



American Civil Liberties Union

Testimony at an Oversight Hearing on Amendments to the Material  
Support for Terrorism Laws:  
Section 805 of the USA PATRIOT Act and Section 6603 of the  
Intelligence Reform and Terrorism Prevention Act of 2004

Before the

Subcommittee on Crime, Terrorism and Homeland Security

of the

House Judiciary Committee

Submitted by

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May 10, 2005

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**American Civil Liberties Union**  
**Testimony at an Oversight Hearing on Amendments to the Material**  
**Support for Terrorism Laws: Section 805, USA PATRIOT Act and Section**  
**6603, Intelligence Reform and Terrorism Prevention Act of 2004**  
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Chairman Coble, Ranking Member Scott and members of the Subcommittee:

Thank you for giving me the opportunity to speak today at this critical oversight hearing on two amendments to the law criminalizing material support of terrorism: Section 805 of the USA PATRIOT Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004.

I am a staff attorney at the ACLU of Southern California, where I have worked on several cases involving the issue of material support of terrorism. However, I am also here today because I have seen first-hand, with my own eyes, how those laws have impeded humanitarian relief operations in the worst natural disaster in recent memory.

I was born and raised in the United States, but my parents and extended family are from Sri Lanka. I was on a plane to visit relatives there last December, in the air between Los Angeles and Singapore, when the tsunami struck – killing 40,000 people in Sri Lanka alone. I landed there a day later, and spent the next three weeks doing relief work with several different humanitarian organizations.

The suffering and devastation I saw was unimaginably horrible. My first mission was to a displaced persons camp in eastern Sri Lanka, with a relief team from the Hospital Christian Fellowship. At that camp we treated about 200

people. Every person I spoke with had lost at least one family member to the tsunami. I spoke with mothers and fathers who had been unable to keep hold of their children as they were sucked away by the sea, and parents who had been forced to choose, in a split second, which of their children to save because they could not grab on to all of them. I met children who saw their families, their homes, their villages – everything they had known – disappear in an instant. Seeing the destruction of whole towns, places of worship, roads, trees – everything – was a humbling experience that is indelibly etched in my memory.

If this had happened anywhere in the world, even here, the devastation and its aftermath would have been terrible to behold. But it was made worse because it happened in Sri Lanka – a country that has been torn by civil war for over twenty years. About one fifth of the territory of Sri Lanka is controlled by the Liberation Tigers of Tamil Eelam (LTTE), an armed group fighting against the government of Sri Lanka. The LTTE has been designated as a Foreign Terrorist Organization by the State Department pursuant to Section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189. As a result, it is a violation of law to give material support to that group. Material support is defined very broadly, as I will discuss below, and consequences for violating the law are severe. Non-citizens face deportation, while citizens and non-citizens alike face civil forfeiture and criminal penalties up to twenty years in prison. 8 U.S.C. § 1227(a)(4)(B); 18 U.S.C. § 2339B.

Although the LTTE is designated as a terrorist organization, in the territory it controls it functions as a government. The LTTE runs a court system, a police force, orphanages, a set of health clinics, and even its own traffic police. It is for all practical purposes the government for well over 500,000 people who

live in the LTTE-controlled areas. And, because the LTTE governs its territory as an authoritarian military regime, it exerts a significant amount of control over all of the institutions in its territory. As with civil war situations around the globe – Somalia, Indonesia, Sudan, Ethiopia, to name a few – providing humanitarian aid to the most needy people in Sri Lanka almost inevitably requires working in areas controlled by – and dealing directly with -- a group that is designated as, or at least meets the very broad definition of, a foreign terrorist organization.

Unlike our material support laws, the tsunami did not differentiate between areas under the LTTE's control and those controlled by the Sri Lankan government. Thousands of people living in LTTE-held territory died, and hundreds of thousands more were displaced into camps, many having lost some or all of their family members and in urgent need of food, shelter, and medical care. In fact, because the LTTE controls large segments of the eastern seaboard of the island, which was most directly hit by the tsunami, people in LTTE territory were some of the most severely affected.

Sadly, though, our material support laws contain no exception for support even if it is necessary to save the lives of people who happen to live in LTTE-held territory. In fact there is no exception for humanitarian assistance at all, except for “medicine and religious materials.” While this exception is important, it is sorely inadequate to meet the needs of people caught in humanitarian crises.

For example, in the first few days of relief work, we focused on treating people's immediate medical needs – injuries, wounds, dehydration, respiratory infections – with medicines and dressings. Such assistance would probably fit

under the exception for “medicine.” But within a week, the most serious public health problems for the hundreds of thousands of displaced people changed. In situations of mass displacement, the greatest killer is often infectious disease, which spreads through contaminated water, inadequate sanitation, and exposure from a lack of shelter. To prevent outbreaks, humanitarian organizations must provide displaced people with water purification systems, toilets, tents, and other such goods which are not “medicine” but nonetheless serve an absolutely critical medical function.

Yet our material support laws do not appear, as a practical matter, to allow humanitarian organizations to provide such vital resources to people living under the LTTE’s control, because such resources generally cannot be provided without providing “material support” to the LTTE as the statute defines that term. For example, as currently written the law defines material support to include “*any* property, tangible or intangible, . . . or service.” This definition appears to encompass much of what I saw was needed for humanitarian relief work, including water, water purification systems, sanitation equipment such as toilets, all forms of shelter (including even children’s clothing), and many of the materials needed for longer-term reconstruction such as boats and building materials. Because the law makes no distinction between lethal aid – such as weapons or ammunition -- and non-lethal aid, a group seeking to provide toilets to the LTTE’s health ministry to take to camps in an area under its control may be violating the material support laws.

The statute also criminalizes the provision of expert advice or assistance (if derived from specialized knowledge).<sup>1</sup> Thus, a public health expert who wants to advise the LTTE -- and the LTTE is the government for all practical purposes in the areas it controls -- about how to set up camps so as to minimize the spread of diseases, such as dysentery or cholera, probably cannot do so under the statute. Indeed, even training psychological counselors working with the LTTE in their territory -- which is a crucial need for children who lost parents in the tsunami -- may violate the “training” or “personnel” provisions, as long as the training imparts a “specific skill” and the counselors work under the LTTE’s “direction and control.”

As a result, qualified people who have the willingness and ability to help those affected by the disaster are scared to do so. I have spoken personally with doctors, teachers, and others who want to work with people desperately needing their help in Sri Lanka, but fear liability under the “expert advice,” “training,” and “personnel” provisions of the law. I also know people who feared to send funds for urgent humanitarian needs, including clothing, tents, and even books, because they thought that doing so might violate the material support laws. I have also consulted with organizations, in my capacity as an ACLU attorney, that seek to send money for humanitarian assistance to areas controlled by designated groups. I have heard those organizations express grave concerns about continuing their work for precisely these reasons.

Unfortunately, the fears of these organizations are well-justified. Our Department of Justice has argued that doctors seeking to work in areas under

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<sup>1</sup> See 18 U.S.C. §§ 2339A, 2339B, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004, at § 6603, Pub. L. No. 108-458 and the USA PATRIOT Act § 805, Pub. L. No. 107-56.

LTTE control are not entitled to an injunction against prosecution under the material support laws, and it has even succeeded in winning deportation orders under the immigration law's definition of material support, for merely giving food and shelter to people who belong to a "terrorist organization" even if that group is not designated. *See Humanitarian Law Project v. United States Department of Justice*, 393 F.3d 902 (9th Cir. 2004) (en banc); *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 299-301 (3d Cir. 2004).

Last year, Congress passed a law that was supposed to clarify the intent needed to prosecute for "material support." Under section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, the government must prove that assistance was provided knowing that the organization had been designated as a "foreign terrorist organization" or that the organization had been involved in international terrorism. This amendment did not provide comfort to the doctors, relief workers and organizations with whom I worked. Many in the humanitarian aid community are well aware of the LTTE's designation, which has been the subject of a number of high-profile court decisions. Even without knowing of the designation, anyone with even a passing understanding of Sri Lanka knows that the LTTE and the government are involved in a violent conflict. Knowledge that the LTTE has engaged in violent acts would probably satisfy the intent requirement under current law. To provide desperately needed drinking water, blankets, clothing or tents in LTTE-held areas may require working with the LTTE officials who are the de facto government in that area. Thus, our law puts aid workers in the untenable position of having to choose between providing assistance, knowing they are exposing themselves and their organizations to a risk of exclusion from the United States, deportation, civil

forfeiture or even criminal prosecution, or leaving desperate victims of natural calamity to face the disaster on their own.<sup>2</sup>

Indeed, the current material support provision with its limited exceptions and extremely broad intent requirement leads to truly irrational results. A humanitarian organization may send medicine to aid in life-saving surgeries, but arguably cannot send a doctor to perform those surgeries. Medicine is useless to people dying of starvation, but the law contains no exception for food.

Most worrisome of all, under provisions currently part of the REAL ID Act, the situation will likely become even worse. A provision of that bill will alter the definition of what constitutes a “terrorist organization” in the Immigration and Nationality Act such that humanitarian groups that provide material support to designated terrorist organizations will themselves be defined as terrorist organizations. Thus, a doctor who goes to work for a humanitarian group that works with both parties to the conflict in Sri Lanka will violate the immigration code’s material support laws, even if he or she never has any contact with a designated terrorist organization at all. This change is of critical importance. The law will soon provide an extremely broad definition of what constitutes a terrorist organization – a definition that will include groups that engage in absolutely no violent activities of any kind. Such expansion must be accompanied by a corresponding narrowing in the definition of what constitutes

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<sup>2</sup> The government may point to the exception in 18 U.S.C. § 2339B(j) for activities that would otherwise constitute providing “personnel,” “training” or “expert advice or assistance” if permitted by the Attorney General and Secretary of State. This exception, of course, makes vital assistance dependent on the politics of the incumbent administration. Furthermore, the exception still bars much-needed humanitarian aid because it does not cover food, water, blankets or other genuine humanitarian items. Finally, there will not be enough time, in many humanitarian crises, to obtain a special license even if the licensing system is working well.



material support if we are to prevent our laws from prohibiting entirely innocent and vitally important humanitarian activity.

The solution to this problem is for Congress to clarify the law by requiring the government to prove that individuals charged under the material support laws actually *intended to further terrorist activity* when they provided humanitarian assistance. Without such a standard, humanitarian organizations and individual volunteers are deterred from providing vitally needed assistance to victims of disasters like the tsunami. The people who managed to survive the tsunami should not be deprived of basic necessities such as food and shelter in their hour of greatest need simply because they happen to live in an area under the control of a designated terrorist organization. Denying humanitarian assistance to such people does not make us safer; giving basic necessities to these devastated people simply does not undermine our nation's security.

The government has argued that a rule requiring proof that an individual actually intended to further terrorist activity will allow bad actors who provide support to terrorist groups to escape liability. However, proof of intent has proved a workable standard in a variety of legal contexts. Reckless disregard of the risk that resources will be misused could still serve as a basis for prosecution, and "deliberate ignorance" or willful blindness to such misuse could also be punished. Indeed, implausible claims that a group did not intend to support a terrorist group are unlikely to succeed in front of juries concerned about the threat of terrorism. However, groups that carefully screen and monitor projects to ensure that aid is sent only to those who truly need it, audit their programs through detailed receipts and written acknowledgements from beneficiaries, or send their own personnel to ensure that aid is provided as

intended will be able to continue their work. If a humanitarian organization can show that its work does not further terrorist activity, it should be free to continue providing life-saving services in conflict areas such as Sri Lanka.

I was working in Manhattan on September 11, 2001, and I felt the horror of the terrorist attacks in a very personal way. I believe we must do everything we can to make our country safe from the scourge of terrorism. However, as I sit here before you today, the faces of the people I saw in the camps in Sri Lanka flash before me, and I know their need. We do not have to choose between national security and our commitment to help those who are suffering around the globe. Amending our material support laws to allow vital humanitarian work to go unimpeded would allow us to fulfill those ideals without undermining our safety. The victims of the tsunami deserve nothing less.

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