

Holder v. Humanitarian Law Project (2010)

561 U.S. 1

Federal law makes it a crime to knowingly provide “material support or resources” to organizations that the secretary of state has designated as foreign terrorist organizations (18 U.S.C. §2339B[a][1]). The statute defines “material support or resources” as including “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel.” The Humanitarian Law Project (HLR), as well as other groups and individuals involved in the case, sought to provide support to two organizations—the Kurdistan Workers’ Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both of which had been identified by the secretary of state as terrorist organizations. However, the HLR claimed that it wished to assist only the lawful, nonviolent purposes of these groups, through monetary contributions, provision of legal training, and political advocacy. It argued that the statute, in preventing it from engaging in these activities, violated its rights to freedom of speech and freedom of association under the First Amendment. After several years of litigation, during which Congress amended the law to clarify its meaning, the federal district court partially enjoined the enforcement of the law, the court of appeals affirmed, and the Supreme Court granted certiorari.

Opinion of the Court: Roberts, Stevens, Scalia, Kennedy, Thomas, Alito.

Dissenting opinion: Breyer, Ginsburg, Sotomayor.

THE CHIEF JUSTICE delivered the opinion of the Court.

The plaintiffs in this litigation seek to provide support to two organizations [designated as terrorist groups]. Plaintiffs claim that they seek to facilitate only the lawful, nonviolent purposes of those groups, and that applying the material-support law to prevent them from doing so violates the Constitution. In particular, they claim that the statute infringes their rights to freedom of speech and association, in violation of the First Amendment. We conclude that the material-support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue. We do not, however, address the resolution of more difficult cases that may arise under the statute in the future.

II

Given the complicated 12-year history of this litigation, we pause to clarify the questions before us. Plaintiffs challenge §2339B’s prohibition on four types of material support—“training,” “expert advice or assistance,” “service,” and “personnel.” They raise three constitutional claims. First, plaintiffs claim that §2339B violates the Due Process Clause of the Fifth Amendment because these four statutory terms are impermissibly vague. Second, plaintiffs claim that §2339B violates their freedom of speech under the First Amendment. Third, plaintiffs claim that §2339B violates their First Amendment freedom of association. Plaintiffs claim that §2339B is invalid to the extent it prohibits them from engaging in certain specified activities. Those activities are: (1) “training members of the PKK on how to use humanitarian and international law to peacefully resolve disputes”; (2) “engaging in political advocacy on behalf of Kurds who live in Turkey”; and (3) “teaching PKK members how to petition various representative bodies such as the United

Nations for relief.” With respect to the other plaintiffs, those activities are: (1) “training members of the LTTE to present claims for tsunami-related aid to mediators and international bodies”; (2) “offering their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government”; and (3) “engaging in political advocacy on behalf of Tamils who live in Sri Lanka.”

III

Plaintiffs claim, as a threshold matter, that we should affirm the Court of Appeals without reaching any issues of constitutional law. They contend that we should interpret the material-support statute, when applied to speech, to require proof that a defendant intended to further a foreign terrorist organization’s illegal activities. We reject plaintiffs’ interpretation of §2339B because it is inconsistent with the text of the statute. Section 2339B(a)(1) prohibits “knowingly” providing material support. It then specifically describes the type of knowledge that is required: “To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism.” Congress plainly spoke to the necessary mental state for a violation of §2339B, and it chose knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.

V

We next consider whether the material-support statute, as applied to plaintiffs, violates the freedom of speech guaranteed by the First Amendment. Both plaintiffs and the Government take extreme positions on this question. Plaintiffs claim that Congress has banned their “pure political speech.” Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations. As the Government states: “The statute does not prohibit independent advocacy or expression of any kind.” Section 2339B also “does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so.” Congress has not, therefore, sought to suppress ideas or opinions in the form of “pure political speech.” Rather, Congress has prohibited “material support,” which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.

For its part, the Government takes the foregoing too far, claiming that the only thing truly at issue in this litigation is conduct, not speech. Section 2339B is directed at the fact of plaintiffs’ interaction with the PKK and LTTE, the Government contends, and only incidentally burdens their expression. The Government argues that the proper standard of review is therefore the one set out in *United States v. O’Brien* (1968). In that case, the Court rejected a First Amendment challenge to a conviction under a generally applicable prohibition on destroying draft cards, even though O’Brien had burned his card in protest against the draft. In so doing, we applied what we have since called “intermediate scrutiny,” under which a “content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Turner Broadcasting System, Inc. v. FCC* (1997). [But] *O’Brien* does not provide the applicable standard for reviewing a content-based regulation of speech, and §2339B regulates speech on the basis of its content. Plaintiffs want to speak to the PKK and the LTTE, and whether

they may do so under §2339B depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred.

The Government argues that §2339B should nonetheless receive intermediate scrutiny because it generally functions as a regulation of conduct. That argument runs headlong into a number of our precedents, most prominently *Cohen v. California* (1971). *Cohen* also involved a generally applicable regulation of conduct, barring breaches of the peace. But when *Cohen* was convicted for wearing a jacket bearing an epithet, we did not apply *O'Brien*. Instead, we recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied more rigorous scrutiny and reversed his conviction.

This suit falls into the same category. The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. As we explained in *Texas v. Johnson*: "If the [Government's] regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must [apply] a more demanding standard."

The First Amendment issue before us is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead whether the Government may prohibit what plaintiffs want to do—provide material support to the PKK and LTTE in the form of speech. Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order. Plaintiffs' complaint is that the ban on material support, applied to what they wish to do, is not "necessary to further that interest." The objective of combating terrorism does not justify prohibiting their speech, plaintiffs argue, because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism.

Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. When it enacted §2339B, Congress made specific findings regarding the serious threat posed by international terrorism. One of those findings explicitly rejects plaintiffs' contention that their support would not further the terrorist activities of the PKK and LTTE: "Foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Plaintiffs argue that the reference to "any contribution" in this finding meant only monetary support. There is no reason to read the finding to be so limited. Congress's use of the term "contribution" is best read to reflect a determination that any form of material support furnished "to" a foreign terrorist organization should be barred, which is precisely what the material-support statute does. Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.

We are convinced that Congress was justified in rejecting that view. The PKK and the LTTE are deadly groups. The PKK's insurgency has claimed more than 22,000 lives. The LTTE has engaged in extensive suicide bombings and political assassinations, including killings of the Sri Lankan President, Security Minister, and Deputy Defense Minister. It is not difficult to conclude

as Congress did that the “taint” of such violent activities is so great that working in coordination with or at the command of the PKK and LTTE serves to legitimize and further their terrorist means.

Material support meant to “promote peaceable, lawful conduct” can further terrorism by foreign groups in multiple ways. “Material support” is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.

Money is fungible, and “when foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.” But “there is reason to believe that foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations.” Thus, “funds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.” There is evidence that the PKK and the LTTE, in particular, have not “respected the line between humanitarian and violent activities.”

The dissent argues that there is “no natural stopping place” for the proposition that aiding a foreign terrorist organization’s lawful activity promotes the terrorist organization as a whole. But Congress has settled on just such a natural stopping place: The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group’s legitimacy is not covered.

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States’ relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. We see no reason to question Congress’s finding that “international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts. The material-support statute furthers this international effort by prohibiting aid for foreign terrorist groups that harm the United States’ partners abroad: “A number of designated foreign terrorist organizations have attacked moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations,” and those attacks “threaten [the] social, economic and political stability” of such governments.

In analyzing whether it is possible in practice to distinguish material support for a foreign terrorist group’s violent activities and its nonviolent activities, we do not rely exclusively on our own inferences drawn from the record evidence. We have before us an affidavit stating the Executive Branch’s conclusion on that question. The State Department informs us that “the experience and analysis of the U. S. government agencies charged with combating terrorism strongly support” Congress’s finding that all contributions to foreign terrorist organizations further their terrorism. That evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference. When it comes to collecting evidence and drawing factual inferences in this area, “the lack of competence on the part of the courts is marked,” *Rostker*, and respect for the Government’s conclusions is appropriate.

One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult

to obtain and the impact of certain conduct difficult to assess. The dissent slights these real constraints in demanding hard proof—with “detail,” “specific facts,” and “specific evidence”—that plaintiffs’ proposed activities will support terrorist attacks. That would be a dangerous requirement. In this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government. The material-support statute is, on its face, a preventive measure—it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur. The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions. Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not.

We also find it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns. First, §2339B only applies to designated foreign terrorist organizations. There is, and always has been, a limited number of those organizations designated by the Executive Branch, and any groups so designated may seek judicial review of the designation. Second, in response to the lower courts’ holdings in this litigation, Congress added clarity to the statute by providing narrowing definitions of the terms “training,” “personnel,” and “expert advice or assistance,” as well as an explanation of the knowledge required to violate §2339B. Third, in effectuating its stated intent not to abridge First Amendment rights, Congress has also displayed a careful balancing of interests in creating limited exceptions to the ban on material support. The definition of material support, for example, excludes medicine and religious materials. In this area perhaps more than any other, the Legislature’s superior capacity for weighing competing interests means that “we must be particularly careful not to substitute our judgment of what is desirable for that of Congress.” Finally, and most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups. At bottom, 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.

We turn to the particular speech plaintiffs propose to undertake. First, plaintiffs propose to “train members of the PKK on how to use humanitarian and international law to peacefully resolve disputes.” Congress can, consistent with the First Amendment, prohibit this direct training. It is wholly foreseeable that the PKK could use the “specific skills” that plaintiffs propose to impart, as part of a broader strategy to promote terrorism. The PKK could, for example, pursue peaceful negotiation as a means of buying time to recover from shortterm setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks. A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote.

Second, plaintiffs propose to “teach PKK members how to petition various representative bodies such as the United Nations for relief.” The Government acts within First Amendment strictures in banning this proposed speech because it teaches the organization how to acquire “relief,” which plaintiffs never define with any specificity, and which could readily include monetary aid.

Finally, plaintiffs propose to “engage in political advocacy on behalf of Kurds who live in Turkey,” and “engage in political advocacy on behalf of Tamils who live in Sri Lanka.” Plaintiffs do not specify their expected level of coordination with the PKK or LTTE or suggest what exactly their “advocacy” would consist of. Plaintiffs’ proposals are phrased at such a high level of generality that they cannot prevail in this pre-enforcement challenge.

The dissent fails to address the real dangers at stake. It instead considers only the possible benefits of plaintiffs’ proposed activities in the abstract. The dissent seems unwilling to entertain the prospect that training and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities. In the dissent’s world, such training is all to the good. Congress and the Executive, however, have concluded that we live in a different world: one in which the designated foreign terrorist organizations “are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” One in which, for example, “the United Nations High Commissioner for Refugees was forced to close a Kurdish refugee camp in northern Iraq because the camp had come under the control of the PKK, and the PKK had failed to respect its ‘neutral and humanitarian nature.’” Training and advice on how to work with the United Nations could readily have helped the PKK in its efforts to use the United Nations camp as a base for terrorist activities.

VI

Plaintiffs’ final claim is that the material-support statute violates their freedom of association under the First Amendment. Plaintiffs argue that the statute criminalizes the mere fact of their associating with the PKK and the LTTE, thereby running afoul of decisions like *De Jonge v. Oregon* (1937), and cases in which we have overturned sanctions for joining the Communist Party. [But] the statute does not penalize mere association with a foreign terrorist organization. As the Ninth Circuit put it: “The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. What [it] prohibits is the act of giving material support.”

The judgment of the United States Court of Appeals for the Ninth Circuit is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

JUSTICE BREYER, with whom JUSTICES GINSBURG and SOTOMAYOR join, dissenting.

I cannot agree with the Court’s conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations’ lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government’s compelling interest in combating terrorism. And I would interpret the statute as normally placing activity of this kind outside its scope.

The statute before us forbids “knowingly providing” “a foreign terrorist organization” with “material support or resources,” defined to include, among other things, “training,” “expert advice or assistance,” “personnel,” and “service.” All these activities are of a kind that the First Amendment ordinarily protects. All involve the communication and advocacy of political ideas and lawful means of achieving political ends. Even the subjects the plaintiffs wish to teach—using

international law to resolve disputes peacefully or petitioning the United Nations, for instance—concern political speech.

That this speech and association for political purposes is the kind of activity to which the First Amendment ordinarily offers its strongest protection is elementary. Although in the Court's view the statute applies only where the PKK helps to coordinate a defendant's activities, the simple fact of "coordination" alone cannot readily remove protection that the First Amendment would otherwise grant. That amendment, after all, also protects the freedom of association.

"Coordination" with a group that engages in unlawful activity also does not deprive the plaintiffs of the First Amendment's protection under any traditional "categorical" exception to its protection. The plaintiffs do not propose to solicit a crime. They will not engage in fraud or defamation or circulate obscenity. And the First Amendment protects advocacy even of unlawful action so long as that advocacy is not "directed to inciting or producing imminent lawless action and likely to incite or produce such action." *Brandenburg v. Ohio* (1969). Here the plaintiffs seek to advocate peaceful, lawful action to secure political ends; and they seek to teach others how to do the same. Moreover, the Court has previously held that a person who associates with a group that uses unlawful means to achieve its ends does not thereby necessarily forfeit the First Amendment's protection for freedom of association. *Scales v. United States* (1961).

Not even the "serious and deadly problem" of international terrorism can require automatic forfeiture of First Amendment rights. After all, this Court has recognized that not "even the war power removes constitutional limitations safeguarding essential liberties." *United States v. Robel* (1967). There is no general First Amendment exception that applies here.

It is not surprising that the majority, in determining the constitutionality of criminally prohibiting the plaintiffs proposed activities, would apply, not the kind of intermediate First Amendment standard that applies to conduct, but "a more demanding standard." Indeed, where, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications "strictly"—to determine whether the prohibition is justified by a "compelling" need that cannot be "less restrictively" accommodated. But, even if we assume for argument's sake that "strict scrutiny" does not apply, no one can deny that we must at the very least "measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment." And here I need go no further, for I doubt that the statute, as the Government would interpret it, can survive any reasonably applicable First Amendment standard.

The Government does identify a compelling countervailing interest, namely, the interest in protecting the security of the United States and its nationals from the threats that foreign terrorist organizations pose by denying those organizations financial and other fungible resources. I do not dispute the importance of this interest. But I do dispute whether the interest can justify the statute's criminal prohibition. To put the matter more specifically, precisely how does application of the statute to the protected activities before us help achieve that important security-related end?

The Government makes two efforts to answer this question. First, the Government says that the plaintiffs' support for these organizations is "fungible" in the same sense as other forms of banned support. Being fungible, the plaintiffs' support could, for example, free up other resources, which the organization might put to terrorist ends. The proposition that the two very different kinds of "support" are "fungible," however, is not obviously true. There is no obvious way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE,

say, how to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible. It is far from obvious that these advocacy activities can themselves be redirected, or will free other resources that can be directed, towards terrorist ends. The Government has provided us with no empirical information that might convincingly support this claim. Instead, the Government cites only to evidence that Congress was concerned about the “fungible” nature in general of resources, predominately money and material goods.

Second, the Government says that the plaintiffs’ proposed activities will “bolster a terrorist organization’s efficacy and strength in a community” and “undermine this nation’s efforts to delegitimize and weaken those groups.” In the Court’s view, too, the Constitution permits application of the statute to activities of the kind at issue in part because those activities could provide a group that engages in terrorism with “legitimacy.” Yet the Government does not claim that the statute forbids any speech “legitimizing” a terrorist group. Rather, it reads the statute as permitting (1) membership in terrorist organizations, (2) “peaceably assembling with members of the PKK and LTTE for lawful discussion,” or (3) “independent advocacy” on behalf of these organizations.

This “legitimacy” justification cannot by itself warrant suppression of political speech, advocacy, and association. Speech, association, and related activities on behalf of a group will often, perhaps always, help to legitimate that group. Thus, were the law to accept a “legitimizing” effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First Amendment battle would be lost in untold instances where it should be won. Once one accepts this argument, there is no natural stopping place. The argument applies as strongly to “independent” as to “coordinated” advocacy.

The “legitimacy” justification itself is inconsistent with critically important First Amendment case law. Consider the cases involving the protection the First Amendment offered those who joined the Communist Party intending only to further its peaceful activities. In those cases, this Court took account of congressional findings that the Communist Party not only advocated theoretically but also sought to put into practice the overthrow of our Government through force and violence. Nonetheless, the Court held that the First Amendment protected an American’s right to belong to that party—despite whatever “legitimizing” effect membership might have had—as long as the person did not share the party’s unlawful purposes.

I am not aware of any case in this Court—not *Gitlow v. New York* (1925), not *Schenck v. United States* (1919), not *Abrams*, not the later Communist Party cases decided during the heat of the Cold War—in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it, e.g., buy negotiating time for an opponent who would put that time to bad use.

In sum, these cases require us to consider how to apply the First Amendment where national security interests are at stake. When deciding such cases, courts are aware and must respect the fact that the Constitution entrusts to the Executive and Legislative Branches the power to provide for the national defense, and that it grants particular authority to the President in matters of foreign affairs. Nonetheless, this Court has also made clear that authority and expertise in these matters do not automatically trump the Court’s own obligation to secure the protection that the Constitution grants to individuals. In these cases, I believe the Court has failed to examine the Government’s justifications with sufficient care. It has failed to insist upon specific evidence, rather than general

assertion. It has failed to require tailoring of means to fit compelling ends. And ultimately it deprives the individuals before us of the protection that the First Amendment demands. That is why, with respect, I dissent.