



December 11, 2007

COURT STRIKES DOWN PORTIONS OF LAW BARRING SUPPORT FOR TERRORIST ORGANIZATIONS

(Humanitarian Law Project v. Gonzales)

The U.S. Court of Appeals for the Ninth Circuit in San Francisco yesterday struck down portions of the USA Patriot Act that make it a crime to provide “material support” to any group that has been designated by the Attorney General as a “foreign terrorist organization.” The decision was a partial setback for the Washington Legal Foundation (WLF), which had filed a brief urging the court to uphold the entire law. WLF has pledged to support any efforts by the federal government to appeal yesterday’s decision.

In a brief filed in *Humanitarian Law Project v. Gonzales*, WLF had argued that the statute is not impermissibly vague and does not violate the First Amendment rights of individuals who wish to support humanitarian work conducted by terrorist groups. The appeals court agreed with WLF that there was no First Amendment violation, but it held that certain terms included within the statute – including prohibitions against the provision of “training,” “service,” and “expert advice and assistance” to designated terrorist groups – were unconstitutionally vague.

The court also agreed with WLF that because the statute, 18 U.S.C. § 2339B(a), purports to impose liability only on those with knowledge that the group they are supporting has been designated as a foreign terrorist organization, the statute limits liability to those with specific intent to violate the law and thus does not violate due process rights.

“Congress has determined that international terrorism ‘threatens the vital interests of the United States’ and that direct material support to international terrorist groups facilitates their terrorism,” said WLF Chief Counsel Richard Samp after reviewing the appeals court decision. “We are disappointed by the appeals court decision. Courts have no business second-guessing determinations of the elected branches of government on such vital national security issues,” Samp said.

The law in question, 18 U.S.C. § 2339B, makes it a felony knowingly to provide “material support or resources” to groups designated as “foreign terrorist organizations.” The law was adopted in 1996 and was strengthened by the USA Patriot Act in 2001 and by other legislation in 2004. Two groups that have been designated by the Attorney General as terrorist organizations are the PKK (a terrorist group fighting for Kurdish independence from Turkey) and the LTTE (a terrorist group fighting for Tamil independence from Sri Lanka). The plaintiffs are groups and individuals who wish to provide support for the PKK and the LTTE. Represented

by the Center for Constitutional Rights, they filed suit against the law in federal district court in Los Angeles.

The district court struck down portions of the law as impermissibly vague, finding that some of the terms used to describe what constitutes “material support or resources” do not provide individuals with clear guidance regarding the scope of the law. But the court rejected the plaintiffs’ First Amendment challenge, finding that the law did not interfere with the plaintiffs’ right to express their support for activities not involving terrorism. Both sides appealed. Yesterday’s decision affirmed the district court in full.

In its brief, WLF argued that § 2339B is not impermissibly vague (in violation of the Fifth Amendment’s Due Process Clause) because it provides people of ordinary intelligence with a reasonable opportunity to understand what conduct it prohibits. WLF argued that Congress’s intent was clear: to bar virtually all significant direct support of designated terrorist groups. WLF argued that the plaintiffs’ real objection is that they disagree with Congress’s decision, not that Congress has failed to specify what actions are prohibited.

The appeals court disagreed, finding (for example) that individuals might not understand what is barred by the prohibition against “training.” The court said that the prohibition could be interpreted to encompass speech and advocacy. WLF agrees with that understanding but disagrees with the appeals court’s conclusion: that such speech and advocacy would be protected by the First Amendment. WLF had argued that Congress was well within its rights in barring Americans from imparting advocacy skills to leaders of designated terrorist groups. WLF noted that § 2339B leaves Americans with ample alternative opportunities to express their views on relevant issues. WLF noted that speech left unregulated by § 2339B includes expressions of support for a terrorist group; independent advocacy in support of the group; and dialogue with the group so long as the dialogue does not take the form of “material support,” as that term is defined in § 2339B.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a considerable portion of its resources to promoting America’s national security. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

* * *

For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF’s brief is posted on its web site.