

In the Name of National Security

Brennan Foxman

The Problem

September 11, 2001 was not the beginning of the War on Terror. Indeed, America has been fighting terrorism and terrorist activity for over thirty years, from the Beirut bombing to the attack on the USS Cole. Over the course of this new-aged battle, the United States has been struggling with the proper balance between national security and our civil liberties. This struggle became exponentially more complicated after the 9/11 attacks and ensuing deaths of nearly 3,000 Americans. Consequently, both American foreign and domestic policy has included provisions that challenge our Constitutional rights and freedoms in the name of national security.

This problem presents an interesting challenge for the court system. On the one hand, the courts must face the fact that we are at war with not only an enemy but also an ideology. Ruling against all violations of our civil liberties will inhibit the tools that law enforcement need in order to combat terrorism and keep our country safe. On the other hand, the courts must also keep protecting our Constitutional rights their primary objective. Regardless of the threat level, the courts have a history of protecting our rights, particularly our First Amendment rights to freedom of speech and association. It is in this atmosphere in which the Roberts Court ruled on the Antiterrorism and Effective Death Penalty Act (AE-DPA) and the Humanitarian Law Project on June 21, 2010.

The Case

In 1996, the Antiterrorism and Effective Death Penalty Act stipulated that, "it is a federal crime to knowingly provide material support or resources to a terrorist organization."¹ Expanded upon, the term "material support" means any property or service, tangible or intangible, excluding the exchange of medicine or religious materials. This includes monetary instruments, expert advice, communication equipment, facilities, weapons, personnel, training, or safe houses. Over the course of its history, the definition of "material support" has been narrowed down to clarify that a violation of this law requires the knowledge of the groups designation as a terrorist organization and to specifically address the definitions of the

1 *Antiterrorism and Effective Death Penalty Act*, codified at *U.S. Code* 18 (1996 & Supp. 2005), § 2339.

words “training”, “expert advice or assistance”, and “personnel”.² In addition, the designation of a group as a terrorist organization lies with the Secretary of State.

The Humanitarian Law Project has been battling this law for over 12 years in the District Court of Los Angeles, the Court of Appeals in the 9th Circuit, and finally the Supreme Court. The issue revolves around two groups designated as foreign terrorist organizations, the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE). Although both groups are designated as terrorist organizations, they both have peaceful and nonviolent aspects of their organizations for which the Humanitarian Law Project wishes to assist or aid.³ For example, American Tamil doctors who are amongst the plaintiffs wish to return to Sri Lanka and provide medical assistance and infrastructure to the areas devastated by the tsunami.

The Humanitarian Law Project focused on challenging the material support statute at two basic levels. First, the AEDPA violated their freedom of speech and association under the First Amendment because it made it illegal to provide “material support” to the PKK and LTTE and it did not put the burden on the government to prove that the plaintiffs wished to further the group’s unlawful activities. Second, they claimed that the statute was unconstitutionally vague.⁴

On June 21, 2010 Chief Justice Roberts delivered the opinion of the Court. In terms of its vagueness, the Court explains that the law does not violate the Due Process Clause of the 5th Amendment. The plaintiffs do not argue that the material support statute awards too much discretion to the federal government; therefore the only challenge would be whether the statute “provides a person of ordinary intelligence fair notice of what is prohibited.”⁵ The Court believes that Congress specifically added more detailed definitions of terms to increase the clarity and therefore reduced the potential vagueness.

In terms of this specific case, the actions of the plaintiff are clearly addressed by the statute. They wish to conduct activities that fall within the realm of “training” and “expert advice”. Even though the plaintiffs try to challenge the law based on hypothetical situations, the Court did not rule on such questions and only applied the law to this specific case.

2 § 2339A(b)(2)

3 “Holder v. Humanitarian Law Project,” Center For Constitutional Rights, <http://ccrjustice.org/holder-v-humanitarian-law-project> (accessed November 12, 2010).

4 *Humanitarian Law Project v. Holder*. 561 U.S. ____ (2010)

5 *Williams*, 553 U.S., at 304. (2008)

Consequently, the challenge of vagueness was automatically discredited. In addition, some of the activities in which the plaintiffs wish to engage in, including “political advocacy”, are entirely legal under the revisions of the material support statute. In order to violate the “personnel” section of the law, one must work “under that terrorist organization’s direction or control.”⁶ In terms of independent advocacy, the law does not apply.

The final question then rested with the supposed restrictions on speech and the infringement on the First Amendment rights to freedom of speech. The Humanitarian Law Project claimed that Congress had banned their pure political speech. The government, on the other hand, wished to argue that the AEDPA only limits conduct, not speech, and therefore the courts should implement intermediate scrutiny. This level of scrutiny implies that “...a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”⁷

The Court disagreed with applying the O’Brien Test because the AEDPA regulates the plaintiff’s speech on the basis of its content. That is to say, the law outlaws certain types of speech based on the content that is in question. O’Brien is a lenient standard the Court uses if the content being regulated by the government is neutral. This not being the case, the Court applied a “more demanding standard” on the government based on *Texas v. Johnson*.⁸

The Court further contended that the government is justified in their actions, despite the stricter scrutiny, because it does in fact serve a compelling government interest. Although the plaintiffs argued that they wish to advance strictly the nonviolent activities of these organizations, the Court concluded that there is strong evidence that these groups do not adequately separate their violent and non-violent activities. For example, Hamas uses money from charitable organizations to fund their terrorist operations. This information was taken from congressional and executive views on the subject and the Court deferred to their advice due to their own lack of expertise in foreign affairs and national security.⁹

In terms of a conclusive answer as to the constitutionality of the AEDPA, the Court made no overarching opinions. They refused to rule on

6 § 2339B(h).

7 *United States v. O’Brien*, 391 U.S. 367, 377. (1968)

8 *Texas v. Johnson*, 491 U.S. 397, 403. (1989)

9 *Humanitarian Law Project v. Holder*, 08-1498 Reporter of Decisions (BNA) (June 21, 2010), <http://www.supremeCourt.gov/opinions/09pdf/08-1498.pdf> (accessed November 19, 2010). Pg 24.

hypothetical situations that were brought up by the plaintiffs and instead focused specifically on the actual actions conducted. Furthermore, the Court remarked that this ruling would not rule out any future cases on the AEDPA in terms of free speech or advocacy. As a result, it is unclear whether or not the Court believed there could be instances in which the law violated the First Amendment.

The dissenting justices, Breyer, Ginsburg, and Sotomayor, agreed with the majority opinion that the law was not unconstitutionally vague. However, they disagreed with the notion that the government has showed that the restrictions of speech serve their compelling interest. The dissent pointed out that this type of speech in which the plaintiffs wish to engage in, political and peaceful speech, usually receives the strongest protection under the First Amendment.¹⁰ Furthermore, the law prohibits providing "personnel" to an organization designated to be a terrorist organization. The Court has previously shown that that association, regardless of its specific role, is protected by the First Amendment.¹¹ The dissenting justices believe that association with a group, regardless of the group's unlawful activities, does not automatically assume the same guilt.

The dissenting opinion ceded the fact that the government had a compelling interest, our national security, in implementing the AEDPA. They argued, however, with the notion that restricting the plaintiff's specific form of speech would somehow render us "less secure". The dissenters were not convinced with the justifications of the government and therefore believe that the restrictions on the plaintiff's speech are not consistent with the First Amendment to the constitution.

Unavoidable Reality:

Although the courts have usually erred on the side of protecting speech even during wartime, it is important to understand that the founding fathers understood that, above all else, the government's main objective was national security. Even during the debate over the ratification of the Constitution, Alexander Hamilton remarked, "the principle purposes of the newly created federal government was the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks."¹² Most of his peers agreed, arguing that the powers of government to protect the people must exist without limitation. George Washington too, during his inaugural address, stated,

10 *New York Times Co. v Sullivan*, 376 U.S. 254, 269 (1964)

11 *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982)

12 THE FEDERALIST NO. 23, 153 (Alexander Hamilton)

“To be prepared for war is one of the most effectual means of preserving peace.”¹³

This being said, national security has always been regarded as one of the most fundamental elements of our nation. The Court obviously agreed in *Humanitarian Law*, stating that national security concerns are high enough to warrant restrictions on speech and association. One of the main grievances used by the plaintiffs, however, was the desire to provide “material support”, including money and financial help, to organizations for their humanitarian and charitable means. The Court addressed this issue.

Due to the fact that money is fungible, terrorist organizations often use this to their advantage. It is a well-known fact that terrorist groups often conceal their violent activities behind political, charitable, or social fronts. Al Qaeda, for example, began to use charitable operations to fund their terrorist activities in the late 1990s. They would install terrorists into leadership positions at various charitable organizations and funnel money into their operations.¹⁴ Groups like the LTTE, Hamas and the PKK use “legitimate” organizations such as charitable foundations in order to “train, fund, and dispatch suicide bombers to attack civilian targets.”¹⁵

It is exactly this blurred line between legitimate and illegitimate activity that forced the Court to rule in favor of the Government in *Humanitarian Law*. In theory, advancing or contributing to a group’s nonviolent and legal activities would be constitutionally protected. However, these groups manipulate all aspects of their organization to benefit their illegal and violent aims.

In addition, the Government took particular care in the creation of the AEDPA and the revisions in the Patriot Act in an attempt to avoid constitutional issues. Accordingly, the Court acknowledged this special care. The Government allows for advocacy, the basic pillar in our freedom of speech, and membership, the basic tenant of our freedom of association. They only seek to limit specific forms of speech and membership that will cause a heightened level of national security to our immediate national interests. The Court believed in the reasoning and justifications provided by the government. It is in this atmosphere that they ruled that

13 Lawrence B. Evans, *Writings of George Washington* (Knickerbocker Press, 1908). Pg 329.

14 Zachary Abuza, *Terrorist Financing*, GAO Report. (December 2003).

15 Matthew Levitt, *Hamas Politics, Charity, and Terrorism in the Service of Jihad*, (Yale University Press 2006).

national security, in this specific case, trumps the right to speech and certain association under the First Amendment of the Constitution.

History Revisited:

One of the main supporters of the plaintiffs was The Victims of the McCarthy Era, a group of individuals who had family members who were persecuted by McCarthy and the American Government. Naturally, this group sympathized with the plaintiffs because they felt political speech and association was being silenced much like it was during the Red Scare. They provided an Amicus Curiae brief on behalf of the Humanitarian Law Project in which they made several correlations between this case and previous ones in an attempt to draw distinctions and conclusions. Two of which are very important to this case and shed light onto whether or not the Court made a consistent and correct ruling in *Humanitarian Law*.

The Victims of the McCarthy Era tried to draw correlations between the AEDPA and the Smith Act, which made it a crime to “advocate, advise, teach, or publish material espousing the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States.” In addition and most importantly, the Act also made it a crime to become a member of, or affiliated with, any group espousing these same beliefs.¹⁶ In essence, the law infringed on the right of association granted by the First Amendment.

The Court ruled on the Smith Act in 1961 in *Scales v. United States* and sternly declared in favor of the right to association and against the Membership Clause of the Smith Act. They outlined two very important limitations on the government; (1) blanket prohibitions on association with groups that have legitimate and unlawful practices is unconstitutional and (2) it is also unconstitutional to impose criminal sanctions on individuals who do not specifically intend to further a groups illicit aims.¹⁷

In terms of *Humanitarian Law Project v. Holder*, the Court responded to certain aspects of *Scales* and rejected others. The Court ruled that the AEDPA did not outlaw independent advocacy and it was therefore not restricting independent association; the plaintiffs were free to advocate for terrorist groups without facing criminal punishment. The Court also made an attempt to rationalize their decision with the 2nd limitation of *Scales* by claiming that although, under normal circumstances, criminal sanctions for individuals not involved in criminal activity would

16 *Alien Registration Act*, codified at U.S. Code 18 (1940), § 2385.

17 *Scales v. United States*, 367 U.S. 203 (1961)

not be allowed. This case is different because the groups in question do not distinguish between their illegal and legal activities. As a result, the Court felt that this precondition would not apply because legal aspects of a terrorist organization could often be used to manipulate or advance their illegal aims.

However, the 1st limitation outlined in *Scales* presents a far more interesting dilemma for the *Humanitarian Law* case. The Court addresses independent advocacy and association, but makes little justification for AEDPA in regards to the first limitation set out in *Scales*. The Court explains that membership is not a criminal activity, but rather providing "material support". These two conditions, however, are not readily distinguishable. For example, the word "personnel" can be translated into a variety of other terms, including laborer, staff, employ, or worker. All of these definitions imply that joining an organization at any level above just a "member" is illegal under AEDPA.

The Court does not address this issue but instead claims membership is legal under AEDPA and therefore presents no constitutional problem with the First Amendment right to association and precedent laid out in *Scales*.

They also try to use national security as justification for the restrictions on association but make no reference to the fact that national security was invoked during the *Scales* case and failed. In fact, the Court specifically addressed the relationship between limitations on speech and association and national security in *United States v. Robel*.

*"The concept of national defense cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term national defense is the notion of defending those values and ideals which set this nation apart...It would be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile."*¹⁸

This glaring defense of wartime rights, particularly the right to association by way of "personnel" and "material support", was not only ignored but also arguably contradicted by *Humanitarian Law*. An almost identical correlation between the *Scales* and *Humanitarian Law* exists in which the Court decided in the latter to put the burden on the government to provide a compelling reason for the abridgement of such rights. Even in the face of a serious communist threat, the Court refused to allow the government to use this as a justification. This Court, however, was

18 *United States v. Robel*, 389 U.S., 263-64 (1967)

presented with a far less serious national security threat, yet allowed the government to essentially prohibit the right of association by means of “material support” between American citizens and terrorist organizations.

Both *Scales* and *Robel* allow us to view the 2010 case differently. In both cases, the Court decided that the government would need to make a compelling case for national security in order to limit our First Amendment freedoms. In addition, the presence of such cases does not automatically mean our rights should be forfeited either. In *Humanitarian Law*, however, the Court often deferred to the government’s advice and recommendations in assessing the threat level of these organizations. In particular, the Court stated that respect for the government’s factual conclusions is necessary due to the Court’s lack of expertise and knowledge in regards to foreign affairs and national security.

This, however, was clearly not the precedent. In fact, the government used extremely strong language in *Robel*, stating that Communism “can no longer be viewed passively as a group of mere political and ideological dissidents, but must be looked upon with all seriousness as a military fifth column actively aiding our enemies.”¹⁹ Despite this, the Court stood its ground and ruled that even this was not compelling enough to abridge the rights of association. They did not defer to the government’s superior knowledge of the situation like the Court did in *Humanitarian Law*.

Perspective: The War on Terror

Since the Court decided that the government had provided a compelling interest, our national security, it seems important to discuss this interest in the context of our nation’s history in terms of war and national security. Specifically, it is imperative that we explore the role of free speech and association during wartime in an attempt to understand the legitimacy and necessity of restricting it in the War on Terror.

Sanford Levinson, a professor of law at The University of Texas, stated that, “It is difficult to read our constitutional history ... without believing that the Constitution is often reduced at best to a whisper during times of war.”²⁰ Most people would agree that, over the course of our nation’s brief history, we have developed a tendency to abandon our core values during times of war. But *Humanitarian Law Project v. Holder*, a case entirely dependent on the government’s ability to prove that our
19 Government brief at pg. 22, *United States v. Robel*, 389 U.S., 263-64 (1967)

20 Sanford Levinson, “What is the Constitution’s Role in Wartime? Why Free Speech and Other Rights Are Not As Safe As You Might Think,” Findlaw (Oct. 17, 2001).

national security interests trump our civil liberties, asks us to investigate exactly how this war and this specific law stack up against previous threat levels and subsequent policy initiatives that quash our basic civil liberties.

Certainly advocates of the AEDPA can point to the Civil War for examples of wartime legislation that disrupted civil liberties. Lincoln, for example, suspended habeas corpus, seized telegraph lines and railroads, and even arrested people for singing Confederate songs.²¹ The First World War was also a moment of great governmental intrusion on our liberties. World War I witnessed the Espionage Act of 1917, a legislative assault on first amendment freedoms that allowed for the suppression of all materials and speech that were seen as disloyal.²²

World War II also had its own infringements. Amongst these were the outrageous Japanese internment camps and the censorship of all news by President Roosevelt following the Pearl Harbor Attacks.²³ And, as previously discussed, the Cold War had its own set of daunting and invasive attacks on the First Amendment's freedom of speech and association. All of this considered, however, it is important to draw distinctions between our previous national security crises and the one we are experiencing today.

How does the War on Terror stack up? In short, it does not stack up too well. The Civil War resulted in the deaths of over 300,000 Americans. The country was ravaged from top to bottom and suffered for decades in recovery. The two World Wars combined for nearly half a million American casualties. And, even though the country suffered no direct deaths in combat with the Soviet Union, proxy wars were waged in both Korea and Vietnam that cost America over 100,000 casualties.²⁴ In addition, the Cold War brought on the possibility of nuclear war with the Soviet Union, which could have resulted in the complete destruction of our nation.

Despite all of this, the courts throughout these conflicts still made attempts to defend our civil liberties. *United States v. Robel* is an example in which the government showed a compelling interest, our national security, yet was restrained by the Supreme Court. In *Humanitarian Law*,

21 Michael Linfield, *Freedom Under Fire: U.S. Civil Liberties in Times of War* (Boston: South End Press, 1990), p. 2.

22 Paul Murphy, *World War I and the Origin of Civil Liberties* (New York: W. W. Norton & Company, Inc., 1979), p. 69.

23 *Korematsu v. United States*, 323 U.S. 214 (1944).

24 R Lee. "The History Guy: Casualties From America's Wars" http://www.historyguy.com/american_war_casualties.html

however, the Court deferred to the government's assessment of the threat to national security in order to justify its restrictions on speech. In context, however, this threat level is extremely overdramatized.

Notwithstanding all the hype and chatter over the lengthy amount of time in both Afghanistan and Iraq, American forces have suffered around 6,000 deaths, a number strikingly low compared to the hundreds of thousands of deaths that resulted from other previous wars. In addition, the domestic security threat as a result of terrorist activity has been highly overdramatized as well. Over the past ten years, a little over 3,000 civilian lives have been lost due to terrorist attacks, nearly all of which came from the September 11th attacks on the World Trade Center.²⁵ In fact, the likelihood of getting killed by a terrorist attack, which is estimated to be between 1/80,000 and 1/110,000, is similar to the probability of getting killed by an asteroid.²⁶ Certainly, given this statistic, it seems unreasonable that the Court would deem the threat level during the War on Terror as high enough to warrant governmental intrusions on our First Amendment liberties, especially considering the precedent of previous courts' ruling in defense of individual liberties during periods of more serious national security threats.

And what of our enemy? Surely if national security is to be used to justify an infringement on our First Amendment rights we must be facing an enemy so powerful that merely giving "expert advice" to such a group would jeopardize our national security interests. The problem is that our enemy, Al Qaeda, has only about 100 fighters in all of Afghanistan²⁷. The Court essentially decided that the War on Terror presents a more urgent national security crisis than the Cold War (considering the decision in *Robel* and that of *Humanitarian Law*), yet our enemy is no bigger than a mid-size law firm. Again, the Court neglected to put the War on Terror into context in making its decision.

Some Problems Arise

The Court clearly stipulated the government has the right to implement the AEDPA as it relates to the Humanitarian Law Project and its activities. Having said this, certain situations that are illegal under the

25 "9 Years Later, Nearly 900 9/11 Responders Have Died, Survivors Fight for Compensation". FOX News. September 11, 2010.

26 John Mueller, *Atomic Obsession* (New York: Oxford University Press, 2010), 181-201.

27 Richard Esposito, "President Obama's Secret," *ABC News*, December 2, 2009, <http://abcnews.go.com/Blotter/president-obamas-secret-100-al-qaeda-nowafghanistan/story?id=9227861>.

AEDPA are worth exploring and discussing in an attempt to understand the Court's decision. For example, the Court declared that association by way of providing "personnel" to a group that is designated a terrorist organization is illegal because there is no definitive line between the group's illegal and legal means. Assume, for arguments sake, that we ignore the precedent laid out in *Scales* or *Robel*.

Amongst the groups of plaintiffs represented by the Humanitarian Law Project were physicians and other humanitarian groups who wished to work with the LTTE in Sri Lanka. This group is designing as one of the terrorist organizations on the U.S. Department of State's list of Foreign Terrorist Organizations. In fairness, this group has shown extensive amounts of terrorist activity over the past several decades. They carried out assassinations, bombings, and kidnappings in an attempt to gain independence from Sri Lanka. The problem, however, is the fact that this group has controlled vast amounts of territory in the Northern Sri Lanka. In fact, the LTTE served as a functioning government in a vast region in Sri Lanka for an extensive period of time.²⁸

This region controlled by the LTTE was home to thousands of Sri Lankans that were devastated by not only civil war, but also the tsunami in December of 2004. These citizens, however, were deprived of American humanitarian aid and assistance because of the AEDPA and its ban on "material support" for the LTTE. Despite efforts of physicians and humanitarian groups to help the people of northeastern Sri Lanka, these individuals were not allowed to receive our aid due to the fact that they would be providing personnel for the LTTE, a designated terrorist organization.

The Court was able to ignore this situation because the LTTE surrendered to the Sri Lankan government in 2009. As a result, the Court assumed that this situation was no longer applicable and therefore did not rule on the parties in regards to the Liberation Tigers of Tamil Eelam. However, the concept of a ruling organization that is both the functioning government of a specific population and a supposed terrorist organization is left unresolved. The Court clearly asserted that working in a subordinate position to a terrorist organization is illegal but did not make this ruling in a case involved a governing organization. This being the case, it would seem unlikely that the government could provide a "compelling" reason for why speech and association, in terms of working to help a

28 "Holder v. Humanitarian Law Project," Center For Constitutional Rights, <http://ccrjustice.org/holder-v-humanitarian-law-project> (accessed November 12, 2010).

population recover from a natural disaster, under the auspices of a “terrorist organization”, should be restricted.

Although it would seem that such a scenario is highly unlikely, there are several examples that present serious legal and moral consequences. Take, for example, Hamas, which is the governing party of Gaza and a terrorist organization according to the State Department. With somewhere between two and five million American Muslims, many of our citizens are restricted from providing personnel to Hamas, even if it is to advance their non-violent objectives. If the government would allow this participation, assuming the activists wished to advance only the legal and nonviolent means of Hamas, there is a possibility that this association and speech alone would have a positive impact on Hamas as a whole. Historical evidence supports this claim as well.

Groups such as the PLO and Fatah had strong histories of terrorist activity. These organizations were once seen as serious threats to American national security as well as the security of our allies, including Israel. As time evolved, however, participation and personnel changes in these organizations began to diversify and varying opinions began to emerge on the representative stages, respectively. The PLO and Fatah both experienced conversions from terrorist organizations into recognized representative bodies as they changed their ways and adapted to both external and internal pressures.²⁹

This being the case, inhibiting participation in these organizations, specifically association and speech that only advances nonviolent and legal practices, would be depriving the opportunity for these groups to convert themselves into legitimate organizations. Therefore the issue presents two distinct moral and practical problems for America. First, the ban on association and speech as it pertains to the plaintiffs and the AEDPA (personnel and material support) has the possible effect of depriving innocent civilians of much needed aid and resources that are entirely independent of their governing organization. Second, the ban on speech and association in the AEDPA effectively eliminates the opportunity for American citizens to try and internally advance the nonviolent goals of a terrorist organization. Such internal advancements, which could possibly convert an organization into a law abiding and legitimate group and effectively *lower* the threat level posed to the United States, are impossible to achieve under the AEDPA.

29 “Fatah faces reform crossroads”. BBC. News. 2005. http://news.bbc.co.uk/2/hi/middle_east/4386355.stm

Governmental Power Stretched Too Far?

Another main concern with the ruling is the power granted to the State Department in deciding which group(s) should be designated a terrorist organization. The legal criteria for such a designation is quite simple; the group must (1) be a foreign organization, (2) it must engage in terrorist activity as defined in section 212(a)(3)(b) of the INA³⁰, and it must (3) threaten the national security of the United States. If these conditions are met, the State Department can designate a group as a terrorist organization with a seven-day review period by Congress.³¹ This loose set of guidelines provides for a wide-range of leeway for the State Department.

Furthermore, the Government could classify a group as a terrorist organization in a direct effort to inhibit the group's speech. This would also mean that, under the AEDPA, providing personnel to this organization would be a criminal act. In essence, the State Department could use this channel of classification to inhibit the civil liberties of previously protected organizations. What group would the Government try to dismantle purely to inhibit their speech? One answer is a relatively new and extremely controversial organization, Wikileaks.

The Court has traditionally protected the press, even in times of national security crisis.^{32 33} But the *Humanitarian Law* ruling could allow for organizations such as Wikileaks to be silenced if the government deems them a terrorist organization. Granted, the definition of a terrorist group is quite specific. Wikileaks does not seem to be in violation of any of the criteria for such a distinction, but the government nonetheless has the ability to classify them as such. Even prominent members of Congress openly support this designation, including Congressman Peter King of New York, the next Chairman of the House Homeland Security Committee.³⁴

Although this scenario is unlikely to play out for both legal and political reasons, it still raises interesting questions as to the scope and power of the AEDPA, which is now reinforced with the *Humanitarian Law*

30 *Immigration and Nationality Act*, codified at U.S. Code 8 (1996) §1182(a)(3)(B)

31 *Antiterrorism and Effective Death Penalty Act*, codified at U.S. Code 18 (1996 & Supp. 2005), § 2339.

32 *Near v. Minnesota*, 283 U.S. 697 (1931)

33 *New York Times Co. v Sullivan*, 376 U.S. 254, 269 (1964)

34 Max Fisher, "Is Wikileaks a Terrorist Organization ?" *The Atlantic Wire*, November 30, 2010, <http://www.theatlanticwire.com/opinions/view/opinion/Is-WikiLeaks-a-Terrorist-Organization-5978>

decision. In this case, the power of the State Department was well understood by the Court, but the Court made no remarks as to the extent or scope of its application. In fact, the Court deferred to the Government's expert advice in matters of national security and stated that they must do so considering the Court's lack of expertise. It is seemingly clear then that the Court could not, in a future case, challenge the power or expertise of the State Department to classify a group or organization as a terrorist organization. That being said, if Wikileaks were to legally fit within the confines of a terrorist organization, the State Department would have full ability to classify them as such, regardless of the organization's otherwise protected rights to free press.

Concern over Impartiality

Humanitarian Law v. Holder presents us with an interesting historical parallel in which outside influences, including public opinion, fear, and political pressure influence the Court into a specific decision. *Korematsu v. United States* also shared similar circumstances and outcomes to the 2010 decision and both cases resulted in the Supreme Court siding with the government, despite a level of "strict scrutiny".

In *Korematsu*, the Court held that Executive Order 9066, which provided for the internment of all Japanese Americans, was constitutional³⁵. This ruling also received a level of "strict scrutiny" but nonetheless sided with the Government. Both *Korematsu* and *Humanitarian* were entirely dependent on the perceived threat levels presented to the Court at the time of the case. And, in both cases, the Court ruled that restrictions on basic civil liberties were permissible because of national security concerns. These concerns, however, can be manipulated, distorted, and overdramatized by all parties.

Both cases straddle the border between the Court's sense of impartiality and individual levels of emotions. The decisions both would have resulted in different outcomes if, for example, the Justices were under the impression that the threat level was not high enough to warrant such governmental actions. Consequently, the media and "expert" influences in the case have an unprecedented amount of power over the outcome. In essence, the liberties of the plaintiffs, including the freedoms of speech and association, are entirely dependent on the ability of either side to persuade the Justices of the threat level of such actions.

We need not look further than the dissenting opinions of Justices Breyer, Ginsburg, and Sotomayor. The dissent, above all else, was simply

35 *Korematsu v. United States*, 323 U.S. 214 (1944)

not convinced by the Government as to the correlation between speech and association of the plaintiffs and a higher level of insecurity. They based their dissent on the fact that the government did not prove a “compelling interest” in limiting these forms of speech and association. As a result, the dissenting Justices felt that the AEDPA, as applied to the case of the plaintiffs, was unconstitutional. To be differentiated from most cases, the dissenting justices and the majority agreed on virtually all aspects of the case. They diverged, however, simply because they experienced different levels of persuasion by the Government.

It is hard to accept the fact that our civil liberties and Constitutional rights depend on factors independent of the law. Indeed, the security of these rights rests with the ability of Justices to find the true correlation between national security concerns and our freedoms of association and speech. We live in a world where media outlets depend on over-dramatizing content to boost profits and politicians hype up threat levels for political gains. It is hard to imagine that a group of Justices could sort through all the hype and hysteria to find the truth. Until then, unfortunately, we continue to live in a country that will occasionally truncate our civil liberties in the name of national security.

Where Do We Stand Now?

The *Humanitarian Law* ruling has a distinct effect on where we stand now as well as where we are going. The ruling was particularly interesting because it was one of the rare instances in which the Court ruled in favor of the Government, despite a policy of “strict scrutiny”. Nevertheless, the decision has numerous implications in terms of its scope as well as its own limitations. It is interesting to note that the plaintiffs believed that they would not only win, but that the Court would also rule even more broadly on the issue and state that Congress cannot make a person liable for the criminal acts of others.³⁶

It is fascinating that, although the Humanitarian Law Project lost this case, they essentially won on many issues. For example, the group wished to advocate on behalf of the LTTE and PKK and this request was determined by the Court to be outside the limits of the AEDPA and very much legal. In addition, the group wished to argue that they had a right to membership within these groups. The Court agreed, but clarified that the AEDPA does not restrict mere membership in a group. Both of these is-

36 “Holder v. Humanitarian Law Project,” Center For Constitutional Rights, <http://ccrjustice.org/holder-v-humanitarian-law-project> (accessed November 12, 2010).

sues were key points in the plaintiffs' case and were ruled legal by being outside the confines of the law.

That being the case, the decision in favor of the Government has broad repercussions as well as unanswered questions. First, the Government can assume they have the power to limit civil liberties, to an extent, as long as they can keep the public and courts in a constant state of fear and insecurity. The AEDPA was reinforced by the Patriot Act, a beehemoth piece of legislation passed in 2001 that simultaneously increased the power of the federal government and decreased the rights of American citizens. This legislation allowed for extended wiretapping, seizure of mail and messages, and searches with delayed warrants.³⁷ All of these components have previously been outlawed due to various infringements on civil liberties, but the Government enjoys protection because of a heightened level of national security.

To be fair, the courts have also struck some measures of Patriot Act down as being unconstitutional, regardless of the level of national security. For example, in 2004 a federal judge in New York ruled that a key component of the USA Patriot Act was unconstitutional because it gave the FBI the power to demand information from Internet service providers without judicial oversight. She emphasized that the provision "effectively bars or substantially deters any judicial challenge" and violates free-speech rights by imposing permanent silence on targeted companies.³⁸ Similar cases have appeared since 2001 and have shown that the courts are not entirely willing to rationalize governmental intrusion in the name of national security.

Furthermore, the Humanitarian decision implies that, as it pertains to the plaintiffs, the AEDPA does not violate our civil liberties. We are free to advocate, speak, and write about any terrorist organization as we wish. We have the liberty to act on behalf of a terrorist organization and communicate with them as much as we would like. We are also permitted to join an organization as long as we do not provide "material support". The AEDPA was revised in 2005 to provide narrower definitions of the terms used in the original statute. Consequently, the Court also ruled that AEDPA was not unconstitutionally vague in this case because the desired actions of the plaintiffs fit well within the terms outlined in the law.

37 *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Public Law 107-56 (October 26, 2001).

38 Dan Eggen, "Key Part of Patriot Act Ruled Unconstitutional," *Washington Post*, September 30, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A59626-2004Sep29.html>

In addition, the ruling implies that certain situations would probably render the AEDPA unconstitutional. For example, the plaintiffs proposed speech and conduct that fall directly within the confines of terms used in the AEDPA, including “personnel” and “training” that provides “expert advice beyond common knowledge”. The Court mentions, however, that if the plaintiffs intended to provide information to these organizations that straddled the border between “common knowledge” and “expert advice” (for instance, geography) then the ruling might have been different. Furthermore, the decision was dependent on the fact that there is no separation between the illegal and legal activities of the group *as it pertains to the proposed conduct of the plaintiffs*. If, for example, the plaintiffs wished to provide expert advice *only* to the civilian population living under the rule of a terrorist organization, even if they had membership status in such a group, the Court might have delivered a different ruling.

The Court, however, paid close attention to avoid ruling on specific things in the AEDPA. They justified the law with *Scales* by claiming that membership was not a crime, but made no reference to the term used in the AEDPA, “personnel”, that covers virtually all contributing members of an organization. In addition, the Court avoided ruling on the humanitarian aid to the LTTE by dismissing it all together due to the defeat of the Tigers in 2009. In terms of vagueness, the Court made a very narrow ruling, stating, “...of course, the scope of the material-support statute may not be clear in every application. But the dispositive point here is that the statutory terms are clear in their application to plaintiffs’ proposed conduct.”³⁹ Finally, they qualified the ruling by saying that it has no bearing on future cases or situations involving the constitutionality of the AEDPA. This close tiptoeing around key issues leaves the door wide open for future challenges as well as misinterpretations of the current law.

National security will always be at odds with our civil liberties. Over the course of our nation’s history, the Supreme Court has consistently acted as the decider between national security concerns and infringements on our rights as citizens. Now, as in the past, the Court feels that the threat level is high enough to warrant certain intrusions on these rights. Granted, the extents to which our liberties are violated under the AEDPA are mild at best. Most Americans have no interest in providing “material support” or any type of support to a group deemed to be a terrorist organization. Even if someone wished to advance the cause of such

39 *Humanitarian Law Project v. Holder*, 08-1498 Reporter of Decisions (BNA) (June 21, 2010), <http://www.supremeCourt.gov/opinions/09pdf/08-1498.pdf> (accessed November 19, 2010). Pg 16.

a group they would have a vast amount of legal leeway to do so, including membership, advocacy, and participation.

Regardless of the scope of the decision, however, it is possible that the Court has relied too heavily on the opinions and influences of the Government. When it comes to decisions regarding restrictions of First Amendment rights, the Supreme Court does not usually defer to the federal government's "expert" advice. Rather, they assess the situation themselves and provide an impartial ruling. In *Humanitarian Law v. Holder*, however, the Court decided to rely on the government's assessment of national security concerns. As a result, we can be sure that the government will continue to over-dramatize threat levels as long as the courts rely on their assessment of national security.