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Timothy Zick

William & Mary Law School, tzick@wm.edu

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Foreign Contacts and the First Amendment

I am editing a paper concerning the relationship between territory and the First Amendment, which I hope to post to SSRN next month. The paper will examine a variety of restrictions on cross-border information exchange, including laws that limit contacts between domestic speakers and foreign audiences and organizations. It will also examine efforts to "export" the First Amendment beyond the nation's borders, as something akin to a universal norm.

Contacts between domestic speakers and foreign audiences, organizations, and would-be collaborators have obviously increased substantially owing to globalization and digitization. Many laws and regulations that impose restrictions on cross-border information exchange, including travel bans and trade laws, have been liberalized or repealed over the past few decades. This is not to say that we have "open borders" insofar as informational materials and foreign audiences are concerned. U.S. laws and regulations continue to impose significant restrictions on cross-border travel and information exchange, many of which would be problematic from a First Amendment standpoint but for the fact that they are imposed at the nation's borders. Cross-border information flow is affected by strict licensing requirements, subject matter review of certain materials, trade embargoes, and limits on the export (and import) of materials, data, and information that may implicate national security concerns.

Contacts between domestic speakers and foreign contacts can raise serious diplomatic and security concerns. Alien scholars and other foreign speakers have no First Amendment or other constitutional right to enter the country for any purpose, including what would otherwise be lawful speech and association activities. The government's power to determine who may enter U.S. territory is subject to few, if any, limits. Contacts between domestic speakers and foreign organizations that are believed to be involved in terrorist activity have come under increasing scrutiny. The State Department has the power to designate certain organizations "foreign terrorist organizations" (FTO). Charities and other organizations have challenged these laws, with relatively little success, on vagueness, overbreadth, and First Amendment grounds. In a case now pending before the Supreme Court ([Holder v. Humanitarian Law Project](#)), several domestic organizations that wish to collaborate with foreign organizations designated as FTOs are challenging federal laws that prohibit the provision of "training," "expert advice or assistance," "service," and "personnel" to foreign terrorist organizations. In their [opening brief](#), the organizations argue that these criminal provisions suppress "pure political speech," including the "provision of training in the use of humanitarian and international law for the peaceful resolution of disputes." At the very least, the organizations argue that the Court should limit the statutory prohibitions to "speech intended to further a group's illegal ends."

The proposed limiting construction would likely avoid the most serious First Amendment questions posed by the statutory prohibitions on material assistance. This route may well be appealing to a majority. But let's assume the Court reaches the First Amendment questions. Does the First Amendment apply with equal force to communications and associations involving foreign organizations, particularly those designated as FTOs? Some thoughts on this issue after the break.

The brief, which is very well written and argued, assumes that the First Amendment applies with full force to the communications and associations in question. In a paragraph on pp. 46-47, the organizations argue that the mere fact that the speech in question "implicates foreign affairs" does not take it outside the First Amendment. Fair enough. The organizations further assert that "self-government includes foreign as well as domestic affairs." No argument there either. Certainly, domestic speakers' comments regarding foreign affairs are protected speech. Finally, the organizations' brief states that "[i]nternational communications are a

central aspect of the robust public debate that the First Amendment is designed to protect." Putting aside that some of the communications at issue may actually take place in domestic venues and be directed to domestic audiences, is it so clear that "international communications" and cross-border associations lie at or near the core of the First Amendment?

Courts and commentators have devoted little attention to this important question. Most of the theoretical work relating to the First Amendment seems to assume a domestic context involving speakers and audiences located within U.S. territorial borders. (Some theorists might simply assume that even speech directed primarily to a foreign audience will almost always reach at least some domestic audience as well.) Does the search for truth extend to international contacts and cross-border speech? Does self-government necessarily depend upon such things? If so, how can we justify allowing the government to limit alien speakers' entry -- perhaps even on purely ideological grounds? Might self-actualization alone support international contacts and exchanges? Or do we need a different justification or theory, one that accounts for globalization and digitization, for cross-border contacts and exchanges?

There is relatively little legal, historical, or precedential support for robust protection of cross-border contacts. The Supreme Court has only grudgingly *assumed* that the First Amendment is implicated by some restrictions on foreign travel. Trade laws continue to restrict a variety of collaborative arrangements involving foreign authors, artists, and scientists. Citizens and resident aliens have no First Amendment right to represent foreign missions in the U.S. In more general terms, the legal and regulatory infrastructure relating to cross-border information flow, which I alluded to at the beginning of this post, suggests that the First Amendment applies with less force to cross-border contacts and speech than it does to domestic speech activities. This is especially true where national security concerns are raised, as is obviously the case where FTOs are concerned.

In sum, the supposition seems to be that "international" contacts and communications lie closer to the *periphery* of the First Amendment than to its core. We need to think much more carefully about how and why the First Amendment applies to cross-border contacts and expression. That issue will only become more important as new cross-border channels of communication are opened.

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