WHY IS TAREK MEHANNA HELD TO A DIFFERENT STANDARD THAN THE HUTAREE MILITIA?

Over the last week, there were two must-read pieces arguing that the sentencing of Tarek Mehanna to 17.5 years in prison for conspiring to materially support terrorism threatens free speech.

David Cole—who argued the *Humanitarian Law Project v. Holder* case in which SCOTUS first permitted speech to be criminalized as material support for terrorism—noted that Mehanna's actions didn't even rise to that troubling standard.

> But in Mehanna's case, the government never tried to satisfy that standard. It didn't show that any violent act was caused by the document or its translation, much less that Mehanna intended to incite imminent criminal conduct and was likely, through the translation, to do so. In fact, it accused Mehanna of no violent act of any kind. Instead, the prosecutor successfully argued that Mehanna's translation was intended to aid al-Qaeda, by inspiring readers to pursue jihad themselves, and therefore constituted "material support" to a "terrorist organization."
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> The prosecutor relied on a 2010 Supreme Court decision in a case I argued, *Holder v. Humanitarian Law Project*. In *Humanitarian Law Project*, a divided Court upheld the "material support" statute as applied to advocacy of peace and human rights, when done in

> coordination with and to aid a designated “terrorist organization.” (The plaintiffs in the case sought to encourage the Kurdistan Workers Party in Turkey to resolve their disputes with the Turkish government through lawful means, by training them in bringing human rights complaints before the United Nations and helping them in peace overtures to the Turkish government.) The Court ruled that the government could criminalize such advocacy of peaceful nonviolent activity without transgressing the First Amendment, because, it reasoned, any aid to a foreign terrorist organization might ultimately support illegal ends.
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> The *Humanitarian Law Project* decision is troubling enough, as I have previously explained. But Mehanna’s case goes still further. The government provided no evidence that Mehanna ever met or communicated with anyone from al-Qaeda. Nor did it demonstrate that the translation was sent to al-Qaeda. (It was posted by an online publisher, Al-Tibyan Publications, that has not been designated as a part of or a front for al-Qaeda.) It did not even claim that the “39 Ways” was written by al-Qaeda. The prosecution offered plenty of evidence that in Internet chat rooms Mehanna expressed admiration for the group’s ideology, and for Osama bin Laden in particular. But can one provide “material support” to a group with which one has never communicated?

(See also Ben Wittes’ curation of Cole’s ongoing spat about the evidence in this case with Peter Margulies.)

And Andrew March, who testified at the trial, distinguished Mehanna’s advocacy from the ideology al Qaeda pushes.

> The prosecution's strategy, a far cry from Justice Roberts's statement that "independent advocacy" of a terror group's ideology, aims or methods is not a crime, produced many ominous ideas. For example, in his opening statement to the jury one prosecutor suggested that "it's not illegal to watch something on the television. It is illegal, however, to watch something in order to cultivate your desire, your ideology." In other words, viewing perfectly legal material can become a crime with nothing other than a change of heart. When it comes to prosecuting speech as support for terrorism, it's the thought that counts.
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> That is all troubling enough, but it gets worse. Not only has the government prosecuted a citizen for "independent advocacy" of a terror group, but it has prosecuted a citizen who actively argued against much of what most Americans mean when they talk about terrorism.
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> On a Web site that the government made central to the conspiracy charge, Mr. Mehanna angrily contested the common jihadi argument that American civilians are legitimate targets because they democratically endorse their government's wars and pay taxes that support these wars.

As I read these pieces (and a lot of the other commentary on Mehanna's sentence, I kept coming back to the recent ruling that threw out all the conspiracy charges against the Hutaree militia on free speech grounds.

These cases are not entirely apposite examples. The Hutaree were charged not with conspiracy to provide material support to terrorism; since white militia groups are not classed as Foreign Terrorist Organizations, material support charges are unavailable. Rather, the Hutaree were charged with conspiracy to engage in a

range of terrorism activities, including sedition and one of the favorite charges used against Islamic extremists, conspiracy to use WMD.

In addition, Judge Victoria Roberts suggested the case had been mischarged; she intimated that a conspiracy to murder law enforcement agents might have succeeded.

Finally, the facts are different. Whereas Mehanna translated videos, the Hutaree consumed them. Whereas Mehanna tried but failed to obtain military training years before being charged, the Hutaree were actively engaged in training, with weapons, in the period when they were arrested. Whereas Mehanna propagated generalized violent speech, Hutaree leader David Stone Sr. engaged in discussions advocating a plan of violence.

And yet the conspiracy charges against the Hutaree, not those against Mehanna, were dismissed (properly, I think) on free speech grounds. Roberts wrote,

> The Government has consistently maintained that this case is not about freedom of speech or association, but about the specific acts of violence alleged in the Indictment. The Court relied upon these representations in denying Defendants' pretrial motions for a jury instruction on the Brandenburg case, and the heightened strictissimi juris standard for sufficiency of the evidence (Docs. 610, 618). However, much of the Government's evidence against Defendants at trial was in the form of speeches, primarily by Stone, Sr., who frequently made statements describing law enforcement as the enemy, discussing the killing of police officers, and the need to go to war. Indeed, at oral argument on March 26, 2012, the Government asked the Court to find the existence of a seditious conspiracy based primarily on two conversations

> involving Stone, Sr., and others – the first on August 13, 2009, and the second on February 20, 2010.
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> Additional evidence the Government relies on includes Defendants' participation in various military-style training exercises, anti-Government literature found in some of the Defendants' homes, and guns and ammunition collected by various Defendants. But, none of these things is inherently unlawful. While this evidence may provide circumstantial proof that some of the Defendants planned to do something unlawful, the Indictment sets forth a specific plot to draw law enforcement to Michigan from around the country by killing a member of local law enforcement.

Again, because of the difference in facts and, more importantly, the different way our country treats international terrrorism from domestic terrorism, it would be a mistake to make too much of this comparison.

But we seem to be in a place where white people engaging in hateful speech and training with weapons have very different legal rights than Muslims merely attempting to obtain training and engaging in less pointed hate speech.

Not only does not not make sense legally, but it also probably makes us less safe to sustain this double standard.