

The Humanitarian Law Project Decision: Problems for Peacebuilding, Aid, and Free Speech One Year Later

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Speakers:

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- Naz Modirzadeh, Associate Director of the Harvard Program on Humanitarian Policy and Conflict Research (NM)
- Emily Berman, Counsel at the Liberty and National Security Program at the Brennan Center for Justice (EB)
- Nathan Stock, Assistant Director of the Conflict Resolution Program at the Carter Center (NStock)
- Joel R. Charny, Vice President of Humanitarian Policy and Practice at InterAction (JC)
- Ambassador Nancy E. Soderberg (NSoderberg)

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KG: Good afternoon. While folks are finishing getting their lunch, I'd like to quickly welcome you on behalf of the Charity and Security Network. I'm Kay Guinane, Director of the Network, which is sponsoring this discussion today. And I wanted to thank our panel of speakers for coming and sharing their insights and expertise with you. The Charity and Security Network is a collaborative effort of U.S. nonprofit organizations to address the problems that national security laws have created for our operations with sensible and practical reforms. And we hope that the information you hear today will help advance understanding of the need for the reform and what kind of principles they should be based on. So, again, there's more information on the table outside and thank you for being here.

NM: Thank you so much, Kay, and welcome to everyone. It's a real pleasure to be moderating this panel on this important issue and one year after the *Holder v. Humanitarian Law Project* decision of the U.S. Supreme Court. My name is Naz Modirzadeh. I'm the Associate Director of the Harvard Program on Humanitarian Policy and Conflict Research. We're a research and policy program at the Harvard School of Public Health and we've been carrying out some research and policy work on this issue for the last year or so looking at U.S. material support law and its impact on humanitarian action and policy, but, also, putting it in the context more broadly of counterterrorism laws around the world, as well as the global counterterrorism system promulgated and maintained by the United Nations. It's a real honor for us to be here with the Charity and Security Network, and we've been really impressed with their work on this issue and their power to convene these kinds of events and discussions so that we can all engage both in terms of recent practice the kinds of dilemmas that have been created for humanitarian organizations, as well as peace building and conflict resolution

organizations, and I think the panel that we have today is really the best collection of people we could have to, first, better understand the decision and its context in the U.S. legal, constitutional sense and in terms of the First Amendment, and then, more broadly, move into the questions of how the decision and the material support statute have affected conflict resolution and peace building activities emanating from the U.S. but working with organizations around the world, as well as humanitarian and charitable work in situations of armed conflict and humanitarian disasters and emergencies worldwide.

So, I'm not going to spend any more time talking, because I really want to give our panelists the most time to chat. Let me just note one matter of housekeeping. We are going to be using this microphone here for questions, so when we get to the question and answer period, I would just ask you to line up at this mic and then we'll recognize you and give you the floor to ask questions. And we'll be sharing these mics here at the table. And I will wait 'till the end of the panelists' comments to open up for questions and comments from all of you.

So, as I said, we're going to be starting out the discussion, hopefully to situate ourselves in what was the background to the decision and what were the key decisions of the court in terms of First Amendment law and the reach and scope of the material support statute. What did the court find and how can we understand what this means for First Amendment law moving forward? And it's my real pleasure in that vein to introduce Emily Berman. She is counsel at the Liberty and National Security Program at the Brennan Center for Justice. She's the author of *Domestic Intelligence: New Powers, New Risks*, a 2011 report about the need for oversight of the F.B.I.'s authority for domestic investigations and, of course, the Brennan Center has done some really tremendous work on these and related issues. She also clerked for Judge John Walker of the 2nd Circuit Court of Appeals, graduated from N.Y.U. Law where she was editor-in-chief of the Law Review and has won a number of awards in both her work and her scholarship. It's really a pleasure to have you joining us, Emily, and we're really looking forward to hearing from you a bit more in how we can understand this decision and its effort – and I'm gonna move the mic over here.

EB: Thanks, Naz. Hi. I want to thank the Charity and Security Network for inviting me to be here today. It's a real pleasure for me to participate in an event where I get to hear the perspectives of people who are not attorneys. So just as a first step, what was this case about? It was a pre-enforcement challenge to the constitutionality of the material support statute. So that means nobody had been charged with this crime, but there were groups who were concerned about whether it would reach the activities that they were engaged in and so they went preemptively to the courts to say, "If you did interpret this law to apply to us, that would be unconstitutional." And the statute that they were challenging was enacted in 1996, expanded under the *Patriot Act*, amended again in 2004, but, essentially, it criminalizes knowingly providing material support or resources to a foreign terrorist organization. And a "foreign terrorist organization" is an organization that's on an actual list maintained by the State Department and designated, essentially, at the Secretary of State's discretion with [pause] a little bit of judicial oversight potentially

for the process of that designation, but, mostly, it's just up to the State Department to decide who goes on that list. And the problematic aspect of the statute is the way that it defines "material support," which is incredibly broad. And it's, you know, like a four-line list of items that include property, monetary instruments, service, training, false documentation, weapons, et cetera and so on. So, I think we could all agree that, you know, not providing money or weapons to groups that engage in terrorist violence is probably a good idea and can be criminalized sort of without a problem, but things like training and expert advice or assistance, which are also barred, create a much more difficult line to draw with respect to organizations that either work with or report on or otherwise interact with groups that might be on this list.

So, the case itself was brought by several organizations and individuals who wanted to provide aid, legal training and policy advocacy on behalf of two groups, the Kurdistan Workers' Party and the Tamil Tigers, both of which engage in non-violent and violent activity and are both designed "foreign terrorist organizations." So the case itself has sort of a tortured twelve-year history, up and down, amongst the various levels of the federal courts, but it eventually ended up in the Supreme Court, as you know, and the holding of that case essentially said that it is not a violation of the Constitution to criminalize speech and other advocacy supporting a foreign terrorist organization even if the aim of that support or speech is to promote a group's peaceful or humanitarian actions. So, under the First Amendment which normally is, bars the government from interfering with speech, the court said, in this case, the importance of the government's aims at controlling terrorism around the world are sufficiently weighty that this does not violate the Constitution. And the underlying premise of this decision, which the court spent some time talking about, is that even benign or well-meaning actions help to advance the dangerous goals of organizations that are on this list, and so the court sort of came up with a list of things that might be a result of providing the type of support that these organizations wanted to give. The court said that advocacy on behalf of foreign terrorist organizations can legitimize the organizations in the eyes of potential recruits, that filing, learning to file human rights complaints in intergovernmental organizations could be used to harass those organizations with repetitive filings, that they could use peacemaking techniques they'd been taught to stall while rearming themselves for future iterations of violent activity. And an important element of this case was that the court didn't point to any examples of these sorts of things having happened. It didn't allege that any of them had actually happened. It was entirely speculative. But, basically, the court abdicated any of its own responsibility to think about whether these things actually did pose a risk sufficient to overcome the First Amendment right and, instead said, "The political branches have determined that this is true and who are we to question them?"

So they did try to include a couple limiting principles – well, Congress included one limiting principle, which is that the speaker has to know that the group is a foreign terrorist organization or engages in terrorism. It doesn't have to want to advance those goals, but it has to know it. And only speech or activity that is directed, coordinated with, or controlled by a group on the list can be criminalized. They tried to make a distinction between independent work that a person or organization does on their own and work that's coordinated with one of these groups. It's, as the dissent pointed out, it's sort of a

hard decision to maintain in certain contexts, but the court did seem to think it was limiting the scope.

So, as far as First Amendment doctrine, there is sort of two fundamental premises that grew mostly out of the Red Scare and McCarthyism, and the first is that speech can be criminalized only if it's both intended to, and likely to cause imminent lawless action. So unless the intent of the speaker is to cause lawless action and they are likely to cause that action in an imminent sense, speech has always been protected up until this point. And another, a second premise is that mere association can't be criminalized, so cases about whether membership in the Communist Party could be criminalized, those cases said only if the person joining the group is intent on furthering the unlawful goals of the organization, only that can be criminalized. If they don't want to further those unlawful goals, then mere association with a group is insufficient to overcome First Amendment protections. So both of these limits have been severely cut back by the *Humanitarian Law Project* decision and, as a result, discretion of government actors becomes incredibly broad in the sense that of prosecutorial discretion, it's entirely up to Justice Department attorneys to decide who to prosecute. And, for example, there was a man in Staten Island who ran a satellite service and carried Hezbollah's TV station on his satellite service, he was sentenced to six years in jail for material support. At the same time, Rudy Giuliani and Michael Mukasey were in Paris a few months ago speaking on behalf of a foreign terrorist organization that they think should not be listed, and there were no consequences to that. Secondly, the Secretary of State's discretion as to which groups go on this list also becomes, then, very important, because the groups on the list become sort of toxic for people who are thinking about doing this work and there's very little oversight of who the Secretary of State can put on this list. And then, also, the discretion of the political branches, jointly, in determining what actually poses a terrorist threat, what sorts of activity poses a terrorist threat, the court has said that so long as those political branches agree, we're not gonna second guess that decision, so that has implications for future counterterrorism laws that might be passed. So those are sort of the doctrinal implications.

As far as the practical effects of the decision, through my experience – the Brennan Center actually worked on an *amicus* brief in the case that was filed on behalf of social science researchers and a journalists' organization that were concerned that some of their work might fall under the definition of material support, and there's been, there's been sort of a varied reaction among that group. I reached out to them recently to ask if they had changed their practices in response, and there were some people, an anthropology professor at Notre Dame, for example, said that she's not going to do any work that's gonna get her or her students anywhere near activities that might run afoul of the law. Meanwhile, other, other of the, other professors thought that there was sort of not particularly high awareness among the Academy and among people doing this sort of research and, so, it seems to have had sort of an uneven effect. But domestically, we have seen an example that I think is a direct outgrowth of this case, which is the ongoing investigation of peace activists in the United States. You may have read about there's a grand jury investigation underway in Chicago and Minneapolis and Michigan. The federal officials raided houses and took documents and subpoenaed people. And the

investigation was triggered by the activities of a couple people in support of the Columbian Revolutionary Armed Forces Group, or FARC, and to other people who were working in, in Palestine. And, so, while FARC is on the FTO list and, therefore, if people were providing them with aid, that could be criminalized. But, also, in the course of this investigation, it became clear that other organizations that were not on the FTO list have also drawn significant FBI attention. And the FBI actually accidentally left behind a file at one of the houses where it was collecting information, and it included a list of questions that the agents were supposed to ask these people that they're investigating. And the questions were not just about providing support to FTOs, but, also, about the leadership structure, membership, activity, travel, immigration status, et cetera, of people involved in non-designated organizations, as well. So, there's a real risk that this decision will also chill, you know, not just academic work and not just pure speech, but the dissent, political dissent within the United States, also could be a casualty of this decision.

So, just to, to put it in sort of a, the larger perspective, because of the centrality of First Amendment protected activity to the democratic process, and because of the risk of chilling that activity with criminal laws, historically, First Amendment doctrine has built a buffer around protected activity, so that the government couldn't even get close to regulating what we would consider political speech. This, this case stepped into that protected zone, I think, and, you know, whether it's an example of the Supreme Court continuing its tradition of alarmist decisions in times of war and crisis and whether we may think better of it in the future, we can hope. But, so far, it's too soon to tell.

NM: Thank you very much, Emily, and I think we'll certainly come back with a lot of questions for you. A stark beginning, but I think one that sets the stage well for not only the First Amendment implications and the implications for speech in the U.S., and for political dissent, as you point out, but also now moving beyond the borders of the U.S. and what are the implications for peace building and other activities, starting out in the U.S., but wishing to have effect beyond this country's borders. And to speak to that, I'm really delighted to introduce Nathan Stock. He's the Assistant Director of the Conflict Resolution Program at the Carter Center. Before coming to the Center, Nathan spent two years implementing a civil society-strengthening program in Afghanistan, where he led the effort to establish a sustainable network of local NGOs capable of providing capacity-building assistance to other civil society organizations throughout Afghanistan. And I think your work there, as well as in a number of other countries, gives us a really great sense and a great perspective to understand better what are the kinds of activities – when we talk about the theoretical impact of this decision – what are the kinds of activities and the kinds of human impact that potentially stand to be lost as a result of the chilling effect and the real effect of this decision? So, Nathan, you have the floor.

NStock: Thanks. I'm going to talk a little bit this afternoon about the Carter Center's work with Hamas. That is the set of issues that I spend most of my time on. In the case of the Carter Center, we monitor elections, as I'm sure everybody knows. And, in order to be credible, when going through that monitoring process, we have to have contact with every major party running in the elections. In certain countries, over the years, this has

meant coming into contact with FTOs. If we were to exclude them, to try to ignore them, then any analysis we put forth about the quality of the electoral process would be incomplete. The electoral context is how we engaged in our first contacts with Hamas back in 1996.

More recently, in 2006, we monitored another set of legislative elections in Palestine, which Hamas won a majority of seats in. Since that election, our engagement with Hamas has been driven by three main goals. First, is to prevent or reduce violence. Over the last two or three years, we've had numerous discussions with Hamas about ceasefires with Israel, we've played at least an indirect role in working out some of those ceasefires. We've also had a series of conversations about nonviolence, and the benefits of moving towards nonviolence. So the first thing, reduction of violence. The second, Hamas has been locked in an increasingly bitter conflict with its Palestinian political rival, another party called Fatah, for several years now, and that political conflict has driven a real spiral in the internal Palestinian human rights situation. There's been a real spike in human rights violations with Hamas cracking down on supporters of its rival, Fatah, and vice versa, such that the framework of rule, of the rule of law and democracy in Palestine has really been imperiled. So, we understood that if we're going to address that, that means talking to Hamas and it means engaging on this conflict between the two parties. This is the main thing that I work on. In that spirit, we've talked to the Europeans, we liaise with the Egyptians, occasionally we've mediated between the two sides and, of course, we have been engaging with the U.S. Government on questions of Palestinian reconciliation. Finally, and on a related note, the other main reason we engage with Hamas, and the other reason we have focused on conflict resolution between the two Palestinian parties, in the long run, is peace with Israel. As long as the Palestinians are divided between these two large political movements, there will not be a Palestinian partner with the legitimacy to someday do a peace deal with Israel. It's not possible. If Hamas is excluded from the process, they will have incentives to undermine it. So, in the long run, if you want a two-state solution to the Israeli-Palestinian conflict, somehow you have to bring Hamas into the picture. Again, that means you need to have conversations with them from time to time.

Okay, so the implications of the court's ruling and, and this wider set of restrictions that predate the Supreme Court decision for our work. The number one thing that we don't do with Hamas that we probably would otherwise do is training. The Carter Center provides training on human rights, electoral issues, in the course of our normal work. We've avoided doing that with Hamas, because of this set of regulations. To give a concrete example, we had received several requests from a Palestinian NGO in Gaza to deliver a conflict resolution training for their staff. The organization is dedicated to conflict resolution, but we knew that there were links to Hamas political officials. So, we demurred. We put them off, but eventually dug into their status a little more deeply and found that this organization, this NGO, is not listed as any sort of Hamas affiliate, and so we thought we could safely split the difference and have a forty-five minute roundtable discussion with their staff about conflict resolution. So we sat down and, and the most memorable part of it for me was a young woman – I think most of the participants were women – who asked us what Hamas needed to do to get off the FTO list. Now, in my

line of work, this is very significant. These are exactly the kind of conversations that you want to be facilitating and this is a conversation we very nearly didn't have because of this set of restrictions. Finally, a little bit on, on... Pardon me. So, beyond this question of training, we do continue to engage with Hamas in three broad areas. The first is exploring how they might comply with U.S. Government policy, presumably something our government wants. The U.S. has put in place, together with other international partners, a set of conditions for Hamas' participation in Palestinian political life – renouncing violence, accepting Israel, accepting prior agreements. We've been exploring how that might be possible. Second, we continue to engage on questions of a ceasefire and nonviolence. And, finally, we continue to engage on this question of reconciliation with their rival, Fatah. And through all of this, we have steadily kept the Obama Administration informed of what we're doing. President Carter has conversations about these issues at the highest levels.

A little bit about some wider implications to this set of regulations. In my opinion, the Supreme Court's ruling really broadens a set of prohibitions that were already in place for U.S. Government personnel out into the realm of private citizens. I mean there's a longstanding, albeit inconsistent trend, where the U.S. lists certain non-state, armed groups, terrorist organizations, as beyond the pale even of diplomatic contact – so toxic that you can't have a cup of coffee with them. These regulations have been in place for FTOs for some time. What the court's decision has done, more or less, is pushed those regulations out to the rest of us. And this is at the same time when, you know, there are wide, I think it's widely acknowledged that the U.S. government, or at least the U.S. military in Afghanistan and Iraq, by necessity, has contact with organizations that not only have committed acts of terrorism, but have actually been implicated in attacks against U.S. soldiers. Taken together, I think the restrictions as they are currently crafted constrain our ability to make effective foreign policy, especially in the Middle East. They make the job of our diplomats, in my opinion, more difficult. Certainly I, you know, I work in conflict resolution. I am all for imposing legitimate sanctions for fighting weapons smuggling, ending financing for terrorist operations, but going beyond that and telling diplomats and private citizens that you can't even have conversations with these groups whose activities impact what we do in our national security, I think is very shortsighted.

In closing, I'm sure, at least in part, this comes down to a question of worldview. To continue with the example of Hamas, I firmly believe that an organization like this that has broad popular support, won a democratic election in its own context, will not be destroyed either by force of arms or by prolonged political and economic siege. I think the historical record in this case should make that quite clear at this point. Especially for groups of this nature, groups that are large, groups that are engaging in a democratic process, that have a certain degree of popular legitimacy, we need to be more flexible and nuanced in our analysis. From a policy perspective, it's obviously very important to have sticks, but there need to be carrots, as well. Our policies need to hold the door open to realistic pathways to legitimate political participation for terrorist organizations who are ready to move in that direction. In the case of Hamas, I think there are many that recognize that this set of policies has been a failure, but it's seen as simply too politically

sensitive to move on. Until that happens, as long as the organization remains broadly isolated by the West, the Carter Center will continue to engage on these issues, because only a political solution that involves them is going to end the collapse in internal Palestinian democracy and, someday, hopefully, bring about a Palestinian partner for peace with Israel. Especially in light of the Supreme Court's decision, and despite the precautions we take, obviously, we know that there are risks, but we continue to engage because we think it's the right thing to do. Thank you.

NM: Thanks very much, Nathan. I think we're building a really good foundation of a sense of the decision and the First Amendment impact, but also the sense of these, as you say, these conversations that we don't know what they're going to entail until we start having them, and the concern that one of the effects of this decision may be that those conversations would not take place at all.

Moving to a slightly different sector of impact – I think a related one, but one where a different set of laws and principles are also brought into play, it's my pleasure to introduce Joel Charney. He is the Vice President of Humanitarian Policy and Practice and Interaction organization. I am sure you're all familiar with, but a broad network of humanitarian organizations working in probably every country in the world, and certainly every disaster and emergency in the world. Joel's work at Interaction involves engaging with the U.S. Government, the United Nations, and nongovernmental organizations that are members of Interaction, on both practical and policy matters. Prior to joining Interaction, Joel was Vice President for Policy with Refugees International, a Washington-based humanitarian advocacy organization, and whilst at RI he traveled and carried out assessments in a broad number of countries and in many humanitarian emergencies and conflict situations. So, Joel, it's a real pleasure to welcome you, and you have the floor.

JC: Thank you. Thanks to the Charity and Security Network for organizing this event and inviting me to be a part of the panel. You've filled the room and that's very impressive, so, hopefully, we'll have plenty of time for comments and dialogue with, with you all. As Naz just said, my, my focus is going to be on the implications of counterterrorism measures on humanitarian action, and our main concern is that such restrictions undermine our ability to respond to urgent humanitarian situations and directly contradict historic and current U.S. obligations under international humanitarian law. So, I'm, I'm bringing in the international dimension, but it's a, it's a legal dimension involving standards that we've historically recognized with a few brief exceptions.

Now, I want to start by being crystal clear that by "humanitarian action," I'm referring to the provision of goods that save lives in emergency situations. And even our own community tends to use the term "humanitarian" more broadly, encompassing not only lifesaving action, but reconstruction and development programs, as well. And while these programs are vital and we want to preserve our ability to respond independently and appropriately to a range of needs, lifesaving action has the clearest protection under international humanitarian law, and thus brings the issue into clearest focus. And that's

why I'm going to try and stick with that. Now, this hasn't come up yet, but President Bush's Executive Order 13224, dated September 23rd, 2001, in, you know, kind of evoked in the immediate aftermath of 9/11 the restrictions on support for designated terrorist organizations, and he had to specifically exempt, or, rather, deny the exemption in the International Emergency Economic Powers Act for – and now I'm quoting – "...articles, such as food, clothing and medicine intended to be used to relieve human suffering..." So, right at the outset, even though it's built in to the International Economic...Emergency Economic Powers Act, and also the Trading with the Enemy Act, dating all the way back to 1917, both laws have exemptions for, basically, goods to respond to human suffering. And at the outset, post-9/11, that exempt...the humanitarian exemption was basically abrogated. And, to me, this is one of the problems, or there's a consistent pattern about the post-9/11 counterterror measures, is that they've broken with the U.S. historic practice of carving out humanitarian exemptions. So, basically, we're going to ignore, you know, the exemptions for goods that relieve human suffering.

Now, if you don't mind, I'm going to very quickly indulge in a quick Humanitarian 101, because I think it's important. In responding to urgent needs, humanitarian agencies strive to abide by three core humanitarian principles. First, humanity, which affirms the value of all human life and requires agencies to respond based on objective assessments of need. The second is impartiality, which means that aid providers, having assessed the need, must respond where the need is greatest regardless of which side in a conflict controls the territory where the most vulnerable people are located. And, then, third, independence, which means that decisions about the aid response are made based on the internal criteria of the organization, which, in turn, are grounded in humanity and impartiality, not on the requirements of external actors, whether they're donors, host governments, armed groups, and so on. So humanity, impartiality and independence are sort of fundamental principles by which we seek to operate. Now, the Geneva Conventions, which the U.S. claims adherence to, are the foundation of international humanitarian law. The entire premise of the Geneva Conventions is that parties to conflict, including non-state actors, must respect the independence of humanitarian action. Humanitarian actors are expected and fully authorized or sanctioned to have contact with and negotiate with parties to the conflict to ensure access to vulnerable people. They're expected to be able to provide lifesaving assistance impartially and independently. Therefore, it's impossible to reconcile international humanitarian law with the *Holder* decision, and with specific counterterror measures such as the partner vetting system promulgated by the U.S. Agency for International Development and applied so far only to Gaza.

My point is, the Obama Administration is basically in a complete contradiction that they're apparently unable and unwilling to resolve. Donald Rumsfeld famously said that the Geneva Conventions were quaint, and, in essence, we weren't going to pay any attention to them. The Obama Administration came in and said, "No, no, no. We're going to abide by the rules. We're going to fulfill our international responsibilities, including adherence to something so fundamental as the, as the Geneva Conventions." But, in the meantime, the Administration continues to pursue these counterterror measures that, in essence, say, "No. You cannot go in and talk to Hamas about

humanitarian access. You cannot go to Sri Lanka and talk to the Tamil Tigers about the possibility of opening up,” you know, “corridors or zones for safe passage in the final stages of the, of the war.” And, again, there’s simply no way to reconcile these, these two positions, and the U.S. seems to be under little pressure to do so.

Now the concrete case I’m going to cite is Somalia. There’s been a drought in Somalia for five years. Some of you are nodding – very few were paying attention. Three million people are at risk. There’s a possibility of famine, yet there’s been no new USAID assistance to Somalia, including to the World Food Program since last year due to concerns that aid might be diverted to al-Shabaab. Now, they attempted to put the burden on the nongovernmental organizations and U.N. agencies to collect information about individual staff, partner organizations, and even contractors, all this information to be run through a secret U.S. government terrorist database. Now this gets into Emily’s point, which is I think there’s a vast effort to basically try and collect data on every human being on the planet who might be potentially dangerous to the United States. And this is not only in F.B.I. raids in, in Chicago; this is through the vehicle of this so-called partner vetting system, i.e., we give information about our staff, the staff of organizations that we’re working with, and the staff of contractors and vendors, this goes to the government, to USAID, it’s run through a secret database, which we have no access to, and, if there’s a match, we’re told there’s a match. Now, there are obvious problems with this in a place like Somalia. There is staff security. It would quickly be known that our community was collecting information on behalf of the U.S. Government and, in essence, acting as intelligence agents. There’s the potential for the misuse of information. Where does the data go? Are the names going to be retained? Who’s going to, who’s going to retain them, including for people who have nothing to do with, with terrorism. Now, I need Emily and Naz’s help on this – but there is the issue of the legality of our accountability to a database that we can’t access. We’re willing to run names through publicly available databases and abide by the law, but the idea that there’s this super-duper, top-secret database with no oversight and accountability, that we feel we, we cannot accept our own accountability to, you know, not be, you know – how can we be accountable to people whose names are on that list, if we can’t access the list? And, then, finally, there’s the whole practical problem of false positives, which is just rampant, and actually dates all the way back to the eighties when we were worrying about communism in Central America.

So there’s no shared risk, there’s no presumption of good faith. We, the NGO community, have to guarantee that not a grain or rice or a cup of flour will get to anyone affiliated with a terrorist organization in a chaotic and rapidly changing environment. So, the tiny, the microscopic possibility that that cup of rice would do some meaningful strengthening of al-Shabaab to the point that they would actually do damage to the United States, that micro-possibility means that we hold up assistance to three million people who are on the verge of, of famine. And it’s that... I mean that’s just completely against the ethics and values of our community. I mean it, just the risk/reward calculation here is just, is just completely off. Now, I think... I, I, again, I want to make sure that there’s enough time for comments and questions. We have been able to push back successfully in the Somalia case and we hope that funding will soon resume, but there’s still... No

sooner... There's this kind of fighting fires thing, where no sooner did we have an agreement on Somalia, than they rolled, started to roll out similar regulations in Afghanistan and now there's talk of a pilot system for partner vetting in five countries, including countries – we could like play “guess the countries,” but, I mean three of them have absolutely nothing to do with anyone's concept of the war on terror. So again, it's this ide...this is going global, ideally. That's what they'd like to do, go global. And, again, I think it's in the interests of getting this massive database of practically every person on the, in the, in the world. Now at the time – I'm going to invoke President Ronald Reagan in this one-hundredth year anniversary of his birth. Reagan, in 1984, at the time of the Ethiopia famine, famously said, and I quote, “A hungry child knows no politics.” And he authorized tens of millions of dollars in U.S. Food Ass...Food Assistance to communist, Soviet-backed Ethiopia. And that was the tradition in the United States and I think we have a constant struggle before us to keep it that way. Thanks.

NM: Thanks very much, Joel. Well, Kay, it's my pleasure to hand you the floor both to introduce Ambassador Soderberg, our last guest, and, also, I think to tell us a bit about the work of the Charity and Security Network on this issue. I think many of you know Kay, but it's my pleasure to introduce her. She's the Director of the Charity and Security Network. She's a public interest attorney who specializes in the rights of nonprofit corporations, particularly in the areas of free speech and the strength and independence of civil society. Her work with CSN has been to bring down barriers to legitimate work of nonprofits from national security measures and includes research, advocacy and consulting with NGOs and grant makers in the U.S. and abroad. Prior to that, she was Director of Nonprofit Speech Rights at OMB Watch in Washington, DC, and has represented a variety of nonprofit organizations in her work as an attorney. Kay, you have the floor.

KG: Thank you. Again, thank you all for being here. As Director of the Charity and Security Network, it's my pleasure and privilege to coordinate a group of nonprofit organizations in the U.S. who have been working to get information about these problems out and to increase the pressure on the Congress and the Administration so that maybe we can see some change in these policies. As part of that, today, we are releasing a statement that will be passed out to you, a statement of principles that has been endorsed by a wide variety of nonprofit organizations – these are statements that are the basis for reform, and we want the nonprofit sector, at large, to take a look at these and join us in this call to action, and we would like the Congress and the Administration to take a look and move in the direction of rules that are consistent with international humanitarian law and with plain commonsense. The two recommendations in this statement are, we would like U.S. law to be updated, or, in a way, go back to the traditional principles, to reforming the prohibition on material support to respect charitable access in order to provide basic humanitarian aid to civilians and to protect free speech association and peace building. And, secondly, reform the process for placing groups and individuals on terrorist lists to ensure that they have sufficient notice and a meaningful opportunity to respond to the charges against them, and insure that the system includes sufficient checks and balances on Executive discretion. That's what we are asking for, and if these principles are

accepted, there are a number of ways they can be implemented and we will be happy to work with the Administration and the Congress in that direction.

To talk about one of our specific reform efforts, Ambassador Nancy Soderberg, currently President of the Connect U.S. Fund and former U.S. Ambassador to the U.N., is here to share that information with you. She has served in the U.S. Senate, the White House, and the United Nations and has a deep understanding of policymaking and negotiations at the highest level of the U.S. Government and the U.N. In 1997, President Bill Clinton appointed her to serve as the alternate representative to the U.N. as a Presidential Appointee with the rank of Ambassador. From 1993 to '97, she served as the third ranking official of the National Security Council at the White House as Deputy Assistant to the President for National Security Affairs. She was responsible for day-to-day crisis management, briefing the President and developing U.S. national security policy. And we are privileged to have her work with us in this reform effort. Ambassador Soderberg?

NSoderberg: Well, thank you very much, Kay, and thank all of you for coming to learn more about this important issue. I really have to say, Kay, I pay great tribute to the Charity and Security Network for all the work that you do. We need more champions of freedom out there to try and eliminate barriers to important charitable work, so, thank you very much. And I encourage all of you to take a look at the, at the principles. I also want to thank Naz for not only moderating this discussion, but for your work at Harvard and before that at Human Rights Watch.

As you all are aware and have heard quite a bit about this morning, or this afternoon, I guess by now, the material support provisions of U.S. law make it extremely difficult for NGOs and private individuals to help resolve costly and deadly conflicts, and that simply just does not make sense. For many years, these players have played critical roles in paving the way for peace by developing dialogues between sworn enemies, by showing combatants that there are alternatives to violence, by demonstrating that peace is not a zero-sum game, and by showing them that there is a broad community prepared to help them with any necessary and always difficult transition. I saw this role firsthand as an advisor to President Bill Clinton, as he sought to use the influence of the United States in convincing the IRA and Northern Ireland to end its violence in the 1990s. And, quite frankly, the U.S. and the British governments lacked the contacts with the key grassroots groups and, frankly, the imagination, to grasp the change that was underway within the IRA. And it was only the groups that had direct conf...contact with, and the confidence of the IRA, here and in Northern Ireland, who both understood the change...the chance for peace and had the influence to push the IRA to make that transformation. And had those private individuals and NGOs involved in that peace process not had that right – and I do consider it a right – to engage with the IRA leadership, peace would have certainly been delayed. And what that means in practical terms is that another 200 to 300 hundred people would have died each year because of that delay. But because you had peace you had an end to the deaths that were being caused each year by that violence. But, today, the conflict resolution process, those very experts, would be prohibited from helping build that peace. The June Supreme Court decision of last year, *Holder versus*

the Humanitarian Law Project upheld the application of laws that would criminalize these types of activities.

However the, the court did defer to Congress and the executive branch to make judgments about the scope of the prohibition because national security issues are involved. In other words, the court held that the law may impose such restrictions, not that it must. And Congress has, in turn, deferred to the Secretary of State through a statutory provision that empowers her to exempt expert advice and assistance, training and personnel from material support prohibitions, when she finds that these activities will not further terrorism. And I would argue that, clearly, activities directly aimed at preventing or resolving conflicts would clearly fit that criterion. And, today, we're passing out a letter to Hillary Clinton, which we sent last, last month calling on her to use this authority to exempt these activities from that prohibition. And without such recourse, without such a course correction, the opportunities to end violence certainly will be lost. Multi-track diplomacy and peace building do not pose a threat to our national security, in fact, they strengthen it. As you look at the signatories of this letter – it's a bipartisan letter, and includes an impressive array of former public officials, including three ambassadors, respected academics, leaders in conflict prevention and resolution field, human rights and humanitarian groups. In total, it's 18 organizations and 27 prominent individuals. They have strong credentials in the field of conflict prevention and national security and they understand that we are missing opportunities for peace.

Nathan just described a couple of these missed opportunities, particularly with Hamas. Let me just go through a couple more that you'll see in some of the appendix to the letter. In Sri Lanka, for instance, in 2010, the former Sri Lankan Ambassador to the U.S. approached the Alliance for Peacebuilding with a proposal to assemble a task force that would bring various groups together, but because one of them, the LTTE was listed as a foreign terrorist organization, the project could not be pursued. Trying to reach out to the Taliban in Afghanistan, the 3D Security Network and an Eastern Mennonite University have been hampered. Violent groups in the Philippines are not being engaged by the American Friends Service Committee. Other groups are trying to encourage action with Hamas, the Africa Action Group, USIP. The U.S. Government's own support to help bring Nepalese advisors to talks in New Delhi were complicated by this. And the project in Times of Transition's work in Columbia was a lost opportunity. I would encourage you to take a look at the practical examples of the impact of this law.

And having been in the conflict of...the business of conflict prevention for decades, it's clear to me that these types of activities are directly in the interests of the United States Government and should be exempt from this provision. And in the letter, we urge Secretary Clinton to take advantage of the powers granted to her in the exemption and work out the language that we've suggested in that law. If you'll look there's a draft letter, exemption language that we propose here that would very clearly exempt any kind of activities in the peace building realm from this provision. The letter also calls on the Secretary to consult with the Attorney General. And clearly the Justice Department has a role in this. And we'll be discussing both with the State Department and the Justice Department steps they could take to enable groups here to be able to conduct these

important activities. For instance, the Justice Department has the authority to issue prosecutorial guidelines that make clear it will not prosecute this type of activity. So there's a range of ways the U.S. Government could respond to this. But we're hopeful that this letter will spur a discussion within the Administration and encourage the Secretary of State to use her statutory authority to guarantee that nongovernmental organizations and individuals will be able to do the job of making the world a safer and more peaceful place. And, thank you, again, to Kay for this important morning, and I, I guess we'll turn it back to you and take some questions. Thank you.

NM: Thanks very much. So, I, I do have moderator's privilege to ask a few questions, but I don't think we have as much time for questions as we were hoping, so I'm going to take very little time, and then turn the floor over to you, so, please, if you do have a question, as I said earlier, if you would just line up at the microphone here, I'll recognize you and you can present your question either to one or several of the panelists. Oh, thanks [as microphone is passed] just in case you couldn't hear me.

So, I'm not going to try to summarize the panel and I think we've really had a thorough and rich overview of the various dilemmas and practical impacts that potentially stem from the decision a year ago, and more broadly – and I, I really want to highlight this, as Joel pointed out – other regulations, restrictions and administrative guidelines that are affecting organizations, both U.S. and abro...in the U.S. and abroad. So, I did want to ask the question – and before we move to those, then we have comments or questions from the audience – to the panelists. If...is there an element to the argument on the other side that you see as reasonable or as grounded in an understanding of security threats that are faced by the United States and other countries here and abroad that you think the sectors that you work with, so either those working on free speech in the U.S. or those working on peace building and diplomacy abroad or those working in humanitarian affairs, need to respond to? Is there under this a reasonable concern to which your own community could or should respond differently? Or is it your sense that the only possible response to this really is a position that says, "We already have in place adequate protections against the threat of terrorists or insurgents or rebel groups, and we don't need to go any further in regulating our own sectors and activities?" Emily, if I could go first to you, and then I'll just go through the panel in order.

EB: Sure. I think that [pause] historically, it's always been a bit difficult to draw the line between something that is regulating speech as speech and something that's regulating activities that might include speech. But I do think that, you know, the Supreme Court has made these distinctions in the past, like the, the case with the Communist membership that I mentioned. I think if the material support law were amended to provide that the defendant had to have the specific intent of furthering unlawful activities or violent activities of the organization that it's in contact with, I think that would be sufficient. I think the type of speech that is prohibited by this statute is really what has always been considered core political speech, voicing political positions, voicing dissent, criticizing government policy, and even [pause] the government itself has said that this statute would apply if, for example, an attorney submitted an *amicus* brief in the Supreme Court on behalf of one of these organizations. So, I think that it's, it's the breadth.

Certainly there is some activity that should be prohibited, but I think it's relatively easy to make changes around the edges that would continue our tradition of protecting political speech.

NStock: Yeah, very briefly, again, it's a question of nuance. I've spent years living in two different war zones at this point. I'd be the first one to agree with the idea that the United States has enormous national security interests in fighting terrorism, acts of terrorism, violence. But it might be helpful to think of a distinction between terrorism, the action, and terrorist groups writ large. And when it comes to those groups, further refine it. I'm just looking at the FTO list from November 2010. There are forty-seven groups on the list. Some of these organizations, as far as I know, are tiny at this point. I mean they may barely exist as a fighting force and have very little political support. Others are enormous – important, powerful, democratic political actors in the countries where they're based. So, distinctions need to be made regarding the type of group, regarding the scope of their activities, with a focus to sanctioning violence, sanctioning procurement of weapons, all of that, but not automatically closing the door to contact, to having a conversation, particularly if it's in the interest of furthering human rights, conflict resolution, access for humanitarian providers.

JC: Yeah, in, in our world, it's actually pretty easy. It's, we don't want our aid to be diverted or misused or manipulated by armed groups, period. And we go into conflict zones with that idea in mind and we devise an approach accordingly. So, if you want to meet on some kind of middle ground, that's the place to meet. But trust us, have confidence in us... I mean, we've actually, the, the irony of this – and, again, there are just so many contradictions, but one of the ironies is that for our own funding in our own sector, we can get a Treasury Department license that allows us to use our own procedures in our own discretion to make sure that aid is not misused. That's all we want. So, I mean, we've got one part of the government that is basically, we're fine with and can operate under those procedures, and we've got another part of the government that's trying to put this far-reaching, draconian set of principles in place. Now, of course, I hesitate to even point this out, because if there's any reconciliation of the contradiction, I guarantee you it's going to be in the wrong direction [laughing] so, you know, our OFAC licenses will all be revoked, you know, within seventy-two hours if word of this gets out. But, again, it's just such a muddle...muddle. It's such a confused picture and, you know, we have, again, no problem with meeting on a middle ground around no diversion and no misuse.

NM: Kay did you want to...

JC: Do you want to add anything?

KG: Just very briefly. I would say all of the arguments that are raised in defense of the current counterterrorism regime, at least as it applies to civil society, the one we hear the most is about fungibility. And there's a Congressional finding when the material support law was passed that every dollar given for charitable purposes or to the social wing...

JC: Sure.

KG: ...of a charitable org...foreign terrorist organization frees up another dollar to be used for explosives.

KG: Now that is a danger that the sector has been very well aware of and has all kinds of procedures and resources in place for organizations to use to avoid that happening. There's never been any example of it happening brought up to justify this Congressional finding. There were hearings where witnesses appeared and brought forth no examples. So it's, in a way, it's kind of addressing what appears to be a non-problem with [pause] a sanctions regime that lacks any proportionality. And I think it's that kind of flexibility and proportionality that we're looking for. And this is not an either/or choice – the interests are really compatible. It's how we choose to make them operational that matters.

NSoderberg: I, I think you all covered it, but I would just add that there's, I think, an often, a failure to understand the sophistication of many of these groups that do understand the nuances and the gray groups...the gray areas and that, I think, actually, I think the NGOs and the individuals involved that I've seen get it, understand it, and also strongly oppose terrorism. That's why they're trying to shift these groups into, into the peace process. So, I just think it's important for those looking at this issue to recognize the sophistication in many of these groups. They're not wild-eyed lefties trying to do peace, love and justice, but I think lot of the criticism doesn't really look at how careful they are. And, so, I commend them. I think they've got it just about right.

NM: Right. Thanks very much. Well, let me open up the floor and ask you to present any questions or comments you would have for the panel. [pause] I know individuals are making their way over to the microphone.

Q&A starts here:

MS: I'm Morton Sklar. I was the Director of Human Rights USA, and currently I'm representing one of the designed groups, an Iranian human rights and political organization. Many people are not aware that the material support provisions included restrictions and prohibitions on the provision of legal assistance to any of the designated groups. That's been changed by the regulations, but I'm wondering, since those regulations still involve a great many restrictions on legal representation, including the licensing requirement that you mentioned earlier, has anyone been paying attention to this aspect of the problem or doing anything about it?

NM: Thank you. If you don't mind, panel, I'm going to take a few questions and then I'll come back to you.

JC: Yeah, definitely. Yeah.

NM: Yeah.

HB: I'm Hilary Bower. I'm the Program Officer for MSF-USA, and I have a comment and a question. I'd like to perhaps support what Joel has said about humanity, because one of the things I find with this Act is that we are dehumanizing populations who live in places where they cannot control the authorities, whether they support them or whether they don't support them. So they live there and they are suffering from this inability for us to, to give them care. I find this strange when we have [pause] a U.S. Government and other governments that talk about winning hearts and minds, that talk about, you know, winning over the population. So [pause] my heart hurts with this, with this particular law. My question – and I'm not entirely sure whether you will be able to answer it, but I wonder whether the U.S. Government, given it's proclamations of adhering to international humanitarian law, would go so far as to prosecute a major U.S. NGO giving humanitarian care. And I'm not talking only about speech. I'm talking about action, the dollar that lets the dollar go for, for weapons. I just would be interested in the panel's opinion about whether some exemption would be found or whether it would actually go ahead and prosecute. Thank you.

NM: Let me take one more question, and then I'll come back to the panel.

MDB: My name is Martin De Boer. I work for the International Committee of the Red Cross. My question actually follows that one. Is, as you mentioned, the Supreme Court deferred the decision-making to the executive branch and [pause] and my question is, has the executive branch then started to enforce, or what are examples of how the executive branch then started to enforce the ruling other than maybe the FBI raids in Chicago or the, the partner vetting regulations? Are there any other examples on how that's implemented? Thank you.

NM: Thank you very much. So, Emily, if I could first come to you to address the question of legal assistance, in particular, how has that been addressed by this, why it was, and where do you see that going, and then also ask you and then Joel to maybe say a bit more about the OFAC Department of Treasury angle on all this, because we've talked about it but not really explained its role.

EB: Sure. Actually, my answer sort of combines those two. It think that the community that's been working to kind of narrow the scope of this law, we haven't really singled out any particular types of restrictions, because, essentially, the intent requirement I talked about would solve problems sort of across communities. But there was, when the ACLU wanted to bring a case on behalf of Anwar al-Awlaki, who was the guy in Yemen who was reportedly on the government's list of people to kill with a drone if possible, and so they were challenging that designation and had to apply for a license to engage in that representation, and, apparently, weeks and weeks go by, they've put in their application, they're waiting for their license, meanwhile, any day, this guy could get, you know, killed and render their case moot. But they didn't seem to be moving particularly quickly on issuing that license, and then when the ACLU made that particular... They then filed a suit to compel the government to make a decision on the license, not even just to give them the license, but to make a decision, and that sort of raised the issue a little bit, to a little bit of a higher salience. And I think it was about twenty-six hours later that the

ACLU got the license. So, that's the only example I know of that specifically dealt with the legal representation issue.

NM: Thanks. Joel?

JC: Yeah... I've been... Hilary, thanks so much for bringing up that question because it's been in the back of my mind. I mean would the U.S. Government, especially this Administration, prosecute a major U.S. humanitarian organization? My vote is "no." And, you know, this, then you get into strategy and tactics with our, with our community. I go way back to the eighties on attempts to impose embargos on humanitarian assistance to Vietnam, to Cambodia, to Nicaragua, when Oxfam America was [pause] was denied a license to ship tools to Sandinista-ruled Nicaragua, we actually did a campaign where we more or less dared the Administration to prosecute us. We collected tools all over the country, we shipped them to San Francisco, and we fully intended to send the shipment with or without a license. And, basically, like a week or two days or twenty-four hours before the shipment was going to go, we got the license. Now, okay, that's romantic history...

[laughter]

JC: We're in a, we're in a different, we're in a different world right now, but, seriously, I dare [pause] even a Republican administration to, you know, bring Save the Children to court for, you know, feeding starving children in, in Somalia. I mean I just don't see it. The problem is that our community is really, is really worried right now. So, I mean, I, I mean, I work for Interaction, which is the federation, and our members want Interaction to kind of take the hits and be visibly in the lead. Individual organizations are very reluctant to challenge as individual organizations. So if, I think if there is any challenge, it'll probably be, in our community, by federation rather than by an individual organization.

NM: Thank you. Ambassador Soderberg?

NSoderberg: I would just add that I, I think the Obama Administration gets this, the challenges. And I think they're, they're looking at it as ways to sort of work through internally how they might address this. The ruling clearly has a chilling effect on activities. I also would agree that the likelihood of a prosecution of a major effort here is pretty close to zero – is zero, I would say – but you don't ever know what, what will happen in another administration, what, what could happen on a smaller group, so I think it's just healthy to clear it up, and that's why we wrote the letter to Secretary Clinton. And I think both the Justice Department and the State Department need to take action to make it clear they will not prosecute, and then to clear up the definition of "material support." That, in itself, will enable the groups to go back to working for peace a hundred percent.

NM: Thanks very much. Let me open the floor again for questions. I think there were a few, a few that went back and sat down.

[pause]

BE: Hi, my name is Bill Espinoza. I'm an attorney and I represent a couple of organizations that have an interest in the subject matter, and I have, like someone before me, both a comment and a question. My comment is that, that, Joel, in your discussion, the Treasury was, was benign, but another agency wasn't, in one case. One of my clients is running into the opposite problem. The Treasury is trying to [pause] determine what books could be purchased in Iran for civil society. And even after the National Endowment for Democracy is clear, but, so it, it works both ways. But I do, I do have a question for the lawyers on the panel, and that is, what – and I think some of this just may be a chilling effect – but what is the, your basis for believing that simply facilitating a dialogue between two opposing parties, as opposed to providing training which was the case in the, in the *HLP* case, is now proscribed.

NM: Thanks very much. So, let me give that question both to Emily and to Nathan. Can you speak a bit more to this issue of, so humanitarian aid, as Joel said, I mean there are some real significant, at least theoretically, issues in terms of facilitating the provision of actual goods and behavior abroad where these groups are active. But what is the concern regarding facilitation of dialogue, peace building and conflict resolution activities that would involve diplomatic affairs, where does that come into interaction with this decision?

EB: Yeah. I'm, I'm... With respect to the facilitation, you know, I think this goes back to the breadth of the definition, and would that be expert assistance? We don't know. I think part of the problem is [pause] the amount of discretion that it gives the government to determine what they think it means and when to apply the statute, which, you know, as, as the Ambassador mentioned, leads to chilling of activities, you know, even if they don't prosecute. I... There just... There are all sorts... One thing to keep in mind is that at the beginning of the *Humanitarian Law Project* case, they asked for the government to pledge that they would not bring prosecution for the activities that they propose, and they could have headed off the entire case by granting, they would, there would have been no standing for the groups to then challenge the statute. And the government declined to do that. So that's not particularly encouraging with respect to what they consider to be problematic activity. [pause]

Other things that, that we worry about [pause] are things like, you know, if the *New York Times* were to publish an op-ed by the leader of Hamas, would that be providing material support? If an anthropologist went to study how [pause] children are taught to deal with problems in areas where there is, violence is the answer to many, to many questions, will that sort of research be considered support? There's, there's no way to do some of that work without coordinating with the groups that are on this list. And I think... There have been examples where the material support statute has been applied much more broadly than, than you would have expected, so, in the immigration context, if you are found to have provided material support to terrorism then you're barred from being granted asylum in the U.S. And there are people who have been coerced into [pause] you

know, working essentially as slaves for leaders of violent groups, who then come to the U.S. and, based on the fact that they provided a service at gunpoint for one of these organizations, their asylum claim was barred. So, I mean I agree that it's unlikely that the government's going to prosecute the *New York Times* or Save the Children, but (a), they could, and that's troublesome, and (b), I think there are lot of sort of more under-the-radar groups that are doing similarly valuable work that are really vulnerable.

NStock: Humm. Yeah.

NM: Thank you. Nathan, can I ask you to comment on this, as well?

NStock: Yeah. This distinction between, in my case, training and negotiating or liaising between two conflicting parties, it's a fine one. I mean, maybe, depending on how the court, were any of this to be prosecuted, chooses to define it, maybe it's moot. I mean we recognize there's a risk there. But in our minds, of course, we would, we would like to show that we're complying, and so this, to us, is something that, that could more obviously be considered providing expert assistance. If you're a conflict resolution expert and you're training someone in conflict resolution and they're listed as an FTO, then, apparently, that's material support. So, it, it's what we think we can do. It's where we think we can cut back [pause] in an effort to try to be compliant. I, I would assume that part of this is tied to the court's point about legitimacy, legitimating, that, that there was this equation between contact and legitimacy. Again, particularly if you make a distinction between large groups that have a major political following versus very small groups, I think that argument is, it, by and large, doesn't hold water. I mean, again, the example that I am most familiar with, Hamas is legitimate because they won an election, not because I have meetings with them.

[laughter]

NStock: I mean, it's kind of farcical, really. Moreover, particularly in the Middle Eastern context, there are lots of groups on this list, not only would contact, public contact with the United States not legitimate them, it would burn them politically. The last thing that half these groups want is to be seen as talking to us, so [pause] I think much of it is, is lacking.

NM: Thanks very much. Let me go to another question.

AW: Yes. Ann Wilcox from the Lawyers Guild here in DC. I just wanted to ask about a couple, perhaps, special cases, and one is going to be in the news in the next few weeks, the Gaza flotilla that'll be going to, to Gaza, the second one. It includes a U.S. boat that, *The Audacity of Hope*, as many have heard...

[laughter]

AW: ...which is sponsored by a coalition of groups. And I'm also thinking of the Friendship Pastors for Peace Caravan that goes to Cuba every year. And I just wonder if

either of those, are they special cases or are they implicated in the context of, of the discussion?

NM: Thanks. Let me take another question.

S: Hi. Thanks to all the panelists for sharing all your expertise. My name is Shannon with the Rights Working Group. And I just had two questions kind of about the domestic implications of this law. The first one, we work on racial profiling by law enforcement, and I was wondering kind of if there's possibilities for racial profiling or religious kind of disparities in terms of who's charged and who's prosecuted for material support charges, especially individuals, who I guess would be more vulnerable. And my second question is related to kind of these anti-Sharia laws that have come up in different states. I know in Tennessee earlier this year, they introduced a law that included similar material support provisions to, to this case, and, clearly, in that situation, it was used kind of as a political tool to target the Muslim community in Tennessee. And I was wondering what the panelists think in terms of whether there's a threat that these types of provisions could be used for kind of political manipulation and if there are other kind of domestic implication within the country in, in terms of targeting specific groups in the name of national security.

NM: Thank you very much. So, let me present Ann's question to Emily, first. I mean what, what's your sense of things like these flotillas that are entering Gaza – multiple organizations, multiple nationalities involved – maybe this would be a good chance to just say a word about the extraterritorial applicability of the material support statute. Is it your sense that the material support law could be invoked in relation to these ships that are on their way?

EB: Absolutely. In 2002, in the Patriot Act, Congress expended the application of the material support statute extraterritorially, so, I think, you know, that seems to me be solidly within the definition of, you know, providing property or services, or what have you, to... You know, if they go to, to the groups that are on the list, yeah.

NM: Yeah, Nathan.

NStock: I used to live in Gaza. I visit there every couple of months. Hamas is the government of Gaza, so, if by some chance, this boat actually makes it into the Gaza City harbor, they're going to be received by that government, presumably employees of that government might unload the cargo. I mean, hell, in that respect, every time I enter the Gaza Strip, I cross through a Hamas-run checkpoint just south of the Israeli checkpoint. Does that mean that I'm coordinating with an FTO every time I travel to Gaza City? I, I don't know, but, but, certainly, virtually every, certainly every U.S. NGO working in Gaza has to bend over backwards to try to not have any contact whatsoever, if they're on U.S. Government funds, particularly, with the government of the territory where they're trying to work. And, presumably, that would apply to the flotilla, as well, if they manage to arrive.

NM: Yeah, Joel.

JC: Yeah, I mean, as I understand it, I mean any... Leaving aside extraterritoriality for a second, I mean any U.S. citizen involved in the flotilla, if, if that person doesn't have express written consent from either the Treasury or the Commerce Department depending on whether it's money or whether it's goods that are, that are being sent, without that express written consent, they're in violation of the embargo that's being imposed on, on Hamas, and therefore subject to, to prosecution. It would be similar for Cuba, but I think, I'm pretty sure the, the Cuba work now is actually licensed. I don't think they're doing that as a civil disobedience act, but I can almost guarantee you that they get a license for it before they do it, and that's the whole... I mean, outside of the War on Terror, which I know is getting more expansive by the minute, but outside of the War on Terror, I mean it's actually possible to get a license to get permission to either travel to Cuba or send aid to Cuba or, or whatever, and I assume in the Cuba case they do that.

NM: Kay, could I ask you to address, also, Shannon's question? We've spent a lot of time talking about large, powerful organizations, civil society organizations. Could you speak to this question of racial profiling and the effect on Muslim charities and smaller organizations within the U.S.?

KG: Humm. Certainly. In, in the U.S. there have been nine U.S.-based charities that have been shut down by the Treasury Department and had their assets frozen. This was done under the same embargo law that imposes sanctions on countries, like North Korea or Iran, and so there's essentially no effective appeal and no deadline for when that money might ever get released. All nine organizations are Muslim or South Asian. Seven of them are basically Muslim faith-based organizations. They're serving people in Muslim-dominated regions or countries, and two were Tamil organizations that were getting aid to Sri Lanka. This... So that there are several ways and all layers where the profiling or the disproportionate impact, I would say, has, has hit. It has hit on the donors who, for these large Muslim charities that were shut down right after 9/11, Global Relief, Benevolence International and the Holy Land Foundation received a lot of Zakāt, religious donations that were made during the month of Ramadan and to have that basically seized by the government and held indefinitely is [pause] serious infringement on their, their right of religious expression. For the operating charities, of course they're shut down, they're not able to continue to deliver their programs, but the worst impact, really, is on the beneficiary side, and this is where the effect is discriminatory whether it's intended or not, and outside the U.S. there's a strong feeling that it is intended, but that most of the programs, whether it's [pause] charities like Save the Children or like [pause] Islamic Relief USA, they are serving in Muslim-majority countries or regions have a lot of extra restrictions on who they can work with or how they can do their work, and in some cases, where they're unable to work. I've heard stories from two large charities about how in Somalia they were told by the U.S. Government they couldn't drill a well in a village because someone from al-Shabaab might come through and get a drink of water, so the whole village goes without the access to water. So, I think in, in getting back to a point that was made both with the flotilla and about the examples, this, what the policy forgets is the concept under international humanitarian law is that civilians are

entitled to aid and protection. We've turned that upside down. Now, civilians aren't entitled to anything, they're suspected of being terrorists and they can only get aid if the government grants a license. And that's, it needs to be flipped back over and respect that presumption of civilian status and honoring of the rights of noncombatants.

NM: Thanks very much, Kay. Well, I think we've come to the end of our time. So I'll just close, first, by asking you to join me in thanking our panelists for their contributions.

[applause]

NM: And thank you for all, you for your questions, and particularly the Charity and Security Network. I would really strongly recommend their website as a resource for materials on this issue. And I think just in closing, I think one year after this troubling – I think is a kind word – decision, I think that we've heard from our panelists that the U.S. has a long and proud tradition of contributing to peace building, democratization and lifesaving humanitarian activities around the world, by professional and longstanding organizations that understand perhaps better than most the threats of rebel groups, terrorists and insurgents to civilian lives and to U.S. national security interests. And I think it's discussions like these that will expand the knowledge and awareness among Americans in the U.S. about this law, these regulations, and their potential implications on that history of charitable and peace building activity on the part of the U.S. and many organizations based here. So, thanks again, Kay, and your hard work on this.

KG: Thank you.

[applause]