Supreme Court backs use of terrorism law against free speech

John Burton
22 June 2010

In the only "terrorism"-related case this term, the Supreme Court on Monday upheld 6-3 a provision of law making it a federal crime to "knowingly provide material support or resources to a foreign terrorist organization," even if the "support" consists only of "expert advice or assistance" for "lawful, non-violent purposes"—in other words, political speech.

The US Secretary of State can designate any "foreign organization" as "terrorist" based on "classified information" establishing that it "engages in terrorist activity" which "threatens the security of United States nationals or the national security of the United States."

Under this week's decision, an individual can be sentenced to as much as 15 years imprisonment if found to "support" a designated organization, even if only by means of engaging in discussions with it or speaking on its behalf.

History has proved that "terrorist" designations are based principally not on an organization's record of engaging in genuine acts of terror, but rather on the exigencies of US foreign policy.

For example, in the 1980s the African National Congress, which led the struggle against apartheid in South Africa, was designated as "terrorist," while the Islamic fundamentalists fighting Soviet troops in Afghanistan—the precursors of al Qaeda—were hailed as equivalent to the US "founding fathers."

This week's ruling marks a new stage in the ongoing attack on democratic rights in the United States. At the behest of the Obama administration, the Supreme Court—for the first time ever—has given its imprimatur to the prosecution and imprisonment of US citizens for advocating support of organizations opposing the policies of the US government or its allies anywhere on the planet.

The plaintiffs in *Humanitarian Law Project v. Holder* were a coalition of US-based human rights organizations, nonprofit groups and citizens who obtained a lower court injunction to protect them from being criminally prosecuted for advising and assisting the separatist Partiya Karkeran Kurdistan (PKK) and Liberation Tigers of Tamil Eelam (LTTE). Both were designated as "foreign terrorist organizations" by Democratic President Bill Clinton's Secretary of State Madeline Albright in 1997.

The injunction allowed the plaintiffs to "train members of the PKK on how to use humanitarian and international law to peacefully resolve disputes," to "engage in political advocacy on behalf of Kurds who live in Turkey"; and to "teach PKK members how to petition various representative bodies such as the United Nations for relief."

The plaintiffs also were allowed to "train members of the LTTE to present claims for tsunami-related aid to mediators and international bodies," to "offer their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government," and to "engage in political advocacy on behalf of Tamils who live in Sri Lanka."

The Obama administration's Attorney General, Eric Holder, appealed the injunction to the Supreme Court, where he was represented by Solicitor General Elena Kagan, President Barack Obama's nominee to replace retiring Associate Justice John Paul Stevens on the court.

The case represents further proof that the assault on democratic rights initiated by the Bush administration in the name of a "global war on terror" is being continued and deepened under the Obama White House.

The challenged law is a provision of the "Antiterrorism and Effective Death Penalty Act of 1996" (AEDPA), a thoroughly reactionary and demagogic crime bill signed into law by Clinton on the first anniversary of the Oklahoma City bombing. Additional AEDPA provisions severely limit access to habeas corpus for death row prisoners and others challenging convictions for serious crimes. (See "US Supreme Court upholds limits on death penalty appeals")

Rejecting plaintiffs' claims that the law unconstitutionally criminalized conduct protected by the First-Amendment's guarantees of freedoms of speech and association, Chief Justice John Roberts, writing for the six-judge majority, stated that such actions "meant to 'promot[e] peaceable, lawful conduct' ... can further terrorism… 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."

Hyperbolically comparing the struggles of these nationalist movements against US allies Turkey and Sri Lanka to an all-out inter-imperialist conflagration, Roberts wrote, "If only good can come from training our adversaries in international dispute resolution, presumably it would have been unconstitutional to prevent American citizens from training the Japanese Government on using international organizations and mechanisms to resolve disputes during World War II."

Roberts' majority opinion was joined by the three other extreme right-wing justices, Antonin Scalia, Clarence Thomas and Samuel Alito, the conservative "swing" Justice Anthony Kennedy, and Stevens, who usually sides with the three moderate justices.

Associate Justice Stephen Breyer wrote the dissent, which was joined by Ruth Bader Ginsburg and Sonia Sotomayor. Breyer's decided to read a summary of his dissent from the bench Monday morning, an unusual occurrence indicating strong disagreement with the majority.

"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," Breyer stated. "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."

After reviewing high court precedents which make government enactments that interfere with First-Amendment protected conduct subject to "strict scrutiny"—such measures can be upheld only if they are necessary to further a "compelling state interest"—Breyer wrote that the "'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," Breyer explained. "Thus, were the law to accept a "legitimating" 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," Breyer warned.

To hammer the point home, Breyer cited "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 'legitimating' effect membership might have had—as long as the person did not share the party's unlawful purposes," Breyer wrote.

Significantly, among the *amicus curiae* "friends of the court" filing briefs in support of the plaintiffs in this case were victims of McCarthyite witch hunts and their family members. They correctly observed the parallels between the political repression of the 1950s and that of the present era.

Breyer expanded on what he called "the Government's themes." Referring to "the plaintiffs' proposal to 'train members of the PKK on how to use humanitarian and international law to peacefully resolve disputes,'" Breyer wrote, "The majority justifies the criminalization of this activity in significant part on the ground that 'peaceful negotiations' might just 'buy time ... , lulling opponents into complacency.' And the PKK might use its new information about 'the structures of the international legal system ... to threaten, manipulate, and disrupt.'

"What is one to say about these arguments—arguments that would deny First Amendment protection to the peaceful teaching of international human rights law on the ground that a little knowledge about 'the international legal system' is too dangerous a thing; that an opponent's subsequent willingness to negotiate might be faked, so let's not teach him how to try?" Breyer asked rhetorically.

"Moreover, the risk that those who are taught will put otherwise innocent speech or knowledge to bad use is omnipresent," Breyer continued. "Hence to accept this kind of argument without more and to apply it to the teaching of a subject such as international human rights law is to adopt 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."

The Obama administration, like the administrations which preceded it, seeks to eliminate all democratic rights which conflict with the interests of US militarism. The current Supreme Court majority is eager to oblige.