
Collateral Damage

*How the War on Terror Hurts Charities,
Foundations, and the People They Serve*



Acknowledgements

This paper is the result of collaborative research conducted by OMB Watch and Grantmakers Without Borders. We believe charities in the United States and throughout the world play a key role in democratic systems by giving citizens a vehicle for participation, providing tools and information that help people get involved, and delivering assistance to those in need. Since Sept. 11, 2001, we have witnessed counterterrorism programs erode the freedom and ability of charities and their funders to carry out their missions and improve the lives of the world's people. We believe that this is damaging civil society in the United States and negatively impacting the nation's reputation and effectiveness on the global stage. We hope this paper will serve as a resource for charities, foundations, and policymakers as they seek to understand the impacts that counterterrorism measures have on charities and as they look to develop more equitable policies that protect the inherent rights of charities and the people the organizations serve.

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Executive Summary

The current U.S. counterterrorism framework is not working well when it comes to U.S. nonprofits. Rather than recognizing the sector as a valuable ally in the “war on terror,” it unfairly characterizes nonprofits as conduits for terrorist funding and a breeding ground for aggressive dissent. This continues despite the fact that, as one expert put it, “On balance and without question, the voluntary sector is a net contributor of human security at the dawn of the twenty-first century.” Consequently, U.S. nonprofits operate within a legal regime that harms charitable programs, undermines the independence of the nonprofit sector, and weakens civil society.

After the attacks of Sept. 11, 2001, the USA PATRIOT Act expanded the government’s counterterrorism powers, and the Bush administration took steps to control what it described as a widespread and significant flow of funds from U.S.-based charities to terrorist organizations. These emergency responses are now having significant and negative long-term consequences.

The nonprofit sector responded to the potential dangers of terrorism responsibly, but attempts to resolve the problems caused by counterproductive counterterrorism laws have been largely unsuccessful. The court system has been overly deferential to Department of Treasury (Treasury) enforcement actions, federal agencies ignore nonprofits’ calls for change, and Congress has not utilized its oversight powers to review counterterrorism programs and weigh the pros and cons of alternative approaches.

This paper is intended to set the historical record straight, raise awareness of a growing problem, and stimulate dialog about reasonable, long-term reforms.

Flawed Legal Regime

It is a crime for any person or organization to knowingly provide, attempt, or conspire to provide “material support or resources” to any person or groups the U.S. government has designated as a terrorist, regardless of the character or intent of the support provided. Treasury only needs to have a “reasonable suspicion” that a nonprofit is providing material support in order to designate it as a supporter of terrorism. Property can be seized “pending an investigation”; no deadlines need to be set, and no criminal charges ever need to be filed.

Treasury has shut down and designated seven U.S. nonprofits as supporters of terrorism. For designated nonprofits, lack of basic due process rights and use of secret evi-

dence mean there is no protection against unsubstantiated evidence, mistake, or abuse. Organizations are unable to present evidence to an independent review body or hire defense counsel with seized funds. Challenging a designation in federal court is also problematic because the courts do not rule on the merits of Treasury's evidence. Instead, they only consider whether Treasury's actions were "arbitrary and capricious." So far, the courts have generally upheld Treasury's designation powers, deferring to the agency's judgment because the matter affects national security. This has created a climate of fear that affects a host of nonprofit operations.

To date, only three designated U.S. charities and foundations have faced criminal prosecution, and none have been convicted. Some of the evidence in these cases has been based on questionable intelligence or faulty translations, leading many observers in the nonprofit sector to question the evidence's use in Treasury's designations.

In contrast, Chiquita Brands International got very different treatment. Between 1997 and 2004, Chiquita paid \$1.7 million to two designated terrorist groups in Colombia. Chiquita admitted these payments in 2003, and in 2007, the company was asked to pay a fine of \$25 million. No criminal charges were filed, no assets were seized or frozen, and Chiquita continues to operate.

The problems for nonprofits are not limited to organizations designated as supporters of terrorism. Treasury has released two "voluntary" tools for all U.S. nonprofits, the *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (Guidelines), and the *Risk Matrix for the Charitable Sector* (Risk Matrix). Each has proven to be highly problematic for program operations and been widely criticized. The Treasury's "voluntary" best practices are the worst of both worlds, demanding burdensome investigation by charities into their partners or grantees, but conferring no protection from legal sanction even if the Guidelines are painstakingly followed. Despite this, Treasury continues to promote these tools, falsely characterizing them as examples of the "close" relationship it has with the nonprofit sector, even though many in the sector have called for the tools' withdrawal.

Broad and Vague Definitions Fuel Government Overkill

The problem with the overall counterterrorism regime is that, since 2001, Treasury's Office of Foreign Assets Control (OFAC) and the Justice Department have incrementally expanded their interpretation of prohibited "material support" beyond direct transfers of funds or goods to include legitimate charitable aid that may "otherwise cultivate support" for a designated organization. This makes it increasingly difficult for charities and foundations to predict what constitutes illegal behavior. Consequently, the U.S. nonprofit community operates in fear of what may spark OFAC to use its power to shut them down.

For example, in the criminal prosecution against the Texas-based Holy Land Foundation, the government argued that even though the group spent \$12.4 million for charitable activities, such activity was a crime because Holy Land "should have known" the local West Bank and Gaza Strip zakat committees were "otherwise associated" with

Hamas. However, none of the zakat committees are on any government terrorist watch list. On Oct. 22, 2007, a Texas jury acquitted one Holy Land leader and deadlocked on the remaining 197 charges, leaving the issue unresolved.

Treasury's Policies Ignore State Department Principles

The lack of due process and clear enforcement standards used against charities are at odds with the State Department's *Guiding Principles on Non-Governmental Organizations*. The Principles say, "Criminal and civil legal actions brought by governments against NGOs, like those brought against all individuals and organizations, should be based on tenets of due process and equality before the law." It is hypocritical for the U.S. to promote these principles to other nations when it does not apply them to its own nonprofit sector.

Flawed Assumptions

Treasury has consistently justified the negative impacts the financial war on terror has on the nonprofit community by claiming the sector is a "significant source of terrorist financing." It has failed to provide specifics and continues to spread its unsubstantiated claims. Treasury's rhetoric is now being picked up and repeated by other agencies, transforming the false assumption into a widely accepted myth.

Treasury's exaggerated claims disregard traditional and effective methods of due diligence already used throughout the nonprofit sector and ignore credible research that contradicts it. This has damaged its credibility with the nonprofit sector, which takes the issue of terrorism very seriously. Due diligence procedures put organizations in close contact with beneficiaries and grantees, creating accountability for services provided and dollars spent.

The fact is that U.S. nonprofits only account for 1.4 percent of total Specially Designated Global Terrorists (SDGTs). Treasury also distorts the data by relying on the number of designations and not the percentage of dollars diverted to terrorism. In addition, designated charities and foundations, both U.S. and foreign, account for only 5.3 percent of total blocked assets.

The root of the problem may be that OFAC is the wrong agency to oversee nonprofits in the context of counterterrorism programs. The agency enforces economic embargoes against nations and criminal money laundering laws that target drug trafficking and organized crime. It has no knowledge or experience with the nonprofit sector, so it is not familiar with what it takes to administer disaster relief programs, make grants for aid and development, or operate under existing state and IRS rules.

Impacts

Barriers to international programs: Data suggests that international philanthropy and programs play an important role in stopping or preventing terrorism. But U.S. counterterrorism laws have made it increasingly difficult for U.S.-based organizations to operate overseas. For example, after the 2004 tsunami, U.S. organizations operating in areas controlled by the Tamil Tigers, a designated terrorist organization, risked violating

prohibitions against “material support” when creating displaced persons’ camps and hospitals, traveling, or distributing food and water.

Some charities operating abroad and foundations funding foreign organizations are perceived as agents of the U.S. government because of counterterrorism measures. Close, established relationships between nonprofits and international partners ensure that funds flow into the intended pockets. However, when nonprofits are forced into the role of police and pushed to investigate people and business relationships beyond the scope of a charitable service or grant, traditional and effective methods of due diligence are undermined, time and resources are diverted from charitable work, and staff are needlessly put in harm’s way.

For aid organizations like the International Red Cross, compliance with U.S. counterterrorism laws can force NGOs to violate standards of neutrality in their work. The *Principles of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Response Programmes* state, “The humanitarian imperative comes first. Aid is given regardless of the race, creed or nationality of the recipients and without adverse distinction of any kind. Aid priorities are calculated on the basis of need alone.”

In some cases, counterterrorism laws have caused nonprofits to pull out of programs. For example, a 2003 *New York Times* article titled “Small Charities Abroad Feel Pinch of U.S. War on Terror” noted that Rockefeller Philanthropy Advisors suspended funding for a Caribbean program designed to “kick-start a flow of American charity” to that often overlooked region because of an inability to comply with the Guidelines.

Frozen funds: Current counterterrorism financing policy allows the funds of designated charitable organizations to sit in frozen accounts indefinitely. Treasury’s *2006 Terrorist Assets Report* estimates that \$16,413,733 in assets from foreign terrorist organizations (which include charities and foundations) have been frozen. The laws that authorize the designation and freezing of assets do not provide any timeline or process for long-term disposition, so they remain frozen for as long as the root national emergency authorizing the sanctions lasts. Since the “war on terror” is very unlikely to have a clear ending, the problem will remain until there is legal reform or Treasury changes its policy. To date, no blocked funds have been released for charitable purposes, despite several requests.

Administrative burdens not justified by results: Nonprofits have responded to counterterrorism efforts responsibly. In 2005, the Treasury Guidelines Working Group released the *Principles of International Charity* (Principles) as an alternative to the Treasury Guidelines. The Principles recognize that there is no one set of procedures for safeguarding charitable assets against diversion to terrorists, and the importance of due diligence and financial controls must be emphasized.

Despite their voluntary label, nonprofits feel tremendous pressure to adopt the practices prescribed within the Guidelines, even though they are not useful for stopping

terrorism and are counterproductive for many organizations. For example, checking terrorist watch lists is not required by federal law, but the Guidelines promote this process. Many organizations feel compelled to use the Guidelines, while others are refusing, citing constitutional objections. Furthermore, many organizations see list checking as an unnecessary burden that fails to identify terrorists. No organization surveyed by Grantmakers Without Borders encountered a true hit when list checking. This highlights the effectiveness of comprehensive and effective due diligence that organizations customarily engage in.

Political Use of Surveillance Powers

In addition to providing aid and services to people in need, charitable and religious organizations help to facilitate a free exchange of information and ideas, fostering debate about public policy issues. The government has treated some of these activities as a terrorist threat. Since 9/11, there have been disturbing revelations about the use of counterterrorism resources to track and sometimes interfere with groups that publicly and vocally dissent from administration policies. In April 2005, the ACLU launched its Spy Files Project and uncovered an intricate system of domestic spying on U.S. nonprofits largely condoned by expanded counterterrorism powers within the USA PATRIOT Act.

Recommendations

The problems detailed in this paper are not insurmountable. The following steps should be taken to address them:

- The nonprofit sector must think beyond its immediate programmatic concerns and address the larger threat to the sector as a whole.
- Charities and foundations must devote the time and resources needed to develop a consensus behind reform proposals and then advocate for them.
- Congress should conduct effective oversight and reassess the current approach to charities, grantmakers, and other nonprofits.
- The Department of State's *Guiding Principles for Government Treatment of NGOs* is a good starting point for reforming the way the U.S. treats its own nonprofit sector.

Introduction

Soon after the 9/11 attacks, it was clear that a military response was not the only front in the “war on terror.” President George W. Bush launched “a strike on the financial foundation of the global terror network,”¹ and the United States Congress passed the USA PATRIOT Act, strengthening financial controls² and expanding surveillance and prosecutorial powers.³

Charities and foundations have been caught in the crossfire of these additional fronts within the “war on terror.” Grantmakers Without Borders and OMB Watch witness the impacts daily and are deeply concerned about the long-term consequences. To date, the plight of charities and foundations has received little media attention, and Congress has not used its oversight powers to weigh the costs against any benefits.

In order to set the historical record straight and raise awareness of a growing problem, this paper tells the story of the war on terror through the experiences of the U.S. non-profit sector. Hopefully, it will kick start policy changes that will not only minimize the negative impacts on nonprofits, but maximize the positive role that the sector plays in promoting national security and the common welfare.

The context of the described events and trends spans nearly seven years, beginning with the attacks on Sept. 11, 2001. Many of the laws and policies are emergency responses that must be reevaluated in light of the need for effective long-term strategies and solutions.

The current counterterrorism policy framework has a myopic view of the U.S. nonprofit sector, only recognizing it as a potential conduit for terrorist funding or a breeding ground for aggressive dissent. It applies the same enforcement regime to charities and foundations that applies to organized crime and drug kingpins. This continues despite the fact that, as one expert put it, “on balance and without question, the voluntary sector is a net contributor of human security at the dawn of the twenty-first century.”⁴

The negative impacts are only gradually becoming apparent and defined. After witness-

¹ “President Freezes Terrorists’ Assets.” Remarks by the President, Secretary of the Treasury O’Neill, and Secretary of State Powell on Executive Order, the White House, Office of the Press Secretary, Sept. 24, 2001.

² 18 U.S.C. 2339A(b)(1).

³ Ibrahim Warde, *The Price of Fear*. Berkeley University of California Press (2007) p. viii.

⁴ Mark Sidel, “The Third Sector, Human Security, and Anti-Terrorism: The United States and Beyond,” International Society for Third-Sector Research and Johns Hopkins University (2006).

ing the U.S. government's shut-down of seven U.S. charities and foundations, which had no real avenue of appeal, some charities and foundations are quietly changing their programs to avoid politically sensitive areas of the world. Charities and foundations that maintain such programs are encountering unnecessary barriers that impede the delivery of humanitarian aid. In addition, many are forced to adopt unproductive administrative procedures that do little to protect against terrorism and instead divert resources from badly needed programs. Other nonprofits have discovered their activities are the subject of unrestrained government surveillance because they chose to speak out on controversial issues.

The nonprofit sector has attempted to respond to the potential dangers of terrorism responsibly, including the publication of guides such as the *Principles of International Philanthropy* and the *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know*.⁵ However, for the most part, the sector has tried to go forward with the work that promotes its mission with as little distraction as possible, adopting token practices to avoid confrontation and hoping for a change of heart in enforcement agencies or a change in direction from the courts. This strategy has largely failed, as the courts have upheld Treasury's absolute power to shut down charities. In addition, the enforcement agencies involved, particularly the Office of Foreign Assets Control (OFAC) within the Department of the Treasury, have continued to operate on flawed assumptions about the U.S. nonprofit sector and misinterpreted this relative non-response as a sign of approval or cooperation.

To minimize confusion, this paper uses the following definitions: "charity" or "charities" includes organizations that provide direct services (such as the Red Cross or Doctors Without Borders) *and* advocacy organizations (such as the ACLU or Amnesty International). "Foundation(s)" refers to public grantmaking organizations (such as community foundations or Global Fund for Women) and private grantmaking organizations (such as the Ford Foundation). "The nonprofit sector" will be used to reference the entire charity and foundation community, and "charitable funds" refers to their combined assets.

Chapters 1 and 2 describe the harsh counterterrorism laws that apply to nonprofits, as well as the limited success of organizations who have challenged their application. Chapter 3 explains the minimal due process rights afforded to organizations affected by enforcement, and Chapter 4 debunks the false assumptions underlying application of counterterrorism laws to nonprofits. Chapters 5-8 explain the negative impacts this combination of harsh law and flawed assumptions have had on the nonprofit sector. Finally, our Conclusions and Recommendations outline the necessary next steps for both the U.S. government and the U.S. nonprofit sector in order to devise a better system.

⁵ *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know*, Independent Sector, Council of Foundations, InterAction, Day Berry & Howard Foundation (2004).

Chapter 1

Overly Harsh Counterterrorism Laws

Many of the counterterrorism laws affecting U.S. charities and foundations existed before President Bush declared a “war on terror.” However, since 9/11, most of these laws have been significantly expanded with legislation and executive orders. There has also been “voluntary guidance” from the Department of the Treasury (Treasury). These new powers allow the government to shut down charities and foundations and seize their assets indefinitely, with the organization having little or no recourse. The non-profit sector has fought back and played a key role in challenging their constitutionality. Most of the litigation is still ongoing, but key elements of existing laws are failing in the face of constitutional scrutiny.

Unfortunately, the ultimate losers in this scenario are the millions of people who depend on the valuable support of charities and foundations. Organizations are being shut down by the U.S. government or are changing programs due to fears of arbitrary closure or government scrutiny. This chapter summarizes the principal counterterrorism laws and policies affecting U.S. charities and foundations and highlights key points within court rulings that challenge their constitutionality.

Statutory Prohibitions Against “Material Support” and Executive Order 13224

Two federal laws and Executive Order (EO) 13224 bar anyone, including charities and foundations, from engaging in transactions with terrorist organizations. This includes humanitarian aid, conflict resolution programs, and other nonviolent activities. The Humanitarian Law Project (HLP)⁶ has filed a series of lawsuits challenging the constitutionality and application of these laws, as they prevent the group from providing human rights and peaceful conflict resolution training to the Kurdistan Workers’ Party (PKK)⁷ and the Liberation Tigers of Tamil Eelam (LTTE)⁸, both designated terrorist organizations. The litigation has resulted in partial victories for HLP, forcing some changes in the law.

⁶ <http://hlp.home.igc.org/>

⁷ The Kurdistan Workers’ Party (PKK) is a political organization representing Kurdish people in Turkey. Its primary goal is Kurdish self-determination. Humanitarian Law Project wishes to provide the PKK with training on the use of humanitarian and international law for the peaceful resolution of disputes and instruction on petitioning for relief before representative bodies such as the United Nations. *Humanitarian Law Project, et al. v. Mukasey, et al.* No. 05-56753, United States Ct. of Appeals for the 9th Circuit, Dec. 10, 2007.

⁸ The Liberation Tigers of Tamil Eelam (LTTE) represents the interests of Tamils in Sri Lanka. Its military arm has sought to create a separate Tamil state in the north and east of Sri Lanka. HLP seeks to provide emergency relief and “expert training” on effectively presenting claims for tsunami-related aid and negotiating peace agreements with the Sri Lankan government to facilitate the distribution of humanitarian aid. HLP also wants to provide engineering and technical services to help rebuild infrastructure in Tamil-controlled areas devastated by the 2004 tsunami and psychiatric counseling for tsunami survivors. *Ibid.*

Prohibited Material Support to Foreign Terrorist Organizations

Providing material support to designated terrorist organizations is prohibited by the Antiterrorism and Effective Death Penalty Act (AEDPA), which was enacted in 1996 and later amended by the USA PATRIOT Act in 2001 and 2004.⁹ AEDPA authorizes the Secretary of State to designate “foreign terrorist organizations”¹⁰ and makes it a crime for any person or organization to knowingly provide, attempt, or conspire to provide “material support or resources” to a designated entity, regardless of the character or intent of the support provided.¹¹

If an organization is designated by the Secretary of State as a “foreign terrorist organization,” notice is provided through an announcement in the *Federal Register*. The designated organization then has 30 days to challenge the designation in the United States Court of Appeals for the D.C. Circuit.¹² In court, the organization is not permitted to present new evidence, and on appeal, a court will only review the State Department’s evidence, which is usually presented to the judge in secret. In addition to designation, the organization and its leaders can face significant criminal and civil penalties.¹³

AEDPA defines “material support or resources” as:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation¹⁴

Each term within the definition is then further defined within the statute. The only exceptions to “material support or resources” are for medical and religious materials, which may be given to a foreign terrorist organization in unlimited amounts.¹⁵

Under AEDPA, all support is presumed to further a designated organization’s terrorist operations, regardless of whether that support furthers its nonviolent operations. The Secretary of State and Attorney General may approve exceptions for aid in the form of “training,” “personnel,” and “expert advice or assistance” where the Secretary determines that the aid may not be used to carry out terrorist activity (exceptions are not permitted for humanitarian aid such as food, water, etc.).¹⁶

⁹ <http://www.abanet.org/natsecurity/patriotdebates/material-support>

¹⁰ <http://www.state.gov/s/ct/rls/fs/37191.htm>

¹¹ Anti-Terrorism and Effective Death Penalty Act of 1996, 104 Public Law 13. See material support provision at 18 U.S.C. § 2339A(b)(1).

¹² 50 U.S.C. APP. 5(B), 22 U.S.C. 2370(A), 22 U.S.C. 6001

¹³ Testimony of Professor David Cole, Georgetown University Law Center, before U.S. Senate Judiciary Committee on May 5, 2004. Available at <http://www.bordc.org/resources/cole-materialsupport.php>.

¹⁴ 18 U.S.C. 2339A(b)(1).

¹⁵ Bill of Rights Defense Committee, “Constitutional Implications of Statutes Penalizing Material Support to Terrorist Organizations,” Testimony of David Cole, U.S. Senate Committee on the Judiciary, May 5, 2004. Available at <http://www.bordc.org/resources/cole-materialsupport.php>.

¹⁶ 18 U.S.C. 2339B(j).

In 1998, HLP initiated litigation in the U.S. District Court for the Central District of California, challenging various provisions of AEDPA as unconstitutional.¹⁷ Throughout its nine-year procedural history, the case has undergone numerous appeals and consolidations. The latest ruling was on Dec. 10, 2007, in the U.S. Court of Appeals for the Ninth Circuit.¹⁸ In that opinion, Judge Harry Pregerson wrote, “Vague statutes are invalidated for three reasons: 1) to avoid punishing people for behavior that they could not have known was illegal; 2) to avoid arbitrary and discriminatory enforcement by government officers; and 3) to avoid any chilling effect on the exercise of First Amendment freedoms.”¹⁹ Using these standards, the court found AEDPA’s definitions of “training,” “other specialized knowledge,” portions of “expert advice or assistance,” and “service” to be impermissibly vague and unenforceable against HLP.²⁰ The court said “the term ‘training’ remains impermissibly vague because it ‘implicates, and potentially chills, Plaintiffs protected expressive activities and imposes criminal sanctions of up to fifteen years imprisonment without sufficiently defining the prohibited conduct.’”²¹ Conversely, the court found the terms “personnel,”²² and the “technical” or “scientific” portions of the definition of “expert advice or assistance” to be clearly defined.²³

Under AEDPA, all support is presumed to further a designated organization’s terrorist operations, regardless of whether that support furthers its nonviolent operations.

HLP has consistently challenged the presumption within AEDPA that all support of a terrorist organization furthers that organization’s terrorist purposes, arguing that this violates the Fifth Amendment because it does not require the government to prove that the defendant acted with specific intent to further the terrorist activity of the designated organization. Nonetheless, the courts have disagreed with HLP’s argument, finding that AEDPA has no specific intent requirement, and any support is prohibited

¹⁷ See Center for Constitutional Rights. <http://ccrjustice.org/ourcases/current-cases/humanitarian-law-project%2C-et-al.-v.-mukasey%2C-hlp%2C-et-al.-v.-gonzales%2C-and-hlp>. *Humanitarian Law Project, et al. v. Ashcroft, now Humanitarian Law Project, et al. v. Mukasey, et al.* (532 U.S. 904; 121 S. Ct. 1226; 149 L. Ed. 2d 136; 2001 U.S. LEXIS 2000; 69 U.S.L.W. 3592, March 5, 2001, Decided) is a case in which the Center for Constitutional Rights (CCR) challenged a USA PATRIOT Act provision that criminalizes the provision of material support in the form of “expert advice and assistance” to so-called “terrorist organizations.” This is a companion case to *Humanitarian Law Project, et al. v. Reno* (205 F.3d 1130 (9th Cir. 2000)) and *Humanitarian Law Project, et al. v. U.S. Department of Treasury*.

¹⁸ *Humanitarian Law Project, et al. v. Mukasey, et al.* (No. 05-56753 United States Ct. of Appeals for the 9th Circuit Dec. 10, 2007).

¹⁹ *Ibid.* at 16155.

²⁰ *Ibid.* at 16157-16160.

²¹ *Ibid.* at 16157.

²² *Ibid.* at 16160-16163. Prior rulings had found the term “personnel” to be impermissibly vague because it “blurs the line between protected expression and unprotected conduct.... [s]omeone who advocates the cause of the PKK could be seen as supplying them with personnel... But advocacy is pure speech protected by the First Amendment.” (*HLP* 1 205 F.3d at 1137) In response to this ruling, Congress amended the definition in 2004. The new definition explicitly excludes individuals acting independently of the designated organization from the definition of prohibited provision of personnel. The United States Court of Appeals for the 9th Circuit found these changes cured the earlier vagueness problem.

²³ *Ibid.* at 16159.

support.²⁴ It is likely that HLP's AEDPA litigation will continue. In addition to AEDPA, HLP's programs with the PKK and LTTE face the additional statutory obstacles described below.

Prohibited Transactions with Specially Designated Terrorists

The International Emergency Economic Powers Act (IEEPA) was originally passed in 1977 to clarify presidential powers during national emergencies, particularly when issuing embargoes against foreign nations.²⁵ IEEPA is administered by Treasury's Office of Foreign Assets Control (OFAC), which also administers anti-money laundering laws and has traditionally dealt with embargoes against nation-states, drug kingpins, and organized crime. In 1995, President Bill Clinton extended IEEPA's use beyond nation-states to target "specially designated terrorists," making it illegal for anyone to knowingly engage in transactions of any kind with designated groups.²⁶ This prohibition includes benevolent activities such as humanitarian aid programs. On Sept. 23, 2001, President Bush invoked his authority under IEEPA to issue EO 13224, naming 27 "specially designated global terrorists" and authorizing the Secretary of Treasury and the Secretary of State to designate more terrorists on the Specially Designated Global Terrorist (SDGT) List²⁷, which is then combined with those named under other sanctions programs in the Specially Designated Nationals (SDN) List.²⁸

OFAC may seize an organization's assets "pending an investigation." Even accidental transactions can result in severe OFAC actions.

To designate an organization, OFAC only needs to have a "reasonable suspicion" that it is providing "financial, material, or technological support for, or financial or other services to" a designated terrorist organization or "otherwise associat[ing]" with a designated organization.²⁹

Consequences of designation include the seizing and freezing of all tangible and financial assets and significant civil and criminal penalties. In addition, OFAC may seize an organization's assets "pending an investigation."³⁰ No criminal charges ever need to be filed, and OFAC is not required to give notice to the organization that its assets will be frozen, nor provide it with a statement of reasons for the designation or investigation.³¹ In fact, due to the government's state secrets privilege and its liberal definition of classified evidence, the organization typi-

²⁴ *Ibid.* at 16149-16154. The court notes that Congress amended AEDPA in 2004 to require that a defendant have knowledge that the organization supported is designated, has engaged in terrorist activity. 18 U.S.C. 2339B(a).

²⁵ International Emergency and Economic Powers Act (IEEPA), Pub. L. No. 95-223, tit. II, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701-1707 (2006)). For a history of IEEPA, see Congressional Research Service "National Emergency Powers," CRS Report for Congress, updated Sept. 15, 2005. Available at <http://www.ombwatch.org/budget/pdf/davisbaconcrs.pdf>.

²⁶ Executive Order 12947 (1995).

²⁷ <http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf>

²⁸ Executive Order 13224. (Sept. 23, 2001) "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism." Available at <http://www.whitehouse.gov/news/releases/2001/09/20010924-1.html>.

²⁹ *Ibid.*

³⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended at various sections of 8, 15, 18, 22, 32, 42, 49, and 50 U.S.C. (2006)) at Section 106 (adding the words "block during the pendency of an investigation" after the word "investigate" in IEEPA, 50 U.S.C. 1702(a)(1)(B)(2000)).

³¹ Executive Order 13224, Sec. 10 (Sept. 23, 2001).

cally never sees much of the evidence that led to OFAC's action.³² It is important to note that IEEPA carries no knowledge requirement, so even accidental transactions can result in severe OFAC actions.

If an organization wishes to challenge its terrorist designation, there is no formal process within Treasury where it can present evidence on its own behalf or challenge evidence against it. Designated charities can and have sent Treasury written responses and information to challenge the designation, but there is no independent review.³³ Appealing the action in federal court is also problematic because the organization still cannot present its own evidence and the courts are limited to considering whether or not the seizure was "reasonable."³⁴

In 2006, HLP filed a companion case to its AEDPA litigation, challenging IEEPA and EO 13224. In November 2006, the United States District Court of the Central District of California in Los Angeles ruled the "otherwise associated with" language in EO 13224 and IEEPA to be impermissibly vague and unconstitutional³⁵ because neither IEEPA nor EO 13224 clearly define it, potentially restricting the freedom of association guarantee in the First Amendment. Later, this portion of the ruling was withdrawn³⁶ after Congress passed this new definition:

(a) To own or control; or (b) To attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to.³⁷

The court also ruled that the president's "unfettered discretion" to designate individuals and organizations to the SDGT list is unconstitutional due to a lack of "definable criteria for designating individuals and groups as [terrorist organizations]."³⁸ In contrast, the court upheld the designation authority of the Secretary of Treasury because EO 13224 and its regulations require findings (a reasonable belief) before a designation is made. The court also found that HLP lacked standing to challenge the president's authority to designate SDGTs because it "cannot establish a genuine and immediate threat they will be designated by the President."³⁹ This case is currently on appeal in the Ninth Circuit.

The court also ruled that the president's "unfettered discretion" to designate individuals and organizations ... is unconstitutional.

³² Professor David Cole Testimony before U.S. Senate Judiciary Committee on May 5, 2004, available at <http://www.bordc.org/resources/cole-materialsupport.php>.

³³ 31 C.E.R. 501.807.

³⁴ *Holy Land Foundation v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003); *Global Relief Foundation v. O'Neill*, 315 F.3d 748 (Dec. 31, 2002).

³⁵ *Humanitarian Law Project v. U.S. Dept. of Treasury*, 463 F. Supp. 2d 1049 (C.D. Cal. 2006).

³⁶ *Humanitarian Law Project v. U.S. Dept. of Treasury*, 484 F. Supp.2d 1099, 1105-07 (C.D. Cal. 2007).

³⁷ 31 C.E.R. 594.316.

³⁸ *Humanitarian Law Project v. U.S. Dept. of Treasury*, 484 F. Supp.2d 1099, 1105-07 (C.D. Cal. 2007).

³⁹ 484 F. Supp. 2d 1099 (C.C. Cal. 2007).

The Voluntary Tools

Treasury has also created voluntary tools that pose unique and difficult challenges for nonprofits. Despite their voluntary label, nonprofits feel tremendous pressure to utilize these tools, largely because they were issued by the same agency that can seize and freeze nonprofits' assets at any time.

First issued by OFAC in November 2002, the *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities* (Guidelines) were designed by OFAC to protect charities and foundations against the unintended diversion of charitable support to terrorist organizations.⁴⁰ Now in its third version, the Guidelines are comprised of suggested governance, transparency, and grantmaking practices. They have been criticized by a broad cross section of the nonprofit sector, including Grantmakers Without Borders and OMB Watch, and calls for their withdrawal continue. Many feel that the Guidelines promote inappropriate practices that do little to prevent the diversion of funds to terrorism and, in fact, chill charitable operations. To make matters worse, the Guidelines have assumed a quasi-mandatory status, pressuring charities and foundations to compromise their operations. This pressure continues despite the fact that compliance with the Guidelines is not a legal defense against an allegation of support for terrorism. Chapters 5 and 6 provide detailed information about these negative impacts.

In 2007, Treasury released a companion tool to the Guidelines entitled *Risk Matrix for the Charitable Sector* (Risk Matrix).⁴¹ The Risk Matrix specifically applies to U.S. foundations and asks grantmakers to apply a formulaic chart of ambiguous factors, eventually branding each grantee or grantmaking practice as “high,” “medium,” or “low” risk. Treasury recommends that the higher the calculated risk, the more practices a grantmaker should adopt from the Guidelines. Few organizations have found the Risk Matrix useful, and it is questionable if any are using it.

Extensive Surveillance Powers Impact Nonprofits

Many of the surveillance powers within current counterterrorism laws were greatly expanded after 9/11, allowing the use of counterterrorism resources to track and sometimes monitor groups that publicly and vocally dissent from administration policies. The Patriot Act created a broadly defined crime of “domestic terrorism” as “activities that appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.”⁴² That opened the door to the surveillance of organizations involved in legal protest demonstrations. It also lowered the threshold for the FBI to collect personal information about people inside the U.S. if the FBI claims it is “for an authorized investigation... to protect against international terrorism or clandestine intelligence activities.”⁴³ It can also conduct in-

⁴⁰ Available at http://www.treasury.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf.

⁴¹ *Risk Matrix for the Charitable Sector*, available at http://www.treas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf.

⁴² Public Law 107-56 § 802(a) (Oct. 26, 2001).

⁴³ *Ibid.* Sec. 215 amends the business records of FISA to allow FISA court orders for FBI to access “tangible things (including books, records, papers, documents, and other items).”

vestigations and seize records without showing probable cause that the subject of the investigation is engaged in any criminal activity and where there is no suspicion that the subject of an investigation is a foreign power or agent of foreign power.⁴⁴

The Patriot Act also amended the Foreign Intelligence Surveillance Act (FISA). Originally passed in 1978 in response to abusive warrantless wiretapping by the National Security Agency (NSA) and the Central Intelligence Agency (CIA), FISA requires the government to obtain a warrant from a special secret court in order to conduct electronic surveillance of a United States citizen, resident alien, or association of such persons.⁴⁵ Under FISA, the government was originally required to certify that “the purpose” of the application was to obtain foreign intelligence information. Section 218 of the Patriot Act amended FISA by expanding the government’s surveillance powers to allow wiretapping for criminal law enforcement, not only for foreign intelligence information, but as long as “a significant purpose” is intelligence gathering.⁴⁶

In December 2006, *The New York Times* revealed that President Bush authorized a secret NSA warrantless electronic surveillance program, known as the Terrorist Surveillance Program (TSP), for international communications into and out of the United States if NSA believed that one of the participants was associated with al-Qaeda.⁴⁷ Currently, Congress is debating amendments to FISA that would curtail this practice.⁴⁸

Al-Haramain Islamic Foundation (Al-Haramain) filed a lawsuit in February 2006 challenging NSA and its surveillance of telephone conversations between its director and officer in Saudi Arabia and its U.S. attorneys.⁴⁹ Al-Haramain received proof of this surveillance in the form of a highly classified document (Document) that was mistakenly turned over to its attorneys by the government in a separate court action.⁵⁰

The government filed a motion for dismissal, based on the state secrets privilege, and a motion to bar Al-Haramain from having access to the Document.⁵¹ Al-Haramain responded that FISA preempts the state secrets privilege, and even without that preemption, the state secrets privilege does not apply because 1) the surveillance program utilized by the government is not a secret (its existence was disclosed by *The New York Times* in December 2006) and 2) the Document was disclosed to Al-Haramain and is not a secret.

The district court accepted Al-Haramain’s arguments and refused to dismiss the action; however, it did bar Al-Haramain from having “physical control” over the Document.

⁴⁴ For more information on how counterterrorism laws are used to monitor organizations, see Chapter 8.

⁴⁵ 50 U.S.C. 1801(i).

⁴⁶ Public Law 107-56 (Oct. 26, 2001). Sec. 218 Foreign Intelligence Information: “Sections 104(a)(7)(B) and 303(a)(7)(B) (50 U.S.C. 1804(a)(7)(B) and 1823(a)(7)(B)) of the Foreign Intelligence Surveillance Act of 1978 are each amended by striking ‘the purpose’ and inserting ‘a significant purpose.’”

⁴⁷ J. Risen & E. Lichtblau, “Bush Lets U.S. Spy on Callers Without Courts,” *The New York Times* (Dec. 16, 2005).

⁴⁸ The 110th Congress has considered several bills that would amend parts of FISA, including H.R. 3773 and S. 2248.

⁴⁹ *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215, 1224 (D. Or. 2006).

⁵⁰ *Ibid.*

⁵¹ *Al-Haramain Islamic Foundation, Inc. v. Bush*, Government’s Motion Proposing Procedures for Filing Separate Public and Sealed Versions of Its Briefs to Protect Classified Information in the Record (June 6, 2007).

The Ninth Circuit Court of Appeals reversed the district court and remanded the case back to the district court for further proceedings.⁵² The Ninth Circuit ruled the Document a state secret but found the surveillance program not to be protected by the state secrets privilege.⁵³ The case will now return to the lower court to determine whether FISA preempted the state secrets privilege. This case demonstrates to the larger non-profit sector that even privileged attorney-client communications are not safe from government surveillance.

⁵² *Al-Haramain Islamic Foundation v. Bush* (9th Cir. 2007), filed Nov. 16, 2007.

⁵³ *Ibid.*

Chapter 2

The Continuously Expanding Interpretation of What Is Prohibited

Since 2001, the Department of the Treasury's Office of Foreign Assets Control (OFAC) and the Justice Department have incrementally expanded their interpretation of the International Emergency Economic Powers Act (IEEPA) and what is considered prohibited "material support" of, or "otherwise associat[ing] with," designated terrorist organizations or individuals. Originally understood to be direct transfers of funds or goods, "material support" is now interpreted to include legitimate charitable aid that may "otherwise cultivate support" for a designated organization. Furthermore, "otherwise associated with" can include indirect or past relationships, even when there is no claim that the relationship included aiding terrorists or participating in terrorist plots or conspiracies.

This incremental expansion of what is prohibited activity, coupled with the vague standards defining alleged terrorist associations, makes it increasingly difficult for charities and foundations to predict what constitutes illegal behavior. Consequently, the U.S. nonprofit community operates in fear of what may spark OFAC to use its power to shut them down.

From a Bar on Direct Support to "Otherwise Cultivate"

When OFAC began shutting down U.S.-based charities after 9/11, it claimed each had provided direct financial support to terrorists.⁵⁴ This caused a great deal of concern in the nonprofit sector, which strongly opposes the use of charities or foundations to support terrorism. Nonprofits asked OFAC to produce specific examples to substantiate these claims and inform the nonprofit community of what to avoid. Instead, OFAC made statements within its *Anti-Terrorist Financing Guidelines* (Guidelines) that dramatically broadened its interpretation of what constitutes support for terrorism. In

⁵⁴ These included the Holy Land Foundation of Texas, the Global Relief Foundation, and Benevolence International of Illinois. In December 2001, OFAC designated the Holy Land Foundation for Relief and Development (HLF), alleging the group funneled millions of dollars to Hamas, a designated terrorist organization since 1995, and provided funds to families of suicide bombers. HLF argued that it only provided humanitarian relief to Palestinian refugees and victims of the wars in Bosnia, Kosovo, and Turkey. OFAC seized more than \$5 million of HLF's assets, including all of its documents and property. On December 14, 2001, the Treasury Department made similar claims when it seized and froze the assets of the Global Relief Foundation (GRF), pending an investigation into alleged ties to terrorist organizations. According to OFAC's website "the Global Relief Foundation ... and its officers and directors have connections to, and have provided support for and assistance to Usama bin Laden, al Qaeda, and other known terrorist groups." The same day, OFAC seized the assets, bank accounts, records, computers, and personal effects of Benevolence International Foundation (BIF), pending an investigation. According to the Treasury Department, BIF allegedly "provided support for and has been linked in other ways to al Qaeda and its operatives." On Nov. 19, 2002, the Treasury Department placed BIF on the Specially Designated Global Terrorist list.

the Annex of the 2006 version of the Guidelines,⁵⁵ OFAC said that the risk of terrorist abuse “cannot be measured from the important but relatively narrow perspective of terrorist diversion of charitable funds...” but also includes the “exploitation of charitable services and activities to radicalize vulnerable populations and cultivate support for terrorist organizations and networks.” OFAC referenced investigations of “terrorist abuse of charitable organizations, both in the United States and worldwide, *to raise and move funds, provide logistical support, encourage terrorist recruitment or otherwise cultivate support for terrorist organizations and operations.*”⁵⁶ (emphasis added) However, it did not provide details of these investigations or explain how the law authorized it to expand its mission so dramatically.

Consequently, OFAC has created an impossibly vague standard. Any activity that OFAC believes may cultivate support, such as providing disaster relief in a territory controlled by a designated terrorist organization or speech in support of political ideas that are similar to those advanced by politically oriented terrorist groups, can be swept into this regulatory black hole. OFAC can then close a nonprofit and seize its assets indefinitely, with no effective recourse for the affected nonprofit.

Criminal Prosecution for Supporting Non-Designated Charities

Concern about OFAC’s expanding interpretation of the law is not unjustified. Most of OFAC’s and the Justice Department’s actions against nonprofits have relied on broad interpretations of “material support” and the “otherwise associated with” standard. For example, in the criminal prosecution of Holy Land Foundation (Holy Land) and its leaders, prosecutors did not argue that the group gave direct material, technical, or other actual support to a designated organization.⁵⁷ Instead, the prosecution argued that by providing \$12.4 million for the charitable activities of non-designated zakat committees in the West Bank and Gaza Strip, Holy Land gave an indirect benefit to Hamas, a designated organization. Prosecutors argued that although the zakat committees were not designated organizations, the defendants “should have known” they were “otherwise associated” with Hamas.⁵⁸

Many nonprofit organizations worried that a conviction on these facts would further complicate the already confusing counterterrorism laws, making it more difficult for organizations to operate and discouraging other U.S. organizations from working overseas. Nonprofit organizations could no longer rely on the government’s designated terrorist watch lists to learn with whom it is legal to do business. In addition, when operating in regions where designated organizations exist or control territory, charities and foundations could expose themselves to criminal prosecution because of the real or perceived associations of program beneficiaries. These concerns remain unresolved. On Oct. 22, 2007, a Texas jury acquitted one Holy

⁵⁵ U.S. Dept. of the Treasury, *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities*, 2006 version, Annex pp. 14-16. Available at <http://www.treas.gov/press/releases/reports/0929%20finalrevised.pdf>.

⁵⁶ *Ibid.*

⁵⁷ The Holy Land Foundation for Relief and Development and five of its leaders were indicted in 2004 on charges of providing material support for terrorism, money laundering, and conspiracy. See July 24, 2004, Department of Justice press release at <http://www.usdoj.gov/archive/ag/speeches/2004/72704ag.htm>.

⁵⁸ Greg Krikorian, “Mistrial in Holy Land terrorism financing case,” *Los Angeles Times* (Oct. 23, 2007).

Land leader and deadlocked on the remaining 197 charges.⁵⁹ However, the government's interpretation of the law has not changed, and prosecutors say they intend to retry the case.⁶⁰

Past Affiliations and Associations Have Led to Designation

Under EO 13224, being "otherwise associated with" a designated terrorist can result in the same sanctions as direct provision of material support. OFAC and the Justice Department's actions indicate that the government takes a very broad view of what relationships are sufficient to lead to designation and closure of an organization.

In 2004, OFAC designated the Sudan-based Islamic African Relief Agency, a/k/a Islamic Relief Agency (ISRA) as a supporter of terrorism.⁶¹ OFAC also shut down the Missouri-based Islamic American Relief Agency (IARA-USA). According to OFAC, IARA-USA is a branch of ISRA, and as such, could be closed for that reason alone.⁶²

IARA-USA asked OFAC to reconsider the closure and blocking of its assets, arguing that it is a separate and independent organization from ISRA, with its own board of directors, administrative structure, executive decision making process, and legal and financial accountability obligations, and that none of these functions and responsibilities is shared with any other organization.⁶³ OFAC denied the request, citing past organizational ties between IARA-USA and ISRA.⁶⁴

In upholding OFAC's action, the United States Court of Appeals for the District of Columbia held that, even though "the unclassified record evidence is not overwhelming," it would defer to OFAC because the issues affect national security and foreign policy. More specifically, the court rejected IARA-USA's argument that OFAC must show ISRA controlled it, holding that the asset-blocking order may stand if there is sufficient evidence that the two groups are the same "even in the absence of evidence that one controls the other." In addition, the court held that "the threat need not be found with regard to each individual entity."⁶⁵

OFAC's action in this case raises important questions for nonprofits. What degree of

⁵⁹ <http://www.nytimes.com/2007/10/23/us/23charity.html>

⁶⁰ "Mistrial for Most Defendants in Muslim Charity Trial," Associated Press (Oct. 22, 2007), available at <http://www.dallasnews.com/sharedcontent/APStories/stories/D8SEFSUO0.html>.

⁶¹ See <http://www.treas.gov/press/releases/js2025.htm>.

⁶² "Treasury Designates Global Network, Senior Officials of IARA for Supporting bin Laden, Others," Press Release, Dept. of the Treasury (Oct. 13, 2004) at <http://www.treas.gov/press/releases/js2025.htm>. In March 2007, IARA-USA, its former executive director, and other leaders were indicted for violating economic sanctions against Iraq. In January 2007, additional charges were filed for funding an orphanage in the Shamshatu Refugee Camp in Pakistan that is located on land belonging to a designated Afghan rebel leader, Gulbuddin Hekmatyar. There are no charges of material support for terrorism, and the cases have not yet come to trial. "Charity Charged with Violating Economic Sanctions in Grants to Orphanage," *OMB Watcher* (Feb. 5, 2008), available at <http://www.ombwatch.org/article/articleview/4159/1/407?TopicID=1>.

⁶³ Jennifer Myers, "Lawyer Backs Islamic Agency, Despite Suspicion, Attorney Says Local Charity Opposes Terrorism," *Columbia Missourian* (Oct. 22, 2004). Available at <http://www.columbiamissourian.com/stories/2004/10/22/lawyer-backs-islamic-agency/>.

⁶⁴ Letter from Robert Werner, Director, OFAC, to Shereef Akil, Attorney for IARA, March 18, 2005.

⁶⁵ *Islamic American Relief Agency (IARA-USA) v. Alberto Gonzales*, United States Ct. of Appeals for the District of Columbia, No. 05-5447 (Feb. 13, 2007).

separation is necessary to protect one organization from being held responsible for the actions of another, and what steps need to be taken to separate one organization from another? This case makes it clear that separate incorporation and tax-exempt status in the U.S. are not enough. Other questions relate to timing. If, as OFAC held in this case, an organization can be deemed a supporter of terrorism based on the association with another group *before* it was designated, what steps, if any, can be taken to protect a nonprofit from being designated due to the bad acts of another?

Past associations were also the basis of OFAC's February 2006 closure of KindHearts USA, pending an investigation for suspected connections to Hamas.⁶⁶ OFAC alleged that KindHearts USA was created out of Holy Land and the Global Relief Foundation (GRF) – two groups shut down in 2001. OFAC's press release stated that "former GRF official Khaled Smaili established KindHearts from his residence in January 2002. Smaili founded KindHearts with the intent to succeed fundraising efforts of both HLF and GRF, aiming for the new NGO to fill a void caused by the closures. KindHearts leaders and fundraisers once held leadership or other positions with HLF and GRF."⁶⁷



Sign on KindHearts booth at Gulf Charities conference

However, the former employees of Holy Land and Global Relief Foundation were never on OFAC's SDGT list. In addition, when KindHearts USA learned of an indictment of a fundraising contractor that was a former Holy Land employee, it immediately terminated that relationship.⁶⁸ Nonetheless, Treasury cited this association as additional proof of KindHearts USA's support for terrorism.

OFAC also alleged that KindHearts USA gave more than \$250,000 to the Sanabil Association for Relief and Development, which was designated as a terrorist organization in August 2003.⁶⁹ However, KindHearts USA board chair, Dr. Hatem Elhady, told the *Toledo Blade* that it contracted with Sanabil to provide aid in refugee camps *before the designation was made*, and the amount was no more than \$115,000. He said, "We did not just give money. We gave it for specific projects, and we saw the results, and we have the receipts."⁷⁰

Treasury's investigation of KindHearts USA was still pending as of June 15, 2008; the group's funds have been unavailable for charitable work for over two years. There is no deadline for Treasury to either designate KindHearts USA or release the freeze on the group's assets.

⁶⁶ "Treasury Freezes Assets of Organization Tied to Hamas," U.S. Dept. of the Treasury Press Release, Feb. 19, 2006. Available at <http://www.ustreas.gov/press/releases/js4058.htm>.

⁶⁷ *Ibid.*

⁶⁸ "Leaders vigorously rebut U.S. allegations; Board members deny Hamas ties," *Toledo Blade* (Feb. 21, 2006).

⁶⁹ "Treasury Freezes Assets of Organization Tied to Hamas," U.S. Dept. of the Treasury Press Release, Feb. 19, 2006. Available at <http://www.ustreas.gov/press/releases/js4058.htm>.

⁷⁰ "Leaders vigorously rebut U.S. allegations; Board members deny Hamas ties," *Toledo Blade* (Feb. 21, 2006).

Chapter 3

Lack of Appeal and Due Process Rights Leaves Charities and Foundations Open to Mistake and Abuse

The problems with the vague legal framework that governs when charities and foundations can be shut down are exacerbated by the lack of traditional due process in the International Emergency Economic Powers Act (IEEPA) to protect against mistake or abuse. Any challenge to the Department of Treasury's (Treasury) actions must happen within the context of no pre-seizure notice or hearing, classified evidence that the organization can never view, and a court system that gives extreme deference to Treasury actions when national security issues are involved. This standard makes it too easy for Treasury to create an inference of wrongdoing based on unsubstantiated evidence, rather than building a clear, accurate, and convincing case that a charity or foundation is supporting terrorism.

Due Process and the International Emergency Economic Powers Act (IEEPA)

IEEPA gives the Executive Branch unchecked power to designate any group as a terrorist organization.⁷¹ Once a charity or foundation is designated for providing material support to a prohibited entity, all of its U.S. property and financial assets may be frozen without notice.⁷² Unlike traditional criminal justice standards, the government does not need to demonstrate "probable cause";⁷³ it only needs to act "reasonably."⁷⁴ IEEPA permits enforcement actions prior to designating the organization. Consequently, property can be seized "pending an investigation," with no deadline on when the investigation must end. The 9/11 Commission Report of August 2004 noted, "The provision of the IEEPA that allows the blocking of assets 'during the pendency of an investigation' ... raises particular concern in that it can shut down a U.S. entity indefinitely without the more fully developed administrative record necessary for a permanent IEEPA designation."⁷⁵

IEEPA does not provide organizations affected by Treasury enforcement action any independent administrative review process to challenge seizure of assets. Consequently, appeals to the judicial system are the only recourse. Recent actions suggest that even basic due process protections, such as a right to counsel, are not guaranteed. As this

⁷¹ 50 U.S.C. 1704-1706.

⁷² EO 13224 Sec.10, Sept. 23, 2001.

⁷³ Probable cause "exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found," *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Illinois v. Gates*, 462 U.S. 213, 238 (1983); also see <http://www.fas.org/sgp/crs/intel/m013006.pdf>.

⁷⁴ Reasonable suspicion is more than a hunch but considerably below preponderance of the evidence; it occurs when an individual has an articulable and particularized belief that criminal activity is afoot, *Ornelas v. United States*, 517 U.S. at 695; *Illinois v. Gates*, 462 U.S. at 235.

⁷⁵ *Terrorist Financing Staff Monograph to the 9/11 Commission*, p. 8.

chapter will show, the courts have deferred to Treasury because of national security implications, creating a legal “catch-22” for designated charities.

No Right to Hire Defense Counsel

Before an attorney can represent a designated organization, he or she must get a license from Treasury.⁷⁶ Representing a designated organization without a Treasury license is considered “material support” to a designated organization and is illegal. In addition, if an organization wishes to pay its legal fees with assets frozen and seized by OFAC (typically the only funding available), it must ask for a separate Treasury license.⁷⁷ In the past, OFAC provided licenses to designated organizations to either obtain counsel or access frozen funds for legal fees. However, recent license applications have been denied, so organizations cannot challenge their designations.

In 2004, Islamic American Relief Agency (IARA) applied to OFAC for a license to obtain access to its frozen funds for legal fees while challenging its designation. OFAC responded that any fees must be paid with “fresh funds.” In other words, they must be funds raised by IARA *after* its designation and from foreign sources not subject to U.S. laws or in the possession or control of any U.S. person.⁷⁸

In August 2007, Al-Haramain Islamic Foundation-Oregon (Al-Haramain) filed suit in federal court in Portland, OR, seeking removal from the SDGT list.⁷⁹ OFAC informed Al-Haramain in February 2008 that use of its frozen funds would be permitted to pay legal fees if:

- The attorneys signed a statement, under penalty of perjury, certifying that the group has no assets of any kind outside the U.S.
- Detailed billing information is submitted to OFAC, including hourly billing rates and number of hours for each phase of the case
- OFAC receives an itemized statement and description of costs
- The attorney signs a certification that the funds are not security for other financial obligations of the group⁸⁰

Treasury’s court filings in the Al-Haramain “de-listing” case argue that its policy regarding paying counsel is “rationally related to achieving legitimate government goals...”⁸¹ However, there was no explanation of why allowing an organization to challenge its designation would hinder national security efforts.

⁷⁶ 31 C.F.R. 595.204.

⁷⁷ OFAC may issue licenses authorizing a designated entity to access frozen funds for paying attorneys’ fees. 31 C.F.R. 595.506; *Global Relief Found.*, 207 F. Supp. 2d at 786.

⁷⁸ See William B. Hoffman, How to Approach a New Office of Foreign Assets Control Sanctions Program, 27 *Stetson L. Rev.* 1413, 1422-23 (1998). At least one court has upheld OFAC’s fresh-funds rule. *Beobanka d.d. Belgrade v. United States*, Nos. 95 Civ. 5138 (HB), 95 Civ. 5771 (HB), 1997 WL 23182, at *2 (S.D.N.Y. Jan. 22, 1997) (holding that the fresh-funds policy was “rationally related to the legitimate goals of the [Federal Republic of Yugoslavia] sanctions program”).

⁷⁹ William McCall, “Ex-charity director pleads not guilty on return to Ore.” Associated Press (Aug. 16, 2007).

⁸⁰ Declaration of Adam Szubin, Dir. Of OFAC, *Al-Haramain Islamic Foundation v. Treasury*, United States District Court, District of Oregon, C.V. 07-1155-K1, p. 28-30.

⁸¹ Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss and for Summary Judgment, *Al-Haramain Islamic Foundation v. Treasury*, United States District Court, District of Oregon, C.V. 07-1155-K1, p. 34.

Courts Have Deferred to Treasury in Designation Challenges

The Global Relief Foundation (GRF) was shut down in 2001 “pending an investigation.”⁸² GRF contested the action in the U.S. District Court in the Northern District of Illinois, Eastern Division.⁸³ While the investigation was pending, GRF was permitted to submit information on its own behalf to Treasury, but it could only respond to Treasury’s unclassified information. GRF counsel was not permitted to see secret evidence. The court, which only reviewed the administrative record, did not rule on the merits of Treasury’s evidence, but instead only considered whether Treasury’s actions were “arbitrary and capricious.”⁸⁴ It upheld Treasury, and GRF appealed to the U.S. Court of Appeals for the Seventh Circuit. On Oct. 18, 2002, a few days before oral argument on the appeal, OFAC formally designated GRF as a Specially Designated Global Terrorist (SDGT).⁸⁵

On Dec. 31, 2002, the appeals court upheld the lower court decision, finding Treasury’s actions reasonable and authorized under IEEPA.⁸⁶ The court held the government’s interest in stopping terrorism and preventing funds from being transferred out the country as compelling enough to justify the use of secret evidence and to omit a pre-seizure notice or pre-seizure hearing.

The ruling in the GRF case set the standard for cases to come. The courts have generally upheld Treasury’s power to designate and shut down charities and foundations, denying organizations basic due process rights. In early 2002, the Holy Land Foundation (Holy Land or HLF) challenged the seizure of its assets in the U.S. District Court for the District of Columbia. Like GRF, Holy Land argued that Treasury violated its due process rights by freezing its assets without notice and using secret evidence. The court upheld Treasury’s action,⁸⁷ noting that its review was limited to considering whether Treasury’s actions were “arbitrary and capricious.” Evidence presented by Treasury included hearsay and secret evidence, and Holy Land’s evidence was never admitted for consideration.

The court’s decision was upheld on appeal in the U.S. Circuit Court for the District of Columbia,⁸⁸ which found that “HLF has no right to confront and cross-examine witnesses” and Treasury’s designation order “need not disclose the classified information” to be presented to the court in a closed hearing. The court also upheld the seizing and freezing of assets without prior notice, based on IEEPA and the national emergency declared by the president after 9/11, saying it “promotes an important and substantial government interest in combating terrorism.”

⁸² Dept. of the Treasury Statement Regarding Designation of the Global Relief Foundation (Oct.18, 2002) PO 3553 at <http://www.treas.gov/press/releases/po3553.htm>.

⁸³ *Global Relief Foundation, Inc. v. Paul H. O’Neill, et al.* 207 F. Supp. 2d 779.

⁸⁴ “Arbitrary and capricious” is defined as a decision made without regard for the facts and circumstances presented and not based on an established rule or procedure.

⁸⁵ Dept. of the Treasury Statement Regarding the Designation of the Global Relief Foundation at <http://www.treas.gov/press/releases/po3553.htm>.

⁸⁶ *Global Relief Foundation, Inc. v. Paul H. O’Neill, Secretary of the Treasury, et al.* 315 F.3d 748 U.S. Circuit Court.

⁸⁷ *Holy Land Foundation for Relief and Development v. John Ashcroft, et.al.* , 219 F. Supp. 2d 67.

⁸⁸ 333 F.3d 156, 2003.

On Dec. 30, 2004, Islamic American Relief Agency-USA (IARA-USA) filed suit in the U.S. District Court for the District of Columbia, asking for a preliminary injunction against its designation and release of its assets and challenging the constitutionality of Treasury's designation and blocking order. The court denied the injunction request in February 2005, and the following September granted the government's motion to dismiss. The court noted that IARA-USA "could challenge the blocking order by writing a letter to the Director of the OFAC." However, IARA-USA was not allowed to see the affidavits supporting the search warrant authorizing the raid on its office, so it could not know what allegations it needed to rebut in such a letter.⁸⁹

In 2007, the U.S. Court of Appeals for the District of Columbia upheld the district court's ruling, saying that "[w]e may not substitute our judgment for OFAC's." The court also stated that "the unclassified record evidence is not overwhelming, but we reiterate that our review – in an area at the intersection of national security, foreign policy, and administrative law – is extremely deferential... [w]e owe the executive branch even more latitude than in the domestic context."⁹⁰

Criminal Cases Expose Flaws in Evidence Used in Designations

To date, only three designated U.S. charities and foundations have faced criminal prosecution. There was a mistrial in the prosecution of the Holy Land Foundation, the case against Benevolence International was dismissed, and charges against IARA-USA are pending. Unlike the civil challenges explained earlier, in criminal trials the government must disclose its evidence, providing defendants and the general public its first glimpse of the administrative record used for designations. Consistently, this evidence has proven to be of poor quality, sometimes based on substandard intelligence or faulty translations. As a result, many observers in the nonprofit sector question the justification for Treasury's designations.⁹¹

The most revealing example is the evidence used to designate Holy Land. In July 2004, Holy Land requested an investigation by the Department of Justice Inspector General, alleging the Federal Bureau of Investigation (FBI) used erroneous translations of sensitive Israeli intelligence material as the crux of its designation.⁹² The request alleged that the designation relied on secret evidence, including a 54-page FBI memo that Holy Land said contained distorted and erroneous translations of Israeli intelligence reports. Holy Land hired an independent translating service to review a four-page FBI document, and 67 discrepancies and errors were found. Instead of launching an investigation, the Justice Department indicted Holy Land and its top officials, charging them with money laundering and providing material support to Hamas.⁹³

⁸⁹ *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 2005 U.S. Dist. (D.D.C., 2005).

⁹⁰ *Islamic American Relief Agency (IARA-USA) v. Gonzales*, (D.C. Cir. Feb. 13, 2007). Available at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200702/05-5447a.pdf>.

⁹¹ Under the Classified Information Procedures Act, defense attorneys had government clearances that allowed them to review classified material. However, they were prohibited from sharing it with their clients. *Los Angeles Times*, "Evidence Against Muslim Charity Seems Fabricated" (Feb. 25, 2007).

⁹² Eric Lichtblau, "Islamic Charity Says FBI Falsified Evidence Against It", *New York Times* (July 27, 2004). Available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE6D6153DF934A15754C0A9629C8B63&sec=&spon=&pagewanted=all>.

⁹³ Indictment available online at http://freedomtogive.com/files/HLF_indmt.pdf.

A June 2006 article in the *Los Angeles Times*⁹⁴ revealed the translation discrepancies found within the FBI memo and other problems with the prosecution's evidence, including:

- The prosecution argued that many of the orphans supported by Holy Land were children of suicide bombers. To support this argument, it presented an "orphans book" seized from Holy Land's office. The *Los Angeles Times* review of this document identified 69 of 400 orphans in the book labeled as children of "martyrs." Noting that the term "martyr" is used broadly to include "common accidents and incidents," the article quoted a sworn statement by the former head of Holy Land's Gaza office, who said social workers interviewed all 69 families and found only 4 had immediate family members that died from making bombs. Of the remaining 65 orphans, 12 lost family members to Israeli troops, 8 were killed by Palestinians for allegedly collaborating with Israel, and the remaining 45 were victims of robberies, heart attacks, accidents, and other non-political deaths.
- Prosecutors also disclosed in pre-trial filings that they had 21 binders with over 8,000 pages of Israeli intelligence information, in addition to previous Israeli intelligence used in the case. Legal scholars quoted in the article expressed concern over the interpretation of foreign intelligence. A former deputy attorney general in the Reagan administration explained, "What really makes me nervous is the foreign translations. Nuances are important in languages, so things can get lost in translations."
- An FBI memo quotes the manager of Holy Land's Jerusalem office as saying their money was "channeled to Hamas." However, Holy Land attorneys argued that the Arabic to Hebrew to English translation should correctly say there is "no connection."

Another serious question about the evidence became public in February 2007 when defense lawyers filed motions that revealed significant discrepancies between transcripts of a 1996 FBI-wiretapped conversation and the official summary. The defense motions asked for additional surveillance material to be made available to them because the summaries contained alleged anti-Semitic remarks attributed to Holy Land executive director Shukri Abu Baker that were not in the actual transcripts. In March 2007, federal Judge Joe Fish denied their request to declassify an estimated ten years of surveillance transcripts so they could be reviewed for accuracy, saying there was no evidence the problem was widespread. However, he said it was disturbing that the inflammatory language was included in the summary but not found in the transcripts and told the defense they could renew their motion if they discovered similar errors.⁹⁵

On Oct. 22, 2007, the jury deadlocked on most of the 197 charges, resulting in a mistrial. David Cole, a Georgetown University law professor who specializes in constitutional

⁹⁴ Greg Krikorian, "Questions Arise in Case Over Islamic Charity," *Los Angeles Times* (June 18, 2006).

⁹⁵ Greg Krikorian, "Judge rejects request by Muslim charity," *Los Angeles Times* (March 1, 2007).

issues related to terrorism, told the *Los Angeles Times*, “This rais[es] serious questions about the administrative process that enabled the government to shut down Holy Land almost six years ago, long before criminal charges were brought.”⁹⁶

The government was also unable to prove support for terrorism when it prosecuted Benevolence International Foundation (BIF). The case began in January 2002 when BIF filed suit⁹⁷ to contest its designation and closure. In April 2002, the government charged BIF and its executive director, Ennam Arnaout, with making false statements in the BIF appeal when they denied association with al-Qaeda. At the criminal trial in February 2003, Judge Suzanne B. Conlon dismissed the charges against BIF,⁹⁸ holding that the prosecution had “failed to connect the dots” to prove a relationship between BIF, Arnaout, and bin Laden.

By the time the criminal case was resolved, BIF’s financial resources were depleted, and it was not able to file another civil action challenging seizure of its assets.⁹⁹ In a speech at Pace University Law School, BIF attorney Matthew J. Piers described the legal action against BIF as the “malevolent destruction of a Muslim charity.”¹⁰⁰ He noted that the government’s case was founded on poor intelligence and a case of mistaken identity. Piers said, “[I]t is hard to see how the government’s activities with regard to Muslim charities have had any positive effect on the war on terrorism ... One thing is clear: critically needed resources for the many refugees and people living in poverty and other dire circumstances throughout the Islamic world have been terminated.”

To date, the government has not successfully prosecuted any of the seven designated U.S. charities or foundations on terrorism charges. As with HLF and BIF, it is likely that insufficient evidence is to blame. If designated nonprofits were afforded adequate due process rights that would test the accuracy of Treasury’s evidence, it would be possible to avoid what may be mistaken designations and the wasted time and resources involved when criminal prosecutions are based on questionable evidence. It is also important to note that despite being unable to successfully prosecute any of the seven organizations, Treasury’s actions have devastated the groups’ operations, and their assets remain frozen.

⁹⁶ “Mistrial in Holy Land terrorism financing case,” *Los Angeles Times* (Oct. 23, 2007).

⁹⁷ *Benevolence Int’l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002).

⁹⁸ Arnaout pleaded guilty to a lesser charge of fraud, admitting that he led BIF donors to believe funds were being used for humanitarian purposes, but that some funds were diverted to Chechen and Bosnian soldiers. He is currently serving an 11-year sentence. This outcome – holding individual bad actors responsible – makes more sense than punishing the entire organization.

⁹⁹ In May 2002, the U.S. District Court for the Northern District of Illinois stayed the civil case pending the outcome of the criminal case, then dismissed the civil case on its own motion (200 F. Supp. 2d 935).

¹⁰⁰ Speech at Pace University School of Law, December 2004.

The Disconnect: U.S. Does Not Follow the State Department’s “Guiding Principles on Non-Governmental Organizations”

In December 2006, the State Department launched an initiative to support the work of human rights defenders throughout the globe. Part of the initiative was the “Guiding Principles on Non-Governmental Organizations” (Principles), intended to guide the U.S. government’s treatment of nonprofits and to assess the actions of other governments. However, there are glaring discrepancies between these Principles and the counterterrorism laws and policies applied to U.S. nonprofits by the federal government. This chart briefly compares existing U.S. counterterrorism measures to the Principles.

Guiding Principles on Non-Governmental Organizations Dept. of State Bureau of Democracy, Human Rights, and Labor December 14, 2006	
<p>Preamble: Recognizing that non-governmental organizations (NGOs)* are essential to the development and success of free societies and that they play a vital role in ensuring accountable, democratic government,</p> <p>And recalling the right to freedom of expression, peaceful assembly and association enshrined in the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the UN Declaration on Human Rights Defenders,</p> <p>We hereby pledge our commitment to the following principles and our determination to work for their full implementation throughout the world:</p> <p>* As used here, the term NGOs includes independent public policy advocacy organizations, non-profit organizations that defend human rights and promote democracy, humanitarian organizations, private foundations and funds, charitable trusts, societies, associations and non-profit corporations. It does not include political parties.</p>	<p>Commentary</p> <p>National security programs have been used for surveillance of U.S. groups that openly dissent from the administration’s policies.</p> <p>The excessive use of watch lists interferes with NGOs working in countries where governments use such lists to suppress political opposition. The Council of Europe has said the lack of standards and due process for watch lists violates basic human rights. (http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=717)</p>
Text	Commentary
<p>1. Individuals should be permitted to form, join and participate in NGOs of their choosing in the exercise of the rights to freedom of expression, peaceful assembly and association.</p> <p>2. Any restrictions which may be placed on the exercise by members of NGOs of the rights to freedom of expression, peaceful assembly and association must be consistent with international legal obligations.</p>	<p>National security programs have been used for surveillance of U.S. groups that openly dissent from the administration’s policies.</p> <p>The excessive use of watch lists interferes with NGOs working in countries where governments use such lists to suppress political opposition. The Council of Europe has said the lack of standards and due process for watch lists violates basic human rights. (http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=717)</p>

<p>Treasury's <i>Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities</i> interfere with U.S. NGO operations by imposing inappropriate procedures that place charities in the role of government investigators. This can put the lives of international aid workers at risk.</p>	<p>Because Treasury has the power to seize and freeze NGO assets without notice or meaningful appeal, NGOs fear reprisals if their operations do not align with U.S. government political objectives.</p>	<p>U.S. nonprofits can be shut down and have their funds frozen and seized, without notice and based on secret evidence. Nonprofits have no right to present their own evidence in court or get independent review of Treasury's action. Treasury has even denied them access to seized funds to pay for legal counsel to challenge Treasury actions.</p>	<p>Donors, including individuals and grantmaking foundations, are fearful of prosecution for supporting the peaceful activities of organizations in conflict areas or areas controlled by designated organizations.</p>	<p>Some U.S. nonprofits, including academic institutions, have been unable to sponsor public forums and events because the government has denied visas for foreign speakers that are critical of its policies. Denial of visas has also affected the ability of universities to hire foreign faculty members.</p>	<p>Government scrutiny of Internet sites has generated surveillance of groups that dissent from administration policies and even resulted in criminal prosecution of a nonprofit volunteer webmaster (who was acquitted).</p>	<p>Executive Order 13224 makes it illegal to be "otherwise associated with" any person or entity on the Specially Designated Nationals terrorist watch list. In addition, USAID has started requiring grantees to collect detailed personal information on its staff and partner organizations overseas to be submitted to the government for "vetting." This puts USAID grant recipients in the role of government spies and threatens the integrity of civil society relationships.</p>	<p>Congress has failed to provide adequate oversight of the impacts counterterrorism measures have on U.S. nonprofits, and the courts have failed to provide nonprofits with fundamental constitutional protections.</p>
<p>3. NGOs should be permitted to carry out their peaceful work in a hospitable environment free from fear of harassment, reprisal, intimidation and discrimination.</p>	<p>4. Acknowledging governments' authority to regulate entities within their territory to promote the public welfare, such laws and administrative measures should protect – not impede – the peaceful operation of NGOs and be enforced in an apolitical, fair, transparent and consistent manner.</p>	<p>5. Criminal and civil legal actions brought by governments against NGOs, like those brought against all individuals and organizations, should be based on tenets of due process and equality before the law.</p>	<p>6. NGOs should be permitted to seek, receive, manage and administer for their peaceful activities financial support from domestic, foreign and international entities.</p>	<p>7. NGOs should be free to seek, receive and impart information and ideas, including advocating their opinions to governments and the public within and outside the countries in which they are based.</p>	<p>8. Governments should not interfere with NGOs' access to domestic- and foreign-based media.</p>	<p>9. NGOs should be free to maintain contact and cooperate with their own members and other elements of civil society within and outside the countries in which they are based, as well as with governments and international bodies.</p>	<p>10. Whenever the aforementioned NGO principles are violated, it is imperative that democratic nations act in their defense.</p>

Chapter 4

A Solution in Search of a Problem: Flawed Assumptions about the Role of Charities and Foundations

The Department of the Treasury's (Treasury) overly broad allegations about the role nonprofits play in terrorist financing has resulted in misplaced efforts that confuse action with results. This only uses up resources that could be better directed toward following concrete investigative leads. While the relative transparency of U.S. nonprofits makes them attractive targets for sanctions programs, and international charitable operations are sometimes located in hot spots of the world, the focus on nonprofits results in neglect of significant terrorist threats.

Treasury has consistently justified the negative impacts the financial war on terror has on the nonprofit community by claiming the sector is a "significant source of terrorist financing."¹⁰¹ Within its *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities* (Guidelines), Treasury alleges the existence of "investigations" that "revealed terrorist abuse of charitable organizations, both in the United States and worldwide, often through the diversion of donations intended for humanitarian purposes but funneled instead to terrorists, their support networks, and their operations."¹⁰² Despite repeated requests from nonprofits, Treasury has failed to provide specifics from these investigations, instead referencing "open source media reports" and its website,¹⁰³ which only provide general information. Treasury's unwillingness to disclose the circumstances surrounding the cases of intentional or unintentional support of terrorism only prevents nonprofits from instituting effective preventative measures. In addition, by not substantiating its claims, Treasury undermines its credibility in the nonprofit sector.

The U.S. nonprofit sector takes the issue of terrorism very seriously. It works tirelessly to ensure that funds are used for their intended charitable purpose. Due diligence efforts put organizations in close contact with beneficiaries and grantees, creating accountability for every service provided and every dollar spent. In addition, it has produced

¹⁰¹ U.S. Department of the Treasury, "Screening Tax-Exempt Organizations Filing Information Provides Minimal Assurance That Potential Terrorist-Related Activities Are Identified," May 21, 2007. Available at <http://www.treas.gov/tigta/auditreports/2007reports/200710082fr.pdf>. The May 2007 report states: "a significant source of terrorist support has been the use of charities and nonprofit organizations..." Also citing the Treasury Guidelines; see Footnote 13.

¹⁰² U.S. Department of the Treasury, "U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities," December 2005, pp. 2-3. See Footnote 13 for link to latest version; see <http://www.ombwatch.org/article/articleview/3210/1/408> for a comparison of the 2002 and 2005 versions.

¹⁰³ U.S. Department of the Treasury, webpage section on terrorism and financial intelligence. See <http://www.treas.gov/offices/enforcement/key-issues/protecting/index.shtml>, Anti-terrorist Financing Guidelines, Annex at p. 14-16.

guides that educate others within the sector on responsible practices to protect their charitable and philanthropic activities from terrorist diversion, such as the *Principles of International Philanthropy* and the *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know*.¹⁰⁴

Many U.S. nonprofits are convinced that Treasury's policies and actions targeting the U.S. nonprofit sector are misguided and exaggerate the threat, ultimately hurting a valuable ally in countering terrorism. In a Feb. 1, 2006, letter to Treasury Secretary Henry Paulson, the Treasury Guidelines Working Group, a diverse collection of more than 40 organizations led by the Council on Foundations, said, "[W]e worry that sweeping statements ... misrepresent the prevalence of terrorist abuse of the U.S. charitable

Many U.S. nonprofits are convinced that Treasury's policies and actions targeting the U.S. nonprofit sector are misguided and exaggerate the threat.

organizations that are the intended audience of the revised Guidelines."¹⁰⁵ The Muslim Public Affairs Council (MPAC) noted that "[t]here are many throughout the U.S. charitable community, both Muslim and non-Muslim, who take issue with such broad and sweeping statements about the evidence of actual criminal abuse within established institutions of the Muslim American community."¹⁰⁶

Treasury's Flawed Claims

Within the Annex to the 2006 version of its Guidelines,¹⁰⁷ Treasury described data purporting to show terrorist financing by charities and foundations. The Annex referenced 43 nonprofits worldwide that are on its Specially Designed Global Terrorist (SDGT) list, and 29 designated individuals allegedly associated with these 43 nonprofits, totaling 72 nonprofit-related designations. According to Treasury, this total accounts for 15 percent of total SDGTs. What Treasury's statistics do not tell you is that U.S. nonprofits only account for 1.4 percent of total SDGTs.

In addition, Treasury distorts the data by relying on the number of designations and not the percentage of dollars diverted to terrorism. The 2006 OFAC *Terrorist Assets Report to Congress*¹⁰⁸ (which is the only available public information regarding terrorist assets) determined that \$326.5 million of seized assets allegedly related to terrorism is currently being held by Treasury. Of that, \$16.4 million originated with foreign terrorist organizations, a category that includes charitable organizations, and \$310.1 million originated with designated state sponsors of terrorism, such as Iran and North Korea.

¹⁰⁴ *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know*, Independent Sector, Council of Foundations, InterAction, Day Berry & Howard Foundation (2004).

¹⁰⁵ http://www.usig.org/PDFs/Comments_to_Treasury.pdf

¹⁰⁶ Comments of the Muslim Public Affairs Council on Updated Anti-Terrorist Financing Guidelines: Voluntary Best Practices for US-Based Charities (December 2005), available at <http://www.ombwatch.org/npadv/PDF/treascomms/MPACTreascomms.pdf>.

¹⁰⁷ U.S. Department of the Treasury, *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities*, 2006 version, Annex pp. 14-16. Available at <http://www.treas.gov/press/releases/reports/0929%20finalrevised.pdf>.

¹⁰⁸ U.S. Department of the Treasury, Office of Foreign Assets Control, "Terrorist Asset Report: Calendar Year 2006 Fourteenth Annual Report on Assets in the United States of Terrorist Countries and International Terrorism Program Designees." Available at <http://www.treas.gov/offices/enforcement/ofac/reports/tar2006.pdf>.

In other words, designated charities and foundations, both U.S. and foreign, account for no more than 5.3 percent of total blocked assets. Since the assets of designated individuals are not included in the total amount provided, even this figure could be artificially high. This hardly justifies Treasury’s broad claims that charities and foundations are a “significant source of terrorist funding.”

OFAC List Category	Reported Blocked Assets	% of Known Blocked Assets
Foreign Terrorist Organizations (including charitable organizations)	\$16,413,733	5%
Six State Sponsors of Terrorism	\$310,100,000	95%
Individuals	? (not reported)	? (not reported)
Total	\$326,513,733	100%

Studies Tell a Different Story

Treasury’s statements ignore known facts about major sources of terrorist financing. For example, within the *Terrorist Financing Staff Monograph to the 9/11 Commission*,¹⁰⁹ extensive investigation “revealed no substantial source of domestic financial support” for the 9/11 attacks. The report goes on to caution that “[i]n many cases, we can plainly see that certain nongovernmental organizations (NGOs) or individuals who raise money for Islamic causes espouse an extremist ideology and are ‘linked’ to terrorists through common acquaintances, group affiliations, historic relationships, phone communications, or other such contacts. Although sufficient to whet the appetite for action, these suspicious links do not demonstrate that the NGO or individual actually funds terrorists and thus provide frail support for disruptive action, either in the United States or abroad.”¹¹⁰

A February 2005 report to Congress from the Congressional Research Service (CRS)¹¹¹ notes that the 9/11 Commission “recommended that the U.S. government shift the focus of its efforts to counter terrorist financing from a strategy based on seizing terrorist assets to a strategy based on exploiting intelligence gathered from financial investigations.” In other words, instead of shutting down suspicious channels of terrorist financing, possibly forcing them underground, these channels should be monitored for their

¹⁰⁹ *Terrorist Financing Staff Monograph to the 9/11 Commission*, p. 3 (2004). Available at http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

¹¹⁰ *Ibid.*, at 9

¹¹¹ Martin Weiss, “Terrorist Financing: The 9/11 Commission Recommendation,” Congressional Research Service Order Code RS21902, updated February 2005.

valuable intelligence. This recommendation was made in part because the Commission found that the most effective overall asset-blocking occurred in the first three months following the 9/11 attacks and because a 2003 Government Accountability Office (GAO) report¹¹² found that terrorists increasingly are using informal methods of raising money, such as money transfers, cash couriers, and sale of contraband. The GAO report points out that the extent to which terrorist networks have turned to alternative funding mechanisms is unknown. It recommends that the Federal Bureau of Investigation (FBI) and other relevant agencies collect and analyze information to learn more.

Other studies suggest that policies that penalize the nonprofit institution, rather than individuals within the institution that are guilty of wrongdoing, are overly harsh and misguided. The 2004 report *Terrorism and Money Laundering: Illegal Purposes and Activities*¹¹³ found no overt conspiracy by U.S. charities to divert funds to terrorism.

Large-scale conspiracies to fund terrorism are not coming from the nonprofit sector.

Instead, it discovered problems typically occur when an individual acts out of ideological and criminal motivation. None of the cases studied found a diversion of funds to a foreign organization by a U.S.-based organization “where the diversion would have been uncovered but for the lack of appropriate due diligence...” and evidence of “links” to terrorist organizations has not resulted in criminal convictions. In other words, large-scale conspiracies to fund terrorism are not coming from the nonprofit sector. Instead, small-scale violations by rogue individuals are primarily to blame for what diversion for non-charitable purposes has occurred. The scale of the government response should be commensurate with this limited involvement.

Nonprofits Object to Continued Misrepresentations by Treasury

These facts have not deterred Treasury from continuing to spread its unsubstantiated claims. In turn, the allegation has been picked up and repeated by other agencies, transforming the false assumption into a widely accepted myth.

For example, in May 2007, the Treasury Inspector General for Tax Administration (TIGTA) based an entire report on Treasury’s unsubstantiated allegations. *Screening Tax-Exempt Organizations’ Filing Information Provides Minimal Assurance That Potential Terrorist-Related Activities Are Identified*¹¹⁴ primarily focused on perceived inefficiencies in the IRS’ terrorist screening process, including the manual screening of selected tax-exempt applications (Form 1023) and annual information reports (Form 990) for “[m]iddle eastern sounding names.” TIGTA concluded that the IRS is finding few terror links because the IRS limits itself to the SDN list maintained by OFAC. Instead, the report said the IRS should use an automated system to check all nonprofit

¹¹² General Accountability Office, Report GAO-04-163, *Terrorist Financing: U.S. Agencies Should Systematically Assess Terrorists’ Use of Alternative Financing Mechanisms*, November 2003.

¹¹³ Victoria Bjorklund, Jennifer I. Reynoso, and Abbey Hazlett, “Terrorism and Money-Laundering”: Illegal Purposes and Activities,” September 19, 2004, paper delivered for National Center on Philanthropy and the Law. Available at http://www.law.nyu.edu/ncpl/library/publications/Conf2004_Bjorklund_DRAFT.pdf.

¹¹⁴ U.S. Department of the Treasury, “Screening Tax-Exempt Organizations’ Filing Information Provides Minimal Assurance That Potential Terrorist-Related Activities Are Identified,” May 21, 2007, Available at <http://www.treas.gov/tigta/auditreports/2007reports/200710082fr.pdf>. Reference Number: 2007-10-082.

filings with the Terrorist Screening Center's (TSC) list, which is a consolidated list of all government watch lists, thereby "increas[ing] the possibility of identifying individuals already known to be or suspected of being involved in terrorist-related activities."

Unfortunately, TIGTA's conclusion assumes that nonprofits are in fact a "significant source of alleged terrorist activities." Several nonprofits, including OMB Watch and Grantmakers Without Borders, immediately wrote a letter¹¹⁵ to Treasury Secretary Henry Paulson to express concern and called upon the Treasury Department to retract this claim, saying, "Treasury needs to recognize that charities are part of the solution and not part of the problem."¹¹⁶

The letter argues that Treasury has never provided information that proves a considerable portion of charitable funds are diverted to terrorist organizations and, in addition, "does not respect the positive role charities play in the world." It also noted several steps the nonprofit sector has taken to guard against diversion of funds to terrorism, including the 2005 publication of the *Principles of International Charity*.¹¹⁷

A separate letter¹¹⁸ sent in July 2007 to Michael Phillips, Deputy Inspector General of Audit at the Department of Treasury, by Steve Gunderson, President and CEO of the Council on Foundations, on behalf of the Treasury Guidelines Working Group, requested a meeting to discuss the problems regarding Treasury's allegations about the nonprofit sector. There was no response.

Not all public officials have blindly accepted these allegations. On July 24, 2007, the House Ways and Means Subcommittee on Oversight hosted a hearing on tax-exempt organizations. Congressman Bill Pascrell (D-NJ) questioned Treasury's repeated allegation, citing the lack of evidence and commenting that Treasury seems to be painting the sector with a "wide brush."¹¹⁹

OFAC: The Wrong Agency to Oversee Nonprofits

Treasury's incorrect assumptions may be the inevitable result of a bureaucratic mismatch. OFAC, which enforces criminal money laundering laws that target drug trafficking, organized crime, and economic embargos against nations, has no knowledge or experience with the nonprofit sector. It is not familiar with what it takes to administer disaster relief programs or make grants for aid and development. In addition, OFAC is set up to administer sanctions programs, not monitor or investigate financial transactions or the charitable sector.

¹¹⁵ See OMB Watch Letter to Henry Paulson, Secretary of the U.S. Department of Treasury, June 8, 2007. Available at http://www.ombwatch.org/npadv/TIGTALetter_Paulson.pdf.

¹¹⁶ *Ibid.*

¹¹⁷ Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors, "Principles of International Charity," March 2005, coordinated by The Council on Foundations. Available at http://www.cof.org/files/Documents/International_Programs/Principles_Final.pdf.

¹¹⁸ Council on Foundations, Letter from Steve Gunderson, President and CEO, to Michael R. Phillips, Deputy Inspector General for Audit, U.S. Department of Treasury, July 23, 2007. Available at http://www.usig.org/PDFs/tigta_letter.pdf.

¹¹⁹ House Committee on Ways and Means Subcommittee on Oversight Hearing on Tax-Exempt Charitable Organizations, July 24, 2007. Transcript available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6507>.

In contrast, the United Kingdom is developing much of its charitable financial controls in partnership with the Charity Commission, similar to the tax-exempt division of the Internal Revenue Service. This is a much more thoughtful approach that respects the realities of nonprofit operations. In addition, the Charity Commission has relied on research on charitable ties to terrorism conducted by the Central Office of Information for the Home Office and HM Treasury. A recently released report found that, “[i]n respect of terrorist exploitation of the charity sector, the Commission’s experience is that actual cases of sham charities or the abuse of legitimate charities are rare.”¹²⁰ Furthermore,

It is important to recognize the significant contribution that third sector organizations make in addressing some of the underlying causes of disaffection often quoted as a reason why people turn to extremism or even terrorist activities. By promoting social inclusion and building stronger communities, organizations active in minority or marginalized communities in particular can offer a constructive, legitimate channel for disaffection. Charities operating overseas can also present a positive impression of British civil society and values, helping to building goodwill and furthering international relations.¹²¹

The Charity Commission’s acknowledgement of the charitable community as an ally in the war on terror contrasts significantly with the approach taken by Treasury.

Experts Question Effectiveness of “Financial War on Terror” Strategy

Some U.S. money laundering experts are also questioning the government’s overall approach to fighting terrorism by blocking its financing, arguing that it is not cost effective. In 2005, Daniel Mitchell, the Heritage Foundation’s McKenna Senior Fellow in Political Economy, told a panel at Georgetown University that this is not an ideological issue, pointing out that the anti-terrorist financing campaign has cost the private sector billions of dollars and has entailed a sweeping invasion of privacy, yet there is “nothing much to show for it.”¹²² In addition, he said the government’s approach defies common sense and has turned traditional law enforcement upside down. As a result, the FBI has not been able to develop a terrorist financial profile that is any different from a regular banking customer. Without specific targets, the U.S. government is overwhelmed with data it cannot use, and the banking sector inefficiently “look[s] for a needle in a haystack.”

Other experts agree that these policies are not making Americans any safer. In an article entitled *Fighting Terror With Error*, Professor Nikos Passas of the College of Crim-

¹²⁰ “Review of Safeguards to Protect the Charitable Sector (England and Wales) from Terrorist Abuse,” http://www.homeoffice.gov.uk/documents/cons-2007-protecting-charities/Charities_consultation.pdf?view=Binary.

¹²¹ *Ibid.*, at 10.

¹²² Georgetown Public Policy Institute Panel Discussion “Safeguarding Charity in the War of Terror,” June 14, 2005. Transcript available at http://cpnl.georgetown.edu/doc_pool/Charity061405.pdf.

inal Justice, Northeastern University ¹²³ shares the results of research funded by the U.S. National Institute of Justice and the World Bank. The study sifts through evidence about informal financial transfer systems, demonstrating that U.S. federal and state regulations frustrate security, crime control, and economic policy objectives by being ill-conceived and unrealistic.

In addition, Ibrahaim Warde of Tufts University argues in his book *The Price of Fear* that the flawed logic of federal anti-terrorist financing programs make

it possible to reduce the complex world of Islamic NGOs to the funding of terror. Intent and consequence, the legitimate and the illegitimate, the deliberate and the unwitting, [are] all blurred. Donors [are] penalized for the sins of recipients. If a sum had been diverted to benefit a terrorist group, if an employee had crossed the line from humanitarian work to militancy, then the entire charity – indeed, every one of donors – could be held accountable. Countless charities [are] branded as “terrorist fronts.” Prosecutors ... go on fishing expeditions in search of infractions – often innocent mistakes or unrelated irregularities – to justify increasingly harsh punishments.¹²⁴

Warde goes on to say, “Reforming the Islamic charities system was long overdue, yet post-September 11 policies proved mostly counterproductive; they weakened mainstream, ‘controllable’ charities, while building up informal, unchecked, and potentially dangerous charitable and donor networks.”¹²⁵

¹²³ Nikos Passas, “Fighting terror with error: the counter-productive regulation of informal value transfers,” *Journal of Crime, Law and Social Change*, Vol. 45, Nos. 4-5 (May 2006).

¹²⁴ Ibrahaim Warde, *The Price of Fear: The Truth behind the Financial War on Terror*. (Berkeley: University of California Press 2007), p. 130.

¹²⁵ *Ibid.*, at 147.

**Double Standard:
Chiquita Pays Fine, Continues Operation – Charities Shut Down**

The experience of Chiquita Brands International provides a valuable example of the different treatment afforded to the for-profit sector for activities that clearly violate counterterrorism law.

- Between 1997 and 2004, Chiquita Brands International paid approximately \$1.7 million to two U.S.-designated terrorist organizations, the United Self-Defense Forces of Colombia (AUC) and the leftist Revolutionary Armed Forces of Colombia (FARC), for protection in a dangerous region of Colombia.
- In 2003, outside attorneys for Chiquita notified the company that the payments violated U.S. counterterrorism laws and should not continue. However, payments to the groups continued until Chiquita sold its Colombia subsidiary, Banadex, in June 2004.
- On April 24, 2003, a board member of Chiquita disclosed to Michael Chertoff, then assistant Attorney General, Chiquita's clear violation of counterterrorism laws. Allegedly, Chertoff told the Chiquita representatives that the activity was illegal, but they should wait for more feedback. Three of Chiquita's officers were then placed under investigation by the Justice Department for authorizing and approving the payments, but in September 2007, the investigation ended without any criminal charges.
- On March 14, 2007, Chiquita Brands International agreed to pay a \$25 million fine. With annual revenues of approximately \$4.5 billion, Chiquita's operations are unlikely to be affected. Had a charity engaged in this type of activity, it likely would have been shut down, its assets frozen indefinitely; Chiquita continues to operate, and none of its assets have been frozen by Treasury or any other agency.

Sources:

1. "Chiquita agrees to fine for paying terrorists," *USA Today* (March 14, 2007). http://www.usatoday.com/money/industries/food/2007-03-14-chiquita-terrorists_N.htm.
2. "In Terrorism-Law Case, Chiquita Points to U.S.," *Washington Post* (Aug. 2, 2007). <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/01/AR2007080102601.html?hpid=topnews>.
3. "Ex-Chiquita Execs Won't Face Bribe Charges," *Washington Post* (Aug. 12, 2007).
4. "Chiquita fined for Colombia payments," *Los Angeles Times* (Sept. 18, 2007).

Chapter 5

Flawed Quasi-Mandatory Federal Guidance Has Negative Effects on Charities and Foundations

Since 2001, the Department of the Treasury (Treasury) has released two voluntary tools for nonprofits, the *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (Guidelines)¹²⁶ and the *Risk Matrix for the Charitable Sector* (Risk Matrix).¹²⁷ Although designed to “assist charities [and foundations] that attempt in good faith to protect themselves from terrorist abuse,”¹²⁸ each has proven to be highly problematic, and many within the nonprofit sector have called for their withdrawal, including Council on Foundations, Save the Children, InterAction, Grantmakers Without Borders, and OMB Watch.¹²⁹ Nonetheless, Treasury continues to promote these policies, falsely characterizing them as examples of the “close” relationship it has with the nonprofit sector and “how this partnership can produce significant results.”¹³⁰ Treasury is half right in that its “voluntary” tools have had “significant results”; however, those results are largely negative.

Treasury Guidelines

In November 2002, Treasury released its first of three versions of the Guidelines (the latest version was released in September 2006). Directed at both charities and foundations, the Guidelines are comprised of suggested governance, transparency, financial, and grantmaking practices. Arguably, U.S. foundations that make grants overseas feel the largest impact due to an entire section within the Guidelines that describes special procedures for organizations that distribute funds, goods, or services to organizations outside the U.S. Much of this chapter summarizes the problems the international grantmaking recommendations have caused for foundations. William P. Fuller and Barnett F. Baron, the president and executive president of the Asia Foundation, respectively, eloquently summed up the general complaints against the Guidelines in their 2003 article, “How the War on Terror Hits Charity”:¹³¹ “The voluntary guidelines contain too many vague and undefined terms that leave grantmakers vulnerable to legal action ... [p]erhaps most important, the new requirements risk undermining cooperative relationships between organizations and their overseas partners ... destroy[ing] relation-

¹²⁶ http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf

¹²⁷ http://www.ustreas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf

¹²⁸ http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf, Footnote 1.

¹²⁹ Council on Foundations letter to Treasury Secretary Henry Paulsen, Dec. 18, 2006, on behalf of 40 charities, seeking withdrawal of the Treasury Guidelines, at http://www.cof.org/files/Documents/International_Programs/TreasuryLetter.pdf. Grantmakers Without Borders letter to the Department of Treasury Opposing Risk Matrix, May 30, 2007, at http://www.gwob.net/advocacy/GwoB_Treasury_Letter-Risk_Matrix.pdf.

¹³⁰ http://hsgac.senate.gov/public/_files/051007Poncy.pdf

¹³¹ William P. Fuller and Barnett F. Baron, “How the war on terror hits charity,” *The Christian Science Monitor* (July 29, 2003) as seen at <http://www.csmonitor.com/2003/0729/p11s01-coop.htm>.

ships of trust and the ability of US foundations to operate freely and effectively.”

History of Guidelines

Treasury first published the Guidelines in November 2002, without public comment or input. In May 2003, in response to criticisms of the Guidelines from the nonprofit sector, the IRS sought comments on ways U.S. charities and foundations might prevent the diversion of charitable assets to terrorists.¹³² Many nonprofits used that opportunity to call for the withdrawal of the Guidelines, noting that the suggested practices did not reduce the risk of diversion of charitable assets to terrorists and placed charities and foundations in a government investigator role.

There is no one set of procedures for safeguarding charitable assets against diversion to terrorists.

In April 2004, organizations that submitted comments to the IRS were invited to meet with Treasury officials to voice concern over the Guidelines. Then-Treasury Secretary John Snow indicated a willingness to answer public comments and revise the Guidelines. Meeting participants established the Treasury Guidelines

Working Group, which released the *Principles of International Charity* (Principles)¹³³ as an alternative to the Guidelines in March 2005. The Principles are designed to more “accurately reflect the diversity of due diligence procedures that effectively minimize the risk of diversion of charitable assets.”¹³⁴ Unlike the Guidelines, the Principles take into account the different ways that charities and foundations operate internationally and in the U.S., recognize that there is no one set of procedures for safeguarding charitable assets against diversion to terrorists, and stress the importance of due diligence and financial controls. Instead of replacing the Guidelines with the Principles, Treasury published a revised version of the Guidelines in December 2005, and after another round of public comments, released the current version in September 2006.¹³⁵ Although there were some improvements, the fundamental problems remain.

¹³² <http://www.irs.gov/pub/irs-drop/a-03-29.pdf>

¹³³ http://www.usig.org/PDFs/Principles_Final.pdf

¹³⁴ *Ibid.*

¹³⁵ For a comparison of the 2005 draft and 2006 Guidelines, see <http://www.ombwatch.org/npadv/TreasGuidelinesSidebySide06.pdf>.

Why the Treasury Guidelines Should be Withdrawn

The Treasury Guidelines Working Group is not alone in its call for the withdrawal of the Guidelines. Widespread objections have followed each version of the Guidelines,¹³⁶ underscoring problems with the underlying policies behind, and propagated by, them. Most troubling to foundations is the fact that no version of the Guidelines acknowledges the tremendous amount of due diligence already being performed by grantmaking organizations. Federal tax law requires foundations to ensure grant funds are used for charitable purposes.¹³⁷ This obligation is taken very seriously, and foundations closely monitor their grants with site visits, pre-grant inquiries, the advice of local advisors and partners, and ongoing accountability throughout the life of a grant.

Ironically, Treasury says it created the Guidelines to protect organizations against the *unintended* diversion of charitable funds to terrorist organizations. However, within its justification for the Guidelines, the only cases cited exemplify *intentional* diversion of funds.¹³⁸ There is no apparent explanation for this discrepancy. Dr. Nancy Billica, a political science professor from the University of Colorado, Boulder and a consultant for Urgent Action Fund, has done extensive research on the effects counterterrorism measures have on the nonprofit sector, specifically foundations that grant overseas. One foundation she interviewed noted, “Charitable organizations are already vigilant, already taking steps; many are already going beyond the law. Many are taking extra steps just to be sure their charitable assets are not being diverted to terrorist or other illegal purposes. We have to agree to disagree with Treasury on this assessment of the problem.”¹³⁹

To further complicate the issue, the Guidelines offer no legal protection to an organiza-

¹³⁶ See OMB Watch Letter to U.S. Department of Treasury, Feb. 1, 2006, available at <http://www.ombwatch.org/npadv/PDF/treascomms/OMBWtreascomms.pdf>.

See also Council on Foundations Letter to U.S. Department of Treasury, Feb. 1, 2006, available at <http://www.ombwatch.org/npadv/PDF/treascomms/WGcomms.pdf>.

See also Muslim Public Affairs Council Letter to U.S. Department of Treasury, January 2006, available at <http://www.ombwatch.org/npadv/PDF/treascomms/MPACtreascomments.pdf>.

See also Kinder USA Letter to U.S. Department of Treasury, Feb. 1, 2006, available at <http://www.ombwatch.org/npadv/PDF/treascomms/KUSAtreascomments.pdf>.

See also Muslim Advocates Letter to U.S. Department of Treasury, Feb. 1, 2006, available at <http://www.ombwatch.org/npadv/PDF/treascomms/MAtreascomments.pdf>.

See also Friends of Charities Association (FOCA) Letter to U.S. Department of Treasury, Dec. 5, 2005, available at <http://www.ombwatch.org/npadv/PDF/treascomms/FOCAtreascomments.pdf>.

See also Treasury Guidelines Working Group Letter to U.S. Department of Treasury Dec. 16, 2006 available at http://www.usig.org/PDFs/TGWG_Letter_to_Treasury.pdf.

See also Grantmakers Without Borders Letter to U.S. Department of Treasury, Dec. 22, 2006, available at <http://www.internationaldonors.org/news/1222pressrelease.htm>.

¹³⁷ IRC 501(c)(3).

¹³⁸ <http://www.ustreas.gov/press/releases/reports/0929%20finalrevised.pdf>, Footnote 15, and “Violent Islamist Extremism; Government Efforts to Defeat It: Hearing Before the Senate Homeland Security and Governmental Affairs Committee” (2007) (statement of Chip Poncy, Director of Strategic Policy at the Treasury Department’s Office of Terrorist Financing and Financial Crimes).

The following is excerpted from Chip Poncy’s testimony in front of the Senate Homeland Security Committee on May 10, 2007:

SEN. LIEBERMAN: ...But the connection therefore between the local charities – American-based charities – and foreign terrorist groups is knowing. I mean, this is not – they’re not being duped by, you know, Hamas or Hezbollah. They intend to support them, correct?

MR. PONCY: That is certainly our view of it.

¹³⁹ http://www.urgentactionfund.org/new_site/assets/files/philanthropy_at_risk/Philanthropy_072507.pdf, p. 9.

tion. The Introduction to the Guidelines states, “Non-adherence to these Guidelines, in and of itself, does not constitute a violation of existing U.S. law. Conversely, adherence to these Guidelines does not excuse any person (individual or entity) from compliance with any local, state, or federal law or regulation, nor does it release any person from or constitute a legal defense against any civil or criminal liability for violating any such law or regulation.”¹⁴⁰ In other words, even if an organization adopts every practice suggested by the Guidelines, it can still have its assets frozen and its operations shut down, and, as explained in Chapter 3, there are no meaningful appeals or independent review of this action. As a result, nonprofits feel tremendous pressure to adopt the practices prescribed within the Guidelines, despite their ineffectiveness and the damage they have on the relationships charities and foundations have with local partners.

Negative Impacts: Flawed Guidelines Treated as Mandatory

Although Treasury makes multiple references within the Guidelines to their voluntariness, the reality does not support this. Minimally, the fact that the Guidelines were released by the federal agency with regulatory authority over tax-exempt organizations gives the Guidelines weight at odds with their supposed voluntariness. In addition, private organizations and other government agencies are using the Guidelines in mandatory contexts. As a result, many organizations feel compelled to follow them.

For example, when Life for Relief and Development tried to open a bank account, the bank conditioned the account on the group’s compliance with a checklist that mimicked the Guidelines’ requirements. Despite the fact that the Guidelines are supposed to be flexible, allowing organizations to adapt individual practices as they deem appropriate, the end of the checklist stated that “[i]f the answer to any of the above questions are NO, the organization should take the immediate necessary legal and administrative steps to comply with the guidelines.”¹⁴¹

The Treasury Guidelines Working Group has also learned of situations where IRS agents have asked about compliance with the Guidelines in the context of IRS audits and tax exemption applications.¹⁴² Organizations must decide whether to divert resources from charitable work to ineffective and discriminatory counterterrorism measures or to fight back, potentially losing funding and diverting time and attention away from their core mission.

Negative Impacts: List Checking

Treasury has placed a heavy emphasis on checking names against terrorist watch lists as a means of determining whether or not transactions with an employee, grantee, or other contact violate counterterrorism laws. Even though this list-checking is not required by federal law, the Guidelines put tremendous emphasis on this process, asking organizations to “conduct a reasonable search of publicly available information to determine whether the grantee is suspected of activity relating to terrorism, including terrorist financing or other support.”¹⁴³ Organizations are asked to check “key employ-

¹⁴⁰ http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf, Footnote 1.

¹⁴¹ http://www.ombwatch.org/npadv/compliance_checklist.pdf

¹⁴² http://www.cof.org/files/Documents/International_Programs/TreasuryLetter.pdf

¹⁴³ Guidelines, Sec. VI (B)

ees, members of the governing board, or other senior management” and “assure itself that grantees do not appear on OFAC’s master list of Specially Designated Nationals (the SDN List).” In addition, charities are told to “be aware that other nations may have their own lists of designated terrorist-related individuals, entities, or organizations pursuant to national obligations arising from United Nations Security Council Resolution 1373 (2001).”

The Guidelines never clearly explain a list-checking procedure. No definition is provided of “key employees ... or senior management,” and no clarification is given on when in the grantmaking process the lists should be checked. In addition, the Guidelines ignore complaints about the the lists, including their inaccuracy, the use of secret evidence for adding names to the lists, and the lack of clear standards for being added to or taken off the lists. Also, some foreign governments have used terrorist watch lists to suppress political opposition, making use of non-U.S. lists problematic.¹⁴⁴

Many foundations have adopted list checking as part of their grantmaking practices because they see it as an easy means of proving compliance with the Guidelines; 69 percent of respondents in a Grantmakers Without Borders survey engaged in list checking.¹⁴⁵ Many organizations that list-check use special software that costs \$500 to \$1,000 per year.¹⁴⁶ The Charles Stewart Mott Foundation requires all its grantees that re-grant Mott funds to list-check. Its website notes that “[p]ursuant to the provisions of Executive Order 13224 and the USA PATRIOT Act, the Charles Stewart Mott Foundation requires all organizations doing re-granting with Mott funds to check the terrorism watch lists issued by the U.S. government and to refrain from providing financial or material support to any listed individual or organizations.”¹⁴⁷

However, other foundations are refusing to adopt list-checking into their grantmaking practices, citing constitutional objections to the existence and application of the lists. Furthermore, many organizations see list-checking as an unnecessary burden that fails to identify terrorists. No organization surveyed by Grantmakers Without Borders encountered a true hit when

Typically when a “hit” is encountered, time and resources are wasted investigating what turns out to be a false positive.

list-checking (highlighting the comprehensive and effective due diligence that organizations are customarily engaging in). Typically when a “hit” is encountered, time and resources are wasted investigating what turns out to be a false positive. This is largely due to the extensive inclusion of common Muslim or Latino names on the SDN list.¹⁴⁸ Despite its widespread use, list-checking provides no legal protection to organizations. For example, the Holy Land Foundation was prosecuted by the U.S. government for

¹⁴⁴ <http://terrorwatchlist.org>

¹⁴⁵ Most check both their international grantees and their U.S.-based grantees against the Terrorist Exclusion List maintained by the Secretary of State and the SDGT list maintained by the Office of Foreign Assets Control.

¹⁴⁶ <http://www.mott.org/toolbox/resources/patriotact/resources.aspx>

¹⁴⁷ *Ibid.*

¹⁴⁸ “The OFAC list *How a Treasury Department Terrorist Watchlist Ensnarers Everyday Consumers*,” The Lawyers’ Committee for Civil Rights of the San Francisco Bay Area (March 2007)

<http://www.lccr.com/03%202007%20OFAC%20Report.pdf>

providing charitable support to non-listed organizations.¹⁴⁹

The Guidelines offer no alternatives to list checking and do not acknowledge circumstances when list checking is not necessary, such as when a grantee is well known to the grantmaker. As an alternative, the Council on Foundations recommends four steps: assess the risk that a grant will wind up in the hands of terrorists; based on the outcome of the risk assessment, decide whether an anti-terrorism compliance program is necessary; if a compliance program is needed, devise and implement a program that is appropriate; and finally, document all the steps taken.¹⁵⁰ At the end of the day, effective prevention of diversion of funds comes down to organizations knowing their grantees and establishing relationships that encourage trust and transparency.

Negative Impacts: Certification Requirements

The Guidelines also call for charities to include certification language in all grant agreements. While the language of these certifications may seem harmless to U.S. organizations accustomed to signing certifications on everything from anti-discrimination to conflict of interest policies, they can have a much different effect on non-U.S. organizations. Terry Odendahl, the 2004-2005 Neilson Chair on Philanthropy at the Georgetown Public Policy Institute, conducted a survey on programmatic changes within foundations due to the Guidelines. She found that among foundations that had adopted certification language, the program officers viewed the certification language as “useless and embarrassing, damaging trust in their work with the very groups that could make a difference in improving the conditions that lead to terrorism.”¹⁵¹

The Guidelines suggest specific language for grantee certifications:

You will take all reasonable steps to ensure that your organization does not and will not knowingly provide material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist acts.¹⁵²

Grantmakers Without Borders questioned the effectiveness of certification language in a 2006 letter written to Treasury, saying, “It is doubtful that an individual with malevolent purposes would hesitate to sign such an agreement. It would be more productive to suggest more traditional methods that create transparent relationships that inspire trust and confidence.”¹⁵³ Despite these concerns, many foundations have adopted certification language into their grant agreements, including the Ford Foundation,¹⁵⁴ the

¹⁴⁹ “Prosecutors Say Charity Aided Terrorists Indirectly,” *The New York Times* (Sept. 18, 2007), at <http://www.nytimes.com/2007/09/18/us/nationalspecial3/18holyland.html>.

¹⁵⁰ <http://www.cof.org/files/Documents/Newsletters/InternationalDateline/2004/LD2Q2004.pdf>

¹⁵¹ Georgetown Public Policy Institute’s Center for Public & Nonprofit Leadership Presents “Safeguarding Charity in the War on Terror” (June 14, 2005).

¹⁵² Guidelines, Sec. VI B (6).

¹⁵³ http://www.internationaldonors.org/news/gwob_letter_122206.pdf

¹⁵⁴ Stephanie Strom, “A.C.L.U. Rejects Foundation Grants Over Terror Language,” *The New York Times* (Oct. 19, 2004).

Charles Stewart Mott Foundation,¹⁵⁵ and the Kellogg Foundation.¹⁵⁶

Most grantees feel they are powerless to oppose certification language. Odendahl noted in her report that “numerous groups, particularly in the global south that have been defunded or believed that they are about to be fear such action as a consequence of refusing certification.”¹⁵⁷ Unfortunately, few groups were willing to go on the record “because they are justifiably concerned that once identified this way they might lose even more scarce grant money.”¹⁵⁸ In 2004, the ACLU and the Drug Policy Alliance very publicly rejected grants from the Ford and Rockefeller Foundations, citing certification language as the reason.¹⁵⁹ The executive director of the ACLU, Anthony Romero, commented that “the language of the contracts governing the Ford and Rockefeller grants was broad and ambiguous, leaving them open to interpretation that could impede free speech and limit advocacy work not only at [the ACLU] but also at other nonprofits.”¹⁶⁰ The Drug Policy Alliance issued a press release titled “We’ve Paid a Price for Free Speech,” referring to the grant money it lost by refusing certification.¹⁶¹

Case Study: The Guidelines’ Influence and the Combined Federal Campaign

Operated out of the U.S. Office of Personnel Management, the Combined Federal Campaign (CFC) is the largest workplace charitable giving campaign in the world; in 2006, it collected \$271 million in donations.¹⁶² Through the CFC, federal government employees may contribute to participating charities and foundations by deducting donations from their paychecks. Charities and foundations must undergo an extensive application process to participate in the CFC, providing specific information about their auditing, governance, and program functions, as well as a completed and signed copy of their IRS Form 990 for their most recent fiscal year.¹⁶³

In 2004, the CFC began to require participating charities and foundations to sign a funding agreement certifying that they did not “knowingly employ individuals or contribute funds to organizations” found on terrorist watch lists created by the U.S. government, United Nations, or European Union. If a matching name was found, the organization was required to notify the CFC within 15 days. Mara Paternoster, then the CFC Director, was quoted in *The New York Times* as saying that organizations participating in the CFC had an affirmative duty to check their employees against the watch

¹⁵⁵ <http://www.iaa.com/resources/PatriotAct.pdf>, p. 40.

¹⁵⁶ Interview by GWOB, anonymous source.

¹⁵⁷ Terry Odendahl, Georgetown Public Policy Institute’s Center for Public & Nonprofit Leadership Presents “Safeguarding Charity in the War on Terror” (June 14, 2005).

¹⁵⁸ *Ibid.*

¹⁵⁹ Stephanie Strom, “A.C.L.U. Rejects Foundation Grants Over Terror Language,” *The New York Times* (Oct. 19, 2004). See also Ian Wilhelm, “Charity Returns Grant Money Over Antiterrorism Provision,” *The Chronicle of Philanthropy* (Dec. 9, 2004).

¹⁶⁰ Stephanie Strom, “A.C.L.U. Rejects Foundation Grants Over Terror Language,” *The New York Times* (Oct. 19, 2004).

¹⁶¹ Ian Wilhelm, “Charity Returns Grant Money Over Antiterrorism Provision,” *The Chronicle of Philanthropy* (Dec. 9, 2004).

¹⁶² “History of Charitable Fundraising Within the Federal Service,” Office of Personnel Management, available at https://www.opm.gov/cfc/html/cfc_hist.asp. “CFC Rings the Register With Fourth Consecutive Record-Setting Charity Drive” (July 26, 2007) Office of Personnel Management, available at <http://www.opm.gov/news/cfc-rings-the-register-with-fourthconsecutive-recordsetting-charity-drive,1204.aspx>.

¹⁶³ <http://www.opm.gov/cfc/html/faq.asp#Charitable>

lists.¹⁶⁴

CFC participants that tried to accommodate this new requirement had minimal guidance, unsure if the names of volunteers, consultants, vendors, trustees, or partner organizations should be checked. Other organizations withdrew from the CFC program in protest.¹⁶⁵ For Amnesty International, this meant sacrificing an expected \$330,000 in CFC donations.¹⁶⁶ Still other organizations called for the policy to be withdrawn, citing inaccuracies and ambiguities on the lists, as well as the unnecessary administrative burden.¹⁶⁷

By Nov. 10, 2004, when there was no change in the CFC program, the ACLU led a group of charities, including OMB Watch, that filed a lawsuit in the U.S. District Court for the District of Columbia.¹⁶⁸ The complaint alleged that the CFC policy violated the First Amendment rights of participating charities and foundations and was made without the required open rulemaking process.¹⁶⁹ At a press conference announcing the lawsuit, Mitch Bernard, litigation director for plaintiff Natural Resources Defense Council, said, “Turning law abiding charities into government agents imposes an illegitimate burden on civic and religious groups.” Bernard also noted that the lists are developed in secret, and “often lack even the most basic information for screening out mismatches against common names.”¹⁷⁰ The undue influence of the Guidelines became clear in February 2005 when the Department of Justice, representing CFC, filed a motion to dismiss the case, claiming the Guidelines as authority for the CFC requirement and noting similar certifications by private foundations as justification.¹⁷¹

Shortly after the lawsuit was filed, the CFC issued “corrective” guidance,¹⁷² clarifying its earlier regulations. Participating organizations were now required to check employees (but not volunteers, consultants, or vendors), all cash donors (not in-kind contributors), and exclude recipient regrants. The memo did not provide information on how often to check the lists but clearly indicated that lists must be checked for the annual application to qualify as a CFC participant. It further explained that if a match is found at the time of application, even if it is a false positive, the group “may not complete the certification and will be denied participation in the CFC.”¹⁷³ After a charity is accepted in the program, the rule would have required any later match to be reported to the Office of Personnel Management “immediately.” The “appropriate” steps would then be taken against the reporting organization, which could include suspension from the

¹⁶⁴ Adam Liptak, “A.C.L.U. Board Is Split Over Terror Watch Lists,” *The New York Times* (July 31, 2004). Available at <http://query.nytimes.com/gst/fullpage.html?res=9803E4D71E3DF932A05754C0A9629C8B63>.

¹⁶⁵ ACLU Press Release Citing Government “Blacklist” Policy, “ACLU Rejects \$500,000 from Funding Program” (July 31, 2004) at <http://www.aclu.org/safefree/general/18526prs20040731.html>.

¹⁶⁶ Amnesty International Press Release (Nov. 10, 2004).

¹⁶⁷ See Statements From Nonprofits Challenging The CFC Watch-List Policy (Aug. 12, 2004) at <http://www.aclu.org/safefree/general/18518res20040812.html>.

¹⁶⁸ http://www.aclu.org/FilesPDFs/cfc_complaint.pdf

¹⁶⁹ *Ibid.*

¹⁷⁰ <http://www.aclu.org/FilesPDFs/nrdc.pdf>

¹⁷¹ Defendant’s Motion to Dismiss, *ACLU et al. v Office of Personnel Management*, U.S. District Court (D.C.) No. 1:04cv01958 EGS, Feb. 7, 2005, available at <http://www.ombwatch.org/npa/CFCMtnDismiss.pdf>.

¹⁷² CFC Memorandum 2004-12.

¹⁷³ *Ibid.*

program, retraction of funds already disbursed, and notification of “investigative and/or enforcement authorities.”

In November 2005,¹⁷⁴ the CFC shifted its position away from mandatory list checking, instead proposing new certification language that permitted participating charities and foundations to determine internally how best to comply with counterterrorism measures. The new certification states:

I certify that the organization named in this application is in compliance with all statutes, Executive orders, and regulations restricting or prohibiting U.S. persons from engaging in transactions and dealings with countries, entities, or individuals subject to economic sanctions administered by the U.S. Department of the Treasury’s Office of Foreign Assets Control. The organization named in this application is aware that a list of countries subject to such sanctions, a list of Specially Designated Nationals and Blocked Persons subject to such sanctions, and overviews and guidelines for each such sanctions program can be found at <http://www.treas.gov/ofac>. Should any change in circumstances pertaining to this certification occur at any time, the organization will notify OPM’s Office of CFC Operations immediately.¹⁷⁵

Many organizations applauded this new approach.¹⁷⁶ On Nov. 7, 2005, the Office of Personnel Management formally withdrew the list-checking requirement. As a result, the lawsuit was voluntarily dismissed.¹⁷⁷

Despite improvements to the final rule, the Guidelines are still referenced within the introduction to the CFC regulation and portrayed as the best standard of compliance: “Charities, however, as a minimum, should follow the U.S. Department of the Treasury Anti-Terrorist Financing Guidelines ... even though OPM will not mandate list-checking by applicants for the 2006 and subsequent campaigns, it continues to encourage charities to check the SDN List and the TEL as a way to help ensure compliance with applicable regulations and as an important part of implementing the type of risk-based compliance program proposed by the Guidelines.” Consequently, the organizations that challenged the CFC policy could only claim a partial victory. They successfully eliminated mandatory list-checking but failed to completely squelch the Guidelines’ influence.

The Risk Matrix for the Charitable Sector

In March 2007, without public announcement or comment, OFAC published the Risk Matrix on its website. The Risk Matrix is directed toward grantmakers, particularly

¹⁷⁴ *Federal Register*: March 29, 2005 (Volume 70, Number 59) Proposed Rules, pp. 15783-15784 at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-6023.htm>.

¹⁷⁵ *Federal Register* 70, Nov. 7, 2005, at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-22186.pdf>.

¹⁷⁶ “CFC Shifts Position on Terrorist List Checking,” *OMB Watcher* (April 4, 2005).

¹⁷⁷ 5 C.F.R. Part 590 at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-22186.pdf>.

foundations with international programs. It asks organizations to apply a formulaic chart of ambiguous factors, eventually branding each grantee or grantmaking practice as “high,” “medium,” or “low” risk. Treasury recommends that the higher the risk, the more voluntary practices a grantmaker should adopt from the Guidelines.

This action ignored a June 2006 request¹⁷⁸ from the Treasury Guidelines Working Group asking Treasury for a public comment period. The Working Group wrote, “We believe that there should be an opportunity for interested groups to comment on the risk matrix before it is issued in final form. We believe the risk matrix is more likely to be a useful document if it is informed by the experience of foundations that make grants internationally and public charities that conduct activities overseas.” Within footnote 5 of the Risk Matrix, OFAC implies consultation with the charitable community by thanking the American Bar Association’s Committee on Exempt Organizations of the Section of Taxation for its “instructive comments on risk factors.”¹⁷⁹ However, these comments were informally given, without the endorsement of the ABA, to the IRS (not OFAC), in response to a request on how charities operate their international programs. They were not intended to be the basis of a “risk matrix.” Few organizations have found the risk matrix useful, and it is questionable if any are using it. Immediately following

its release, Grantmakers Without Borders called for its withdrawal.¹⁸⁰

Few organizations have found the risk matrix useful, and it is questionable if any are using it.

The factors used within the Risk Matrix unfairly label U.S. grantmakers that fund emerging, grassroots organizations overseas as engaging in “high risk” behavior. Coined as social change

philanthropy, it is these types of grants that often result in bottom-up development and empower local communities to address the social, economic, and environmental inequalities within their communities. The Risk Matrix stigmatizes this valuable and legitimate form of grantmaking and discourages other U.S. funders from adopting similar missions and supporting similar grantees. Treasury ignores the fact that it is done with the same degree of care and professionalism as other means of philanthropy. As a result, the Risk Matrix can force local communities out of their own development picture.

The risk factors listed within the Risk Matrix shed little light on what circumstances constitute a “high” risk situation. For example, organizations with a history of legitimate charitable activities are considered “low” risk, and organizations that have little or no history are “high” risk. However, recent scandals at the Smithsonian Institution and the American Red Cross demonstrate that even organizations with a long history of legitimate charitable activities are susceptible to corruption.¹⁸¹ Charities working in conflict zones or “regions known to have a concentration of terrorist activity” are deemed

¹⁷⁸ Treasury Guidelines Working Group Letter to Under Secretary Levey for Terrorism and Financial Intelligence, June 19, 2006. Available at http://www.ombwatch.org/npadv/PDF/public_comment_riskmatrix.pdf.

¹⁷⁹ Risk Matrix, Footnote 5.

¹⁸⁰ http://www.internationaldonors.org/advocacy/GwoB_Treasury_Letter-Risk_Matrix.pdf

¹⁸¹ Floor speech of Sen. Charles Grassley, Ranking Member, Senate Finance Committee, March 19, 2007, at <http://finance.senate.gov/press/Gpress/2007/prg031907h.pdf>

“high” risk, without providing any guidance on what regions meet these criteria. The Risk Matrix asks grantmakers to supplant traditional methods of due diligence with a series of risk factors, despite the fact that the location or age of an organization provides little insight into the actual use of a charitable grant. Few grantmaking tools more effectively guarantee that funds are used for their intended charitable purpose than the grantor/grantee relationship and the mutually agreed upon standards of transparency and accountability they entail. Rooted in the long-standing practice of “knowing your grantee,” strong relationships promote trust and transparency while respecting the complicated realities that exist for a grantee. This is a more effective deterrent to terrorism than the poorly conceived Risk Matrix.

Chapter 6

Counterterrorism Laws Create Barriers for International Philanthropy and Programs

Counterterrorism laws, the *Anti-Terrorist Financing Guidelines* (Guidelines), and, to a lesser degree, the *Risk Matrix for the Charitable Sector* (Risk Matrix), have significantly affected international philanthropy and programs. Direct grants to grassroots organizations appear to be declining, due to funders that want to avoid unwanted scrutiny by the Department of the Treasury (Treasury), even though international giving is up overall. Disaster and other relief organizations are faced with the dilemma of complying with laws barring broadly defined “material support” for terrorism or violating the International Red Cross’s long-standing standards of neutrality in aid delivery. Organizations that seek funding from the United States Agency for International Development (USAID) are now susceptible to extensive terrorist vetting by the State Department, and development and relief programs are hampered when working in areas controlled by designated organizations. These measures have done little to fight terrorism. Instead, they are politicizing aid and creating a hierarchy of beneficiaries that is not based on need.

Impacts on Private International Philanthropy

Private philanthropy plays a significant role in global aid and development. Accounting for 22 percent of all foundation grants, international grantmaking totaled \$4.2 billion in 2006, a staggering 48.4 percent increase from 2005.¹⁸² Some interpret the growth in international philanthropy as indicative of a healthy sector. However, deconstructing the data reveals some noteworthy trends.

International grantmaking typically happens through one of three channels:

- A grant is given to a U.S.-based organization with international programs (for example, Save the Children);
- A grant is given directly to an overseas recipient (also known as a cross-border grant); or
- A grant is given to an intermediary that regrants the funds to organizations and projects outside the United States (intermediaries are both U.S.- and non-U.S.-based).¹⁸³

¹⁸² *Foundation Giving Trends*, Foundation Center, 2008 Edition. The Foundation Center’s database sample includes private foundations and community foundations (it does not include public grantmaking charities).

¹⁸³ Grantcraft defines an intermediary as “an organization (not an individual) that provides specialized expertise to foundations and other donors, in particular through the regrating of funds to organizations and projects outside the United States. An intermediary’s expertise may include legal knowledge of U.S. and other governments’ guidelines, a deep understanding of a specific issue or region of the world, or capacity building and other support to grantee organizations.” *Working With Intermediaries*, at <http://www.grantcraft.org/index.cfm?fuseaction=page.viewPage&pageID=932&nodeID=1>.

Each can be an effective means of international giving. However, the complexities of international grantmaking, coupled with the uncertain regulatory environment created by counterterrorism measures, are marginalizing overseas recipients in the developing world.

The percentage of international grants targeting overseas recipients dropped from almost 40 percent in 1998 to 31 percent in 2001¹⁸⁴ and dropped again between 2002 and 2004.¹⁸⁵ In 2006, the percentage rebounded, accounting for almost 45 percent of all international grants. However, 60.1 percent went to grantees in Switzerland, England, and Kenya. This suggests many grants were given to intermediaries for regranteeing or to western-based organizations in the developing world. Likely only a minority of cross-border grants went to grassroots organizations in the developing world.

There are many reasons why intermediaries and western-based charities played such a significant role in international grantmaking. Both are often used to help with due diligence and terrorism vetting, often when grantmakers lack the capacity to do it themselves or when they are intimidated from engaging in cross-border giving by the threat of being shut down by Treasury if something goes wrong. In a 2004 Foundation Center survey, a majority of respondents agreed that it was now more difficult to fund internationally due to “the more demanding and uncertain regulatory environment” and “increased security risks abroad.”¹⁸⁶

In 2003, *Alliance*,¹⁸⁷ the world’s leading magazine on philanthropy and social investment, published a study on perceived barriers to international giving by U.S. foundations.¹⁸⁸ The study found that complying with counterterrorism measures is particularly difficult in the context of cross-border grants. Organizations interviewed for the study noted practical problems in applying counterterrorism measures and organizational anxiety due to the draconian consequences of non-compliance. Many also



feared the long-term consequences to international grantmaking because of the unpredictability of counterterrorism enforcement – inexperienced grantmakers “will [be] frighten[ed] away ... think[ing] that it is not worth the effort.”¹⁸⁹

A 2003 *New York Times* article entitled “Small Charities Abroad Feel Pinch of U.S. War on Terror” noted that Rockefeller Philanthropy Advisors suspended funding for a Caribbean program designed to “kick-

¹⁸⁴ *International Grantmaking Update*, Foundation Center, October 2003, at <http://foundationcenter.org/gainknowledge/research/pdf/intlupdt.pdf>.

¹⁸⁵ *International Grantmaking Update*, Foundation Center, October 2006, at <http://foundationcenter.org/gainknowledge/research/nationaltrends.html>.

¹⁸⁶ *Ibid.*

¹⁸⁷ <http://www.alliancemagazine.org/>

¹⁸⁸ Rachel Humphrey, “Alliance Extra – June 2003.” *Alliance* (June 2003).

¹⁸⁹ *Ibid.*

start a flow of American charity” to that often-overlooked region. Inability to comply with the Guidelines was cited as the reason, and Eileen Growald, Rockefeller Philanthropy’s chairwoman, stated that “[i]f these guidelines become the de facto standard of best practices for giving abroad, we might very well have to stop making grants outside the United States.”¹⁹⁰ Later in the article, Robin Krause of the law firm Patterson, Belknap, Webb & Tyler said, “If a donor can choose between three programs, he’s likely to choose the least risky one, and right now that’s not an international one.”

In her paper *Philanthropy at Risk*, Dr. Nancy Billica¹⁹¹ warns of overly conservative programmatic changes within international grantmaking organizations, saying “philanthropists are sometimes impelled to do more than what is outlined in order to demonstrate that they are acting in good faith and in full compliance – a hedge against the possibility of even more intrusive and/or restrictive government actions in the future.”¹⁹² Furthermore, vague government policies surrounding international philanthropy create the appearance that it is a risky grantmaking environment, causing some organizations to turn away from international work or not start international programs.¹⁹³ She also notes that counterterrorism measures especially affect grantmaking organizations with small budgets because they lack the personnel or resources to engage in the exhaustive new procedures.¹⁹⁴

Although it appears that international funders are finding ways around perceived and real barriers to international grantmaking, the face of international philanthropy is changing. At a time in history when America has so much to gain by supporting international philanthropy, it is unfortunate that it is becoming more difficult. There is data to suggest that international assistance does much more than make Americans feel good; it also makes the world feel good about America, thereby counteracting anti-American sentiment. For example, Terror Free Tomorrow conducted surveys within Indonesia to gauge public opinion about the U.S. after the 2004 Indian Ocean tsunami, when more than \$13.4 billion in U.S. humanitarian aid, both public and private, went to help victims.¹⁹⁵ Due to the tsunami relief, 44 percent of respondents in January 2006 reported a favorable view of the U.S., compared to 15 percent in May 2003, before the tsunami.¹⁹⁶ In addition, Indonesia reported the lowest level of support for Osama bin Laden and terrorism since 9/11. This same phenomenon was recorded by Terror Free Tomorrow in Pakistan after the 2005 earthquake;¹⁹⁷ 75 percent of Pakistanis had a more favorable opinion of America, and most cited earthquake relief as the reason.

Barriers to U.S.-Based Relief and Development Program Operations

U.S. counterterrorism laws have also made it increasingly difficult for U.S.-based relief and development organizations and their volunteers to operate in areas controlled by

¹⁹⁰ Stephanie Strom, “Small Charities Abroad Feel Pinch of U.S. War on Terror,” *The New York Times*, (Aug. 5, 2003).

¹⁹¹ Professor of Political Science at the University of Colorado, Boulder and consultant for Urgent Action Fund.

¹⁹² http://www.urgentactionfund.org/new_site/assets/files/philanthropy_at_risk/Philanthropy_072507.pdf

¹⁹³ *Ibid.*

¹⁹⁴ http://www.urgentactionfund.org/new_site/assets/files/philanthropy_at_risk/Philanthropy-Post%209-11_Final.pdf, p. 15.

¹⁹⁵ http://www.internationaldonors.org/issues/pdf/tlp_exec-summary.pdf

¹⁹⁶ <http://www.terrorfreetomorrow.org/articlenav.php?id=82>

¹⁹⁷ <http://www.terrorfreetomorrow.org/articlenav.php?id=5#top>

designated organizations. When designated groups control territory and governmental functions in areas where relief agencies need to go, such as eastern Sri Lanka after the 2004 tsunami disaster, it is nearly impossible to set up displaced persons camps and hospitals, travel, or distribute food and water without violating the laws barring “material support” for terrorists.

In Sri Lanka, the Liberation Tigers of Tamil Eelam (LTTE), a designated terrorist organization, controlled areas where thousands died from the tsunami and hundreds of thousands lost their homes. The story of one volunteer, Ahilan Arulanantham, told in testimony before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security,¹⁹⁸ exemplifies the experience of many relief workers. The son of Sri Lankan immigrants and an attorney for the ACLU of Southern California, Arulanantham was on his way to Sri Lanka to visit relatives when the tsunami hit in December 2004. Instead of his planned vacation, he spent three weeks volunteering for relief efforts with several organizations, including at a displaced persons camp serviced by the Hospital Christian Fellowship. He told the committee,

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 ... 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 [legal] exception for “medicine.” But within a week, the most serious public health problems of the hundred of thousands of displaced people changed. In situations of mass displacement, the greatest killer is often infectious disease, which spread through contaminated water, inadequate sanitation, and exposure from 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 ...

I have spoken with doctors, teachers, and others who want to work with people desperately needing their help in Sri Lanka, but fear liability under the portions of the material support laws that bar expert advice, training and personnel ...

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 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.

¹⁹⁸ Testimony at 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, by Ahilan Arulanantham, Staff Attorney, American Civil Liberties Union, May 10, 2005, available at <http://www.aclu.org/safefree/general/17536leg20050510.html>.

The Code of Conduct

Compliance with overly broad U.S. counterterrorism laws can force NGOs to violate The International Red Cross and Red Crescent Movement's Principles of Conduct in Disaster Response Programmes:

1. The humanitarian imperative comes first;
2. Aid is given regardless of the race, creed or nationality of the recipients and without adverse distinction of any kind. Aid priorities are calculated on the basis of need alone;
3. Aid will not be used to further a particular political or religious standpoint;
4. We shall endeavor not to be used as an instrument of government foreign policy;
5. We shall respect culture and custom;
6. We shall attempt to build disaster response on local capacities;
7. Ways shall be found to involve program beneficiaries in the management of relief aid;
8. Relief aid must strive to reduce vulnerabilities to future disaster as well as meeting basic needs;
9. We hold ourselves accountable to both those we seek to assist and those from whom we accept resources;
10. In our information, publicity and advertising activities, we shall recognize disaster victims as dignified human beings, not hopeless objects.

Source: <http://www.ifrc.org/publicat/conduct/code.asp>

Government-Funded International Aid Programs Under Fire

USAID is an independent government agency that provides foreign assistance throughout the globe to support U.S. foreign policy objectives.¹⁹⁹ Most assistance is given through nonprofit partners, and in 2006, USAID distributed almost \$10.4 billion,²⁰⁰

¹⁹⁹ USAID Primer: What We Do and How We Do It, available at http://www.usaid.gov/about_usaid/PDACG100.pdf.

²⁰⁰ USAID, Analysis of USAID's Financial Statements, chart 3, available at http://www.usaid.gov/policy/par06/highlights_006.html, and Sarah R. Eremus, "NGOs Respond to USAID's Proposed Anti-Terror Screen," *The International Journal of Not-for-Profit Law*, Vol. 10, Issue 1 (Dec. 2007).

supporting economic growth, agriculture, trade, global health, democracy, education, conflict prevention, and humanitarian assistance. Many nonprofits that partner with USAID feel the burden of political ties with the U.S. and struggle to maintain neutrality within their international programs. However, counterterrorism measures are making this increasingly difficult.

Since 2001, USAID has adopted new grant procedures to help ensure that any assistance given is not delivered to or through terrorists, in compliance with EO 13224. In addition, congressional spending bills since 2003 have required USAID to take “appropriate steps to ensure that [foreign] assistance is not provided to or through any individual, private or government entity, or education institution that the Secretary [of State] knows or has reason to believe advocates, plans, sponsors, engages in, or has engaged in, terrorist activity.”²⁰¹

Recipients of USAID funds in the West Bank and Gaza undergo additional scrutiny through a USAID program called the “USAID mission for the West Bank and Gaza” (the mission).²⁰² Any entity that receives support or grants from USAID in these areas must screen their key personnel and leadership. The names of individuals and organizations that implement USAID projects are submitted to USAID/Washington, which sends the information to a government vetting center to be checked against databases and other information sources to determine if they are associated with terrorism. Organizations must also certify that no employee is affiliated with any government-listed terrorist group and that they do not provide material support for terrorism.²⁰³ A certification form is now part of every USAID grant agreement. All contracts, grants, and cooperative agreements include clauses that remind recipients that transactions with those associated with terrorism are prohibited.²⁰⁴



Photo credit: Kinder USA

A 2006 Government Accountability Office (GAO)²⁰⁵ report criticized USAID’s implementation of the mission in the West Bank and Gaza, saying it did not routinely collect required identification information on individuals, properly maintain the database of vetting results, and did not ensure all sub-awardees signed certification statements. In addition, an internal audit from the USAID Inspector General revealed USAID funding went to a Bosnian group whose president was on a “watch list” and an aid “partner”

²⁰¹ USAID West Bank and Gaza Antiterrorism Procedures, available at <http://www.gao.gov/new.items/d061062r.pdf>.

²⁰² *Ibid.*

²⁰³ Certification Regarding Terrorist Funding required by Internal Mandatory Reference AAPD 04-14, available at <http://www.usaid.gov/wbg/misc/2007-WBG-26.pdf>.

²⁰⁴ Update to Mission Order #21, 2007-WBG-26, Oct. 5, 2007, at <http://www.usaid.gov/wbg/misc/2007-WBG-26.pdf>.

²⁰⁵ <http://www.gao.gov/new.items/d061062r.pdf>

who later pleaded guilty to lying to federal agents about his involvement with Osama bin Laden.²⁰⁶ The audit suggested that “[t]hese instances could have been avoided if USAID had comprehensive vetting policies and procedures.”²⁰⁷

USAID moved to address these criticisms in July 2007, when it announced a major shift in its funding process called the Partner Vetting System (PVS). This essentially seeks to implement the West Bank and Gaza programs on a global scale.²⁰⁸ Under the proposed PVS,²⁰⁹ every organization that applied for “USAID contracts, grants, cooperative agreements, or other funding or who apply for registration with USAID as Private and Voluntary Organizations (PVOs)” would have had to collect and submit highly personal information to ensure that “neither USAID funds nor USAID-funded activities inadvertently or otherwise provide support to entities or individuals associated with terrorism.”

Nonprofits expressed strong objections to the proposal, leading USAID to restrict the initial implementation of PVS as a pilot program in the West Bank and Gaza.²¹⁰ In the meantime, USAID published an *Updated Anti-Terrorism Procedures, Update to Mission Order #21* in October 2007 to address concerns raised in the GAO report.²¹¹

Many nonprofits hope that before PVS is expanded globally, serious flaws will be addressed. The PVS methodology, not the objective, is the problem. PVS asks organizations to collect information about their employees, directors, officers, any individual “otherwise employed by either for-profit or not-for-profit organizations,” and the recipients of re-grants. Collected information includes phone numbers, date and place of birth, e-mail addresses, nationality, gender, profession, citizenship, and copies of government-issued identifications (such as a social security number and passport number). This information is then submitted to USAID for vetting against unspecified terrorist watch lists. Grants will be denied or funding suspended if a possible match is found.

The initial *Federal Register* notice that announced the PVS exemptions to the Privacy Act also explained that applicants would not be able to dispute a list match because USAID would not inform applicants on why funding is denied. USAID explained that “[b]ecause the results of screening on any particular organization or individual may be derived from classified and sensitive law enforcement and intelligence information, USAID cannot confirm or deny whether an individual ‘passed’ or ‘failed’ screening.”²¹² OMB Watch submitted comments warning that “PVS will more than likely result in the creation of a secret USAID blacklist of ineligible grant applicants, based on PVS results. Organizations and individuals erroneously listed as having ties with terrorism will have no way of knowing they are deemed as such, or why. Innocent and well de-

²⁰⁶ <http://blogs.abcnews.com/theblotter/2007/11/feds-may-fund-t.html>

²⁰⁷ *Ibid.*

²⁰⁸ <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-3330.pdf>

²⁰⁹ *Ibid.*

²¹⁰ Walter Pincus, “U.S. Delays Terror Screening for Aid Groups,” *Washington Post* (Aug. 28, 2007), at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/22/AR2007082202847.html>.

²¹¹ USAID 2007-WBG-26, Oct. 5, 2007.

²¹² <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-3331.pdf>

serving grantees will have no formal means of appealing such decisions.”²¹³

Some nonprofits believe the PVS violates the Privacy Act, which requires, among other things, an agency to only collect information that “is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President.”²¹⁴ USAID exempts portions of the PVS database from the Privacy Act, thereby denying participants these necessary protections.²¹⁵ Objectors to the PVS argue that the collected information is overly invasive and is not necessary to prevent taxpayer dollars from going to terrorist organizations; other approaches would accomplish that purpose with less harm or invasion of privacy. The International Center for Not-for-Profit Law’s (ICNL) comments about PVS argue that “[t]he Privacy Act was intended to cover just these cases, and should be scrupulously followed to avoid unwarranted intrusions on civil liberties.”²¹⁶

In addition, many nonprofits fear that collecting such personal information for the U.S. government puts USAID partners at risk of being perceived as law enforcement or intelligence agents. The Global Health Council’s letter to USAID said such data collection “can only serve to incite animus and increase the likelihood of attacks. Rather than alleviating risk, the PVS will create new dangers for the staff of its partners, who already routinely work in very difficult circumstances.”²¹⁷ InterAction further stated, “[USAID partners] are perceived to be extensions of the U.S. intelligence community, terrorist attacks against them can only increase. Putting our employees in this position is totally inconsistent with efforts USAID is making to help its implementing partners improve the security of staff members working in hazardous places.”²¹⁸

The PVS program was created and implemented without normal rulemaking procedures²¹⁹ or authorization from Congress.²²⁰ Additionally, it was originally scheduled to go into effect the day public comments were due, Aug. 27, 2007, suggesting the agency had no plans to consider the concerns of the nonprofit sector. Many organizations submitted comments criticizing the PVS, including OMB Watch, the ACLU, ICNL,

²¹³ <http://www.ombwatch.org/npa/OMBWPVSComments.pdf>

²¹⁴ 5 U.S.C. 552a(e)(1) and INCL letter.

²¹⁵ *Federal Register*, July 20, 2007, at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-3331.pdf>.

²¹⁶ INCL letter to Philip Heneghan, USAID, August 2007, at http://www.npaction.org/pdfs/pvs_icnl.pdf.

²¹⁷ Global Health Council letter to Philip Menegan, USAID, Aug. 23, 2007.

²¹⁸ InterAction letter dated Aug. 17, 2007.

²¹⁹ EO 12866 and the Congressional Review Act require all government agencies to screen “significant regulatory action” and “major rules” with the Office of Information and Regulatory Affairs (OIRA). OIRA then reviews the regulations, a statement of need, and “an assessment of costs and benefits of the regulatory action.” Economically significant regulations must include a cost-benefit analysis of reasonable alternatives and “an explanation of why the planned regulatory action is preferable to the identified alternatives.” USAID argued that an OIRA review was not necessary because the PVS is not a “significant regulatory action.” However, EO 12866 tasks OIRA, not the agency proposing the regulations, to decide if a regulatory proposal is significant.

²²⁰ USAID cites “annual foreign operations appropriation legislation” and EO 13224 as statutory authority for the PVS. However, neither of these specifically proscribe the PVS system, and a requirement under 22 C.F.R. Section 226.1 mandates, “USAID shall not impose additional or inconsistent requirements except as provided in Sections 226.4 and 226.14, or unless specifically required by federal statute or executive order.” The “annual foreign operations appropriation legislation” addresses the USAID mission program in the West Bank and Gaza, and EO 13224 grants the Secretaries of State and Treasury the authority to designate individuals and entities as terrorist organizations, not implement a PVS program for all USAID grants.

InterAction and many of its members, and the Global Health Council.²²¹ InterAction, the largest alliance of international humanitarian and development organizations working overseas, has a historical partnership with USAID in U.S. foreign assistance policy. However, it said, “The process by which this new Partner Vetting System was designed seems to ignore that partnership.”²²²

The PVS program was created and implemented without normal rulemaking procedures or authorization from Congress.

During a public meeting on April 11, 2008, USAID announced that there will be changes made to the program since the July 2007 *Federal Register* announcement. One significant change is that applicants that are denied a grant can present additional information and proceed with an administrative appeal within USAID. However, there will be no formal description of this appeals process or any other change before the program becomes mandatory.

InterAction issued a press release on April 11 that stated, “As USAID has made changes to the proposed PVS, it must reintroduce the PVS, following the applicable rulemaking processes, and provide: accurate descriptions of the appeal and correction process; a concise definition of those individuals in each application organization that will need to provide personal information; and a description of the processes for emergency vetting in appropriate circumstances.”

Politicization of Aid

Compliance with counterterrorism laws can bring nonprofits into conflict with basic tenets of non-discrimination in carrying out international programs. After Sept. 11, 2001, compliance with counterterrorism policies has caused some charities to be perceived as agents of the U.S. government. This, coupled with increasingly negative opinions of the U.S. abroad, impedes the groups’ ability to do politically neutral charitable and development work.

In 2001, former U.S. Secretary of State Colin Powell described non-governmental organizations (NGOs) as “force multipliers”²²³ that helped achieve the government’s political and military goals in the war in Afghanistan. The statement generated protests from the nonprofit sector, reflecting what scholar Sarah Lischer calls “[t]he growing friction between military and humanitarian organizations.”²²⁴ Lischer notes that three guiding principles govern nonprofits’ approach to their work: “neutrality, impartiality and independence. Neutrality requires an organization to refrain from taking sides in a conflict. Impartiality means basing the provision of aid solely upon the need of the

²²¹ Available at <http://www.ombwatch.org/article/articleview/3978/1/265?TopicID=1>.

²²² InterAction letter to Philip Heneghan, USAID, Aug. 17, 2007, at [http://www.interaction.org/files.cgi/5976_InterAction_response_to_July_23_Federal_Register_Notice_\(PVS\).pdf](http://www.interaction.org/files.cgi/5976_InterAction_response_to_July_23_Federal_Register_Notice_(PVS).pdf).

²²³ U.S. Department of State Remarks by Secretary of State Colin L. Powell to the National Foreign Policy Conference for Leaders of Nongovernmental Organizations (NGO), Oct. 26, 2001. Available at <http://www.globalsecurity.org/military/library/news/2001/10/mil-011026-usia01.htm>.

²²⁴ S.K. Lischer, “U.S. Military Interventions and the Humanitarian Force” (March 2004).

recipients. Independence ensures that governments do not influence the decisionmaking or actions of the NGO.”

Since 9/11, these three principles have been threatened by government policy and counterterrorism measures. Increasingly, U.S. charities and foundations are under pressure to ally themselves with the foreign policy and political goals of government. In December 2003, this led Oxfam’s policy adviser on Iraq, Jo Nickolls, to say, “Bush’s doctrine – the ‘with-us-or-against us’ doctrine – denies the possibility of neutrality by simply vanishing it away. It defines the two sides of a conflict – ‘terrorism’ versus ‘freedom’ and ‘civilisation’ – then automatically assigns all parties to one or the other: if you cannot side with Bush, you are for terrorism.”²²⁵

This only multiplies an already negative impression of U.S. NGOs abroad, where many believe “that the politicization of aid before and during the war, and the resulting absence of clear distinctions between the U.S. government and aid organizations, including those distinctively focused on independent humanitarian action, has created the perception that all assistance is part of the U.S. agenda.”²²⁶

The pressure on U.S. nonprofits to adjust their operations to suit U.S. military operations is growing. Department of Defense Directive Number 30000.05 calls on the military to build alliances with nonprofits for “stability operations,” defined as “maintaining order in States and regions.” As a result, an INTRAC Policy Briefing Paper reports, “US NGOs thus today find themselves being approached in various countries by the US military with proposals for joint development and stability activities. Some NGOs and faith-based NGOs complain that the appearance of joint operations or visits by US military personnel imperil the NGO’s reputation for neutrality and independence in the eyes of local communities.”²²⁷

²²⁵ Limits to neutrality in Iraq, Jo Nickolls, Oxfam, at <http://www.odihpn.org/report.asp?id=2579>.

²²⁶ Nicolas de Torrente, “Humanitarian Action under Attack: Reflections on the Iraq War,” *The Harvard Environmental Law Review* (Spring 2004). Available at <http://www.doctorswithoutborders.org/publications/opedsarticles/2004iraq.cfm>.

²²⁷ Joseph McMahon, “Developments in the Regulations of NGOs via Government Counter-Terrorism Measures and Policies,” International NGO Training and Research Center (September 2007).

Chapter 7

The Mysterious Fate of Frozen Charitable Funds

Current counterterrorism financing policy allows the funds of designated charitable organizations to sit in frozen accounts indefinitely. The intent of the original donor is disregarded, and funds are unable to achieve any charitable purpose. The Department of the Treasury's (Treasury) *2006 Terrorist Assets Report*²²⁸ estimates that the assets of foreign terrorist organizations, a category that includes charities and foundations, is \$16,413,733. Some of these funds have been in frozen accounts for more than six years. The sanctions laws that authorize the designation and freezing of assets do not provide any timeline or process for long-term disposition, meaning that funds could remain frozen for as long as the root national emergency authorizing the sanctions lasts. Since the "war on terror" is very unlikely to have a clear ending, the funds could remain frozen indefinitely.

Most of the frozen charitable funds originated with relatively small donors who intended to provide critical humanitarian assistance, particularly to people displaced by natural disaster, war, or famine. Although current regulations grant Treasury authority to allow transfer of these funds,²²⁹ research indicates that no blocked funds have been released for charitable purposes, despite several requests. In fact, Treasury has repeatedly said that allowing transfers for humanitarian and disaster aid is not in the national interest. The situation is further complicated by lawsuits brought by families of victims of terrorism that target the funds of designated U.S. nonprofits.

A group of U.S. nonprofits has initiated a dialogue with Treasury in an attempt to resolve this situation. As their November 2006 letter to Treasury states, "The need for humanitarian assistance is not frozen and has continued to grow since 2001. Meanwhile frozen funds sit in bank accounts helping no one, while critical needs go unmet."²³⁰ To date, there is no resolution in sight.

²²⁸ "Terrorist Assets Report Calendar Year 2005 Fourteenth Annual Report to Congress on Assets in the United States of Assets of Terrorist Countries and International Terrorism Program Designees," U.S. Department of the Treasury, Office of Foreign Assets Control. Available at <http://www.treas.gov/offices/enforcement/ofac/reports/tar2005.pdf>.

²²⁹ See 31 C.F.R. 501 and 597.

²³⁰ See OMB Watch Letter to Henry Paulson, Secretary of the U.S. Department of Treasury, Nov. 6, 2007. Available at http://www.ombwatch.org/npadv/Paulson_letter.pdf.

In its opinion denying the Holy Land Foundation's (Holy Land) challenge to Treasury's terrorist designation and asset freezing, the U.S. District Court for the District of Columbia recognized that the seizure of Holy Land's property "d[id] raise significant Fourth Amendment [search and seizure] concerns."

Nonetheless, the court held that freezing assets is not a seizure but a "temporary deprivation" of property. It suggested that at some unspecified point in time, the frozen status of Holy Land's funds may no longer be temporary but a confiscation by the government: "Plaintiff may ... some day have a credible argument that the long-term blocking order has ripened into vesting of property in the United States." However, current law does not define when this "vesting" takes place. Holy Land's funds have been frozen since 2001.

Background: Authority and Process for Freezing Charitable Funds

The economic sanctions powers described in Chapter 1 allow Treasury to block bank accounts and seize tangible property and records once it designates or investigates a person or entity as a supporter of terrorism. In the case of nonprofits, this includes money earmarked for genuine charitable programs. Once an organization is designated, it can ask Treasury to reconsider or "de-list" it, but there is no formal hearing process, and Treasury has complete discretion to grant or deny such requests.²³¹ Appeals to the courts are not likely to be successful, since, as discussed in Chapter 3, the courts have deferred to Treasury when national security is involved. That leaves the licensing process under Treasury regulations as the only remaining vehicle under current law for requesting release of funds for charitable programs.²³²

Regulations allow the Office of Foreign Assets Control (OFAC), an agency within Treasury, the power to grant specific licenses to designated organizations to allow financial transactions that would otherwise be prohibited. This can include fund transfers for charitable purposes. The applicant must submit the names of all parties "concerned with or interested in" the proposed transaction and "any further information as is deemed necessary."²³³ Additional information can be submitted at any time before the decision is made. OFAC can place conditions on a license, including reporting requirements "in such form and at such times and places" as it wishes²³⁴ or "exclude any person, property, or transaction from the operation of any license."²³⁵ OFAC maintains control of the licensee's activities throughout the life of the license and has discretion-

²³¹ 31 C.F.R. 501.807.

²³² 31 C.F.R. 501.801(b).

²³³ 31 C.F.R. 501.801(b)(3).

²³⁴ 31 C.F.R. 501.801(b)(5).

²³⁵ 31 C.F.R. 501.597.502.

ary power to amend or cancel it.

If the application is denied, the applicant or “other party in interest” may request an explanation by letter or in person, or it may subsequently ask for the application to be re-opened. It can also file a new application.²³⁶ There is no independent review process for OFAC’s decision.

The Department of the Treasury has published guidelines on specific license applications for transactions with the Palestinian Authority, issued on a case-by-case basis. These guidelines provide a useful framework for any applicant seeking to unblock funds for charitable purposes. The guidelines are online at http://www.treas.gov/offices/enforcement/ofac/programs/terror/ns/pal_guide.pdf.

Treasury Policy: Humanitarian Aid and Disaster Relief Are Not in the National Interest

Several U.S.-based charities that have been shut down by Treasury have requested that some or all of their assets be transferred to other nonprofits for charitable programs. Based on a search of publicly available information and documents shared by the attorneys of designated organizations, it appears that Treasury has rejected every request.

For example, in 2002, Treasury denied a license to Benevolence International Foundation (BIF) for the release of most of its funds to a children’s hospital in Tajikistan and the Charity Women’s Hospital in Dagestan, even though the application included safeguards to ensure the money arrived at the proper destinations.²³⁷ In 2006, KindHearts USA (KindHearts) asked that its funds be released and spent by the UN, USAID, or any other humanitarian program, asking only that “special consideration be given to the refugees in the earthquake ravaged areas of Pakistan since the overwhelming majority of frozen funds were earmarked for projects therein.” The application was denied.²³⁸ In a March 23, 2006, letter to KindHearts’ attorney, OFAC said, “It is a basic tenet of OFAC sanctions policy that blocked funds are not licensed for release except under limited and compelling circumstances consistent with the national security, economic and foreign policy of the United States. Therefore, your request to fund relief efforts in Pakistan from blocked funds is denied.”

The Islamic American Relief Agency (IARA-USA) made repeated requests over a two-year period for release of funds for humanitarian and disaster aid, including assistance for victims of Hurricane Katrina. These requests included offers to change their gover-

²³⁶ 31 C.F.R. 501.801(b)(4).

²³⁷ 9/11 Commission, *Terrorist Financing Monograph*, Ch. 6, Illinois Charities, p. 14.

²³⁸ Letter from Office of Foreign Assets Control to KindHearts attorney Jihad Smali, March 23, 2006.

nance structure, financial accounting, and even personnel, in order to assure Treasury that no funds would be diverted to terrorism. In a Feb. 7, 2005, letter from its attorney, Shereef Akeel, IARA-USA explained that “the organization would be vigilant to ensure that all of its funds reach its intended humanitarian destination. This organization would even consider some sort of reasonable monitoring program imposed by the government...” In a Sept. 16, 2005, letter to OFAC, IARA-USA requested that funds be released for humanitarian purposes, including Hurricane Katrina. The letter stated, “This letter serves as an urgent appeal for you to reconsider your position to allow the unfreezing of the funds so they may be applied toward humanitarian aid.” On Nov. 15, 2005, IARA-USA asked OFAC to “unfreeze the funds to assist the victims from the earthquake which occurred in Pakistan [w]e re-emphasize that we would be agreeable to any reasonable monitoring program to ensure that the monies reached its intended humanitarian destination.”

OFAC’s response was instructive. In a June 29, 2006, letter to IARA-USA, OFAC stated:

It is a basic tenet of OFAC sanctions policy that blocked funds are not licensed for release except under limited and compelling circumstances consistent with the national security, economic and foreign policy of the United States. OFAC’s current policy to deny requests to release blocked funds is consistent with the congressional intent underlying section 201(a) of the Terrorism Risk Insurance Act of 2002, Public Law 107-297. Therefore, your request to fund relief efforts in Zaire, Niger or in the wake of Hurricane Katrina from blocked assets is denied.



Photo credit: Fund for Nonviolence

This is difficult to understand, since there are strong arguments that allowing charitable aid to flow where it is badly needed would enhance U.S. standing abroad. Treasury says that meeting the needs of foreign disaster and Hurricane Katrina victims is somehow inconsistent with national security interests. This is not a sensible or humane position for the U.S. government.

Misapplication of the Terrorism Risk Insurance Act to Frozen Funds

OFAC has taken the position²³⁹ that all frozen funds are being held in case victims of terrorism or their families file suit and obtain judgments under the Terrorism Risk Insurance Act (TRIA).²⁴⁰ However, TRIA does not authorize funds to be held where no lawsuits have been filed or judgments rendered. The law, passed in 2002 and renewed

²³⁹ OMB Watch review of correspondence between Treasury and three designated U.S. nonprofits.

²⁴⁰ 107 P.L. 297, § 201.

in December 2007,²⁴¹ is intended to reduce economic risks and consequences related to terrorism by restoring insurance capacity to the marketplace.²⁴² Section 201 of the act allows blocked assets to be used to pay judgments from litigation “against a terrorist party.” Only one of the designated organizations, the Holy Land Foundation (Holy Land), has been brought into litigation by victims of terrorism that involves a claim under TRIA. As a result, TRIA is not a legitimate basis for denying license applications from other charities, such as KindHearts.

It appears that Treasury’s reasoning is fueled by policy rather than legal necessity, putting extra-judicial restraints on funds when there is no judgment or attachment under TRIA. In addition, there is no evidence the Congress intended blocked funds to be held based only on the potential for litigation.

There are strong arguments that allowing charitable aid to flow where it is badly needed would enhance U.S. standing abroad.

In April 2004, Holy Land asked for permission to transfer \$50,000 to the Palestine Children’s Relief Fund. The application was denied²⁴³ due to a February 2004 judgment awarded to the children of Yaron and Efrat Ungar, who were killed in an attack by Hamas in 1996.²⁴⁴ Although the Ungars did not sue Holy Land itself, the court granted them a writ of execution, allowing them to collect from Holy Land’s blocked funds. The writ was based on OFAC’s designation of the organization as a supporter of terrorism.²⁴⁵ Holy Land did not have notice of the litigation or the application for the writ of execution and only learned of it when the writ was served on the group’s bank.²⁴⁶

In July 2004, before the Ungars could collect the funds, Holy Land and several of its leaders were indicted on federal criminal charges. The prosecutors sought and obtained a restraining order from the federal District Court for the Northern District of Texas, which prevented the Ungars from receiving Holy Land’s funds. The ruling was based on federal criminal forfeiture laws, which provide for forfeiture to the U.S. government in the case of a conviction.²⁴⁷ The Ungars challenged this decision, but in July 2007, the United States Court of Appeals for the Fifth Circuit upheld it.²⁴⁸ The criminal case is still pending, since the first trial ended in a mistrial and the government has indicated it will retry the case. As a result, the Ungars’ right to collect their judgment against Hamas from Holy Land assets remains up in the air as long as the criminal case is pending.

A similar case not brought under TRIA but using a provision of federal criminal law provides some insight into the possible outcome of the Ungars’ litigation. On Dec. 28,

²⁴¹ Reauthorization Act of 2007, signed by President George W. Bush on Dec. 26, 2007.

²⁴² “The Business of Terrorism: TRIA,” 77 *Fla. Bar J.* 63 (October 2003).

²⁴³ Letter from OFAC Director Richard Newcomb to John Boyd, attorney for Holy Land Foundation for Relief and Development, April 28, 2004, Case No. SDGT-314.

²⁴⁴ *Ungar v. Palestinian Authority, et al*, Civil Action No. 00-105L (D. R.I.).

²⁴⁵ *Estates of Ungar ex. Rel. Strachman v. Palestinian Authority*, 304 F.Supp.2d 232, 238, 242, (D. R.I. 2004).

²⁴⁶ Interview, John Boyd, Feb. 1, 2008.

²⁴⁷ 21 U.S.C. 853(e)(1)(A).

²⁴⁸ *U.S. v. Holy Land Foundation*, No. 04-11282, July 18, 2007.

2007, the U.S. Court of Appeals for the Seventh Circuit overturned a \$156 million judgment against Holy Land and two other U.S.-based charities brought by the Boim family, whose son was a victim of terrorism by Hamas.²⁴⁹ The court ruled that any judgment must be based on evidence and not solely on Treasury's designation. The court explained that Treasury's finding was based on evidence that Holy Land never had the opportunity to see or contest. In addition, the court found the trial court's reliance on hearsay evidence and out-of-court statements to be improper. The court drew a distinction between a civil dispute between private litigants and one involving a national security sanctions program. Judge Ilana Diamond Rovner wrote,

Belief, assumption, and speculation are no substitutes for evidence in a court of law.... We must resist the temptation to gloss over error, admit spurious evidence, and assume facts not adequately proved simply to side with the face of innocence and against the face of terrorism. Our endeavor to adhere to the dictates of law that this great nation has embodied since its founding must persevere...²⁵⁰

The case was sent back to the lower court where there may be a new trial.

The Nonprofit Sector Seeks Release of Frozen Funds for Charitable Purposes

In a Nov. 6, 2006, letter, a group of nonprofits asked Treasury to release frozen funds belonging to charities or foundations designated as supporters of terrorism "to trustworthy aid agencies that can ensure the funds are used for their intended charitable purposes."²⁵¹ The signatories requested a meeting with Treasury officials to discuss the proposal in more detail. The letter's organizational signers include the Council on Foundations, Grantmakers Without Borders, Independent Sector, Global Fund for Women, the Muslim Public Affairs Council, and OMB Watch.

On Jan. 15, 2008, representatives of this group met with Treasury to discuss a process for releasing the funds, but the results were inconclusive, making further efforts necessary to ensure these funds benefit people in need. During the meeting, Treasury was given a list of questions regarding the status of frozen charitable funds but has said it will not respond.

²⁴⁹ *Boim v. Holy Land Foundation*, U.S. Court of Appeals for the Seventh Circuit, No. 05-1815, 05-1816, 05-1821 & 05-1822, Dec. 28, 2007.

²⁵⁰ *Ibid.*, at 93.

²⁵¹ See Letter to Henry Paulson, Secretary of the U.S. Department of Treasury. Available at http://www.ombwatch.org/npadv/Paulson_letter.pdf.

Chapter 8

Counterterrorism Measures Used to Limit Dissent and Public Debate on Issues

In addition to providing aid and services to people in need, charitable and religious organizations help to facilitate a free exchange of information, fostering debate about public policy issues. This dialogue is necessary to keep the public informed and our democracy healthy. However, when the government interprets it as a terrorism threat, the strength of American civic engagement diminishes.

This kind of nonprofit civic participation blends three essential elements of First Amendment rights: the rights of free speech, of association, and to petition the government for redress of grievances. These rights are threatened when government uses its police and security powers to intimidate or silence dissent and public discussion of issues. Since 9/11, there have been disturbing revelations about the use of counterterrorism resources to track and sometimes interfere with groups that publicly and vocally dissent from administration policies. In addition, federal agencies have taken action that limits public debate in nonprofit venues by denying visas to foreign scholars and experts. All this suggests a troubling trend toward use of national security powers for political purposes.

Professor Mark Sidel of the University of Iowa School of Law noted:

The fallacy of assuming that government actions would be directed solely against a few Muslim charities, and that the remainder of the nonprofit sector would be left alone, has been further challenged by the emergence of new evidence indicating that the government has, in fact, targeted a much broader swath of the American nonprofit sector for surveillance and observation. It is now clear that literally hundreds or perhaps thousands of American nonprofits have had events observed, telephone calls sorted, or financial transactions examined by government agencies. (MSNBC, 2005, *Washington Post*, 2006) It is also clear that the U.S. government continues to view the nonprofit sector as a source of insecurity well beyond the initial prosecutions of a few Muslim charities for channeling funds to terrorism.²⁵²

These actions illustrate an unfortunate historical tendency by the U.S. government to use overbroad police and national security powers for political purposes. This result almost inevitably flows when the law lacks clear standards, transparency, due process,

²⁵² Mark Sidel, Professor of Law and International Affairs and Faculty Scholar, University of Iowa, "The Third Sector, Human Security, and Anti-Terrorism: The United States and Beyond" (Sept. 27, 2006).

and independent review. Beginning with the Alien and Sedition Acts of 1798, the U.S. government's response to national emergencies has included suppression of political dissent and opposition. This includes the Palmer Raids during World War I, the internment of Japanese-Americans during World War II, the civil liberties abuses of the McCarthy era, and the FBI's COINTELPRO program during the 1960s that interfered with civil rights and peace groups.²⁵³ As columnist Anthony Lewis put it:

This is not the first time in American history that civil liberties have suffered during war or national alarm; it has happened again and again. Each time the country later regretted what had happened... To recall past episodes of repression and regret is to realize that there is something different about incursions on liberty today. The war on terrorism is being waged against a hidden enemy who is not going to surrender in a ceremony aboard the U.S.S. *Missouri*. There is indeed no way to foresee how or when this war will end. The fear of terrorism may well go on for the rest of our lives. We may not have breathing space to understand and regret punitive excess. If we are to preserve constitutional values – the values of freedom – understanding and resistance must come now.²⁵⁴

Domestic Surveillance and the ACLU's Spy Files Project

In 2005, the American Civil Liberties Union (ACLU) uncovered disturbing evidence of counterterrorism resources being used by the Federal Bureau of Investigation (FBI) for surveillance of nonprofits. In April 2005, citing evidence of FBI and police surveillance of “environmental, anti-war, political, and faith-based groups,” the ACLU launched its Spy Files Project. Its purpose is “to expose and limit FBI spying on people and groups simply for speaking out or practicing their faith” and to discover more information on the structure and policies of the “so-called Joint Terrorism Task Forces.”²⁵⁵ Originally initiated with Freedom of Information Act (FOIA) requests in ten states and the District of Columbia, the project has since expanded to additional states²⁵⁶ and government agencies, including the Department of Defense (DOD), the FBI, and the Department of Homeland Security. The Project has uncovered an intricate system of domestic spying largely condoned by expansive counterterrorism powers within the Patriot Act.



Logo courtesy of the American Civil Liberties Union

Defense Department's TALON Database Tracks Protesters

In December 2005, NBC News²⁵⁷ and the Early Warning Blog on [washingtonpost.com](http://www.washingtonpost.com)²⁵⁸ disclosed a DOD Counterintelligence Field Activity Agency (CIFA). The DOD cre-

²⁵³ See <http://www.trackedinamerica.org/>.

²⁵⁴ Anthony Lewis, *Security and Liberty*, a Century Foundation Report (2003).

²⁵⁵ American Civil Liberties Union “FBI Spy Files,” April 25, 2005. Available at <http://www.aclu.org/safefree/resources/18734res20050425.html>.

²⁵⁶ For lists of states, see http://www.aclu.org/spyfiles/index_old.html.

²⁵⁷ Lisa Myers, Douglas Pasternak, Rich Gardella, and the NBC Investigative Unit, “Is the Pentagon Spying on Americans?” NBC News, MSNBC. Available at <http://www.msnbc.msn.com/id/10454316/>.

²⁵⁸ http://blog.washingtonpost.com/earlywarning/2005/12/pentagon_domestic_spying.html

ated CIFA in 2003 to track suspicious occurrences or potential terrorist threats against military installations through Threat and Local Observation Notices (TALON).²⁵⁹ Although intended to be an anti-terrorist database, TALON became “a catch-all for leads on possible disruptions and threats against military installations in the United States, including protests against the military presence in Iraq.”²⁶⁰ All TALON reports were meant to be assessed by CIFA as “credible” or “not credible” national security threats, but NBC News revealed that even threats deemed “not credible” or peaceful in nature remained in the database²⁶¹ despite DOD regulations²⁶² prohibiting retention of non-threatening information about United States persons for more than 90 days.²⁶³ In addition, content in the database was shared across federal, state, and local jurisdictions, spreading the error in multiple directions.²⁶⁴ The ACLU and its affiliates responded to these revelations by filing FOIA requests on behalf of dozens of anti-war and social justice groups. The results revealed “186 TALON reports on anti-military protests or demonstrations in the U.S.”²⁶⁵ organized by nonprofit advocacy groups.

It is clear that the Pentagon was aware of the problems with the TALON program. In a preliminary review, the Pentagon found the database was not properly maintained,²⁶⁶ and in January 2006, Deputy Secretary of Defense Gordon England ordered intelligence personnel to get “refresher training” on collection and use of information on U.S. citizens.²⁶⁷ In November 2006, the ACLU released additional documentation of nonviolent groups targeted by TALON and called for a congressional investigation into the program. By April 2007, the TALON program was terminated. Undersecretary of Defense for Intelligence James Clapper said the Department “has assessed the results of the Talon program and does not believe they merit continuing the program as currently constituted, particularly in light of its image in Congress and the media.”²⁶⁸

The government has continued to pursue surveillance and data mining programs. For example, at the same time the Pentagon was including peace groups in the TALON database, the Justice Department was opposing bipartisan Senate legislation that would require federal agencies to disclose to Congress information about data-mining programs used to find possible patterns of criminal or terrorist activity.²⁶⁹

²⁵⁹ *Ibid.*

²⁶⁰ Eric Lichtblau and Mark Mazzetti, “Military Documents Hold Tips on Antiwar Activities,” *The New York Times* (Nov. 21, 2006) Available at <http://www.nytimes.com/2006/11/21/washington/21protests.html>.

²⁶¹ American Civil Liberties Union, *No Real Threat: The Pentagon's Secret Database on Peaceful Protest*. New York: American Civil Liberties Union. (2007) Available at http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf.

²⁶² <http://msnbcmedia.msn.com/i/msnbc/sections/news/DOD.1982.IntelligenceCollectionOnU.S.Persons.pdf>

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *No Real Threat: The Pentagon's Secret Database on Peaceful Protest*.

²⁶⁶ Walter Pincus, “Pentagon Will Review Database on U.S. Citizens,” *Washington Post* (Dec. 15, 2005).

²⁶⁷ “The Pentagon's Counterspies Counterintelligence Field Activity (CIFA),” States News Service (Sept. 17, 2007).

²⁶⁸ Walter Pincus, “Pentagon to End Talon Data-Gathering Program,” *Washington Post*, p. A10 (April 25, 2007).

²⁶⁹ Ellen Nakashima, “Senate Bill Would Mandate Disclosure of Data Mining,” *Washington Post*, p. D03 (March 21, 2007). Available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/20/AR2007032001604.html>.

Although the surveillance itself can be documented, measuring the long-term impact to civil society is difficult. Linda Fisher, Associate Professor of Law and Director of the Center for Social Justice at Seton Hall Law School, eloquently described the likely effects in her article “Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups”:

The costs of unjustified political surveillance are not always direct or immediately evident. Fear spreads slowly and insidiously. The long-term effect is to undermine the general level of trust and social bonds, as well as to increase alienation. A phenomena that begins as the chilling of speech leads to an erosion of the quality of free association, which in turn leads to a breakdown of civil society, undermining the foundation of democracy.

Source: Linda Fisher, “Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups,” *Arizona Law Review*, Vol. 46, p. 621 (2004).

Examples of nonprofits that have been under surveillance as part of the TALON program and disclosed through the ACLU’s Spy Files Project include:

- *American Friends Service Committee*
In 2005, DOD added the American Friends Service Committee (AFSC), a 90-year-old pacifist Quaker organization and 1947 Nobel Peace Prize winner, to the TALON database²⁷⁰ after AFSC invited the public to join a protest against the Iraq war. In addition to labeling the organization’s call to action “suspicious,” the TALON database also “identified a 79-year-old grandmother attending an anti-war meeting at a Quaker meeting house in Florida as ‘potential terrorist activity.’”²⁷¹
- *War Resisters League*
A February 2005 TALON report focused on protests planned by the War Resisters League (WRL) near New York City military recruiting stations. The document describes WRL as advocating “Ghandian nonviolence.” The protests, TALON states, were to include “a church service for peace,” “live-ly signs and loud chants,” a vigil, and a procession with coffins. Protesters agreed that they “will not use physical violence or verbal abuse towards any person,” that they “will not damage any property,” and that they “will not carry weapons.” Nonetheless, the report warns that WRL members may fa-

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

vor “civil disobedience and vandalism.”²⁷²

FBI and Joint Terrorism Task Force Surveillance

The ACLU Spy Files project also used FOIA to obtain FBI files on itself, peace groups Code Pink and United for Peace and Justice, Greenpeace, People for the Ethical Treatment of Animals, the American-Arab Anti-Discrimination Committee, the Muslim Public Affairs Council, and over 100 other groups from around the country. It learned that the FBI conducted surveillance through its Joint Terrorism Task Force (JTTF).²⁷³ Examples of JTTF files that the ACLU obtained:²⁷⁴

- *United for Peace and Justice*
A memo was sent from counterterrorism personnel in the FBI’s Los Angeles office to similar offices in New York, Boston, and Washington about United for Peace and Justice’s plans for demonstrations during the political conventions in 2004. The memo notes alleged anarchist connections of some individuals in the group and quotes extensively from the organization’s website.
- *Rocky Mountain Peace and Justice Center*
The FBI used the JTTF program to investigate the Rocky Mountain Peace and Justice Center and the Colorado American Indian Movement after the groups announced plans for anti-war demonstrations.
- *Thomas Merton Center*
The Thomas Merton Center for Peace and Justice in Pittsburgh, PA, was investigated because the group “has been determined to be an organization which is opposed to the United States’ war with Iraq.”²⁷⁵ The documents indicate that the FBI began investigating the Center in November 2002, noting that the group was distributing leaflets in Pittsburgh²⁷⁶ and identifying the Center as a “left wing organization advocating, among many political causes, pacifism.” A February 2003 memo titled “International Terrorism Matters” describes how the Pittsburgh JTTF reviewed the Merton Center’s website to gain information about anti-war demonstrations and rallies the group had planned. The Center’s Executive Director, Jim Kleissler, said the organization’s “members were simply offering leaflets to passersby, legally and peacefully, and now they’re being investigated by a counter-terrorism unit. Something is seriously wrong in how our government determines who and what constitutes terrorism when peace activists find themselves targeted.”²⁷⁷

²⁷² American Civil Liberties Union, “ACLU Calls for Investigation In Response to New Details of Pentagon Spy Files” (Nov. 21, 2006). Available at <http://www.aclu.org/safefree/spyfiles/27468prs20061121.html>.

²⁷³ *PROTECTING AMERICA AGAINST TERRORIST ATTACK: A Closer Look at the FBI’s Joint Terrorism Task Forces* (Dec. 1, 2004). Available at <http://www.fbi.gov/page2/dec04/jtff120114.htm>.

²⁷⁴ FBI Spy Files Project: ACLU Client List (Dec. 2, 2004). Available at <http://www.aclu.org/safefree/resources/18706res20041202.html>.

²⁷⁵ OMB Watch, “FBI Used Anti-Terrorism Powers to Target Peace Group,” (March 21, 2006). Available at <http://www.ombwatch.org/article/articleview/3348/1/84?TopicID=2>.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

Limiting Dialogue on the Issues of the Day

Nonprofits, including universities and advocacy groups, educate the public on policy issues. The government has created barriers and disincentives for organizations engaged in scholarship and public education, particularly when the issues being discussed address national security, the Middle East, or the Iraq war. While it is impossible to quantify the extent or the impact these actions have, a few examples illustrate the efforts to limit public access to information and suppress debate on important issues.

- *Attempts to intimidate sponsors of public forums*

In March 2006, the Michigan League of Women Voters sponsored a forum on freedom of information and open government that provoked a complaint from the FBI about a speech given by Chellie Pingree, then President of Common Cause, that expressed concern about whether the Patriot Act is justified. Pingree said that freedoms are being eroded in the name of national security and “government wants to act in secrecy to invade your privacy.”²⁷⁸ A few days later, FBI agent Al DiBrito called Susan Gilbert, president of the local League, after he saw Pingree quoted in the local paper. DiBrito told Gilbert that Pingree’s comments were “way off base” and that someone from the federal government should have sat on the panel.²⁷⁹ He went on to say that someone from the U.S. Attorney’s office in Grand Rapids would be contacting her to set the record straight on the Patriot Act.²⁸⁰ Gilbert believed this to be a threat and told the *Herald-Palladium* newspaper that the FBI “should not go around intimidating the League of Women Voters and Common Cause because they don’t like the Patriot Act. There are many people who don’t like the Patriot Act, including members of Congress. I’m just stupefied.”²⁸¹

Pingree and Gilbert then sent a letter to FBI Chief Robert Mueller describing what had transpired, explaining that “[w]hen the country has far more pressing security and terror concerns, we question the FBI using precious resources hounding leaders of two of the most distinguished citizen advocacy organizations in the country. Is this the kind of behavior citizen activists can expect from the FBI? To us, it smacks of intimidation.”²⁸²

- *Denying visas to scholars*

Some foreign scholars, human rights activists, and writers who have been critical of U.S. policies are now barred from entering the U.S. This exclusion restricts U.S. citizens from hearing diverse viewpoints and associating with

²⁷⁸ OMB Watch, “Groups Complain of FBI Intimidation” (April 4, 2006). Available at <http://www.ombwatch.org/article/articleview/3364/1/41?TopicID=1>.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ William F. Ast III, “2 Groups Complain About FBI Phone Call,” *The Herald-Palladium* (March 23, 2006). Reprinted by Common Cause. Available at <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1504947>.

²⁸² *Ibid.*

people of their choosing, both rights protected by the First Amendment.

In January 2004, Tariq Ramadan, a leading Muslim scholar and a fellow at the University of Oxford, was offered a position at the University of Notre Dame.²⁸³ To enter the United States, he was granted a specialized nonimmigrant visa but was then informed by the U.S. Embassy in Bern, Switzerland, that his visa had been revoked. The Department of Homeland Security told the press²⁸⁴ that the revocation was consistent with federal law that permits the exclusion of someone who “has used the alien’s position of prominence within any country to endorse or espouse terrorist activity.”²⁸⁵ Ramadan applied for another visa, and in September 2006, the government denied the application because he had donated to a French-based charity, the Committee for Charity and Aid to Palestinians (CBSP). The CBSP is listed as a terrorist organization in the U.S. but not in France, its home country. Ramadan said that he had sent the funds to the French-based charity in 2000 before it was declared a terrorist organization by the U.S. He also noted that the CBSP was legal in France and that the French city of Lille had cooperated with it for several years in charity projects for Palestinians. As of 2008, the U.S. government had cleared Mr. Ramadan of being a supporter of terrorism but still will not grant him a visa.²⁸⁶

Adam Habib, director of the Human Sciences Research Council’s (HSRC) Democracy and Governance research program in South Africa, is a world-renowned researcher, scholar, human rights activist, and political commentator. Professor Habib is also a vocal critic of U.S. foreign policy, including the war in Iraq. On arrival at John F. Kennedy Airport in New York in October 2006, Professor Habib’s 10-year visa was revoked without explanation. Consequently, he was unable to attend scheduled meetings with U.S. scholars and representatives from U.S. and international agencies, universities, and foundations.²⁸⁷ The American Association of University Professors wrote a letter to the Department of State²⁸⁸ noting that Habib has been to the U.S. several times to give speeches, and the case “raises troubling implications for academic freedom.”

In May 2007, Habib applied for a new visa that would allow him to travel to

²⁸³ Adam Liptak, “Say What You Like, Just Don’t Say it Here,” *The New York Times* (Oct. 22, 2007). Available at <http://www.nytimes.com/2007/10/22/us/22bar.html>.

²⁸⁴ “Muslim Scheduled to Teach at Notre Dame Has Visa Revoked,” *Los Angeles Times*, (August 25, 2004).

²⁸⁵ Sec. 411 of Public Law 107-56 (PATRIOT ACT) amended the Immigration and Nationality Act to allow the exclusion of someone who “has used the alien’s position of prominence within any country to endorse or espouse terrorist activity.”

²⁸⁶ *American Academy of Religion v. Chertoff*, U.S. District Court for the Southern District of New York.

²⁸⁷ IOL “US embassy probing SA academic’s deportation,” Oct. 25, 2006 at http://www.int.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1161766982976B224.

²⁸⁸ Letter to Ms. Julie Furuta-Toy, Director, Office of Diplomatic and Public Liaison Visa Services and Mr. Paul M. Morris, Executive Director, Admissibility Requirements and Migration Control, Office of Field Operations, U.S. Customs and Border Protection, Dept. of State, from Roger W. Bowen, General Secretary, American Association of University Professors, Oct. 27, 2006. Available at <http://www.aaup.org/AAUP/issues/int/Letters/South+Africa/Habib.htm>.

the U.S. to attend speaking engagements, including the annual meeting of the American Sociological Association in August 2007. The government did not process his application in time for him to attend. As a result, the ACLU and a number of other U.S. associations filed a lawsuit against the Secretary of the Department of Homeland Security, Michael Chertoff, and the Secretary of State, Condoleezza Rice. The case, *American Sociological Association v. Chertoff*, was filed with the United States District Court for the District of Massachusetts in September 2007²⁸⁹ and amended in November 2007.²⁹⁰ As of April 30, 2008, the case was still pending.

Study Commission or Thought Police?

A bill pending in the U.S. Senate²⁹¹ that would create a commission and research center on “violent radicalization” and “extremist belief systems” that can lead to homegrown terrorism is a good example of the challenges ahead for free speech.

The Violent Radicalization and Homegrown Terrorism Act, H.R. 1955, passed the House in October 2007,²⁹² and an identical bill was introduced in the Senate. It would create a 10-member commission charged with examining the “facts and causes of violent radicalization, homegrown terrorism, and ideologically based violence in the United States” and report its findings and legislative recommendations to Congress within 18 months of its creation. The commission would have the power to conduct hearings and receive evidence but would not have authority to subpoena persons or records.

The proposed “Center of Excellence for the Study of Violent Radicalization and Homegrown Terrorism in the United States” would be established at a university designated by the Secretary of Homeland Security. Its purpose would be to “study the social, criminal, political, psychological, and economic roots of violent radicalism” and methods for federal, state, local, and tribal homeland security officials to address them.

OMB Watch, the Equal Justice Alliance, ACLU, Center for Constitutional Rights, and other groups are raising concerns that the legislation’s vague definitions could be interpreted to include rallies, sit-ins, protest marches, and other traditional forms of dissent. For example, one of the greatest challenges to countering terrorism is drawing the line between advocacy of ideas, including violence, and taking concrete steps toward carrying out a violent act. The bill fails to make the distinction between violence and civil disobedience.

The bill’s findings in Section 899B point out that the “Internet has aided in facilitating violent radicalization, ideologically based violence, and the homegrown terrorism process in the United States by providing access to broad and constant streams of terror-

²⁸⁹ *American Sociological Association v. Chertoff*, U.S. District Court for the District of Massachusetts, at <http://www.aclu.org/safefree/exclusion/32758prs20071114.html>.

²⁹⁰ American Civil Liberties Union, “ACLU Rebukes U.S. Government for Denying South African Scholar’s Visa” (Nov. 14, 2007). Available at <http://www.aclu.org/safefree/exclusion/32758prs20071114.html>.

²⁹¹ S. 1959 (110th Congress).

²⁹² U.S. House, Prevention of Violent Radicalization and Homegrown Terrorism Act, H.R. 1955 (110th Congress). Available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1955rfs.txt.pdf.

ist-related propaganda to United States citizens.” The ACLU raised further objections in a Nov. 28, 2007, press release,²⁹³ which said, “Law enforcement should focus on action, not thought.” It said, “The focus on the Internet is problematic” and could lead to censorship.

²⁹³ American Civil Liberties Union, “ACLU Statement on the Violent Radicalization and Homegrown Terrorism Prevention Act of 2007” (Nov. 28, 2007). Available at <http://www.aclu.org/safefree/general/32886prs20071128.html>.

Conclusions and Recommendations

The current counterterrorism framework is not working well when it comes to the U.S. nonprofit sector. The negative impacts harm charitable programs and the people they serve, and by undermining the independence of the nonprofit sector, weaken our democracy. The ability of the nonprofit sector to improve the common welfare and human security has been diminished in the myriad ways detailed in this report. These costs far outweigh any national security benefits gained.

Our counterterrorism regime was created hastily, in a climate of urgency and fear after 9/11, with little consideration for its effectiveness or potential consequences. Our review of this framework and its impacts on nonprofits has led us to the following conclusions:

- The USA PATRIOT Act was a short-term response to the attacks of 9/11. These short-term solutions are now having long-term consequences, based on flawed assumptions that charities and foundations are somehow a national security threat.
- A double standard applies when the counterterrorism framework is enforced. For-profit corporations are given opportunity to cure their infractions of counterterrorism laws and pay fines, while nonprofits are immediately shut down with no real opportunity to defend themselves.
- Congress has not utilized its oversight powers to review counterterrorism programs and weigh the pros and cons of alternative approaches. It has a responsibility to hear diverse points of view on the impacts and ideas for long-term changes, especially for nonprofits.
- As a result of the "war on terror," the work of humanitarian aid, development, and conflict resolution programs is hindered at best, politicized at worst. This counteracts the positive role charities and foundations can play in fighting the root causes of terrorism.
- Freedom of speech and association are undermined by policies that equate dissent with terrorism.

- The nonprofit sector's attempts to resolve the problems caused by counter-productive counterterrorism laws have been largely unsuccessful. The court system is overly deferential to the executive branch when it comes to national security, upholding the shut-down of charities under circumstances that violate fundamental fairness and the Constitution. As a result, federal agencies ignore nonprofits' calls for change.
- Compliance with U.S. counterterrorism laws can be in direct conflict with international standards of aid as defined by the International Red Cross.

These problems are not insurmountable. The following steps should be taken to address them:

- The nonprofit sector must think beyond its immediate programmatic concerns and address the larger threat to the sector as a whole.
- Charities and foundations must devote the time and resources needed to develop a consensus behind reform proposals and then advocate for them.
- Congress should conduct effective oversight and re-assess the current approach to charities, grantmakers, and other nonprofits.
- The Department of State's *Guiding Principles for Government Treatment of NGOs* is a good starting point for reforming the way the U.S. treats its own nonprofit sector.

As Alexis de Tocqueville noted in *Democracy in America*, the coming together of people for a common purpose is one of the fundamental aspects of a democratic civil society. Americans are famous worldwide for the vast number and diversity of organizations they have created and continue to create for a wide variety of purposes. Nonprofit organizations, and their ability to exercise the fundamental rights and freedoms protected by the Constitution, are at the heart of American democracy and have been critical to the nation's success since its founding.

Government actions that erode and violate such freedoms strike dangerous blows to the very foundation of our country and our ability to provide aid and encourage democracy on the international stage. This is what has happened in the United States during the ongoing war on terror. With regard to the way it has treated and dealt with charities that have been accused of engaging in terrorist activities or providing material support to terrorist organizations, the federal government has overstepped its bounds and has operated far outside the authority granted to it by the Constitution.

In order to preserve the rights of all nonprofit organizations, and indeed, the rights of all people, all levels of government must conduct their counterterrorism activities in a way that consistently protects liberty and civil society. Otherwise, Americans and others lose safeguards that were designed to protect us all from creeping tyranny.

Additional Reading

Safeguarding Charity in the War on Terror (OMB Watch: October 2005).
http://www.ombwatch.org/pdfs/safeguarding_charity.pdf

Muslim Charities and the War on Terror (OMB Watch: February 2006).
http://www.ombwatch.org/pdfs/muslim_charities.pdf



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