

JUSTICES UPHOLD A BAN ON AIDING TERROR GROUPS FREE SPEECH CHALLENGE 'Material Support' Held to Be Illegal, Even if It Seems Benign

By ADAM LIPTAK

WASHINGTON — In a case pitting free speech against national security, the Supreme Court on Monday upheld a federal law that makes it a crime to provide “material support” to foreign terrorist organizations, even if the help takes the form of training for peacefully resolving conflicts.

Chief Justice John G. Roberts Jr., writing for the majority in the 6-to-3 decision, said the law’s prohibition of providing some types of intangible assistance to groups the State Department says engage in terrorism did not violate the First Amendment.

The decision was the court’s first ruling on the free speech and associations rights of Americans in the context of terrorism since the Sept. 11 attacks. The law has been an important tool for prosecutors: Since 2001, the government says, it has charged about 150 defendants for violating the material-support provision, obtaining about 75 convictions.

The court’s majority said deference to the other branches was called for, given the threat posed by terrorism.

“At bottom,” Chief Justice Roberts wrote, “plaintiffs simply disagree with the considered judgment of Congress and the executive that providing material support to a designated foreign terrorist organization — even seemingly benign support — bolsters the terrorist activities of that organization.”

Justices John Paul Stevens, Antonin Scalia, Clarence Thomas, Anthony M. Kennedy and Samuel A. Alito Jr. joined the ma-

majority decision.

The material-support law bars not only contributions of cash, weapons and other tangible aid but also “training,” “personnel” “service” and “expert advice or

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assistance.”

Justice Stephen G. Breyer took the unusual step of summarizing his dissent from the bench. He said the majority had drawn a false analogy between the two kinds of assistance.

“Money given for a charitable purpose might free up other money used to buy arms,” Justice Breyer said from the bench. But the same cannot be said, he continued, “where teaching human rights law is involved.”

The decision was a victory for Solicitor General Elena Kagan, who argued the case in February and whose confirmation hearings for a seat on the court are scheduled to start next week. But Chief Justice Roberts said the government had advanced a position that was too extreme and did not take adequate account of the free-speech interests at stake.

“The government is wrong,” the chief justice wrote, “that the only thing actually at issue in this litigation is conduct” and not speech protected by the First Amendment. But he went on to say that the government’s interest in combating terrorism was enough to overcome that protection.

In his written dissent, which was joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor, Justice Breyer said the majority had been too credulous in accepting the government’s argument that national security concerns required restrictions on the challengers’ speech and had “failed to insist upon specific evidence, rather than general assertion.”

The law was challenged by, among others, Ralph D. Fertig, a civil rights activist who has said he wanted to help the Kurdistan Workers’ Party in Turkey find peaceful ways to achieve its goals.

On Monday, Mr. Fertig said the decision, which effectively ended

12 years of litigation, was a grave disappointment. “This is a very dark day in the history of the human rights struggle to assist groups overseas that are being oppressed,” he said.

The other plaintiffs were a doctor and six domestic organizations. Some of them said they had sought to help the Liberation Tigers of Tamil Eelam, a group that seeks to create an independent Tamil state in Sri Lanka.

Both groups, along with Hamas, Hezbollah, the Khmer Rouge and some 30 others, were designated as terrorist organizations by the State Department. The United States says the Kurdish group, sometimes called the P.K.K., has engaged in widespread terrorist activities, including bombings and kidnappings. The Tamil group, the government said, was responsible for a 1996 bombing that killed 100 people and injured more than 1,400.

The plaintiffs said they had sought to aid only the two groups’ nonviolent activities. For instance, they said, they wanted to offer training in how to use international law to resolve disputes peacefully and “how to petition various representative bodies such as the United Nations for relief.”

That sort of help, they said, was speech protected by the First Amendment.

David D. Cole, a lawyer for the plaintiffs with the Center for Constitutional Rights, said the court’s rejection of that argument was disappointing. “This decision basically says the First Amendment allows making peacemaking and human rights advocacy a crime,” Mr. Cole said.

The United States Court of Appeals for the Ninth Circuit, in San Francisco, ruled in 2007 that bans on training, service and some kinds of expert advice were unconstitutionally vague. But it upheld the bans on personnel and

expert advice derived from scientific or technical knowledge.

All nine justices said the appeals court was wrong to strike down the law as too vague. They differed, though, about the role the First Amendment had to play



in analyzing the law and whether it should be read to apply only where a defendant intended to support a designated group's terrorist activities.

Chief Justice Roberts emphasized what he said was the limited reach of the decision, which applies only to activities coordinated with the designated groups. Other sorts of speech remain protected, he said.

"Plaintiffs may say anything they wish on any topic," he wrote.

"They may speak and write freely about" the Kurdish and Tamil groups, "the governments of Turkey and Sri Lanka, human rights and international law." Indeed, the chief justice added, the plaintiffs are free to become members of the two groups.

What they cannot do is make a contribution to a foreign terrorist organization, even if that contribution takes the form of speech. "Such support," he wrote, "frees up other resources within the organization that may be put to violent ends," "helps lend legitimacy to foreign terrorist groups" and strains "the United States' relationships with its allies."

Justice Breyer, in dissent, said the activities at issue "involve the

communication and advocacy of political ideas and lawful means of achieving political ends." It is elementary, he went on, that "this speech and association for political purposes is the kind of activity to which the First Amendment ordinarily offers its strongest protection."

The majority opinion said it expressed no view about whether Congress could bar assistance to domestic groups.

But Justice Breyer said he feared that the decision in the case, *Holder v. Humanitarian Law Project*, No. 08-1498, had implications for all sorts of speech said to threaten national security. The majority's logic, he said, amounts to "a rule of law that, contrary to the Constitution's text and First Amendment precedent, would automatically forbid the teaching of any subject in a case where national security interests conflict with the First Amendment."

Looking at intangible help like 'training' and 'service.'