Early Warning System 1st Quarterly Report on the United States Charity and Security Network

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. 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 September 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 continue to have 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 still ignore nonprofits' calls for change, and Congress has not used its oversight powers to review counterterrorism programs and weigh the pros and cons of alternative approaches.

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. Authorities can seize property "pending an investigation," but no deadlines are required, and no criminal charges ever need to be filed.
Treasury has shut down seven U.S. nonprofits, designating them supporters of terrorism. For designated nonprofits, lack of basic due process rights and use of secret evidence 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 difficult 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." The courts have thus far generally upheld Treasury's designations, justifying this high level of deference as necessary in matters of 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 only one has had employees convicted (the charity itself was unrepresented during trial). Some of the evidence in these cases was 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 received 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 tool has proven highly problematic for program operations and been widely criticized. These "voluntary" best practices are the worst of both worlds, demanding burdensome investigation by charities into their partners or grantees, while conferring no protection from legal sanction even if the charities follow the Guidelines exactly. 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

Broad and vague definitions are at the root of the problem with the overall counterterrorism regime. 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 determine what constitutes illegal behavior or predict what activities will cause OFAC to shut them down.

For example, Texas-based Holy Land Foundation for Relief and Development (Holy Land) spent $12.4 million on charitable activities. In the criminal prosecution against the foundation, the government argued that this constituted 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 November 24, 2008, after a two month retrial, Holy Land and five of its leaders were found guilty on charges of supporting Hamas.

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," yet has failed to provide specifics to substantiate these claims. Treasury's rhetoric is now being picked up and repeated by other agencies, transforming the false assumption into a widely accepted myth.

Treasury ignores credible research that contradicts its exaggerated claims and disregards traditional and effective methods of due diligence already used throughout the nonprofit sector. In doing so, Treasury 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 less than two 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. Designated charities and foundations, both U.S. and foreign, account for only seven 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 that pus them into the role of police. Close, established relationships between nonprofits and international partners ensure that funds flow into the intended pockets. However, when nonprofits are forced 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 violates 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, nonprofits have pulled out of programs because of counterterrorism laws. 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 authorizing the designation and freezing of assets do not provide any timeline or process for long-term disposition, so assets may remain frozen for as long as the root national emergency authorizing the sanctions persists. Since the "war on terror" is very unlikely to have a clear resolution, the problem of frozen assets 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, while emphasizing the importance of due diligence and financial controls.

Nonprofits face tremendous pressure to adopt the practices prescribed within the Treasury Guidelines, even though these measures are supposedly "voluntary," burdensome, and ineffective at preventing terrorism. For example, the Guidelines promote checking terrorist watch lists. This process is not required by federal law, and 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, highlighting the effectiveness of existing due diligence that organizations customarily engage in. Still, many organizations feel compelled to use the Guidelines. Others are refusing, citing constitutional objections.

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 and foster 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.