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What's 'Free' About Speech?

By A. Marco Turk

For years there has been a parade of humanitarian groups engaged throughout the world, attempting to achieve peace in various ways in different parts of the globe and working with a diversity of populations. Among these organizations are Amnesty International, American Friends Service Committee, Saferworld, and the Humanitarian Law Project, to name but a few. Added to this list are individuals, such as former President Jimmy Carter, who devote their efforts to bringing about a more peaceful world. To my knowledge there has been no conscious attempt by these organizations and individuals to work with "terrorist" organizations.

Now comes our Supreme Court through the written opinion by Chief Justice John G. Roberts Jr., recently deciding 6-3 in *Holder v. Humanitarian Law Project* that the constitutional right of free speech does not protect one from prosecution under provisions of the Patriot Act that prohibit giving "material support" to those who are "terrorists," even when devoting efforts urging the relinquishment of arms and adopting lawful, peaceful methods to realize a political agenda.

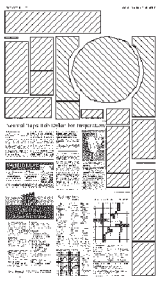
Under the Patriot Act, U.S. citizens are prohibited from rendering "services," "personnel" or "training, expert advice or assistance" to groups who have been designated a "terrorist" by our government. The Act's prohibition against weapons training and funding have not been questioned. So the question before the Court was to what extent activities not linked to terrorism could be punished. The answer provided is astounding: Irrespective of the nature or the purpose, any aid to such groups will be prohibited if it could assist the group in legitimizing itself.

The result is that groups such as the Humanitarian Law Project that planned to provide advice to the Kurdistan Workers' Party (PKK) could not do so without violating the Act. *The Washington Post* commented, "So members of the Humanitarian Law Project legally can stand on a street corner and praise the PKK for carrying out terrorist acts, but they cannot work with the PKK in an effort to stop the violence." In other words, the right of free speech may be exercised in support of violence but cannot be used in an effort to stop it.

In dissenting, Justice Stephen G. Breyer (joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor) argued that the necessary deference to the political branches of our government in matters of national security does not override the right of free speech. "Not even the 'serious and deadly problem' of international terrorism can require automatic forfeiture of First Amendment rights," was emphasized in dissent.

Interesting and far more reasonable than the majority view was the alternative proposed by the dissent: Citizens should not be prosecuted unless they act with knowledge, based on reasonable belief, that the service they provide will be employed to further the violence. As *The Washington Post* concluded, "Congress was right to criminalize the donation of money and tangible goods to terrorist groups; such resources can be used to further violent ends even if donors mean them for legitimate purposes. The same cannot be said of the kind of services the Humanitarian Law Project intended to provide."

Under the majority view, the potential for unconstitutional intrusion into lives of U.S. citizens is chilling. Purportedly an effort by the law school at the University of Southern California, the Humanitarian Law Project appears to have been founded in 1985 as a non-profit organization. It dedicates itself to "protecting human rights and promoting the peaceful resolution of conflict by using established international human rights laws and humanitarian law." Its "long-term objectives are to strengthen human rights standards ratified by nations around the globe and to foster communication on compelling international human rights issues among human rights activists, law faculty and students, members of Congress and their staffs, as well as interested



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citizens." The group represents that it "is a non-governmental organization (NGO) with consultative status at the United Nations with a mandate to seek compliance with armed conflict laws."

Incredible as it may sound, the Humanitarian Law Project case demonstrates that even former President Jimmy Carter could be subject to criminal prosecution under the Patriot Act for his work in assisting the monitoring of fair elections in Lebanon. After rendition of the majority opinion, David Cole, the Cooperating Attorney at the Center for Constitutional Rights (CCR) was quoted as saying, "We are deeply disappointed. The Supreme Court has ruled that human rights advocates, providing training and assistance in the nonviolent resolution of disputes, can be prosecuted as terrorists. In the name of fighting terrorism, the Court has said that the First Amendment permits Congress to make human rights advocacy and peacemaking a crime. That is wrong."

CCR notes that this type of speech, which could even extend to the filing of an amicus brief in the Supreme Court, would constitute a crime if pursued in support of a group that had been labeled as "terrorist." The extension of this analysis seems to be open-ended in its effect on the exercise of free speech.

Senior CCR Senior Attorney Shayanna Kadidal has noted that many unanswered questions remain after the rendering of the majority decision in the Humanitarian Law Project case, such as, "whether publishing an op-ed or submitting an amicus brief in court arguing that a group does not belong on the list is a criminal act." Her expressed concern is that we must "ensure that humanitarian groups may engage in human rights advocacy, training in non-violent conflict resolution and humanitarian assistance in crisis zones without fearing criminal prosecution."

The Roberts' Court has joined those very few instances in the history of this country when our highest court (of last resort) has allowed the government that is supposedly of, by and for the people, to establish as a crime the advocation of activity that is nothing more than lawful and nonviolent.

Perhaps all those organizations, such as Mediators Beyond Borders', peopled by uncompromisingly dedicated individuals that devote time, money and effort to the important work that truly is world-saving, need to rethink how they can continue their critically important work without facing up to 15 years behind bars for rendering "material support" to organizations designated as "foreign terrorist." This is notwithstanding that their work is intended for no purpose other than the promotion of objectives that are purely peaceful and lawful.

Because the definition of "material support" includes any "service," "training," "expert advice or assistance," or "personnel," the adage that one person's terrorist is another's freedom fighter, becomes all the more critically important to those of us who have dedicated a major portion of our lives to peacebuilding, peacemaking, and peacekeeping activities.

The Humanitarian Law Project case demonstrates that even former President Jimmy Carter could be subject to criminal prosecution under the Patriot Act for his work in assisting the monitoring of fair elections in Lebanon.

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