2010

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David Cole
Georgetown University Law Center, cole@law.georgetown.edu

David Cole, "The Roberts Court vs. Free Speech," The New York Review of Books, August 19, 2010, at 80.

August 2010

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Professor of Law
Georgetown University Law Center
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AUGUST 19, 2010

by David Cole

Holder v. Humanitarian Law Project
a case decided by the Supreme Court, June 24, 2010

On January 21, in its first decision of its recent term, *Citizens United* v. *Federal Election Commission*, the Supreme Court's five-member conservative majority announced that the First Amendment bars Congress from restricting the ways corporations can employ their vast financial resources to drown out the voices of ordinary people in federal election campaigns. On June 21, in one of its last decisions of the term, *Holder* v. *Humanitarian Law Project*, the same majority, this time joined by Justice John Paul Stevens, ruled that the First Amendment permits Congress to imprison human rights activists for up to fifteen years merely for advising militant organizations on ways to reject violence and pursue their disputes through lawful means. The two decisions purported to apply the same First Amendment standard, but in fact the Court applied that standard in radically different ways. In the Roberts Court's world, corporations' freedom to spend unlimited sums of money apparently deserves substantially greater protection than the freedom of human rights advocates to speak.

Ronald Dworkin has cogently identified the errors in the Court's legal reasoning in *Citizens United*, a decision President Obama himself has criticized.[1] But you won't see the President condemning the decision in *Humanitarian Law Project*, the first Supreme Court case to pit free speech rights against national security since the September 11 attacks. At issue was a federal law banning "material support" to "foreign terrorist organizations" even when the "support" consists only of speech advocating peace and human rights. The lower courts had repeatedly declared the provisions that prohibit speech unconstitutional, but the Obama administration—represented by Elena Kagan, the solicitor general—appealed to the Supreme Court, to which she was later nominated. (I argued the case for the Humanitarian Law Project, an organization that works to promote human rights and peace in conflict-ridden regions.)

The material support law, enacted as part of the 1996 Antiterrorism and Effective Death Penalty Act and expanded by the 2001 Patriot Act, gives the secretary of state virtually unchecked authority to formulate a list of "foreign terrorist organizations." The list currently includes, among others, Hamas, Hezbollah, and the Kurdistan Workers' Party of Turkey. It is a crime to provide "material support" to listed groups, not only in the form of money or weapons, but also in the form of speech; the law specifically prohibits anyone from providing them with "expert advice," "training," and "services." According to the Obama administration the law prohibits even speech that seeks to discourage violence by encouraging lawful alternatives.

Under this law, when former President Jimmy Carter monitored the June 2009 elections in Lebanon, and met with each of the parties to advise them on fair election practices, he could have been prosecuted for providing "material support," in the form of "expert advice," to a designated group, because he advised Hezbollah. When *The New York Times*, *Los Angeles Times*, and *The Washington Post* published Op-Eds by Hamas leaders in recent years, they, too, were committing the crime of providing "material support" to a designated terrorist group, because doing so provided Hamas a "service." And my clients, a retired judge and a human rights group, cannot continue to work with the Kurdistan Workers' Party for peace and human rights on behalf of the Kurds in Turkey, as they had been doing before the law took effect, without risking long prison terms.

In the past, the Supreme Court has ruled that the First Amendment protected the right to advocate even criminal activity, including overthrow of the government, so long as one's advocacy was not intended and likely to produce an imminent crime. In the *Humanitarian Law Project* case, however, the Court ruled—for the first time in its history—that speech advocating only lawful, nonviolent activity can be subject to criminal penalty.

The Court's decision is all the more disturbing when contrasted with *Citizens United*. The campaign finance law that the Court struck down did not prohibit speech, but merely required corporations to establish political action committees, using separate funds, to engage in political campaign speech. The campaign finance law applied across the board to all corporations and unions, without regard to political identity, and afforded public officials no discretion to pick and choose. The material support law, by contrast, criminalizes speech outright—consulting with, advising, or speaking on behalf of disfavored groups. And it gives the executive branch carte blanche to apply the ban only to those organizations it disfavors, thereby greatly amplifying the risk of censorship.

The Supreme Court found that both laws restrict speech based on its content, and therefore had to undergo the Court's most demanding standard of review, known as "strict scrutiny." Under strict scrutiny, laws can be sustained only if they are narrowly tailored to serve a compelling government interest. The late Stanford law professor Gerald Gunther once described this standard as "strict in theory, but fatal in fact," because so few laws have ever survived it. The standard reflects the First Amendment's strong presumption against content-based regulations of speech, and is supposed to ensure that the justices' own sympathies for particular speech or speakers do not affect their constitutional analysis.

In both cases, there was no dispute that the government had a legitimate goal; the question was whether the means chosen were narrowly tailored. Thus, in *Humanitarian Law Project* the Court asked whether barring peaceful communication with listed groups intended only to further non- violent ends was necessary to protect our national security. In *Citizens United*, the question was whether requiring corporations to use segregated funds for campaign spending was narrowly tailored to guard against corruption of the political process.

In *Citizens United*, the Court imposed a heavy burden of justification on the government, and required solid evidentiary support for all justifications that the government offered. For example, the Court rejected as insufficiently supported by evidence the government's argument that unrestricted corporate expenditures could lead to corruption of politicians, despite extensive congressional findings and evidence documenting precisely such corruption.

By contrast, in *Humanitarian Law Project*, the Court upheld the material support law based on justifications that were unsupported by evidence—and in some instances were not even advanced by the government. The Court reasoned that speech advocating peace and human rights might "legitimate" a designated terrorist group, thereby interfering with US foreign policy. And even though neither Congress nor the administration ever suggested as much, Chief Justice Roberts speculated that advising an organization on how to file human rights complaints with the United Nations might permit the group to use the law to "threaten, manipulate, and disrupt," and that helping a group pursue peace might give it cover to prepare for its next attack.

The Court demanded no evidence that any of these hypothetical dangers had ever come to pass. Instead, the Court explained that, because the material support statute's goals were "preventive," no evidentiary support was required. But of course, the campaign finance law was equally preventive, since it sought to forestall corruption and distortion of the political process. Indeed, virtually all laws restricting speech are "preventive," inasmuch as they seek to avoid future harm.

Moreover, in permitting the government to suppress speech on the ground that it might make people think better of designated groups, the Court endorsed a "viewpoint-based" rationale directly antithetical to the First Amendment. The Court has in the past reserved its most skeptical review for "viewpoint-based" laws, which prohibit speech on one side of a particular issue, but not the other. In fact, until *Humanitarian Law Project*, no viewpoint-based law had ever survived Supreme Court review. The administration's claim that it can bar speech because it might "legitimate" an organization is, by definition, "viewpoint-based": it prohibits speech because it sends a message—that a group is "legitimate"—of which the executive disapproves. Yet Chief Justice Roberts never even addressed this critique.

Attempting to portray his decision as restrained, Roberts stressed that it addressed only speech "coordinated" with foreign organizations engaged in terrorism, not independent advocacy or speech coordinated with domestic groups. (By "coordinated," he seemed to mean speech that involves some kind of direct contact with the group in question.) But as Justice Stephen Breyer noted in dissent, independent advocacy is if anything more likely to confer "legitimacy" on a designated group, so if independent advocacy cannot be prohibited on that ground, why can coordinated speech be suppressed? Coordinated speech is just as protected as independent speech; the right to speak necessarily implies the right to speak with and to others. Nor is Roberts's emphasis on the foreign identity of the designated groups convincing, particularly in our increasingly interconnected world. An American writing for the London *Guardian* is no less protected from US criminal prosecution for his articles than one writing for *The New York Times*.

As to the use of violence by the groups in question, the Court has previously upheld the right of US citizens to speak and associate with the Communist Party as long as they intended to further only lawful ends—even though Congress formally found that the Communist Party was an international conspiracy that used terrorism and other violent means to seek the overthrow of the United States by force and violence. At oral argument, Justice Antonin Scalia said the Communist Party was different because people associated with it for "philosophical" reasons, a rationale a conservative of his stripe would have scoffed at during the McCarthy era itself. In any event, surely the First Amendment protects those who speak out of a commitment to human rights and peace no differently than those who speak from philosophical motives. Chief Justice Roberts maintained that decisions in the Communist Party cases were different because they protected association and assembly, not "material support." But when "material support" consists of the mere act of speaking with or to a group, there is nothing left of the rights to associate and assemble.

In short, while the Court ostensibly applied the same stringent standard of review in both *Citizens United* and *Humanitarian Law Project*, in the latter case it accepted arguments that would never have satisfied the demanding test it employed in *Citizens United*. Once the administration invoked national security and the war on terror, the Court abandoned its obligation to protect speech. History shows that it is in moments of great fear that governments are most likely to target speech and association. The same history also shows that such overreaching not only compromises the fundamental freedoms that undergird our democracy, but is likely to backfire, by targeting innocents and breeding resentment. At its best, constitutional law reflects the

lessons of history and saves us from repeating our mistakes. Modern First Amendment doctrine in particular was formulated in response to the excesses of the McCarthy era. But when the Court allows unsupported speculation about "terrorism" and disapproval of a speaker's viewpoint to justify making advocacy of human rights a crime, we appear to be repeating history rather than learning from it.

—A previous version of this article was published on the NYRblog.

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1. "The Decision That Threatens Democracy,"*The New York Review*, May 13, 2010. ↩