals that are difficult to grapple with. But I'm not aware of very many cases that kind of fit this model where people have been prosecuted. That doesn't answer the question about its potential chilling effect.

It raises the question of who should decide which is -- which I brought up at first and has been mentioned throughout. And, you know, these are difficult policy questions. But the statute definitely does strike the balance and err on the side of national security.

MR. NNAMDI: Here is Matthew in Springfield, Virginia. Mathew, you're on the air. Go ahead, please.

MATTHEW: Hey, Kojo. It's great to speak with you again. I love your show. And I just wanted to basically, I guess, posit a hypothetical situation based on a hypothetical -- no, the question based on a situation. Now, say that the Supreme Court decides in favor of these groups based on free speech rights.

Now, this to me brings up interesting issue with a decision that they came about to earlier, where it involves corporations being able to donate unlimited amounts of funds, as I take it, based on the right of their being able to do this with free speech. And since money equates to speech, this could be, in my mind, problematic for how this case actually does get decided and what actually does constitute material support versus what is protected free speech.

MR. NNAMDI: Adam Liptak is there. Anything we can learn from the Supreme Court's decision in *Citizens United v. FEC* that would apply to this case of *Holder v. Humanitarian Law Project*?

MR. LIPTAK: I think the answer to that is no, Kojo, for this reason. *Citizens United* explicitly said it's not about coordination, it's about independent expenditure. So it said corporations may spend money to put up independent ads on behalf of the politicians they like, or against the politicians they don't like.

And here too there's no question that Ralph Fertig and the others, independently of the Kurds, can say

whatever they want. So in that sense, Citizens United actually helps us think about what is and isn't proper under the material support law as the government sees it. And the government was very clear that anything you want to do independently of the terrorist organizations, including publishing op-eds on their behalf, going to court and making arguments and amicus briefs and so on would be fine.

MR. NNAMDI: Matthew, thank you for your call. Jonathan Winer, is it a problem that the government only has one category of terrorist? Because, to my mind, the FARC in Colombia is a different kind of animal, so to speak, than al Qaeda.

MR. WINER: It's -- FARC is different. FARC is a terrorist group, a drug-trafficking group, organized crime. It kind of does all those things. It also does assassinations. It's a pretty terrible group, but it's quite different. They can -- the government can always tailor sanctions programs in various ways.

And, for example, in the area of economic asset freezing, that David Cole referred to a minute ago, the sanctions about Cuba are actually much broader, ironically, than the sanctions on terrorists or any other category of person or thing, just the way the law was drafted. So there's lots of flexibility there.

In the end there's a one big gigantic question which I think everybody should be thinking about, which is should you be able to impose sanctions on people of various kinds such as limiting their right to take action, communicate with, or support, let's -- let me try and (inaudible) that issue for a second.

A group that the President says is a foreign terrorist group, should the President have the right to do that as a national security matter or not? There's a lot of other questions that arise from that. But you have start with that question and stay with it. And that -- and the sanctions --

MR. NNAMDI: I'm afraid we're going to have to end with that question.

MR. WINER: Yes, okay.

MR. NNAMDI: Because we're just about out of time. Jonathan Winer is senior vice president at APCO

Worldwide. He's former deputy assistant secretary of State for international law enforcement. David Cole is a professor of Law at Georgetown University Law Center. He represented the Humanitarian Law Project in the recent Supreme Court arguments.

Adam Liptak is Supreme Court reporter with the *New York Times*. Robert Malley is Middle East and North Africa Program director with the International Crisis Group, which, along with other human rights organizations, filed briefs in support of the Humanitarian Law Project in the recent case.

And Anthony or Tony Barkow is executive director of the Center on the Administration of Criminal Law at New York University Law -- School of Law. He's a former assistant U.S. attorney in the southern district of New York. He filed a brief in support of the government's position in that Supreme Court case. Thank you all for joining us.

And thank you for listening. I'm Kojo Nnamdi.