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## Humanitarian Law Project – the dissent

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How much deference, then, does the dissent say should be given to the government's judgments in this high-scrutiny First Amendment context?

On this point, Justice Breyer makes three points. The first is that "here, there is no evidence that Congress has made ... a judgment regarding the specific activities at issue in these cases." (Dissent at 15.) It does appear, in fact, that neither Congress nor the State Department official's affidavit on which the majority relied repeatedly does specifically focus on material support in the form of, for example, training in the use of international dispute resolution mechanisms. Breyer writes that "[t]he most one can say in the Government's favor about these statements [invoked by the Government] is that they *might* be read as offering highly general support for its argument." (Dissent at 9.)

But perhaps one should defer to such highly general support, on the ground that foreign policy issues are distinctively in the political branches' sphere of expertise and responsibility? Breyer's second point is that while "the Government's expertise in foreign affairs may warrant deference in respect to many matters, *e.g.*, our relations with Turkey, .... it remains for this Court to decide whether the Government has shown that such an interest justifies criminalizing speech activity otherwise protected by the First Amendment." (Dissent at 16.) This statement is somewhat elusive. Perhaps Justice Breyer means that the Government can tell the Court that our relations with Turkey *matter*, but nothing more. Breyer next says, however, that "the fact that other nations may like us less for granting that protection cannot in and of itself carry the day." (*Id.*) That observation seems to imply that Breyer concedes also that the Government can tell the Court that particular steps by the U.S., such as criminalizing or not criminalizing certain kinds of speech, will cause other nations to dislike us -- in other words, that the Government not only can define what our foreign policy goals are but also has expertise, entitled to at least *some* deference, concerning the impact of events and actions on those goals.

If Breyer would go that far, why doesn't he accept the government's argument that here this foreign policy concern trumps the free speech interests at stake, even though heightened scrutiny protects those interests? His third point is, I think, his answer: Breyer sees the government's theory here as so far-reaching that it deeply invades First Amendment values. The court perhaps must accept the government's appraisal of the foreign policy interests, but those interests must be weighed against First Amendment costs, and that weighing is the job of the Court. (Breyer emphasizes this role at 15-16.) Here, Breyer says that it just isn't plausible to treat the kind of speech at issue here as "fungible" with direct support for terrorism in the way that, say, cash donations would be. (Dissent at 8-9.) Moreover, he says that the government's argument that speech, even about international dispute resolution processes, will potentially enable terrorist organizations to "legitimate" themselves is dangerously sweeping, for any speech that somehow favored a terrorist organization's cause might legitimate it and so the logic of this argument would sweep far into unmistakably protected speech. (Dissent at 10.)

The majority's response to this is that there is indeed a stopping point -- whether the speech in question was or wasn't "coordinated" with the terrorist organization. (Majority opinion at 26.) Breyer disputes this, arguing that almost any speech will be coordinated in some sense, *e.g.* in the scheduling of the training class sessions. (Dissent at 14.) But the majority undoubtedly agrees that the degree of damage to First Amendment interests remains a matter for the Court to assess.

Does this mean that Breyer rejects the legitimation argument for restricting speech always and everywhere? Not quite. He writes, at 11, that "[i]n short, the justification, put forward simply in abstract terms and without limitation, must *always*, or it will *never*, be sufficient. Given the nature of the plaintiffs' activities, 'always' cannot possibly be the First Amendment's answer." This language is pregnant with a possible exception for less-abstract contentions, further hinted at by Breyer at 16: "Finally, I would reemphasize that neither the Government nor the majority points to any specific facts that show that the speech-related activities before us are fungible in some *special way* or confer some *special* legitimacy upon the PKK." One way to take these observations is to say that the ultimate difference between the majority and the dissent lies in how far the two

sides are prepared to defer to the government's estimate of the severity of risk: the majority, to a considerable extent; the dissent, much less. But if the government made a stronger showing, Justice Breyer too might accept even the legitimization rationale as a basis for restricting speech.

What would a stronger showing be? One possibility would, certainly, be more specific proof of the connection between speech and legitimization for a particular terrorist organization. It's not easy to imagine compelling proof on these lines, however -- partly because legitimization itself is a rather intangible concept, and partly because gathering proof (public opinion polls? scholarly studies?) is likely to be arduous and slow, when the need for government response is presumably sometimes present and acute.

Perhaps a better interpretation, though not one that jumps out from the words Justice Breyer uses, would be that a specific showing is made when the group in question is one that we are at war against. (I suggested this in an earlier post.) The fact of war does not directly prove the special salience of harm from speech that arguably provides "material support," but it does give special reason to believe that any such harm is a grave danger to the United States. Otherwise, the Courts might find themselves either deferring to predictions of danger generally, or looking for proof of specific danger that is unlikely to be available. In war, perhaps, some special extension of government power is legitimate -- *some*, but not too much.

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