



2008

Panel: Restrictions on Freedom of Association Through Material Support Prohibitions and Visa Denials


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Am. U. L. Rev. 1212-1217 (2008)

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II. PANEL: RESTRICTIONS ON FREEDOM OF ASSOCIATION THROUGH
MATERIAL SUPPORT PROHIBITIONS AND VISA DENIALS

A. *David Cole**

I am delighted to be here at the *Washington College of Law*, one of the nation's leaders in fighting for human rights and educating on the subject of human rights. I am also honored to be on a panel with representatives of the American Civil Liberties Union and PEN American Center. One of my first cases as a young lawyer at the Center for Constitutional Rights was working with PEN American

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Center and the ACLU in defending Margaret Randall. Margaret was an American-born poet who obtained Mexican citizenship in the 1960s and lived abroad for a long time. She wrote many books very critical of the United States and when she decided she wanted to come back, the United States government initiated deportation proceedings against her for her political views.²⁴ She was accused of having advocated world communism in her poetry and her journals. This was not 1954, but 1984. But her case was a holdover from the guilt by association days of the McCarthy era.

In the 1950s, we were afraid of Communism. We were afraid, in particular, of the Soviet Union, the world's second greatest superpower, which was armed with masses of nuclear warheads aimed at all our largest cities. As a result, we fought the Cold War, engaged in espionage, proxy wars, and an arms race. We also took aggressive preventive measures at home. The principal preventive measure of that period was guilt by association. We made it a crime to be a member of the Communist Party, and we created a whole administrative scheme to implement and enforce this notion of guilt by association.

There were a handful of criminal prosecutions of some leaders of the Communist Party, and they had a substantial chilling effect. Yet more effective than the criminal prosecutions were the administrative mechanisms created to make sure that this theory was infused deeply throughout society. President Truman issued an Executive Order that required loyalty inquiry boards to investigate the political ideologies, affiliations, and magazine subscription practices of virtually all federal employees.²⁵ Many private businesses that worked with the federal government also had to undertake these loyalty inquisitions. The House on Un-American Activities Committee ("HUAC") held congressional hearings, and encouraged the development of a partnership between public and private entities in the name of political repression. The HUAC would "out" people as communists and then private industry, notably Hollywood, would blacklist those individuals from getting any jobs. In the end, millions of Americans were affected. It is now well accepted that guilt by association was a gross overreaction adopted in the name of prevention.

Today, the threat is terrorism, not communism. And as a doctrinal matter at least, guilt by association is barred by the First and Fifth

24. *Randall v. Meese*, 854 F.2d 472 (D.C. Cir. 1988).

25. Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947).

Amendments. But we nonetheless see a remarkably similar reaction in place. Instead of targeting association expressly, the government targets “material support” for terrorist organizations. But the essential features of this prohibition are the same. The government employs an extremely broad criminal substantive standard—material support—which encompasses any activity in association with a group classified as a terrorist organization. Giving the organization money is the most obvious example of material support, but even the volunteering of one’s time also constitutes material support.

We not only have a broad criminal statute,²⁶ but we also have administrative and public-private partnership schemes for implementing this prohibition. The Secretary of State, through an administrative process, designates foreign terrorist organizations, and the Secretary of the Treasury, through another administrative process, identifies another list of proscribed terrorist groups, which now includes over 1,000 names. The Treasury Department also facilitates public-private partnerships by setting forth “voluntary guidelines” that charities, foundations, and businesses are encouraged to employ when they are doing their business.²⁷

Attorney General John Ashcroft called this the “paradigm of prevention.”²⁸ He argued that when you are facing terrorists who are willing to commit suicide to inflict mass casualties on civilians, it is not enough to bring them to justice after the fact; we have to prevent the next terrorist attack from occurring. Of course, we all want to prevent the next terrorist attack from occurring; no one wants to see another 9/11. But the measures that the Administration has taken in furtherance of this preventive paradigm are quite extreme.²⁹ They include preventive detention. And in my view, the material support statute is a form of preventive detention.

The material support statutes hold people responsible, not for what they have done in the past—the material support itself may be negligible and there need be no showing that it has actually furthered any kind of terrorist activity— but rather out of the fear that they or those they support might do something bad in the

26. 18 U.S.C. § 2339B(a)(1) (Supp. IV 2004).

27. Anti-terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities, 71 Fed. Reg. 63,838 (Dep’t of the Treasury Oct. 31, 2006).

28. John Ashcroft, Att’y Gen., Dep’t of Justice, Remarks at the Council on Foreign Relations (Feb. 10, 2003), <http://www.usdoj.gov/archive/ag/speeches/2003/021003agcouncilonforeignrelation.htm>.

29. See generally DAVID COLE AND JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (2007) (cataloguing compromises on the rule of law prompted by Bush administration measures in the “war on terror”).

future. As such, these statutes permit a kind of de facto preventive detention, implemented through the rubric of the criminal law.

The material support statutes raise a host of constitutional problems, both in terms of how groups and individuals get designated as terrorist in the first place, and with respect to the sanctions then imposed on anyone who supports a designated entity. The initial designation process is a largely secret administrative process. Groups first learn that they have been designated as a terrorist group through a notice published in the Federal Register. Groups and individuals overseas may be listed without any notice or opportunity to respond whatsoever. Groups and individuals in the United States are entitled by due process to some notice and opportunity to respond, but the opportunity is largely a sham; groups are not permitted to confront their accusers, are not provided a hearing, and are typically designated on the basis of secret evidence that they have no chance to see or rebut. Designations are simply announced, and the government publishes no statement of reasons or explanation for why any particular entity was designated.

A designated entity may bring a challenge to its designation in court. But it cannot introduce any evidence in that challenge, and it generally cannot see the government's evidence, which if classified is presented to the judge behind closed doors and outside the presence of the designated entity or its lawyers. Not surprisingly, no organization has successfully challenged its designation as a terrorist group.

I am currently representing a group that has not yet been designated but is under investigation for possible designation, and I will describe briefly the process that we have been through. About two years ago, the federal government shut down the organization, froze all its assets, and seized all its documents and records. It did so without any finding—or even allegation—of wrongdoing. The fact of the investigation was enough.

Because this is an American group, as noted above, it is entitled to some notice, and to submit in writing materials in its defense. To that end, the government produced a short stack of documents that it said constituted its “administrative record” regarding the organization. Approximately 95 percent of the documents do not even name the organization that we are representing. There are indictments of other organizations, and miscellaneous documents referring to other organizations. But there is no explanation as to what these documents have to do with our client, or of what, if anything, our client is alleged to have done to warrant being placed

under investigation. We are left to guess in the dark at the government's concerns.

But it is worse than that. The government has also informed us that it is relying on classified evidence that it cannot tell us about. So we must defend the group without knowing the accusations against it, and without seeing most of the evidence in the file.

We do have an opportunity to submit whatever we want—in writing—in our defense. The only problem is that we do not know what the charges are, what the evidence is, and they have all our documents. (Laughter) So we wrote to them and said, “We would actually like to get access to our own documents so that we might prepare a defense.” They replied that the U.S. Attorney sees those, not Treasury, so you will have to deal with the U.S. Attorney. When we wrote to the U.S. Attorney, he said, “I do not have any interest in the Treasury Department and so I am not going to let you see the documents.” So much for due process in the designation of terrorist groups.³⁰

The second set of constitutional issues raised by the material support statutes relates to the prohibitions on support that are triggered by a designation. The principal concern here is that because the prohibition on “material support” is so sweeping, it effectively imposes guilt by association. An example is another case I am handling. I represent the Humanitarian Law Project, a thirty-year-old human rights group in Los Angeles, which has been working with the Kurds in Turkey for a long time. The Kurds are a much-abused group in Turkey. The Humanitarian Law Project was working with them to teach them how to advocate for human rights, for example, training them in petitioning the United Nations, going to the Human Rights Committee, and putting forward a case.³¹ In particular, the Project worked with the Kurdistan Workers Party because it is the principal political representative of the Kurds in Turkey. In 1997, however, the United States designated the Kurdistan Workers Party as a terrorist organization. It then became a crime for my clients to continue to teach the Kurdistan Workers Party how to advocate for human rights. Even though my clients had no intention of furthering terrorism, even though they were actually seeking to *discourage* a resort to violence by encouraging the use of

30. In May 2007, the government provided us with a DVD containing copies of the organization's seized records – but it did so under a protective order barring us from sharing the documents with our clients absent another court order. Thus, the government's position is that the clients cannot even review their own documents for their defense without getting specific document-by-document permission.

31. *E.g.*, *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007).

peaceful means to resolve conflicts, that is no defense. Material support is prohibited regardless of its purpose, and is defined to include all “training,” all “expert advice and assistance,” and all “services” of any kind whatsoever. The United States Court of Appeals for the Ninth Circuit has declared these aspects of the material support statute unconstitutional, finding that they are hopelessly vague and potentially criminalize a wide range of speech and associational activities.

The material support statutes raise First and Fifth Amendment concerns. The First Amendment guarantees the right to associate with groups that engage in both lawful and unlawful activity, as long as one does not intentionally further their unlawful activities. And yet these statutes do not in any way distinguish between support that is designed to further illegal activities and support that is designed to further legal activities.

Second, these statutes raise concerns of vagueness and overbreadth. What do the prohibitions on training, expert advice and assistance, or services really bar? If they are as broad as they seem, then they are constitutionally overbroad, because they prohibit virtually all First Amendment activity in support of one of these organizations. The government tries to avoid that conclusion by contending that individuals are not prohibiting advocacy “on behalf of” a designated organization. But at the same time, the government maintains that the prohibition on providing “services” encompasses anything done “for the benefit of” the organization. So one can advocate on behalf of a group, but if it turns out that one was advocating “for the benefit of” the group, a crime has been committed. And if one thinks his advocacy is on behalf of, but the jury finds that it was actually for the benefit of, he may go to jail for fifteen years.

These laws—imposed in secret designation processes, and carrying sweeping criminal prohibitions—cause a tremendous chilling effect throughout the Muslim community. As these laws demonstrate, the preventive paradigm pushes the government to sweep broadly because it does not know where the threat lies, and it is so afraid of the threat that it is willing to impose penalties on a broad spectrum of actors. I do not think that is a very *effective* strategy for a variety of reasons that I would be happy to go into in question-and-answer, but I am certain that it is an *unconstitutional* strategy. Thank you very much.