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Experts debate merits of the 'material support' ban

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By Patricia Manson

Chicago attorney Michael E. Deutsch contends that laws that prohibit giving aid and comfort to terrorists have been stretched so far out of shape by the president and the U.S. Supreme Court that they no longer resemble the measures enacted by Congress.

Despite his background as a constitutional law professor, President Obama is "essentially following the game plan set out by the prior administration" and using the ban on "material support" to foreign terrorist organizations as a weapon against those who oppose certain U.S. policies, Deutsch said. And Deutsch said he the U.S. Supreme Court — or at least a majority of its members — has not acquitted itself any better.

A 6-3 ruling a year ago rejecting a First Amendment challenge to material support provisions "is an ominous expansion of the law and threatens anyone who is involved in any political activity in support of foreign struggles," Deutsch said.

"I think the law has been expanded beyond what the intent of Congress was."

Professor Andrea D. Lyon of DePaul University College of Law contended that the alleged expansion of material support provisions leaves individuals and entities uncertain as to which activities are forbidden. "The problem with the law is that it's so vague it would be very difficult to give any money to any kind of foreign humanitarian organization without having some concern that you're giving funds to a bad cause," Lyon said.

But former federal prosecutor Joseph M. Ferguson does not see it that way.

The "material support" provision is needed so that those connected with groups that have "some nexus" with terrorism "know where the line is," Ferguson said.

Ferguson conceded that the line is not set in stone.

Prosecutors need the leeway to respond to any changes in the way terrorists pursue their goals, Ferguson said.

"The law is written with some degree of openness and flexibility to allow it to be applied in a way that evolves with the circumstances that we see in the terrorism realm," Ferguson said.

But Ferguson contended that this flexibility does not prevent individuals and organizations from knowing when they step over the line from providing humanitarian aid and conflict-resolution services to bolstering the activities of terrorists.

Ferguson was a prosecutor and Deutsch and Lyon were on the defense team in the trial of former grocer Muhammad Salah and business professor Abdelhaleem Ashqar.

In early 2007, a federal jury in Chicago acquitted the men in 2007 of charges that they sent money to the militant Palestinian group Hamas to help finance murders, bombings and kidnappings.

The jury found Salah and Ashqar guilty of lesser obstruction-of-justice charges.

Ferguson is now Chicago's inspector general. Deutsch is with the Peoples Law Office.

Three years after the verdict was returned in Salah and Ashqar's case, the U.S. Supreme Court in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), held that the government had the authority to bar all forms of material support to designated terrorist groups, even if that support took the form of training and advice about peaceful and legal activities.

The high court rejected the argument that provisions in the Antiterrorism and Effective Death Penalty Act that allow the government to take such a step violate the First Amendment's guarantee of free speech and assembly.

On June 21, a slew of organizations acting under an umbrella group called the Charity and Security Network marked the one-year anniversary of the Humanitarian Law Project ruling with a statement calling for the reform of U.S. laws and policies that purportedly hamper charitable activities and violate the First Amendment and the due process clause.

"Laws governing 'material support' to designated terrorist organizations sweep too broadly, criminalizing life-saving humanitarian aid to civilians, efforts at peace-building and speech advocating only lawful, nonviolent activity, even where it furthers no terrorist acts whatsoever," the statement says. "In addition, the laws give the executive branch broad discretion to place groups on terrorist lists without affording them adequate notice and a meaningful opportunity to defend themselves."

Organizations joining the statement included the Arab-American Anti-Discrimination Committee, American Friends Service Committee, National Association of Criminal Defense Lawyers and Grantmakers Without Borders.

Kay Guinane, the director of the Washington, D.C.-based Charity and Security Network, emphasized that the statement's signers are not calling for the elimination of material support provisions. Instead, Guinane said, the signers are asking for the ability, with the fear of criminal prosecution, to provide aid and training in conflict-torn areas "so we can get terrorist groups to lay down their arms and renounce violence."

Also released on June 21 was a letter urging Secretary of State Hillary Rodham Clinton to exempt from the material support provisions activities "directly aimed at preventing or resolving conflicts." The letter notes that the Supreme Court in *Humanitarian Law Project* held that Congress may impose restrictions on conflict-resolution and other activities, not that it must.

And Congress, in turn, enacted a statutory provision giving the secretary of state the power to determine whether to lift restrictions on certain activities, the letter says.

The letter was signed by more than two dozen individuals, included former U.S. Rep. Bob McEwen of Ohio; executive director Jolynn Shoemaker of Women in International Security; and Professor Carrie Menkel-Meadow of Georgetown University Law Center and Irvine Law School at the University of California.

Also signing the letter were several organizations, including some that joined the statement calling for the reform of material support policies and laws.

The Constitution Project, a Washington, D.C.-based organization dedicated to strengthening the rule of law, was among those organizations.

TCP senior counsel Sharon Bradford Franklin said there was no question that the United States needs to fight terrorism.

And Franklin said laws prohibiting material support for terrorist activities can be effective weapons in that fight.

But the laws also can backfire if they are not wielded properly, Franklin contended.

"Unfortunately, those laws sweep too broadly and they prohibit conduct that, No. 1, should be allowed by the First Amendment and, No. 2, that would help, not hinder, efforts to combat terrorism," Franklin said.

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