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Tax deductions for support to West Bank settlements and the courts' role in reviewing foreign policy judgments

A New York Times article by Jim Rutenberg, Mike McIntire, and Ethan Bronner, "Tax-Exempt Funds Aid Settlements in West Bank" (published July 5, 2010) provides an ironic counterpoint to the "material support" statute. Although US foreign policy, at least as articulated by the Obama Administration, firmly opposes Israeli settlements on the West Bank, many Americans are actively supporting these very settlements, some of them with their own labor in the settlements, some with tax-deductible donations. (There are limits on what activities can be supported with tax-deductible donations – and there are questions about whether those limits have been obeyed – but it seems clear that some donations are fully entitled to tax deductibility.)

Why are these donations tax-deductible, while material support to designated terrorist organizations in the form of money or even in the form of training in use of peaceful international dispute settlement mechanisms is criminal?

One answer might be that our interest in suppressing designated terrorist organizations is “compelling,” while our interest in preventing expansion of Israelis’ West Bank settlements is not. But why would that be so? One plausible answer would be that the designated terrorist organizations are a grave danger to the United States, while the Israeli settlers are not. This may in fact be true, but it’s hardly self-evident. The settlers, some would say, are contributing directly to the rise of Islamic hatred of Israel and the United States, and thus are a cause of the terrorist threat we face today. Meanwhile, the Kurdish PKK and the Tamil LTTE might disclaim any hostile intent towards the United States (as the settlers no doubt would as well). While the PKK and the LTTE may be dangerous to countries with which we wish to maintain friendly ties, and material support to them from US citizens might therefore have foreign policy repercussions, it’s not certain that those repercussions are greater than the ones resulting from US citizens’ support for the settlers.

It’s hard for me to see how a court could assess which set of foreign policy impacts poses the graver problem for the United States. If that’s so, then perhaps all that a court can usually do is to ascertain whether both political branches concur on an objective. If Congress and the President agree on something, it’s more compelling than if only one branch or the other endorses it. If one branch supports it while the other overtly opposes it, the case for “compelling” status might be even weaker. Putting such weight on whether the two branches are in agreement or not is true to the teaching of Justice Jackson’s 1952 concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, a very influential guide in this area.

But perhaps the two branches concur on the need to block further settlement expansion. (There surely are members of Congress who don’t agree – but unanimity isn’t what’s required. We can, in theory, go to war based on a declaration of war that gathers 50% plus one of the votes in the Senate and the House.)

If the goal is agreed upon, and if we assume that that agreement by itself qualifies it as a compelling objective rather than just, say, an “important” or “legitimate” government objective, then why is tax-deductible support for the settlers permitted? Presumably the answer would be that barring material support to settlements is not necessary to achieve our foreign policy objective of blocking continued settlement expansion.

Perhaps barring material support -- even labor and money -- isn't necessary to stopping the expansion of the settlements. Perhaps banning material support -- even speech, such as training in the use of international dispute resolution mechanisms -- is necessary in the context of designated terrorist organizations. But how would one ever prove either of these propositions in a court?

One answer to that conundrum is for courts simply to defer to the political branches' judgments, either by refusing to assess them (for example, by calling such matters nonjusticiable "political questions") or by assessing them but more or less automatically accepting the political branches' judgments.

But there are other possibilities, to which I'll return, with the help of a discussion of how much deference the *Humanitarian Law Project* majority and dissent give to the political branches' foreign policy judgments.