

Nassau Lawyer

Criminalizing Consulting: Does the USA PATRIOT Act Go Too Far?

By Alexander G. Bateman, Jr., Esq.
and Andrew T. Garbarino



Alexander Bateman

The twenty-first century has already seen a profound change in the way the United States conducts its foreign affairs. The war on terrorism has significantly altered our perception of the world in which we live and has changed the international political landscape significantly. In an effort to respond to these changes, the country's political leadership has been forced to grapple with many issues, including the aiding of what we deem to be "terrorist organizations" by American citizens.

A means by which the Congress sought to address these problems is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (more commonly known as the "USA PATRIOT Act"). While the stated objectives of the Act are unquestionably worthwhile, it seems that in its zeal to act swiftly, Congress may have criminalized the exercise of legitimate and constitutionally protected advocacy. That prospect was at issue in a recent federal case, *Humanitarian Law Project v. Ashcroft*, (C.D. Cal. 2004), in which a Federal District Court judge held at least a portion of the Act to be unconstitutional.

When it was enacted in 2001 the USA PATRIOT Act, with its 157 sections amended and thereby expanded the scope of more than a dozen existing federal statutes. In many instances, this was accomplished by broadening the definitions of prohibited conduct. The plaintiffs in *Humanitarian Law Project* brought the case because of such a broadened definition, contained in the Antiterrorism and Effective Death Penalty Act (the "AEDPA").

Section 303 of the AEDPA prohibits any person within the United States, or any person otherwise subject to the jurisdiction of the United States, from knowingly providing (or attempting or conspiring to provide) material support or resources to a foreign terrorist organization, as identified by the Secretary of State, with assistance from

the Secretary of the Treasury and the Attorney General. The object of the statute is obviously to prevent the subsidizing of terrorist activities. A violation of the AEDPA carries a penalty of imprisonment for up to fifteen years, or life imprisonment if the activities cause a person's death. Section 805(a)(2)(B) of the USA PATRIOT Act expanded the AEDPA definition of "material support or resources" to include "expert advice or assistance."

Last month, United States District Judge Audrey B. Collins declared that broadened definition unconstitutional, stating that the amended language within the statute was impermissibly vague because "it could be construed to include unequivocally pure speech and advocacy protected by the First Amendment." Judge Collins did not, however, go as far as the plaintiffs had requested, refusing to grant a nationwide injunction enjoining the enforcement of the contested provision. Judge Collins limited her injunction to foreclosing any prosecution against the *Humanitarian Law Project* plaintiffs.

The plaintiffs in the case were two private citizens and five organizations which actively support lawful, nonviolent activities of certain foreign groups, mainly located in the Middle-East. Members of the plaintiff organizations include lawyers, judges and other professionals. One such organization, the Humanitarian Law Project, acts as a non-governmental consultant for the United Nations. The plaintiff organizations supplied humanitarian aid and political advocacy on behalf of these foreign groups, which, in this case, had been designated by the United States as "foreign terrorist organizations" under the AEDPA. Although many of the groups designated as terrorist organizations had actively engaged in active violent or military combat, the plaintiff organizations condoned and aided only non-violent activities of these groups.

The plaintiffs contended that the definition as amended by the USA PATRIOT Act was unconstitutionally vague and argued that the law, as written, would

"... in its zeal to act swiftly, Congress may have criminalized the exercise of legitimate and constitutionally protected advocacy."

create a chilling effect with respect to activities undertaken by the plaintiffs, aimed at encouraging non-violent resolutions to current international conflicts.

In attacking the vagueness of the statute, the plaintiffs identified various support efforts that the USA PATRIOT Act would conceivably criminalize. These included offering of expert advice or assistance, such as engaging in political advocacy or diplomacy, providing literature to the foreign organizations regarding how they may engage in political advocacy on their own behalf and assisting members of these organizations during international peace conferences, in the hopes of creating a peaceful resolution to the international conflicts with which they are involved.


Because the statute makes no distinction between advice and assistance rendered which advocates violence and advice rendered for peaceful purposes, the contested language would foreclose far more than the activities of these humanitarian organizations. As the world we live in becomes increasingly smaller due to the advances of technology such as the internet and professional firms become increasingly larger and engage in international practices, criminalizing the rendering of expert advice or assistance could have a major impact on the way various professionals conduct their business.

For example, law firms that maintain international offices or specialize in any form of international law should pause and give consideration to the scope of their advice and assistance. Under the Act, a lawyer's advice or counsel in support of a legitimate, non-violent activity rendered to a foreign client could be deemed criminal. In addition to lawyers, economists would be prohibited from rendering advice; doctors and other medical professionals would be prohibited from lending their expertise to legitimate causes. The risk that a client may somehow be associated with a "terrorist organization" would significantly impact the viability of representing international clients.

While our government fights the war on terror, it is essential that our leaders not lose sight of the American ideals that terrorists despise, including the freedom to engage in the free exchange of ideas and the tolerance of each other's beliefs. As Americans struggle with the increasing threat of attack from rouge organizations dedicated to the suppression of these freedoms, our government must ensure that in protecting the country from outside threats, we do not impinge the freedoms upon which the government is founded.

Another quandary caused by the apparently hasty drafting of the USA PATRIOT Act is that even though it serves a worthwhile goal, as more of these litigations

come to light, a groundswell of opposition to the Act is growing, even by other government institutions. As of this writing, the Los Angeles City Council has gone so far as to pass a resolution indicating its opposition to the USA PATRIOT Act.

Humanitarian Law Project offered a glimpse into the problems that result when Congress reacts too swiftly to an albeit important need for legislation. In response to much of the criticism aimed at the Act Congress has in fact initiated some efforts at amending the legislation. The Security and Freedom Ensured Act, a proposed bill, would modify the portion of the USA PATRIOT Act that permits "sneak and peek" searches, which allow law enforcement to indefinitely delay notification to persons whose homes have been searched. The Bush administration, through Attorney General John Ashcroft, has vowed to veto any such legislation. Various provisions of the USA PATRIOT Act will no doubt continue to be challenged and result in further amendments by Congress. How these important legislative efforts to fight terrorism will criminalize legitimate consulting and advocacy remains to be seen. 

Alexander G. Bateman, Jr. is a partner at *Ruskin Moscou Faltischek, P.C.*, where he is a member of the firm's Health Law Department, co-chair of the White Collar Crime & Investigations Group and member of the Corporate Governance Practice Group. He can be reached at 516-663-6589 or abateman@rmfpc.com.


RUSKIN MOSCOU FALTISCHEK P.C.
Smart Counsel. Straight Talk.

East Tower, 15th Floor
1425 RexCorp Plaza, Uniondale, NY 11556-1425
New York City ▾ Uniondale
516.663.6600 ▾ www.rmfpcc.com