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Charity and Security Network

On

**Anti-Money Laundering: Blocking Terrorist Financing and Its
Impact on Lawful Charities**

Before the

Subcommittee on Oversight and Investigations

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Introduction

I would like to begin by expressing my thanks to you, Chairman Moore, Ranking Member Biggert, and Members of the Subcommittee, for holding this hearing and inviting me to testify. This hearing is a critical first step in calling attention to an often overlooked and serious problem: barriers current national security laws and policies create for legitimate charitable, development, educational, grantmaking, peacebuilding, faith-based, human rights and similar organizations.

The Charity and Security Network is a project of OMB Watch, a government watchdog organization that seeks to increase government transparency and accountability; to ensure sound, equitable regulatory and budgetary processes and policies; and to protect and promote active citizen participation in our democracy. As Program Manger of the Network, I coordinate a diverse group of U.S. nonprofit organizations that seeks to address this problem through education and by proposing sensible, practical solutions that protect both national security and the people in need of our services and programs.

Today I will address the six questions listed in this committee's invitation to testify, and recommend some new directions we hope Congress will support. In this testimony I will use the term "charities" to refer to the large universe of aid, development, education, grantmaking, advocacy, faith-based and similar organizations.

Overview: The charitable sector condemns violence and works instead to eradicate poverty, promote democracy, peace, sustainability and human rights.

First, let me be very clear in stating that the charitable sector condemns terrorism and violence. We share the Department of Treasury's (Treasury) goal of dismantling terrorist financing networks and preventing resources, whether charitable or otherwise, from benefitting terrorist organizations, either directly or indirectly. Due to the nature of our work, the charitable sector is acutely aware of the dangers and challenges of working in conflict zones and areas where terrorist groups operate, and are constantly updating and adapting our due diligence efforts to address the threat of terrorism.

Snapshot of the U.S. Charitable and Philanthropic Sector

As of 2007, more than 1.64 million nonprofit organizations registered with the Internal Revenue Service (IRS),¹ employing 8.7 million workers, or approximately six percent of the U.S. labor force.² Public charities account for more than 900,000 of these groups.³ Nearly 600,000 of these

¹ Data on the number of tax-exempt organizations are from Internal Revenue Service Data Book 2007, Publication 55B (Internal Revenue Service, March 2008), table 25; available on the Internet at <http://www.irs.gov/taxstats/article/0,,id=168593,00.html>. Note that churches are not required to apply for tax-exempt status.

² Bureau of Labor Statistics, Wages in the Nonprofit Sector: Management, Professional, and Administrative Support Occupations (Oct. 28, 2008), available at <http://www.bls.gov/opub/cwc/cm20081022ar01p1.htm#revisionnote> (revised April 2009).

³The Nonprofit Sector in Brief, Public Charities, Giving and Volunteering, 2009, The Urban Institute, online at <http://www.urban.org/uploadedpdf/412085-nonprofit-sector-brief.pdf>

groups have revenues over \$25,000 and must report annually to the Internal Revenue Service (IRS). In 2005, the latest year for which complete data are available, their revenue reached approximately \$1.6 trillion.⁴

Charities that are primarily engaged in international programs constitute only two percent of the U.S. nonprofit sector, and two percent of its total revenue. Three-quarters of these groups have annual revenue of less than \$500,000 per year. The vast majority of these groups provide direct services.⁵ The following chart shows the distribution of U.S. international charities:

Table 1: Activities of U.S. International Charities

Type of International Charity	Number of Groups	Revenue Spent
Direct services (including aid to individuals, technical assistance and training and institutional capacity building)	74%	89%
International understanding	16%	6.3%
International affairs	11%	4.8%

Source: The International Charitable Nonprofit Sector: Scope, Size and Revenue, Kerlin and Thanasombat, The Center on Nonprofits and Philanthropy Policy Brief No. 2, September 2006

In addition, private foundations support a wide array of charitable and educational programs. The Council on Foundations has over 2,000 members,⁶ and the Association of Small Foundations says the U.S. has over 60,000 small foundations, defined as those that are led entirely by volunteer boards or operated by just a few staff.⁷ Grantmakers Without Borders, a philanthropic network dedicated to increasing funding for international social justice and environmental sustainability and to improving the practice of international grantmaking, has 160 grantmaking members. All these organizations provide support and resources to their members, including ways to protect charitable assets for charitable purposes.⁸

The Charitable Sector's Mission and Work Counters Terrorism

The relatively small number of international charities and revenue does not reflect the enormous global impact and influence these groups have. Many charities work in conflict zones, politically unstable areas and communities suffering the effects of generations of severe poverty. Often they are the sole providers of vital services, such as healthcare, education and food programs.

⁴ Facts and Figures from the Nonprofit Almanac 2008: Public Charities, Giving, and Volunteering by Amy Blackwood, Kennard Wing, Thomas H. Pollak Online at <http://www.urban.org/publications/411664.html>

⁵ The International Charitable Nonprofit Sector: Scope, Size and Revenue, Kerlin and Thanasombat, The Center on Nonprofits and Philanthropy Policy Brief No. 2, September 2006

⁶ <http://www.cof.org>

⁷ <http://www.smallfoundations.org/>

⁸ <http://www.gwob.net>

But our work goes a step further. Overseas development and training programs enable grassroots partner organizations and their communities to build capacity to address future community needs, build local civil society and institutions and address grievances through non-violent means.

In effect, the work of the U.S. charitable sector confronts terrorism directly. This critical role has been recognized by Ambassador Daniel Benjamin, Director of the Coordinator for Counterterrorism at the Department of State.⁹ On January 13, 2010 in a presentation at the Cato Institute, he said,

“[T]here is probably no success in this area that can happen without civil society. So many of the societies we need to engage in it’s the NGOs that have the ground knowledge which is vitally important... It’s the NGOs that are politically palatable because there are many places, quite frankly, direct engagement would not be constructive....Many of us have made the argument that we need to always keep in sight that starvation is not going to help us with our counterterrorism equity...We need to confront the political, social, and economic conditions that our enemies exploit to win over the new recruits...’

Similarly, Secretary of State Hillary Clinton, in a December 14, 2009 speech at Georgetown University, explained that a wide focus on rights must address “desperation caused by poverty and disease often leads to violence that further imperils the rights of people and threatens the stability of governments.”¹⁰

This position is underscored by results of a 2006 public opinion survey conducted by Terror Free Tomorrow after the 2004 Indian Ocean tsunami, when tens of millions of dollars in U.S. humanitarian aid, both public and private, went to help victims.¹¹ They found that after the tsunami relief, 44 percent of respondents reported a favorable view of the U.S., compared to 15 percent in May 2003, before the tsunami.¹² During this time Indonesia reported the lowest level of support for Osama bin Laden and terrorism since 9/11. The results of a survey in Pakistan after the 2005 earthquake were the same; 75 percent of Pakistanis had a more favorable opinion of America, and most cited earthquake relief as the reason.¹³

The U.S. charitable sector is highly regulated, and protects its funds and resources to be used exclusively for charitable purposes

U.S. charities must apply to the IRS for recognition of tax-exempt status. If revenues exceed \$25,000 the organization must file a detailed information return (Form 990) each year with the

⁹ Daniel Benjamin, Director of the Coordinator for Counterterrorism at the Department of State, online at <http://www.cato.org/event.php?eventid=6807>

¹⁰ Hillary Rodham Clinton, Secretary of State, Georgetown University's Gaston Hall, Washington, DC, December 14, 2009, online at <http://www.state.gov/secretary/rm/2009a/12/133544.htm>

¹¹ http://www.internationaldonors.org/issues/pdf/tlp_exec-summary.pdf

¹² <http://www.terrorfreetomorrow.org/articlenav.php?id=82>

¹³ <http://www.terrorfreetomorrow.org/articlenav.php?id=5#top>

IRS.¹⁴ It requires that public charities disclose details of their foreign activities to the IRS, including grants and other assistance to organizations outside the United States.¹⁵

In addition, the IRS requires specific due diligence procedures when a U.S. charitable organization supports activities by foreign charities. For example, private foundations may support foreign organizations that have not been recognized by the IRS by undertaking a process known as “expenditure responsibility”¹⁶ or by making a good faith determination that the foreign entity is the equivalent of a U.S. public charity.¹⁷ To exercise expenditure responsibility, the foundation must:

- investigate potential grantees,
- execute a written agreement with specified terms prior to awarding the grant funds, and both receive and make regular reports concerning the use of the grant monies.¹⁸

A determination that a foreign charity is the equivalent of a U.S. charity can be based on an affidavit from the grantee or an opinion letter from either the foundation’s or the grantee’s counsel that the organization is the equivalent of a U.S. public charity.¹⁹ These documents must be detailed so that the IRS can determine the status of the grantee.²⁰ In addition, the foundation must confirm periodically review the situation to make sure the foreign grantee continues to qualify as a public charity.

The IRS requires public charities that provide support to foreign organizations to:

- conduct a review of the projects in advance to determine that they are in furtherance of its charitable purposes,
- monitor the foreign organization’s adherence to the U.S. charity’s goals²¹
- limit grants to specific projects that retaining control and discretion on how funds are used, and
- maintain records to establish that all grant funds were used for charitable purposes.²²

¹⁴ Or Form 990PF for private foundations

¹⁵ See IRS Form 990, Sch. F.

¹⁶ See IRC § 4945(h).

¹⁷ Treas. Reg. § 53.4945-6(c)(2)(ii); .

¹⁸ See Treas. Reg. § 53.4945-5(b) and (c).

¹⁹ Treas. Reg. § 53.4945-5(a)(5).

²⁰ *Id.*; see also Rev. Proc. 92-94, 1992-2 C.B. 507 (setting forth specific information that, if presented in such an affidavit, would sufficiently establish that the grantee organization would meet the section 501(c)(3) requirements), available at http://www.irs.gov/pub/irs-tege/rp_1992-94.pdf.

²¹ Rev. Rul. 66-79, 1966-1 C.B. 48.

²² See Rev. Rul. 68-489, 1968-2 C.B. 210.

1. The general impact that government efforts to stop the flow of money and support to terrorist organizations have had on charitable organizations following the events of September 11th.

General Structural and Procedural Problems

The embargo laws that underlie Treasury's enforcement regime are not well suited to the legitimate charitable sector. Economic sanctions programs under these laws apply to foreign nations, terrorist organizations, or criminal enterprises, and do not adapt well to legitimate charitable operations. There is no office in Treasury dedicated to safeguarding charitable programs in the way the Financial Crimes Enforcement Network (FinCEN) is designed to safeguard financial systems. Staff at the Office of Foreign Assets Control (OFAC) or the Office of Terrorism and Financial Intelligence (TFI) that I have encountered do not have experience or expertise in international charitable program operations. This has a negative impact on enforcement and undermines public confidence in Treasury's ability to determine when terrorist support actually occurs.

The designation and asset blocking process essentially turns Treasury into the prosecutor, judge, jury and executioner of a charity it suspects is supporting terrorism. Although Treasury issued a regulation in June 2003²³ that permits designated entities to seek administrative reconsideration after they have been designated and had their property frozen, the overall redress procedures are inadequate. There is no independent review, no requirement the charity even know why they are being investigated or designated, no timelines for Treasury to respond to requests for reconsideration, and inadequate opportunity to confront and present evidence.

Combined with a lack of transparency, this wide discretion opens the door to mistake and abuse. Although only nine U.S. charities have been designated, the lack of process for defending themselves and the indefinite freeze on their funds has made the rest of the U.S. charitable sector very aware of the dangers of being arbitrarily or erroneously shut down by Treasury.

Specific Problems Treasury's Enforcement Has Caused Legitimate U.S. Charities

A. Treasury enforcement ignores the humanitarian imperative

Treasury officials tell us their mission is to "disrupt and dismantle" terrorist financing flows. But their enforcement policy for charities has disrupted and dismantled humanitarian aid flows as well by freezing charitable funds and ignoring humanitarian considerations.

Humanitarian principles that guide charities are enshrined in documents such as the International Red Cross and Red Crescent Movement's *Principles of Conduct in Disaster Response Programmes*, which states that "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."²⁴ It also says aid not be used to further a particular political or religious

²³ 31 CFR 501.807

²⁴ <http://www.icrc.org/web/eng/siteeng0.nsf/html/p1067>

standpoint or be used as an instrument of government foreign policy. (The ten principles in this code are attached in the Appendix.)

The Universal Declaration of Human Rights, adopted by the United Nations in 1948, guarantees rights of charities to “non-discrimination in delivery of services and benefits, including factors such as ethnicity, religion, opinion, national origin, or the political or international status of the nation to which a person belongs.” The Geneva Conventions (Article 2) also “establish an impartiality standard in that they grant to humanitarian organizations the right of access to non-combatants during armed conflict.”²⁵

Treasury enforcement policies for charities are at odds with these international and widely accepted standards. For example, the Geneva Conventions allow nonprofits to communicate with combatants when necessary to deliver aid to civilians. This is considered illegal by Treasury and could lead to the organization being shut down and have its assets frozen. Treasury’s overbroad interpretation of terrorist support is inconsistent with the principle that aid is not a weapon.

B. Use of the undefined “exploitation and abuse” standard

The phrase “exploitation and abuse” appeared in the Annex to the 2006 version of Treasury’s *Voluntary Anti-Terrorist Financing Guidelines for U.S. Charities* (Guidelines).²⁶ Treasury 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.” These terms have not been adequately defined, and Treasury appears to include intangible, non-economic considerations outside the scope of the International Emergency Economic Powers Act (IEEPA).²⁷

In the first five years after 9/11 terrorist support was understood to be direct transfers of funds or goods. By introducing the exploitation and abuse standard in the Annex to voluntary guidance, Treasury significantly expanded the universe of prohibited conduct without Congressional review, public comment or adequate definition. Now Treasury appears to interpret “material support” to include legitimate charitable aid that may “otherwise cultivate support” for a designated organization. This is so broad that it could include inadvertent and indirect support, such as members of a terrorist group advertising aid distribution without the knowledge of the charity.

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.

²⁵ Geneva Conventions, Common Article 3, <http://www.nytimes.com/ref/us/AP-Guantanamo-Geneva-Conventions.html> (5 May 2009)

²⁶ 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><http://www.treas.gov/press/releases/reports/0929%20finalrevised.pdf>

²⁷ 50 USC 1601 et. seq.

Charities are well aware of the problem of abuse by terrorist organizations, since violence against aid workers has increased dramatically since 9/11. In 2008, 260 humanitarian aid workers were killed, kidnapped or seriously injured in violent attacks. This toll is the highest in the 12 years of the Center of International Cooperation and the Overseas Development Institute began tracking these incidents.²⁸

The situation has gotten so bad that the Program on Humanitarian Law and Conflict Research at Harvard University conducted webinar training for aid workers on May 11, 2010 titled, “How to Survive a Kidnapping.”²⁹ In addition, InterAction’s Security Advisory Group has published guidelines for aid and development organizations to assess their security risks and identify mitigation measures.³⁰

C. Frozen funds

IEEPA allows Treasury to block, or freeze, the funds and assets of organizations it designates or, in some cases, pending investigation into designation.³¹ The law does not provide any timeline or process for long-term disposition of frozen funds, so they 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 of designated charities could remain frozen indefinitely.

Treasury regulations give it the power to grant specific licenses to designated organizations that would allow transferring the funds to legitimate charities for charitable purposes. Several U.S.-based charities that have been shut down by Treasury have requested that some or all of their assets be transferred this way. However, Treasury has rejected every request. For example:

- In 2002, Treasury denied Benevolence International Foundation (BIF) a license to release 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 destination.
- 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 and earthquake victims in Pakistan. These requests included offers to change their governance structure, financial accounting, and even personnel, in order to assure Treasury that no funds would be diverted to terrorism.
- In 2006, KindHearts for Charitable Humanitarian Development asked its funds be released and spent by the USAID Program or any other humanitarian program, asking only that “special consideration be given to the refugees in the earthquake ravaged areas

²⁸ Providing aid in insecure environments:2009 Update Trends in violence against aid workers and the operational response HPG Policy Brief 34 Humanitarian Policy Group April 2009, Online at http://www.cic.nyu.edu/Lead%20Page%20PDF/HPG_2009%20.pdf

²⁹ <http://www.hpcrresearch.org/events/security-mission-how-survive-kidnapping>

³⁰ <http://www.eisf.eu/resources/library/SRM.pdf>

³¹ 50 USC 1702(b)

of Pakistan since the overwhelming majority of frozen funds were earmarked for projects therein.” The application was denied.

Treasury has repeatedly said that allowing transfers for humanitarian and disaster aid is not in the national interest, without explaining how or why.³² It also says Congress intended that all frozen funds be held in case victims of terrorism or their families file suit and obtain judgments under the Terrorism Risk Insurance Act (TRIA).³³ Section 201 of the act allows blocked assets to be used to pay judgments from litigation “against a terrorist party.” However TRIA does not authorize funds to be held where no lawsuits have been filed or judgments rendered. Only one of the designated organizations, the Holy Land Foundation, has been brought into civil litigation by victims of terrorism.

The consequence of Treasury’s policy is that people in need are doing without. Although there is no public information on how many charitable dollars have been frozen, it appears that at least \$7 million in assets from U.S. charities is at stake. To illustrate the impact these funds could have if released, I have used data from UNICEF, the United Nations Children’s Fund founded in 1946. UNICEF publishes a chart³⁴ that outlines how many children could be helped with small donations. For example, \$25 will provide basic health supplies for 41 children.

Based on that release of \$ 7 million in frozen funds would assist needy children as follows:

- 11,480,000 children could receive basic health supplies
- 12,180,000 children could be vaccinated against polio
- 25,900,000 severely malnourished children could get ready-to-eat nut spread
- 9,549 families could get tents

Congress can remedy this situation by making it clear to Treasury that charitable funds should be protected for charitable purposes.

The process of freezing funds is problematic. Section 10 of Executive Order 13224 states that no prior notice of designation needs to be provided to U.S. organizations before funds are frozen “because of the targeted organization’s ability to transfer funds or assets instantaneously, which would render the blocking measures ineffectual.”³⁵ Treasury has made a blanket assumption that this danger exists in all designations of charities, when it could use less drastic measures that would ensure legitimate charitable programs can continue.

This problem was addressed by the court in the KindHearts case, where the court said “law enforcement must have an objective, factual basis to believe that “the loss or destruction of evidence is imminent.”³⁶ The court ruled that Treasury must demonstrate facts to support its belief that funds are in danger of transfer as part of showing probable cause to obtain a warrant

³² OMB Watch review of correspondence between Treasury and three designated U.S. nonprofits.

³³ 107 P.L. 297, § 201.

³⁴ <http://volunteers.unicefusa.org/activities/fundraise/>

³⁵ Executive Order 13224 issued by President George W. Bush on Sept. 23, 2001, online at <http://www.fas.org/irp/offdocs/eo/eo-13224.htm>

³⁶ *KindHearts for Charitable Humanitarian Development v. Geithner, et. al* United States District Court for the Northern District of Ohio, Western Division Case No. 3:08CV2400 p. 30, opinion

authorizing the seizure/freezing of the funds. This process could be the basis for new procedures dealing with frozen charitable funds.

D. Lack of proportionality

Treasury's approach to enforcement fails to differentiate between acts undertaken by an organization and those undertaken by employees or others acting outside the scope of their authority and without the knowledge or consent of the governing body. Research suggests that Treasury's policy of shutting down entire charities, rather than sanctioning individuals within the institution that are guilty of wrongdoing, is overly harsh and misguided. For example, a 2004 report *Terrorism and Money Laundering: Illegal Purposes and Activities*³⁷ reviewed the facts surrounding the shut down U.S. charities and found problems typically occurred when an individual acted out of ideological or criminal motivation. Small-scale violations by rogue individuals were primarily to blame when diversion for non-charitable purposes occurred.

Treasury's response, the complete shutting down of organizations and freezing of their funds, is disproportionate to this type of situation. A better approach is reflected in its treatment of for-profit entities such as Chiquita Banana.

Between 1997 and 2004 Chiquita Brands International paid approximately \$1.7 million to the United Self-Defense Forces of Colombia (AUC) and the leftist Revolutionary Armed Forces of Colombia (FARC), both designated terrorist organizations, for protection in a dangerous region of Colombia. Instead of designating Chiquita and freezing its assets, the Department of Justice put three of its officers under investigation. No criminal charges were filed, but on March 14, 2007, Chiquita agreed to pay a \$25 million fine.

On April 24, 2003, a board member of Chiquita disclosed to Michael Chertoff, then assistant Attorney General, Chiquita's clear violation of anti-terrorism 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.³⁸

E. Flawed assumptions

After 9/11 and through early 2009, Treasury justified the negative impacts anti-terrorist financing enforcement has had on charities by claiming the sector is a "significant source of terrorist financing."³⁹ The *Guidelines* allege its investigations "revealed terrorist abuse of charitable

³⁷ 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://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1032&context=lawrev> .

³⁸ "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.

"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..> "Ex-Chiquita Execs Won't Face Bribe Charges," *Washington Post* (Aug. 12, 2007). "Chiquita fined for Colombia payments," *Los Angeles Times* (Sept. 18, 2007).

³⁹ 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

organizations, both in the U.S. and worldwide, often through the diversion of donations intended for humanitarian purposes but funneled instead to terrorists, their support networks, and their operations.”⁴⁰ The charitable sector has made repeated requests for specifics so that it could be better informed about what kinds of situations to avoid. Treasury has only referenced open source media reports and its website,⁴¹ which only provide general information.

Treasury data shows that the charitable sector, especially U.S. charities, is not a significant source of terrorist financing. For example, U.S. charities account for only 1.68 percent of all SDGTs. See Table 2 below.

Table 2: Charities & Individuals Associated with Charities on OFAC’s 2009 SDN List

Charities & Individuals Associated With Charities (77, including 48 charities & 29 individuals)	10.69%
All Charities: (48 listed on OFAC list)	9.0%
Individuals Associated With Charities: (29 listed on OFAC list- no updated data available)	5.4%
Foreign Charities: (39 listed on OFAC list)	7.3%
U.S. Based Charities: (9 listed on OFAC list)*	1.68%

(Of approximately 530 entities listed on the September 2009 OFAC list)

The Staff Monograph to the 9/11 Commission “revealed no substantial source of domestic financial support” for the 9/11 attacks.”⁴² The report cautions 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.”⁴³

Treasury has also promoted an overly simplistic theory of “dual purpose charities” that ignores differences between front organizations, social service wings of terrorist groups and those that may be infiltrated by terrorist sympathizers.

<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

⁴⁰ 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.

⁴¹ 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.

⁴² Terrorist Financing Staff Monograph to the 9/11 Commission National Commission on Terrorist Attacks Upon the United States, p. 3 (2004). Available at http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

⁴³ *Ibid*, at 9

This theory was described on May 20, 2007 in a hearing before the Senate Homeland Security and Governmental Affairs Committee on the topic “Violent Islamist Extremism: Government Efforts to Defeat It.” Chip Poncy, the Director of Treasury’s Office of Strategic Policy, for Terrorist Financing and Financial Crimes, testified that Treasury considers an entire organization to be a supporter of terrorism if any aspect of an organization is engaged in terrorist support. Poncy acknowledged that this “raises operational issues as to whether or not Treasury can look at minimalizing collateral damage.” However, Treasury has not taken any steps to minimize collateral damage.

2. Steps charitable organizations have proactively taken to prevent their resources from being used to benefit designated terrorist organizations.

To ensure charitable resources are used only for charitable purposes, the U.S. charitable sector has proactively taken steps to address the unique threat terrorism poses to charitable programs. Since 9/11, guides and programs have been created that provide responsible practices to protect charitable and philanthropic activities from terrorist diversion. These include the Treasury Guidelines Working Group’s *Principles of International Philanthropy*⁴⁴ and the Council on Foundations and Independent Sector’s *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know*.⁴⁵

In addition, United States International Grantmaking, a project of the Council on Foundations and the International Center for Not-For-Profit Law “facilitates effective and responsible international grantmaking by U.S. foundations.” It sponsors a website⁴⁶ with information on international grantmaking basics, legal issues, accounting and information on global disasters response.

In August 2008 Muslim Advocates launched the Muslim Charities Accreditation Program. It “is designed to enhance the knowledge and ability of nonprofit leaders to meet the demands of governance, legal and financial compliance.”⁴⁷ The program is a partnership with the Better Business Bureau’s Wise Giving Alliance, a charity evaluation program that also promotes nonprofit best practices. Muslim Advocates educates nonprofit leaders about the BBB-WGA Standards for Charity Accountability, assists them with evaluation by BBB-WGA and provides technical training, free expert assistance, and professional evaluation of legal and financial records.

Additional examples of due diligence, standards and best practices resources generated and used by the U.S. charitable sector include:

- *InterAction’s Private Voluntary Organization Standards*, which define “the financial, operational, and ethical code of conduct for InterAction and its member

⁴⁴ Treasury Guidelines Working Group, March 2005, online at http://www.usig.org/PDFs/Principles_Final.pdf

⁴⁵ *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).

⁴⁶ <http://www.usig.org/>

⁴⁷ <http://www.muslimadvocates.org/charities/main.html>

agencies.”⁴⁸ With more the 180 members, InterAction is the largest coalition of U.S.-based international nongovernmental organizations (NGOs).

- *Humanitarian Accountability Partnership*,⁴⁹ (HAP) founded in 2003, “certifies those members that comply with the HAP Standard in Humanitarian Accountability and Quality Management, providing assurance to disaster survivors, staff, volunteers, host authorities and donors that the agency will deliver the best humanitarian service possible in each situation.”
- Transparency International’s (TI) *Preventing Corruption in Humanitarian Operations” Handbook of Good Practices* ⁵⁰ which “includes ways to track resources, confront extortion and detect aid diversion. The handbook, part of TI’s broader work to stop corruption in humanitarian assistance, covers policies and procedures for transparency, integrity and accountability, and specific corruption risks, such as supply chain management and accounting.”

What does this due diligence look like in practice? U.S. charities adopt appropriate risk procedures appropriate to the organization’s mission and circumstances. The methods used will depend on a variety of factors, including the location of the program, cultural factors, local financial systems, the relationship the government and civil society, including the regulatory structure and level of independence from government interference in civil society, logistical barriers and urgency, such as responding to a natural disaster.

The many possible methods of due diligence include:

- Advance investigation of grantees and local partners to ensure they are qualified to carry out the funded programs and activities
- Written agreement that specifies terms for use of grant funds
- Regular reports on use of grant monies⁵¹
- Ongoing monitoring of the grantee’s progress in carrying out funded programs and activities, through site visits or other means
- Require the grantee to maintain records to show all grant funds used for charitable purposes⁵²

⁴⁸ <http://www.interaction.org/document/interactions-pvo-standards>

⁴⁹ <http://www.hapinternational.org/>

⁵⁰ The Feinstein International Center (FIC) of Tufts University, the Humanitarian Policy Group (HPG) of the Overseas Development Institute, and TI in collaboration with seven leading international non-governmental humanitarian organisations: Action Aid, CARE International, Catholic Relief Services, Islamic Relief Worldwide, Lutheran World Federation, Save the Children USA and World Vision International.

http://www.transparency.org/news_room/in_focus/2010/hum_handbook

⁵¹ Treas. Reg. 53.4945—5(b) and (c)

⁵² Rev. Rul. 68-489, 1968-2 C.B. 210

- Work in cooperation or consultation with other organizations that are familiar with the region and the local charity, such as the International Committee of the Red Cross Red Crescent, or one of its affiliated organizations, including the American Red Cross
- Obtain referrals for local implementing partners from reputable nonprofit organizations operating in the region
- Provide capacity building training to local partners
- Check U.S. watch lists on local partners

In the final analysis, this is a people to people business. Good accounting and management practices are not enough to ensure charitable resources are used appropriately. That is why charities ensure that their missions are successful and guard against cooption of charitable funds and services for illicit purposes by cultivating relationships of trust with donor and recipient communities. In our sector this is referred to as “knowing your grantee.”

3. Government efforts to block terrorism financing and support have made charitable work difficult internationally

A. Discouraging International Programs

The most counterproductive impact Treasury’s enforcement practices have had on legitimate charities is that it has discouraged U.S. charities from pursuing international humanitarian, development and peacebuilding work. This has been particularly true in areas where Specially Designated Global Terrorists (SDGTs) control territory and are also impacted by natural disaster, famine or other emergencies. It also makes communications intended to bring an end to violent conflict impossible.

There are few studies that document these trends, as it is difficult to measure the absence of programs. However, some data from the Foundation Center provides an indication of the trend that supports anecdotal evidence. For example, between 1998 and 2001 international grants targeting overseas recipients dropped from almost 40 percent in 1998 to 31 percent⁵³ and dropped again between 2002 and 2004.⁵⁴ Although it appears to rebound in 2006, accounting for almost 45 percent of all international grants, 60.1 percent went to grantees in Switzerland, England, and Kenya. The study Collateral Damage said, “This suggests many grants were given to intermediaries for regranting or to western-based organizations in the developing world.

⁵³ International Grantmaking Update, Foundation Center, October 2003, at <http://foundationcenter.org/gainknowledge/research/pdf/intlupdt.pdf>.

⁵⁴ International Grantmaking Update, Foundation Center, October 2006, at <http://foundationcenter.org/gainknowledge/research/nationaltrends.html>.

Likely only a minority of cross-border grants went to grassroots organizations in the developing world.”⁵⁵

A survey by the Foundation Center in 2004 survey found a majority of respondents agreed that international funding is more difficult due to “the more demanding and uncertain regulatory environment” and “increased security risks abroad.”⁵⁶ A study published by *Alliance* magazine in 2003 found that counterterrorism measures create practical problems for program operations and organizational anxiety about the draconian consequences of non-compliance. Organizations interviewed expressed concern for the future of international grantmaking because of the unpredictability of counterterrorism enforcement, saying inexperienced grantmakers “will [be] frighten[ed] away ... think[ing] that it is not worth the effort.”⁵⁷

This effect of this fear was illustrated in a 2003 *New York Times* article, “Small Charities Abroad Feel Pinch of U.S. War on Terror,” that described how the Rockefeller Philanthropy Advisors suspended funding for a Caribbean program designed to “kick-start a flow of American charity” to poverty stricken areas. Treasury’s Guidelines were cited as the reason. 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.”⁵⁸ Later in the article, Robin Krause of the law firm Patterson, Belknap, Webb & Tyler noted, “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.”

B. Failure of OFAC to publicly list all organizations it considers illegal for U.S. charities to deal with as a SDGT

Treasury promotes checking the SDGT list as a primary method of compliance with anti-terrorist financing laws, but does not list all the groups charities are expected to avoid. This came to light during the criminal trial of the Holy Land Foundation (HLF). In that case the defense argued HLF’s program was legal because they delivered aid through zakat (charity) committees that were not on the SDGT list. However, OFAC official Robert McBrien told the jury that designation is not necessary and that keeping up with front groups “is a task beyond the wise use of resources.” Instead, he said OFAC targets umbrella groups.⁵⁹

OFAC’s position essentially forces charities to guess whether any particular group is on OFAC’s non-public, secret list. Uneven enforcement adds to the confusion, since, the same zakat committees HLF funded also received aid from the U.S. Agency for International Development (USAID) and International Red Cross, and they were not prosecuted.⁶⁰

⁵⁵ *Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve by Grantmakers Without Borders and OMB Watch*, June 2008, online at <http://www.ombwatch.org/node/3727>

⁵⁶ *Ibid.*

⁵⁷ Rachel Humphrey, "Alliance Extra – June 2003. *Alliance* (June 2003). Online at <http://www.allavida.org/alliance/axjune03a.html>.

⁵⁸ Stephanie Strom, "Small Charities Abroad Feel Pinch of U.S. War on Terror," *The New York Times*, (Aug. 5, 2003).

⁵⁹ <http://www.ombwatch.org/node/3849>

⁶⁰ <http://www.alternet.org/module/printversion/108740>

C. OFAC's licensing process is slow, inconsistent and politicized.

Under Treasury regulations, charities wishing to provide aid in areas subject to IEEPA sanctions or where listed groups may inevitably be involved must request a specific license to OFAC, which has absolute discretion in granting or denying such licenses. There are no criteria, no deadlines for making a decision, and no appeal if the application is denied.

Specific license applicants must submit the names of all parties “concerned with or interested in” the proposed transaction and “any further information as is deemed necessary.”⁶¹ OFAC can place conditions on a license or “exclude any person, property, or transaction from the operation of any license.”⁶² OFAC can impose reporting requirements “in such form and at such times and places” as it wishes,⁶³ maintains control of the licensee’s activities and has discretionary power to amend or cancel it.

There are widespread complaints from operating charities that the licensing process is plagued by delays, unexplained denials, lack of standards and timetables. They say this is particularly problematic in disaster response situations, making their response much less effective. In addition, the State Department directs many of OFAC’s charitable license decisions, which causes delays and subjects charitable programs to government foreign policy. This violates the separation between the voluntary sector and government, politicizing private philanthropy. In addition, charities seeking to ship bulk goods for aid must get licenses from the Commerce Department, which is similarly beset with delays and unexplained denials.

4. The communication and coordination process between the Treasury Department and the charitable organizations community is problematic.

While Treasury officials have made efforts to reach out to the charitable sector by speaking at events and meeting with charities, these efforts have not been productive. There continues to be substantial disagreement about the nature of the problem and the proper way to address it.

At the May 2007 Senate Homeland Security and Governmental Affairs Committee, Poncy characterized Treasury’s relationship with the charitable sector as a “close” relationship involving “extensive consultation.” This characterization ignores the fact that the charitable sector has consistently and clearly asked for the withdrawal of the Guidelines. The ongoing discussions between Treasury officials and the Treasury Guidelines Working Group, which is comprised of a broad cross section of U.S. charitable organizations and experts have not brought Treasury and the charitable community to agreement on a common understanding of the nature of charitable operations or provided clarity about how Treasury defines the problem. I posted a summary of such a meeting online⁶⁴ to provide the sector with a snapshot of the issues. It

⁶¹ 31 C.F.R. 501.801(b)(3).

⁶² 31 C.F.R. 501.597.502.

⁶³ 31 C.F.R. 501.801(b)(5).

⁶⁴ http://www.charityandsecurity.org/analysis/emerging_issuses_US_counterterrorism_regime Sept. 22, 2008 conference call between the Treasury Guidelines Working Group (TGWG) and officials of Treasury’s Office of Terrorism and Financial Intelligence.

covered the current nature of the terrorist threat to charities, the extent to which charities are conducting risk assessments and consulting terrorist lists and relief operations in high risk areas of the world.

The discussion revealed problems with:

- Treasury’s broad and vague definition of the nature of the threat
- Treasury’s legal authority to regulate “exploitation” and “abuse” under economic sanctions laws,
- Treasury’s new “alternative delivery system” initiative
- the lack of humanitarian principles not incorporated into Treasury’s idea of risk assessment
- lack of clarity and due process in Treasury’s designation process

The “alternative delivery system” is an arrangement between Treasury, USAID and American Charities for Palestine (ACP) that provides an alternative route for delivery of services for nonprofits working in conflict zones. It is structured to give USAID authority over private charitable donations, which is inconsistent with the basic principle that the charitable sector is independent of government. The U.S. charitable community has opposed this structure as a solution to the problems of delivering aid in conflict zones.

In some cases Treasury has failed to respond to requests for meetings, particularly on the issue of frozen funds. For example, in November 2006 a group of nonprofits sent Treasury a letter asking it 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.”⁶⁵ 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.

There was no response until Rep. Jose Serrano’s office asked Treasury to meet with the group. At the January 15, 2008 meeting representatives of the charities proposed a process for releasing the funds. Treasury’s response was inconclusive and it took no further action. During the meeting, Treasury was given a list of questions regarding the status of frozen charitable funds but never responded.

In July 2009 members of the Charity and Security Network met with David S. Cohen, the newly appointed Assistant Secretary for Terrorist Financing. The problem of frozen funds was discussed at that meeting, and Cohen agreed to a follow up meeting that would also include representatives of the Department of Justice. After receiving no response to emails requesting

⁶⁵ See Letter to Henry Paulson, Secretary of the U.S. Department of Treasury. Available at http://www.ombwatch.org/npadv/Paulson_letter.pdf.

date for a follow up meeting, I wrote to Assistant Secretary Cohen in February requesting a date. In April I received a letter from Poncy summarizing Treasury's position on frozen funds, expressing willingness to meet but not proposing a meeting date.

5. The anti-terrorist financing guidelines issued by the Department of Treasury are not useful to charitable organizations.

In November 2002, Treasury released the *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (Guidelines)⁶⁶ without public comment or input. It included suggested governance, transparency, financial, and grantmaking practices. The Guidelines were widely criticized by the charitable sector for suggesting practices did not reduce the risk of diversion of charitable assets to terrorists and placed charities and foundations in a government investigator role.

In a 2003 article "How the War on Terror Hits Charity"⁶⁷ William P. Fuller and Barnett F. Baron of the Asia Foundation summed up the general complaints against the Guidelines, saying "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] relationships of trust and the ability of US foundations to operate freely and effectively."

In May 2003, the IRS sought public comments on ways U.S. charities and foundations might prevent the diversion of charitable assets to terrorists.⁶⁸ In April 2004, Treasury invited organizations that submitted comments to the IRS to meet and discuss potential revisions. Meeting participants established the Treasury Guidelines Working Group, which developed the *Principles of International Charity*⁶⁹ 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,"⁷⁰ recognizing that there is no one set of procedures for safeguarding charitable assets against diversion to terrorists. However, rather than adopting these principles, Treasury published a revised version of the Guidelines in September 2006.⁷¹ Although there were some improvements, the fundamental problems remain.

The primary problem with the Guidelines is that compliance provides no legal protection against being shut down and having assets frozen. In addition, they promote problematic procedures, such as:

- Organizations are asked to check "key employees, members of the governing board, or other senior management" and "assure itself that grantees do not appear on OFAC's

⁶⁶ http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf

⁶⁷ William P. Fuller and Barnett F. Baron, "How the war on terror hits charity," *The Christian Science Monitor* (July 29, 2003) as seen at www.csmonitor.com/2003/0729/p11s01-coop.htm .

⁶⁸ <http://www.irs.gov/pub/irs-drop/a-03-29.pdf>

⁶⁹ http://www.usig.org/PDFs/Principles_Final.pdf

⁷⁰ *Ibid.*

⁷¹ For a comparison of the 2005 draft and 2006 Guidelines, see <http://www.ombwatch.org//npadv/TreasGuidelinesSidebySide06.pdf> .

master list of Specially Designated Nationals (the SDN List).” Many charities have objected to this process because of flaws in the listing process and the vagueness and breadth of who should be checked against the list. 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.

- The Guidelines promote anti-terrorism certification statements to be signed by grantees and foreign partner organizations. One study found that foundations 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.”⁷²
- The voluntary nature of the Guidelines is questionable, given the broad powers Treasury has under the Patriot Act and Executive Order 13224 to seize and freeze charitable assets.
- The Guidelines continue to take a one-size-fits-all approach.
- There are no safe harbor procedures, opportunities to cure problems, and intermediate sanctions that allow charitable programs to continue to serve their intended beneficiaries.
- The guidelines can make funders risk averse, at the cost of programs that reach out to vulnerable populations and address the political and economic hardships at the root of terrorism.
- The sections which address governance and transparency are outside OFAC’s area of expertise, and are not relevant to the goal of preventing diversion of funds to terrorists.
- The Guidelines are being used by other regulatory agencies in ways that conflict with their supposed voluntary nature.
- The proposed increase in vetting procedures “suggest that charitable organizations run a gauntlet of information collection and reporting procedures that exceed due diligence practices which are routinely followed by organizations and which have, to our knowledge, proved adequate to prevent the unintentional diversion of assets to terrorist uses.” These provisions threaten the safety of humanitarian workers “who may be targeted as a result of their perceived lack of independence from the government.”

In December 2006 the Council of Foundations sent a letter⁷³ to then Treasury Secretary Henry Paulson on behalf of the Treasury Guidelines Working Group asking for withdrawal of the

⁷² Georgetown Public Policy Institute’s Center for Public & Nonprofit Leadership Presents "Safeguarding Charity in the War on Terror" (June 14, 2005), citing 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.

⁷³ http://www.cof.org/files/Documents/International_Programs/TreasuryLetter.pdf

Guidelines. The letter states, “the Guidelines significantly exaggerate the extent to which U.S. charities have served as a source of terrorist funding.” Additional problems cited include:

- The administrative burden of information collection and reporting requirements results in less time that can be spent for program activities.
- The Guidelines are set as voluntary by the Treasury Department, but “Members of the Working Group are also aware that IRS agents--both in the context of audits and exemption applications--have questioned organizations about their compliance with the Guidelines. If the Guidelines are voluntary, they should not become a criterion for evaluating tax-exempt status.”

In April 2010 the same working group again wrote to Treasury seeking withdrawal of the Guidelines. We are waiting for a response.

6. Suggestions on how to improve this process or the guidelines for charities issued by the Treasury Department

The U.S. charitable sector has been working on practical, sensible proposals to fix these problems. We will be happy to meet with you, Department of Treasury and the administration to share these ideas and discuss ways to achieve the common goals of charity and security. Our Principles to Guide Reform are attached to this testimony.

Changes are needed in the areas of transparency, accountability, proportionality and humanity.

A. Transparency

Improved transparency will benefit national security and legitimate U.S. charities by minimizing the risk of mistake or abuse in enforcement, facilitating oversight and better informing the regulated community. The following steps toward transparency are recommended:

- Create clear standards of what is and is not allowed
- Allow charities to defend themselves before an independent ombudsman, including the right to adequate notice, legal representation and confront and present evidence.
- Provide the public with explanations of the specific reasons for the shutting down of charities, so the charitable community can determine standards from Treasury practices
- Let the public know the amount and status of frozen charitable funds and seized goods.
- Establish clear standards and timelines for the licensing process

B. Accountability

This hearing an important step toward accountability, and I hope it is the beginning of an ongoing effort to address the issues raised. Congress should follow up on this hearing with concrete recommendations to Treasury and require them to report their progress.

There are some specific areas where Treasury should be held accountable and explain how it will address the problems described today. These include:

- How it will avoid repetition of losing KindHearts 1300+ page filing and its failure to respond to requests for reconsideration in a timely manner
- Refusing to release charitable funds without adequate justification
- Plans to correct constitutional defects in its designation procedures
- What steps it will take to be timely in response to requests from the affected charitable community to meet to discuss proposals for reform (i.e. frozen funds requests)
- Improve processing of license applications

C. Proportionality

In military operations the Department of Defense employs tactics designed to avoid civilian casualties. In anti-terrorist financing programs, Treasury fails to take similar care, leading to blocked aid for civilians overseas.

In fact, Treasury has said this ‘collateral damage’ is something Congress indicated it was willing to accept by writing the law the way it did.⁷⁴ Congress should make it clear to Treasury that this is not the intended outcome of IEEPA, and encourage the agency to take a more proportional approach to enforcement.

In fact, IEEPA already provides Treasury with the authority to employ less drastic remedies. It allows the President to “investigate, regulate, or prohibit” a host of financial transactions by means of regulations, licenses, instructions or other means.⁷⁵ In addition, IEEPA allows for “investigation, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit” any transactions relating to property held by the designated foreign country or national.”⁷⁶ These powers do not require freezing assets, and would allow for alternative approaches that correct improper transactions or procedures in otherwise law-abiding organizations. Instead:

- Congress should encourage Treasury to use intermediate sanctions and less drastic measures than designation and freezing funds, in a manner similar to treatment of entities like Chiquita Brands International.
- Treasury should distinguish between bad acts of individuals inside charities and bad faith conduct of the charity itself when considering sanctions. It should also distinguish between inadvertent errors and intentional diversion of funds.
- Treasury should recognize that U.S. organizations are highly regulated by IRS and state authorities, and take compliance into account.

⁷⁴ Chip Poncy, presentation at Pace Law Review Symposium, "Anti-Terrorist Financing Guidelines: The Impact on International Philanthropy" December 2004, summary online at http://www.charityandsecurity.org/background/Pace_Law_Symposium_Summary_Impact_Charities_AntiTerrorist_Guidelines

⁷⁵ Section 1702(a)

⁷⁶ Section 1702(b)

The bottom line should be that when acting in good faith and adhering to widely accepted due diligence standards, nonprofit organizations should be allowed to provide aid and services to people in need.

D. Humanity

The current U.S. government's lens of anti-terrorist financing is limited to a 'disrupt and dismantle' strategy that ignores the bigger picture. When the lens of the humanitarian imperative, is applied, we see suffering that can be avoided and opportunities for peace that can be exploited.

I urge you to adopt a humanitarian lens and instruct Treasury to do the same. Concrete steps in this direction include:

- Congressional re-examination of the finding in EO 13224, which placed humanitarian aid on the list of prohibited transactions with designated terrorist organizations.⁷⁷ IEEPA bars the President from blocking "donations of food, clothing and medicine, intended to be used to relieve human suffering, unless the President determines that such donations would 'seriously impair his ability to deal with any national emergency.'" Congress can to determine the extent and severity of this threat.
- Congress should make it clear that it wants charitable funds to be used only for charitable purposes. As a result, currently frozen funds should be released and new procedure adopted that would avoid freezing charitable funds in the future. The judicial branch could implement much of the process, bringing an element of independent review and decision making into the process. This would help de-politicize decisions regarding use of charitable funds and provide accountability. It also draws on the success of regulatory structure in the United Kingdom, where the UK Charity Commission is an arm of the court system. Courts could appoint conservators or receivers to oversee disposition of charitable funds in a manner that protects the charitable mission and respects the intent of donors. This would fill the gap in current law, and meet the public policy objectives of protecting charitable programs and the people they serve.

Conclusion

In May 2009, after a three year investigation of the worldwide impact of counterterrorism laws in 40 countries that included 16 hearings, the prestigious International Commission of Jurists released the report *Assessing the Damage, Urging Action*.⁷⁸ It found that many governments, including the U.S., have "confronted the threat of terrorism with ill-conceived measures that have undermined cherished values and resulted in serious human rights violations." It calls on governments to re-assess their strategies and not let temporary measures become permanent. Oversight by this subcommittee can serve as the first step in this reassessment.

On May 12, 2010 a group of thirty charities and experts wrote to President Barack Obama asking him to fulfill the commitment made in his June 2009 speech in Cairo to address problems current

⁷⁷ Section 1702(b)(2)

⁷⁸ http://icj.org/news.php3?id_article=4453&lang=en

national security laws create for charitable giving. The letter says, “Since the Reagan administration’s declaration in 1984 that ‘a hungry child knows no politics,’ U.S. policy has been to provide humanitarian assistance on the basis of need, without regard to political affiliation, creed, race or the international status of the country or territory to which a person belongs. It is the Golden Rule of the American nonprofit sector as it provides humanitarian assistance all over the world.”

I hope this committee will assess anti-terrorism financing programs in the context of this vision, respecting both our long traditional of charitable giving and security needs. Thank you for considering these issues. I look forward to a constructive dialog aimed at resolving the problems described.

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.

Reform Principles

The following ten principles should guide the U.S. government's approach to fixing national security rules and policies that create problems for legitimate charities, development programs, grantmakers, peacebuilding efforts, human rights advocacy and faith-based organizations:

1. The charitable mission, as stated in an organization's governing documents, should be protected at all times.
2. Humanitarian aid to non-combatants should be legal when necessary to save lives or relieve suffering, even when contacts with a listed terrorist organization are unavoidable in order to deliver such aid.
3. Aid and development programs should put the humanitarian imperative first, be nondiscriminatory, and free to target vulnerable populations, such as children and the disabled and promote community development.
4. The efforts of peacebuilding and mediation programs contribute to a peaceful world and should be legal, especially when they seek to turn terrorist organizations away from violence.
5. Human rights and security laws are complementary, and not in competition with each other.
6. Security policies and rules applicable to nonprofits should be transparent, fair and proportionate.
7. An action, including donating to a charity or partnering with another organization, that is legal at the time it is taken should never become illegal after the fact.
8. Nonprofits and their donors should not be targeted for investigation or sanctions based on their religious or political beliefs.
9. To be guilty of the crime for supporting terrorism, a person or organization must intend to support its illegal and violent activities.
10. Nonprofit organizations are independent of government. Security policies and rules should not seek to use them as instruments of foreign policy.

Additional Resources

Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve by Grantmakers Without Borders and OMB Watch, June 2008, online at <http://www.ombwatch.org/node/3727>

How the Work of Charities Counters Terror: And How U.S. Laws Get in the Way, Charity and Security Network, December 2009, online at http://www.charityandsecurity.org/system/files/CharityandSecurityNetwork_How_the_Work_of_Charities_Can_Counter_Terror.pdf

Resume

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Kay Guinane is a public interest attorney who specializes in the rights of nonprofit organizations, particularly in the areas of free speech and national security. Currently she is Program Manager of the Charity and Security Network, a project aimed at bringing down barriers to legitimate work of nonprofits from ill-advised national security measures. Her work includes research, advocacy, presenting and consulting with NGOs and grantmakers in the U.S. and abroad. Prior to that she was Director of Nonprofit Speech Rights at OMB Watch, a Washington, D.C. based government watchdog organization.

Ms. Guinane has represented a wide variety of nonprofit organizations, both as an advocate on issues and an advisor on tax and nonprofit law. Ms. Guinane has worked for the Alliance for Justice, the National Consumer Law Center, Environmental Action (Washington, DC), the Legal Aid Society of Louisville, and Citizens for Social and Economic Justice and the public defender service (Hazard, Kentucky). She holds Bachelors and Juris Doctor degrees from the State University of New York at Buffalo and is licensed to practice law in the District of Columbia, Kentucky and Maryland.

Publications:

Ms. Guinane has written and co-authored several reports on related subjects. These include the U.S. chapter for the book *Civil Society Under Strain: Counter-Terrorism Policy, Aid and Civil Society*, (Kumarian Press, edited by the London School of Economics Civil Society Centre), *How the Work of Charities Can Counter Terror* (Charity and Security Network 2009), *Collateral Damage: How the War on Terror Hurts Charities, Foundations and the People they Serve* (OMB Watch and Grantmakers Without Borders, July 2008), *Counterterrorism Developments Impacting Charities*, (International Center for Not for Profit Law, 2007), *Muslim Charities and the War on Terror: Top Ten Concerns and Status Update* (OMB Watch, March 2006), *The USA Patriot Act and its Impact on Nonprofit Organizations* (OMB Watch, 2003), and *Anti-Terrorism Bill Could Impact Nonprofits* (2001, abridged version in the *Nonprofit Quarterly* Spring 2002).

Publications on nonprofit speech rights issues include co-authoring the book *Seen But Not Heard: Strengthening Nonprofit Advocacy* (Aspen Institute, 2007), *Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) organizations* (First Amendment Law Review, University of North Carolina School of Law, Fall 2007), *IRS Political Activities Enforcement Program for Nonprofit Groups: Questions & Concerns* (OMB Watch, 2006), and *Attacks on Nonprofit Speech: Death by a Thousand Cuts I and II* (OMB Watch 2003 and 2004). Ms. Guinane joined attorneys Elizabeth Kingsley and John Pomeranz in writing *E-Advocacy for Nonprofits: the Law of Lobbying and Election-Related Activity on the Net* (Alliance for Justice, 2000) and is the author of *Group Buying Power: Meaningful Choices for Energy Consumers* (American Public Power Association, 1997).
