

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).