Chapter 1

Overly Harsh Counterterrorism Laws

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

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

Statutory Prohibitions Against "Material Support" and Executive Order 13224

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

[6] http://hlp.home.igc.org/

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

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

Prohibited Material Support to Foreign Terrorist Organizations

Providing material support to designated terrorist organizations is prohibited by the Antiterrorism and Effective Death Penalty Act (AEDPA), which was enacted in 1996 and later amended by the USA PATRIOT Act in 2001 and 2004.[9] AEDPA authorizes the Secretary of State to designate "foreign terrorist organizations"[10] and makes it a crime for any person or organization to knowingly provide, attempt, or conspire to provide "material support or resources" to a designated entity, regardless of the character or intent of the support provided.[11]

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

AEDPA defines "material support or resources" as:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation ….[14]

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

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

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[9] http://www.abanet.org/natsecurity/patriotdebates/material-support

[10] http://www.state.gov/s/ct/rls/fs/37191.htm

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

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

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

[14] 18 U.S.C. 2339A(b)(1).

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

[16] 18 U.S.C. 2339B(j).

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

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

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

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

[19] *Ibid.* at 16155.

[20] *Ibid.* at 16157-16160.

[21] *Ibid.* at 16157.

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

[23] *Ibid.* at 16159.

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

Prohibited Transactions with Specially Designated Terrorists

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

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

To designate an organization, OFAC only needs to have a "reasonable suspicion" that it is providing "financial, material, or technological support for, or financial or other services to" a designated terrorist organization or "otherwise associat[ing]" with a designated organization.[29] Consequences of designation include the seizing and freezing of all tangible and financial assets and significant civil and criminal penalties. In addition, OFAC may seize an organization's assets "pending an investigation." [30] No criminal charges ever need to be filed, and OFAC is not required to give notice to the organization that its assets will be frozen, nor provide it with a statement of reasons for the designation or investigation.[31] In fact, due to the government's state secrets privilege and its liberal definition of classified evidence, the organization typi-

[24] *Ibid*. at 16149-16154. The court notes that Congress amended AEDPA in 2004 to require that a defendant have knowledge that the organization supported is designated, has engaged in terrorist activity. 18 U.S.C. 2339B(a).
[25] International Emergency and Economic Powers Act (IEEPA), Pub. L. No. 95-223, tit. II, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701-1707 (2006)). For a history of IEEPA, see Congressional Research Service "National Emergency Powers," CRS Report for Congress, updated Sept. 15, 2005. Available at http://www.ombwatch.org/budget/pdf/davisbaconcrs.pdf.
[26] Executive Order 12947 (1995).
[27] http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf
[28] Executive Order 13224. (Sept. 23, 2001) "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism." Available at http://www.whitehouse.gov/news/releases/2001/09/20010924-1.html.
[29] *Ibid*.
[30] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended at various sections of 8, 15, 18, 22, 32, 42, 49, and 50 U.S.C. (2006)) at Section 106 (adding the words "block during the pendancy of an investigation" after the word "investigate" in IEEPA, 50 U.S.C. 1702(a)(1)(B)(2000)).
[31] Executive Order 13224, Sec. 10 (Sept. 23, 2001).

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

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

In 2006, HLP filed a companion case to its AEDPA litigation, challenging IEEPA and EO 13224. In November 2006, the United States District Court of the Central District of California in Los Angeles ruled the "otherwise associated with" language in EO 13224 and IEEPA to be impermissibly vague and unconstitutional[35] because neither IEEPA nor EO 13224 clearly define it, potentially restricting the freedom of association guarantee in the First Amendment. Later, this portion of the ruling was withdrawn[36] after Congress passed this new definition:

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

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

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[32] Professor David Cole Testimony before U.S. Senate Judiciary Committee on May 5, 2004, available at http://www.bordc.org/resources/cole-materialsupport.php.
[33] 31 C.F.R. 501.807.
[34] *Holy Land Foundation v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003); *Global Relief Foundation v. O'Neill*, 315 F.3d 748 (Dec. 31, 2002).
[35] *Humanitarian Law Project v. U.S. Dept. of Treasury*, 463 F. Supp. 2d 1049 (C.D. Cal. 2006).
[36] *Humanitarian Law Project v. U.S. Dept. of Treasury*, 484 F. Supp.2d 1099, 1105-07 (C.D. Cal. 2007).
[37] 31 C.F.R. 594.316.
[38] *Humanitarian Law Project v. U.S. Dept. of Treasury*, 484 F. Supp.2d 1099, 1105-07 (C.D. Cal. 2007).
[39] 484 F. Supp. 2d 1099 (C.C. Cal. 2007).

The Voluntary Tools

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

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

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

Extensive Surveillance Powers Impact Nonprofits

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

[40] Available at http://www.treasury.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf.
[41] *Risk Matrix for the Charitable Sector*, available at http://www.treas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf.
[42] Public Law 107-56 § 802(a) (Oct. 26, 2001).
[43] *Ibid*. Sec. 215 amends the business records of FISA to allow FISA court orders for FBI to access "tangible things (including books, records, papers, documents, and other items)."

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

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

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

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

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

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

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[44] For more information on how counterterrorism laws are used to monitor organizations, see Chapter 8.
[45] 50 U.S.C. 1801(i).
[46] Public Law 107-56 (Oct. 26, 2001). Sec. 218 Foreign Intelligence Information: "Sections 104(a)(7)(B) and 303(a)(7)(B) (50 U.S.C. 1804(a)(7)(B) and 1823(a)(7)(B)) of the Foreign Intelligence Surveillance Act of 1978 are each amended by striking 'the purpose' and inserting 'a significant purpose'."
[47] J. Risen & E. Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *The New York Times* (Dec. 16, 2005).
[48] The 110th Congress has considered several bills that would amend parts of FISA, including H.R. 3773 and S. 2248.
[49] *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215, 1224 (D. Or. 2006).
[50] *Ibid*.
[51] *Al-Haramain Islamic Foundation, Inc. v. Bush*, Government's Motion Proposing Procedures for Filing Separate Public and Sealed Versions of Its Briefs to Protect Classified Information in the Record (June 6, 2007).

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

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