

COMMITMENT TO CHARITABLE GIVING:
ONE YEAR AFTER OBAMA'S CAIRO SPEECH

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Kay Guinane: The one year anniversary of President Obama's speech in Cairo calls to our attention for us to create for charitable organizations and to work with government to craft solutions that we believe this is a problem in itself that we believe that human rights and security laws can coexist and that we have to achieve that synthesis. Today on the panel we will have four speakers. We have one change, Mark Owens, was called to testify in a trial in Ohio today. It was supposed to be Monday, but they rescheduled for today. So Rob Buchanan President of the El-Hibri Charitable Foundation and former director of International Programs at the Council on Foundations has kindly agreed to come in.

Steve Vladeck, from American University will be here a little late. He is testifying at a hearing in the Senate this morning. I think that will ring a bell with him. And he says we're wrapping up and he will be here in about seven minutes so we'll time him.

So with that, I will do a brief overview of the regulatory regime that we are concerned with before getting into the details both what's happening legally and what's happening with operational charities on the ground.

The importance of the Cairo speech, we mentioned the problem with charitable giving on its highlight is the problems that most severely impacted Muslim organization funded charities that it applies to the entire US nonprofit sector as well. So it's a national problem our sector experiences. The overall legal regime is based on a combination of antiterrorism and economic sanctions laws that sanction all transactions of any kind with the listed organization unless it is to supply medicine or religious material. US Department of Treasury is the main enforcement agency.

The Treasury believes that charities have supported terrorists. They have shut down organizations without prior notice, freezing all funds and ceasing all files, equipment and tangible property including financial and donor records, and charitable donations. There are no clear standards to help charities to learn what Treasury considers to be terrorist support. There is not an independent review of Treasury's action. In fact, its regulations only allow an organization to send a letter and submit information asking for reconsideration. This is made more difficult by use of secret evidence- it means accused charities cannot confront the evidence against them effectively. The Treasury only allows organizational funds to be used for legal defense in very limited circumstances.

On appeal to a federal court, attorney's now allow to present evidence en banc and in camera. And there is no process for the frozen funds to be released for charitable purposes. Only adherence to IRS rules and Treasury's voluntary Antiterrorist Guidelines provide no legal protection for the assumption of innocence against the present sanctions.

So the regime that was in place last June when President Obama made his speech in Cairo remains in place today.

Our first speaker in February was named President of the El-Hlbri Charitable Foundation which is located here in Washington. He provides strategic leadership by working with the Board of Trustees and the Management Team, discussed long laying goal strategies, division and policies. He brings to the foundation over 20 years of experience from the nonprofit sector with expertise in the international development world, including serving as Director of International Programs at the Council on Foundations.

Rob Buchanan: Thank you Kay. I'm very happy to be here and I'm going to be drawing primarily on my 10 years of experience with the Council On Foundations, and so I'm not really speaking on behalf of the El-Hibri Charitable Foundation for the purposes of this particular forum.

Just to take you back to the post 9-11 environment in this country, the government took several actions which affected the nonprofit community Executive Order 13224 of the Patriot Act, and in November of 2002 the Treasury Department's Antiterrorist Financing Guidelines. And I have to say for those of us who think that we're sort of keeping an eye on what's going on in the government and trying to help out the charitable community we were caught off guard by these Treasury Guidelines. We were not expecting them.

They had come about because a group of Muslim American organizations had gone to the Treasury Department in the summer of 2002, as I understand it, and they said to the Treasury Department, look we understand that we are under the microscope as far as you guys are concerned, that our every move is being monitored and we're about to enter the Ramadan period fund raising which is a big fundraising time of year for us, and we want to make sure that we do our fundraising in a way that is totally above board, totally transparent, doesn't raise any red flags for you, doesn't get anybody into any trouble. So the Treasury Department said okay we'll give you some guidance on that. And the result was the Treasury Department issued the Antiterrorist Financing Guidelines, but they didn't issue them in a specific way for these Muslim American groups. They issued them a general way, applying to all charities. And that's where it caught the attention certainly of the Council On Foundations at that point.

So just to give you a sense of the flavor of these guidelines, they called on charities to investigate all of their grantee's organizations in terms of their

principle officers and board members, which most charities were doing in fact, at that point and are required to do during existing law and regulations. But the guidelines went beyond that and said okay we think that you ought to investigate your, the contractors of your grantees and the subcontractors of your grantees to make sure that they're all above board. And we also think that you ought to investigate the banking relationships of your grantees to make sure that there's no money laundering activity or any other illegal activity involved. So it's at that point that the charities began to say well, and we began to hear from them at the Counsel On Foundations. Like this is way beyond our skill set, way beyond our capacity. We feel like we should be taking these guidelines seriously, we don't want to get into trouble with the federal government even though these are voluntary, you know, we think maybe we ought to comply with them. But gosh we can't do all that. We don't have the, as I say the skills, we don't have the manpower, the woman power, we don't know how to investigate banking relationships.

The Council on Foundations began to look very seriously at these guidelines. They have a very heavy law enforcement orientation. These guidelines were written by, they came out of the General Council's Office and Treasury, they were written by law enforcement people for a law enforcement purpose. They were not written by people who understand how charities operate and what they do. The guidelines did not, for instance, come out of the exemplary (inaudible) of the IRS, which all we can tell was basically not consulted along these guidelines.

So a very heavy law enforcement approach, unrealistic in terms of what charities could actually do. Ineffective, we felt, in the long run because the guidelines suggested that the charities collected a whole lot of data about their grantees and then they could determine about whether the grantees were risky, were terrorists, so forth. And the fact is that as we pointed out many times at the Treasury

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Department, if you're a terrorist organization you are not going to admit that you're a terrorist organization. You're going to say we're a legitimate charity, we're no problem here. So you're going to be collecting all that information, we don't think it's going to help you to identify the terrorists ultimately.

And importantly we began to understand that if charities were out in the rural, in particular charities in overseas offices and field staff, humanitarian organizations that work in very dangerous areas of the world, if they go around collecting lots of information on people and government registration and that sort of thing they're going to be viewed as an extension of US Government, not as a dependent organizations. Their staff are therefore, going to be at risk, in danger of, humanitarian aid workers have been murdered, they've been killed. We're all aware of that, and this is the kind of situation which just puts them in great, great peril. If the NGO, the charity is perceived as maybe not quite what they say they are and maybe being connected the CIA or some other element of the US Government immediately people become endangered in that situation.

So in 2004, after a number of organizations complained about the Guidelines, the Council on Foundations communicated with the Treasury Department, our concerns about the guidelines, there was a meeting at Treasury, then Treasury Security John Snow appeared for a time at the meeting and he said well look we'll just trying to solve a problem here and if the guidelines aren't exactly the way that they ought to be you guys tell us and we'll look at the possibility of changing them. So the upshot of that meeting was that we created a task force, the Treasury Guidelines working group- some 40 or 50 organizations, charities, businesses, religious organizations, legal experts who are involved in this area. And so we began to just try to think about well how can we take these guidelines and recommended some changes in them. And frankly, we felt the guidelines were so far out there that it just wasn't possible to change the guidelines to

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amend them, so we went a different direction, we developed a whole other set of what we which we ultimately called The Principals of International Charity, eight different points about what we felt the charities should be doing to safeguard their assets to make sure they didn't fall into the hands of terrorists. As we said many times in our discussions with the Treasury Department, we're all on the same side here, nobody wants to see charitable assets be converted to terrorists, but we just think your approach is not a very realistic one, effective one. Here's a list of eight points that we think are very important for charities to keep in mind in terms of doing what they can and they can do a lot to make sure that their assets don't fall into the hands of terrorists.

So we presented the Principles of International Charity to the Treasury Department, they said hmm, well we like some of that. We like, actually we like quite a bit of it, not sure that we can agree with all it. We urged them to drop the Voluntary Guidelines and just adopt our Principles of International Charity, that would have been the ideal solution, and they said no we can't do that. But they rewrote the guidelines. And to their credit they did modify the Voluntary Guidelines, rewrote them, incorporated much of what we had proposed in The Principles of International Charity, but certainly not all of it. And by 2006 they had revised the Antiterrorist Financing Guidelines twice, and then kind of indicated no we're probably not going to revise them any more. This is, we've don't about all that we can do here with you guys. But there's still some major problems with the guidelines. Even with the modifications we just felt they didn't go far enough in terms of meeting our concerns. So we continued to call for withdrawal of the guidelines. So this is the working group in the Council of Foundations. And then those who are involved and they continue to (inaudible) guidelines.

So the issues that remain at that point were that Treasury continued to beat the drum in all of their public messaging around terrorism that charities provide, and this is, these are the words they used, charities provide a significant source of funding for terrorists. And they keep saying that. Every speech, every testimony on The Hill, they sort of insinuate charities are providing a significant source of funding for terrorism. And we would say to them as we often did, if it's happening here in the United States we don't see it. If you know something we don't know you should be telling us about it because we want to correct that problem. We don't think it's happening. Give us the examples. Well we can't, it's all classified, we can't share that with you. So that was a continuing problem with the guidelines.

They also continue to emphasize data collection, you should collect all this information, you should collect all this information and all this information. Very time consuming, very costly for charities, diverting charitable resources into administrative types of work which we didn't feel there would be as effective anyway. You have all this information but you wouldn't know who the terrorists are in the end. So we felt that the approach was still misguided.

Another point was that the Treasury Department kept saying well the guidelines are to help legitimate charities avoid the unintentional diversion of their resources. In other words, Treasury keeps saying that charities are exploited by terrorists and we need to be more vigilant about that. And so the guidelines are to be helpful in terms of preventing this unintentional diversion of charitable assets. But every time we ask them for an example where this had happened they would provide an example of intentional diversion of assets. So this is a mismatch of what they're saying, where they're saying the problem is and the way that they're addressing it in the Voluntary Guidelines.

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Our position became, quite frankly, there really isn't a problem with the miss charities, you guys are barking up the wrong tree, you're spending a lot of time and energy chasing something that is really not the conflict here. Go after the folks who are intentionally diverting assets by all means, but leave the rest of the charities alone and don't taint them with your rhetoric about charities supporting terrorism. Because this has had its greatest impact in the Muslim American charity community. There's no question about that. Muslim American charities, which there are many, many good ones, have just had and, eight I think the number is eight, Muslim American charities have been shut down by the Treasury Department, and they are in legal proceedings around some of them, some of which the Treasury has lost on. But others that other Muslim American charities have just found it very, very difficult to raise money in this kind of environment. So they've been very limited in what they could do. I know back in I think it was 2006 that the Pakistan earthquake, they were the (inaudible) Foundation and a number of other Muslim organizations were trying to raise money in the United States for humanitarian relief was just very, very (inaudible) not able to raise very much.

So I'll just conclude here. I think the fact that the Obama Administration came in and we felt that there will be some new faces at Treasury, some fresh eyes, maybe some new thinking about some of these issues. There was a new Assistant Secretary appointed at Treasury for the terrorist issues, and we had some meetings with him last year. And I think there's been a change in the rhetoric a little bit but I've noticed they've stopped talking to a large extent about the charities providing a significant source of funding for terrorism and they've focused more on the criminal activities. So I think maybe we've had a bit of an impact there, but the Treasury Guidelines, as far as know, are still sort of pretty much where they were last year. I've been away from it for a few months. So I think I'll stop there.

Kay Guinane: Okay. Thank you. Next Ellen Willmott from Save the Children will speak on the perspective of charity operating on the ground internationally. She's Deputy General Counsel and Vice President, and has represented Save the Children and the US Agency for International Development, the Department of State and Treasury/Office of Foreign Asset Control, and Congressional Staff in connections with counter-terrorism regulations and other regulatory policy matters.

Ellen Willmott: Thank you Kay. So even in a world if the Treasury Guidelines were not here and we actually were able to get the charitable contributions that we need to operate overseas, actually operating overseas is highly problematic given the current US Regulatory Trademark and policies of several of the US Government donor entities, such as USAID and Department of State. In addition, there are over regard definitions in our regulatory schemes, the Office of Foreign Asset Control to funds, Sudan for example, as one part of Sudan exempts out the disputed territories of Darfur, the Department of Commerce under the Exploit Administration Act defines Northern Sudan as all of Northern Sudan including Darfur. So if we were able to get permission from the Department of Treasury Office of Foreign Asset Control to transact business in Darfur and have say staff members there to provide services to the camps we wouldn't be able to give that staff person a satellite phone, so necessary for emergency communications, because the Department of Commerce would say no, no, no you need a license to get a satellite phone to Darfur, but that's Sudan was define it, even though it's not Sudan as the Department of Foreign Asset Control defines it for the prohibited parts.

Many of the regulatory and policy directives out of US Government create multilayer processes. Just to get permission to go overseas you have to apply

for licenses for OFAC, you have to apply for licenses for commerce, you have to go in and argue why giving psychosocial training to teachers in Gaza is not in fact, a transfer a big benefit to Hamas. You have to explain why that is not a prohibited transaction. And then it takes them six to nine months to get that license, and by that time the funding that you needed to perform say psychosocial training for children who have been devastated by the violence, you can't help their teachers identify them. You can't help their teachers direct them to the necessary medical or psychosocial services that they might need.

All of these types of prohibited prohibitions that are based on race, creed, color, national origin, tend to undermine the ability of the US Foreign Assistance policies and programs. It also undermines the legitimacy of the NTOs operating overseas, and more importantly, the Code of Conduct for the International Red Cross and Red Crescent Society and NGOs in disaster relief. And these are principles and commitments to which the US Government voluntarily agreed to become committed when it signed onto the Code of Conduct.

So example of the regulatory impacts on the operational charities include Executive Order 13224, as Rob mentioned, the USA Patriot Act, The Material Support Provisions, the OFAC Counterterrorism Regulations, the Exploit Administration Act. These are all administered by various agencies within the US Government. For example, under OFAC's most recently issued regulations for Somalia it would prevent a charity who has a license to be in Somalia and operate in al-Shabab controlled area, but you can't in fact build a well for water for a drought stricken area because someone from al-Shabab might draw a cup of water from that well. That would be material support.

I gave you the example of how the Exploit Administrative Act has administered by the Department of Commerce, for example, for Sudan where Darfur is part of

Sudan under their regulatory scheme but not part of Sudan, or except from the sanctions under the OFAC scheme. Knowing who you have to go to get a license to do what is nearly impossible, and it results in significant time, energy and effort to either ask forgiveness if you accidentally violate some of these provisions, or money if you have to pay a fine.

The eligibility requirements for under certain USAID schemes, for example, Mission Order 21 in the West Bank Gaza region, that creates such a chilling effect in a post conflict region that it's undermining the humanitarian imperative. I explained we can't provide psychosocial training to teachers who are with the public schools in Gaza because they are a Hamas controlled entirely, whereas we could work with a smaller, private school or a religious school because they are not Hamas controlled. But the children who are attending these schools, if in fact they can get rebuilt, aren't able to get the necessary care and services that they need.

Other examples, I think Bob really very clearly pointed out the jeopardy in which our staff is placed. When we are required to, and again West Bank Gaza currently and potentially the rest of the world at the end of the year under the USAID Partner Vetting System, if we are required to turn over personal information, sensitive information to the US Government for purposes of comparing it against the Department of Justice and terrorist, doubled secret probation, you're a terrorist but we're not putting you on a public list, list. Which by the way, this information is available to foreign governments, law enforcement agencies of the United States, let's see, who else? I think foreign governments and law enforces agencies of the United States is enough. If we're required to turn that information over and put it into a system to which there is no right of appeal, not process for which you can go and get the information changed if it should be erroneous. To be compared against a list that the Government

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Accounting Office, determined in fall of 2009, to be at least 30% inaccurate as to who was a terrorist and who wasn't a terrorist, our staff is going to be part of a large target on their back.

In addition, we have new regulations coming out called SPOT, which is the Specialized Predeployment Operational Tracker, which is going into effect in Afghanistan and Iraq in connection with the USAID and Department of State Funding. It is a military database. It is owned, operated, maintained, by the Department of Defense, the US Army to be exact. It too, is a database that is not confidential, it is subject to sharing of information with other US Government agencies, including law enforcement, foreign government agencies, and the like. We are being asked to input personal, sensitive information of our staff, the staff of sub-partners, the staff of sub-sub-partners who are funded through USAID or Department of State into the this database.

One of my favorite operational challenges is the Department of State's restrictions on speech. The No Contact Policy in West Bank Gaza, mostly West Gaza, is implemented by USAID. So basically, if you've received money from USAID, are paid with USAID money, or funded through a USAID grant, you are not allowed to have contact with members of Hamas.

Stephen Vladeck: The whole issue in this case is really distills to the standards that apply to the designation process employed by OFAC, by the Office of Foreign Assets Control, which has as you know issued a series of regulations, implementing the President's authority under IEFA and under the executive order.

Now to be clear, neither IEEPA or the executive order, require OFAC to make any statement as to why an entity is designated as a specially designated global

terrorist. Two, require OFAC to comply with any deadlines or providing notice. Or three, identify the burden of poor the agency carries. Now I'm not a law professor, oh wait, yes I am. Those are actually three relatively useful things. Instead it might be helpful to know what the agency's constraints were.

In addition, none of these authorities specify whether or when OFAC can provide for licenses to those groups who can show that they should not be subjected to the effects of these blocking orders. There's also a suggestion that they don't know what IEEPA requires, blocked individuals, relations with a nation on which the government has actually imposed economic sanctions, or whether OFAC can properly block any assets in which any foreign national has an interest. Unfortunately, the case lot has sort of gone in the latter direction where OFAC's authority is fairly unfounded. But although OFAC had a remarkable streak of never losing in court, ever, that streak has actually come into some tension in the last couple of years.

So the first case of the case some of you may be familiar with is the Al Haramain case from Oregon, and they are the District Court, although I upheld the designation of the Al Haramain Islamic Foundation of Oregon as a specially designated global terrorist under the ADA, it actually found that the notice procedures provided to Al Haramain violated the due process laws. Specifically because the procedure is that OFAC had devised delayed notice, right, for an unreasonable time. So even though OFAC had known for quite a while that they were considering blocking Al Haramain, put it on the list, it took forever to tell Al Haramain. And the District Court in Oregon said that violated the due process clause although then the District Court turned around and said but the error was harmless.

But the second case, and this actually we just had a decision on Tuesday, so the timing couldn't be better. It's the KindHearts case from Ohio. And there, similarly, the District Court found that in blocking KindHearts' assets, OFAC had violated the due process clause. The government, but more than that the District Court found the government had violated the KindHearts' fourth amendment rights by failing to obtain a warrant based on probable cause before they conducted the seizure of their assets. And moreover that they violated KindHearts' fifth amendment rights by relying on criteria for the so-called block pending investigation that are unconstitutionally vague as applied. And like the Al Haramain decision, that it failed to provide KindHearts with adequate notice and a meaningful opportunity to respond. And finally, as if that weren't enough, the District Court also said OFAC after they arbitrarily and capriciously in limiting KindHearts' assets to its own funds to pay for counsel for its defense.

So the courts are finally starting to have some skepticism of what OFAC has been doing.

Now in contrast with Al-Haramain, the District Court in the decision issued was it Tuesday or Monday? Monday I guess. On Monday of this week, held that the due process violations were not harmless, and in fact, ordered a remedy. And the specific remedy was actually a fairly creative one, in my opinion, which was that OFAC actually has to show up before the District Court, and in proceedings that are modeled after the Classified Information Procedures Act, has to show the district judge, en banc and in camera, what information it has that could provide meeting full notice to the designated entity to KindHearts for why it was sent to a block-order in the first place. We can talk more about this maybe in a few days, but I actually think there's a lot to commend this analogy to CIPA, a statute specifically designed to allow defendants or subjects of government

action meaningful access to government information to classified information even while protecting the government's in its secrecy.

So those are the two big block-in cases, and those are the two that are directly on point. The two that are not on point but that I want to suggest to you might be more relevant than you think. The first is a case currently before the Supreme Court that I'm sure many of you are familiar with, Holder vs. Humanitarian Law Project. This was argued on February 23rd by Solicitor General Kagan, who I suspect is going to get in trouble at her confirmation hearing for something she said in the oral argument, and I'll elaborate on that.

Just really quickly, the Material Support Provisions for those of you who aren't quite the nerd that I am, are a series of provisions enacted first in 1994 and updated in '96 and 2001, that generally prohibit the provision of a whole bunch of things to groups that are designated for antiterrorist organizations by the Secretary of State. The problem is that the kinds of things that are prohibited are things like service, trade-in, and expert advice and assistance. And the question that had arisen is what the heck do those things mean? And indeed the Humanitarian Law Project litigation has been going on for 13 years now, and there has been a series of rulings where the 9th Circuit had said the statute's unconstitutionally vague because it's not clear what it actually prohibits, and congress had responded by saying here's what we need when we say personnel or other things.

This time around, the 9th Circuit held that three provisions were unconstitutionally vague; service, training and expert advice or assistance, and without clarification from congress the Justice Department went to the Supreme Court which will decide the case. And what is striking about the government's argument is that at one point Justice, I believe it was Kennedy, asked the

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Solicitor General whether the government's position really would prohibit a lawyer from filing a amicus brief in a federal court on behalf of the designated foreign terrorist program because this would be "expert advice or assistance". And I'm sure you're all thinking the answer has to be no because Justice Kennedy loves lawyers. But in fact, she said yes, which I think does not bode well for her confirmation and in fact, many of the Justices were quite skeptical in response to that answer.

So the reason why this matters is because I suspect that, first of all the government's going to lose in Humanitarian Law Project, which I think will have very useful implications for the kind of work that these groups are doing. But second, that there's going to be pressure on congress as there has already been twice, to again revisit the Materials Support statute and to again provide further clarity for what actually these two prohibit, whether it needs to prohibit the Provision of Material Support to terrorist groups

Now the reason why that matters is by assemblance with the fourth case, which a feel fairly convince most of you have never heard of, which is a case called World Fuel Corporation vs. Paulson. Anybody? World Fuel? No? All right. Good.

So don't be disappointed if you've never heard of it, it's not reported and therefore you couldn't have found of it unless you were hanging out in the archives of the Federal District Court in Miami. But this is actually a case from 2008 also about OFAC. Now it's not about the specially designated global terrorists, it's about a different statute. In case you're not tired of acronyms yet, it's about the Foreign Narcotics Drugpin Recognition Act. Sorry, The Foreign Narcotics Kingpin Designation Act. I knew I'd get it right eventually. And basically, under the Foreign Narcotics Kingpin Designation Act, which we can't

just call the Kingpin Act because there's already another kingpin act, OFAC has the authority, much like its authority vis-a-vis SDGT's to identify the foreign narcotics kingpins and to use the same block-in power and sanction power and investigatory power to basically disrupt the flow of all assets to those designees.

What's fascinating about the Foreign Narcotics Kingpin Designation Act though is there is clear legislative history that congress meant for there to be an exception for any innocent American citizen or company that commerce actually specifically intended that OFAC's authority would not extend to any US entity that could demonstrate to some degree or certainly that they were innocent, that they actually were simply being harmed by their peripheral and unintentional affiliation with this group.

So in World Fuel you had a fuel supplier who had a contract with an airline and sued for breach of contract, one of the judgments in State Court, and wanted to get their money. But the airline was on the Foreign Narcotics Kingpin list, and so the money was blocked. And what the Court ruled was that OFAC in fact, exceeded its authority in not taking into account the possibility that World Fuel was in fact, an innocent third party and was therefore beyond the scope of the Kingpin Act.

The reason why World Fuel is an interesting case, even though there are clear and important differences between the Foreign Narcotics Kingpin Designated Act and IEFA, it suggests that were congress to consider creating statutory licensing authority, or a statutory exception for groups that could show that their effort were benign, they were peaceable, that they were innocent in some beautiful fashion, the World Fuel decision seems to suggest that those limits will be enforceable and that OFAC will be required by the federal courts to take that into account

when it decides whether or not to license these groups and to provide acceptance to its blocking orders.

So to add these last two cases together, if congress is in fact motivated to revisit this entire scheme in light of the HLP decision, it's very possible in my view that the World Fuel decision could provide further means of getting congress to not edit the Materials Support Statute, but to actually think holistically about how to ensure that it's only restricts that conduct which it both has the constitutional authority to prescribe and the intent to prescribe. And I think that could be very helpful.

Kay Guinane: Thank you. The last speaker will be Sahar Aziz of the Law Office of Sahar Aziz. She's a Civil Rights Attorney working with the Bill of Rights Defense Committee and the Muslim Legal Fund of America. She teaches National Security Law and Policy at the Georgetown University Law Center, and has served as Senior Policy Advisor to the Office for Civil Rights and Civil Liberties at the US Department of Homeland Security.

Sahar Aziz: Thank you very much, Kay. Well lest the image be the doomsday one after everything that we've heard, I am here to tell you that there is a solution or there are solutions. I've been tasked with explaining to you the product of months of efforts between various nonprofits and civil rights attorneys and law professors and frankly, I must give credit to Kay and Suraj and the Charity and Security Network because they've done a fabulous job of bringing together some great lines to come up with some solutions. And I do think that these attractable, these seemingly attractable problems can be resolved in a way that both to use the cliché, balances security with liberty.

So as you've heard from my co-panel the legal regime as it stands now is unacceptable and it demands improvement. Not only are they ill-equipped to take on this daunting task, but is also politicizes them which compromises their ability to form their mission, which is predominately humanitarian.

So what we have come up with, we, meaning the network, and that includes like I said the nonprofits and the individuals, are some principles, some underling principles and then some specific recommendation. There's about 10 principles which I won't go into all of them, but I did want to highlight a few of them.

The first one is that aid and development programs should put the humanitarian impertave first. And they should meet non-discriminatory when needed, and for vulnerable populations such as children and the disabled. Now I want to emphasize the non-discrimination element. And it has created a chilling effect among the donor community within the United States, and it's also just impeded the Muslim-Americans community's right to engage in charitable giving, as well as frankly some of their First Amendment activity to the extent that charitable giving is an expression of wants political viewpoints or wants associates.

Second, an action including donation to a charity or partnering with another organization that is legal at the time it is taken should never become illegal after the fact. So retroactive enforcement is just unacceptable, unacceptable as a matter of principal and unfair.

Fourth, donors and the nonprofits and their donors should not be targeted for investigation or sanctions based on the religious beliefs. This has occurred because essentially what's happened, and for example, the Holy Land Foundation case and some of the others, is the government has taken the donor list and gone down from the largest, I think, to the smallest, but particularly the

largest, and investigated those individuals for immigration or tax problems. So you are being penalized for being a donor.

And to be guilty, the next principle, to be guilty of the crime of supporting terrorism a person or organization must intend to support its illegal and violent activity. And I'll go more into detail. The specific intent was really important because of the implications, the negative implications, that are very long-term with being convicted or even accused of material support.

And finally, just preserving the independence of nonprofit organizations and ensuring that they are not tasked with combating terrorism and that they not become agents of foreign policy. And that frankly just, it completely undermines the principle among of the nonprofits, the tradition of the nonprofits independence.

Okay. So I'll go into specifics. First, there need to be clear and fair standards for designation and freezing of funds, and they must be established. Right now as some of my co-panel stated, they don't even, charities don't receive notice except for the Federal Register, and I don't know how many of you read the Federal Register every day, but it's not a very common source. So you find out because your assets are suddenly frozen and you only have 30 days to do anything about it, and that includes getting an attorney, and usually you don't know what is being used against you.

So one fix, there's many fixes, but one thing is specific intent needs to be included in any designation. So in other words, the government needs to prove that there was an intentional diversion of funds on monetary instruments to an SDGT, Specially Designated Global Terrorist or FTO, Foreign Terrorist Organization, or an intentional provision of material support, and there needs to be a defense. The defense is that the nonprofit can show that it did not know or

have reasonable cause to suspect that it was making funds economically resources or intangible support available then it should not be liable. And this just goes back to what some of the co-panel is saying, is how are you supposed to know everything that is going on in the conflict zone when there is an organization that's designated?

What is a reasonable solution, or a fair one, is to impose a due diligence standard. If the nonprofit engages in reasonable due diligence it should not be held accountable for things that it did not know of or intend to do. So due diligence could be included, for example, ongoing monitoring for signs of diversion or materials of war, exploitation, and use by some of its employees. Maybe the introduction of appropriate risk procedures appropriate to an organization's missions and circumstances. So in other words, I think that the proposals are reasonable be in a sense that the nonprofits aren't sticking their head in the sand and saying well we don't want to do anything and we don't want the government to, we want to government to leave us along. I mean, the nonprofits have to accept the due diligence as a responsibility in the past, but it should not be penalized for, or in such, due diligence should not be disregarded, it should be used to its advantage to protect itself.

The second thing that we recommend is that charities should be afforded a fair opportunity to defend themselves, and this is really important because secret eminence is a lynch bin on much of this, and even the CIPA, which Steve eluded to, is not even applicable, which is the Classified Information Procedures Act. And so one of our recommendations is to use that regime as guidance in this context, and to be used in the context there's no reason why it shouldn't be used here. Which essentially comes down to two things. Is that either the nonprofit has an attorney what has the appropriate security clearance, they then can review the documents and meaningfully represent their client. Or that there is a

summary provided, constitution specificity that gives enough information that again, the nonprofit is not intending to support terrorist activity. Because if you're just given some very vague or broad allegation and you don't have the facts or evidence, that's not a meaningful, that's not a meaningful process. It's kind of useless frankly. So that's one recommendation that we think is very important. And to also to take away from, right now is the Office of Foreign Asset Control and Treasury, take a way the function, the multiple function of prosecutor, judge, jury and executioner. There is no judicial, there is very, very little judicial review. Which again, is in violation of fundamental principles of justice in this country. And in other context, is unacceptable.

So when the US Government determines that it enforce an action that may be necessary it needs, it must, we believe, notify in writing and deliver to the Chief Executive Officer or the Chair of the governing board. The Federal Register should be, it cannot be the primary means of notice. And the notice needs to include, list sufficient specificity, the information that is the basis for the allegation. And there needs to be adequate time given to the nonprofit to hire an attorney and to provide a response. Thirty days it really not enough. Especially since these are very serious allegations.

With regard to obtaining legal counsel, one thing that's been a problem is financing, is you can't just go hire a lawyer pro bono that easily, you need to pay your lawyer. And the nonprofit has funds because they have been frozen. So they would like to use at least a portion of at least being responsible of those funds. At this point they have to get a license, and Treasury has unfettered discretion, and historically has pretty much denied them, which has left the backbone the nonprofit without representation. So it's not enough to say yes, you don't have a lawyer and you know, we'll give you some extra time. But you need to allow them to obtain a portion of their funds to be able to obtain legal counsel.

The other due process issue is to be able to appeal the designation. At this point if you get designated you can only go to Treasury and we think, we believe, or we argue that there should be a right to appeal in the US District Court with the appropriate jurisdiction. And the standard review should be whether the government's action was supported by substantial evidence. And you should be provided 120 days to respond. I think right now , what is it 30 or 60?

Unidentified Male Speaker: Sixty.

Sahar Aziz: Sixty days, which we find to be unreasonably short. Because again, have these are very serious allegations and you need time to just to get counsel takes time.

And finally, I just want to emphasize the prohibition on material, the Humanitarian Aid Law Project kind of goes into, but we think there should be an exemption for care of the wounded and sick, including medicine, medical services and hospitals. Right now the only exemption is religious materials and medicine. But you can't, anything that you need to actually take the medicine to the underprivileged individuals is not being supported. So supplies essential to survival such as food, clothing, shelter, water to take the pill has highlighted off it. Facilitation of communication between family members, orphanages and similar facilities and education for children should be exempted. Communications regarding security necessary to ensure a safe convoy of aid. Mediation and conflict resolution services and training, which is the crux of the Humanitarian Law Project. And legal services, despite Solicitor General Kagan's statements.

And finally, with regard to the fund, one concern is that the funds are frozen indefinitely at this point, and we would like to ensure that the funds go to, towards

the charitable purposes that they were indeed to by the donors. And that there needs to be some kind of a process in place whether it was an appointment of receivership or receiver or conservator that will allow an independent person that's qualified to manage the funds and direct them appropriately to another nonprofit or to some kind of same charitable purpose that was intended originally.

Q AND A SESSION

Unidentified Female Speaker: Can you talk about what recommendations you have to address these concerns and where they would be submitted?

Kay Guinane: I'll address that because the Charity and Security Network is coordinating that effort and there is a summary of it on our website. Right now we have a series of work groups who are turning these desired policies into specific regulatory legislative and legislative language, and we are communicating with congress and the agencies and going to the Whitehouse staff to ask them to meet with us, sit down and look at these specific proposals and see where we can come to an agreement.

Unidentified Male Speaker: I'm curious, (inaudible) have any success in policy to change (inaudible)? I'd just like to give a little bit of background. I haven't been with this (inaudible), but many years ago I dealt a lot with the Office of Foreign Asset Control and the basic mentality there was that they someone said at one point that we're all on the same side, but I don't think that the Office of Foreign Asset Control necessarily agree. There was a long history, we have (inaudible), Cambodia, North Korea and Cuba that had very restricted (inaudible) for many

years. And the position of the office was almost more sleepy than anything that occurred (inaudible). I had a long conversation with a (inaudible) who would have been the director of the office, now that a transaction involving someone who had, through Vietnam, that who as a result of transity through Vietnam, was designated a Vietnamese National, thus making it difficult to engage in transactions (inaudible). And I asked him literally I said well does this mean that if I go out and buy Jane Fonda's exercise tape after she's been in Vietnam you could come after me? And he said with a perfectly straight face, yes we won't do that, we're not going to do something quite that stupid. But we have the authority to do it. So they're coming from a viewpoint that they went to keep maximum authority to interfere with anything that they want, and in the context of also feeling that it's very nice to provide assistance but what we're really trying to do is weaken government influence, in particular (inaudible), and when you provide assistance in Gaza you are indirectly strengthening Hamas. So there's no way you're going to get around that.

Kay Guinane: Let's let the panelists address that because that's a key question.

Ellen Willmott: We actually did get a license to operate in Gaza and to engage in transactions that would be considered prohibitive if you take material support in the broadest possible content. We were allowed to handout, let's see tongue depressors, thermometers, measuring tools to gauge a child's weight gain during the times of stress. We were able to get permission to do all of that. We were not allowed however, to coordinate with the public health organization or the public school systems in order to implement programs, which is where they needed to be, because of the No Contact Policy which is not administered by OFAC. So it became nearly impossible for us to operate on a big enough scale to be as sufficient enough. In fact, we needed up basically working out of the back of a

truck. Or back of a car saying here, come we'll give you some materials, we'll give you some training, but we couldn't engage in that dialogue.

I think the mindset is sufficiently open at OFAC and the Department of State which is actually the foreign policy advisement to OFAC. I mean OFAC may stamp the document, but the Department of State says yes you can stamp the document. So if the Department of State, they heard us when we said we need to get in there and be able to do these things, they said yes you can. So I think that the will is there, I think what we need though is a concerted effort, not one off efforts to create some exemptions or some, a list of permissible charitable humanitarian activities that just allow us to go in and not have to necessarily go for the license or go convince the Department of State that it's not material support.

Stephen Vladeck: And I think that's why, and I have very little faith. I have very little faith in OFAC that it will change by itself. I mean I think the real question is what is the supreme court going to say to the Humanitarian Law Project because it's not such a question of whether they strike down the Material Support Statute, it's the question of how they do it. The Supreme Court has never had, to my knowledge, an occasion to pronounce on the things the First Amendment protects the kind of conduct and speech rights activities these groups are involved in with regards to whether is FTOs or SDGTs or both.

Unidentified Female Speaker: Or global terrorist organizations.

Stephen Vladeck: Or FTOs that's right, or those. Or just terrorists, right? I can one way or the other, unless the Supreme Court is totally coming out the other way in the Humanitarian Law Project the court's going to say something interesting and it's going to prompt congress to revisit the issue for better or for

worse. And I don't know necessarily that it would be for the better, but I think the more the court can say about the importance of this kind of speech and the importance of this kind of conduct, I think the more cover that will give to Treasury and congress to get behind legislative stronger licensing requirements or stronger legislation.

Sahar Aziz: I just have two responses. The first one is that President Obama made a promise, and very high profile one. He went to Cairo and he recognized that American Muslims are facing very serious impediments to their rights, which is their charitably giving, which is a religious tenant which is protected by the first amendment. And he recognized that. And I think that let's assume that he was genuine and authentic in his concerns and that he was also genuine is again that he was interested in finding a solution. So I think from the perspective that the foreign policy perspective is that he made a commitment and many people are going to be watching this and if he follows through then he deserves credit. If he doesn't follow through, not just among the American Muslims but I think within the Middle East, and right now given the two wars that we are undertaking, I think that he from afar possibly essentially cares about what many of those countries think. And again, it's a very serious issue if he's a fundamental tenant.

The second, so I think just politically that at least keeps the issue on the radar. But second, this and maybe I practice my comments emphasizing too much on the American Muslim impact, but that's not really what it's about, that's just how it's becoming expressed in our time. But it's really about the independence of the nonprofit sector. It's about what's going to happen in five, 10, 15, 20, 30 years. It's a about fundamental principles of how these this legal regimen is going to be played out. And doing what, essentially what all lawyers try to do to those who are big supporters of due process is to make sure the mechanisms in place so that its uses can't be made based on political minds. And so to the extent that

that is a salient argument and one that resonates let's say to congress, I think it's one that should be pushed forward, not just by Americans and charities, they can just show the impact, but also by the entire charitable sector .

Unidentified Male Speaker: I guess I can just add what's already been said that sure OFAC can be very tough and very firm, they don't want to change, they want to maintain as much control, but they're not an independent agency of the government. The political winds have shifted a bit, you can argue about how much and how far and what's going to happen, I don't have a crystal ball, but it's certainly through meetings that I've had with State Department people with the Whitehouse, the national security, counsel level staff, their concerned about these issues at OFAC. I mean, in a way that the previous administration was not. And so I think there is some political pressure coming from outside of OFAC on that particular vibe to take a different look at how they're doing things and the consequences of the policies that they're having, whether this will lead to the positive changes that we want, who knows.

Kay Guinane: Congress for the first time will be conducting an Oversight Hearing into Treasury's practices in this area on May 26th. The House Financial Services committees oversight in investigations subcommittee will be having that. So there is increasing scrutiny and some of the people in government looking at this from different perspectives.

Other questions?

Unidentified Male Speaker: I wondered how the principle of International Humanitarian Law, our intention with the policies and procedures and laws that you've discussed, and in a related way what do you think about the relevance of the United Nations, some decisions by European force, that how do they bear on

this? Is there pressure internationally? It's a play on the US to adjust for policies.

Kay Guinane: Okay. Briefly, there's a, the European courts too, have found that the same kind of lack of due process in the United States and the European context with the violation of their human rights charters and partly respond to those pressures in December the UN passed a resolution to provide a due process for delisting for the UN list. The United States support that. It's not by any means what we would think of the US as an adequate process, but it is actually better than what we have in the US. So that are some, there's similar, there's also a universal periodic review of human rights records coming up in the UN. The US is one of the countries being reviewed in November, and the Charity and Security Network submitting a statement about how violation of civil society rights under the Universal Declaration, etc.

Ellen Willmott: And doesn't the UK's similar provision on material support focus on the intent or contains certain humanitarian response exemptions from their sanctions?

Stephen Vladeck: Yeah, although a lot of of it has to do with the fact that the UK courts are ultimately reviewable by the European Criminal Court.

Kay Guinane: Any final comments you'd like to make before we conclude?

Sahar Aziz: I just want to make one point. I just think that it, the onus is one those of us who are very concerned about the negative outcomes of the ruling. I think we have to take the responsibility to push or forge forward. I don't think they're going to happen on their own. And I do think that they're going to be very

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difficult, but most good things that occur don't occur easily. So I think it's, this is just the beginning and hopefully it'll produce something what helps the entire nonprofit sector.

Ellen Willmott: I want to make a quick conclusion. In this whole area I think the lens we use to do things defines what we see. Currently US Government's lens of antiterrorist financing leads to a very limited, disrupted, dismantled strategy that ignores the bigger picture. If we apply the lens of humanitarian imperative we see suffering that can be avoided and opportunities for peace that can be exploited. So what the charitable sector is doing is asking the administration to adopt the humanitarian plans, and that's what this letter is saying.

Again, thank you all for coming. Keep track of our departments and the mpac.org and CharityandSecurity.org websites, and thank our panelists.