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June 21, 2010

A Bruise on the First Amendment

Forty-three years ago, when the nation lived in fear of Communist sympathizers and saboteurs, the Supreme Court **said** that even the need for national defense could not reduce the First Amendment rights of those associating with American Communists.

On Monday, in the first case since the Sept. 11, 2001, attacks to test free speech against the demands of national security in the age of terrorism, the ideals of an earlier time were eroded and free speech lost. By preserving an extremely vague prohibition on aiding and associating with terrorist groups, the court reduced the First Amendment rights of American citizens.

The case was not about sending money to terrorist organizations or serving as their liaison, activities that are clearly and properly illegal. And it did not stop people from simply saying they support the goals of groups like Hamas or Al Qaeda, as long as they are not actually working with those groups. But it could have a serious impact on lawyers, journalists or academics who represent or study terrorist groups.

The case arose after an American human rights group, the Humanitarian Law Project, challenged the law prohibiting "material support" to terror groups, which was defined in the 2001 Patriot Act to include "expert advice or assistance." The law project wanted to provide advice to two terrorist groups on how to peacefully resolve their disputes and work with the United Nations. The two groups — the Liberation Tigers of Tamil Eelam and the Kurdistan Workers' Party — have violent histories and their presence on the State Department's official list of terrorist groups is not in dispute.

But though the law project was actually trying to reduce the violence of the two groups, the court's **opinion**, written by Chief Justice John Roberts Jr. on behalf of five other justices, said that did not matter and ruled the project's efforts illegal. Even peaceful assistance to a terror group can further terrorism, the chief justice wrote, in part by lending them legitimacy and allowing them to pretend to be negotiating while plotting violence.

In a powerful dissent, Justice Stephen Breyer, also speaking for Justices Ruth Bader Ginsburg and Sonia Sotomayor, swept away those arguments. If providing legitimacy to a terror group was really a crime, he wrote, then it should also be a crime to independently legitimize a terror group through speech, which it is not. Never before, he said, had the court criminalized a form of speech on these kinds of grounds, noting with particular derision the notion that peaceful assistance buys negotiating time for an opponent to achieve bad ends.

The court at least clarified that acts had to be coordinated with terror groups to be illegal, but many forms of assistance may still be a criminal act, including filing a brief against the government in a terror-group lawsuit. Academic researchers doing field work in conflict zones could be arrested for meeting with terror groups and discussing their research, as could journalists who write about the activities and motivations of these groups, or the journalists' sources. The F.B.I. has questioned people it suspected as being sources for a New York Times article about terrorism, and threatened to arrest them for providing material support.

There remains a reasonable way of resolving these disputes. Justice Breyer proposed a standard that would criminalize this kind of speech or association "only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions." Because he was unable to persuade a majority on the court, Congress needs to enact this standard into law.

