

Chapter 4

A Solution in Search of a Problem: Flawed Assumptions about the Role of Charities and Foundations

The Department of the Treasury's (Treasury) overly broad allegations about the role nonprofits play in terrorist financing has resulted in misplaced efforts that confuse action with results. This only uses up resources that could be better directed toward following concrete investigative leads. While the relative transparency of U.S. nonprofits makes them attractive targets for sanctions programs, and international charitable operations are sometimes located in hot spots of the world, the focus on nonprofits results in neglect of significant terrorist threats.

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.”¹⁰¹ Within its *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities* (Guidelines), Treasury alleges the existence of “investigations” that “revealed terrorist abuse of charitable organizations, both in the United States and worldwide, often through the diversion of donations intended for humanitarian purposes but funneled instead to terrorists, their support networks, and their operations.”¹⁰² Despite repeated requests from nonprofits, Treasury has failed to provide specifics from these investigations, instead referencing “open source media reports” and its website,¹⁰³ which only provide general information. Treasury's unwillingness to disclose the circumstances surrounding the cases of intentional or unintentional support of terrorism only prevents nonprofits from instituting effective preventative measures. In addition, by not substantiating its claims, Treasury undermines its credibility in the nonprofit sector.

The U.S. nonprofit sector takes the issue of terrorism very seriously. It works tirelessly to ensure that funds are used for their intended charitable purpose. Due diligence efforts put organizations in close contact with beneficiaries and grantees, creating accountability for every service provided and every dollar spent. In addition, it has produced

¹⁰¹ U.S. Department of the Treasury, “Screening Tax-Exempt Organizations Filing Information Provides Minimal Assurance That Potential Terrorist-Related Activities Are Identified,” May 21, 2007. Available at <http://www.treas.gov/tigta/auditreports/2007reports/200710082fr.pdf>. The May 2007 report states: “a significant source of terrorist support has been the use of charities and nonprofit organizations...” Also citing the Treasury Guidelines; see Footnote 13.

¹⁰² U.S. Department of the Treasury, “U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities,” December 2005, pp. 2-3. See Footnote 13 for link to latest version; see <http://www.ombwatch.org/article/articleview/3210/1/408> for a comparison of the 2002 and 2005 versions.

¹⁰³ U.S. Department of the Treasury, webpage section on terrorism and financial intelligence. See <http://www.treas.gov/offices/enforcement/key-issues/protecting/index.shtml>, Anti-terrorist Financing Guidelines, Annex at p. 14-16.

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guides that educate others within the sector on responsible practices to protect their charitable and philanthropic activities from terrorist diversion, such as the *Principles of International Philanthropy* and the *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know*.¹⁰⁴

Many U.S. nonprofits are convinced that Treasury's policies and actions targeting the U.S. nonprofit sector are misguided and exaggerate the threat, ultimately hurting a valuable ally in countering terrorism. In a Feb. 1, 2006, letter to Treasury Secretary Henry Paulson, the Treasury Guidelines Working Group, a diverse collection of more than 40 organizations led by the Council on Foundations, said, "[W]e worry that sweeping statements ... misrepresent the prevalence of terrorist abuse of the U.S. charitable

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organizations that are the intended audience of the revised Guidelines."¹⁰⁵ The Muslim Public Affairs Council (MPAC) noted that "[t]here are many throughout the U.S. charitable community, both Muslim and non-Muslim, who take issue with such broad and sweeping statements about the evidence of actual criminal abuse within established institutions of the Muslim American community."¹⁰⁶

Treasury's Flawed Claims

Within the Annex to the 2006 version of its Guidelines,¹⁰⁷ Treasury described data purporting to show terrorist financing by charities and foundations. The Annex referenced 43 nonprofits worldwide that are on its Specially Designed Global Terrorist (SDGT) list, and 29 designated individuals allegedly associated with these 43 nonprofits, totaling 72 nonprofit-related designations. According to Treasury, this total accounts for 15 percent of total SDGTs. What Treasury's statistics do not tell you is that U.S. nonprofits only account for 1.4 percent of total SDGTs.

In addition, Treasury distorts the data by relying on the number of designations and not the percentage of dollars diverted to terrorism. The 2006 OFAC *Terrorist Assets Report to Congress*¹⁰⁸ (which is the only available public information regarding terrorist assets) determined that \$326.5 million of seized assets allegedly related to terrorism is currently being held by Treasury. Of that, \$16.4 million originated with foreign terrorist organizations, a category that includes charitable organizations, and \$310.1 million originated with designated state sponsors of terrorism, such as Iran and North Korea.

¹⁰⁴ *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know*, Independent Sector, Council of Foundations, InterAction, Day Berry & Howard Foundation (2004).

¹⁰⁵ http://www.usig.org/PDFs/Comments_to_Treasury.pdf

¹⁰⁶ Comments of the Muslim Public Affairs Council on Updated Anti-Terrorist Financing Guidelines: Voluntary Best Practices for US-Based Charities (December 2005), available at <http://www.ombwatch.org/npadv/PDF/treascomms/MPACtreascomments.pdf>.

¹⁰⁷ U.S. Department of the Treasury, *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities*, 2006 version, Annex pp. 14-16. Available at <http://www.treas.gov/press/releases/reports/0929%20finalrevised.pdf>.

¹⁰⁸ U.S. Department of the Treasury, Office of Foreign Assets Control, "Terrorist Asset Report: Calendar Year 2006 Fourteenth Annual Report on Assets in the United States of Terrorist Countries and International Terrorism Program Designees." Available at <http://www.treas.gov/offices/enforcement/ofac/reports/tar2006.pdf>.

In other words, designated charities and foundations, both U.S. and foreign, account for no more than 5.3 percent of total blocked assets. Since the assets of designated individuals are not included in the total amount provided, even this figure could be artificially high. This hardly justifies Treasury’s broad claims that charities and foundations are a “significant source of terrorist funding.”

OFAC List Category	Reported Blocked Assets	% of Known Blocked Assets
Foreign Terrorist Organizations (including charitable organizations)	\$16,413,733	5%
Six State Sponsors of Terrorism	\$310,100,000	95%
Individuals	? (not reported)	? (not reported)
Total	\$326,513,733	100%

Studies Tell a Different Story

Treasury’s statements ignore known facts about major sources of terrorist financing. For example, within the *Terrorist Financing Staff Monograph to the 9/11 Commission*,¹⁰⁹ extensive investigation “revealed no substantial source of domestic financial support” for the 9/11 attacks. The report goes on to caution that “[i]n many cases, we can plainly see that certain nongovernmental organizations (NGOs) or individuals who raise money for Islamic causes espouse an extremist ideology and are ‘linked’ to terrorists through common acquaintances, group affiliations, historic relationships, phone communications, or other such contacts. Although sufficient to whet the appetite for action, these suspicious links do not demonstrate that the NGO or individual actually funds terrorists and thus provide frail support for disruptive action, either in the United States or abroad.”¹¹⁰

A February 2005 report to Congress from the Congressional Research Service (CRS)¹¹¹ notes that the 9/11 Commission “recommended that the U.S. government shift the focus of its efforts to counter terrorist financing from a strategy based on seizing terrorist assets to a strategy based on exploiting intelligence gathered from financial investigations.” In other words, instead of shutting down suspicious channels of terrorist financing, possibly forcing them underground, these channels should be monitored for their

¹⁰⁹ *Terrorist Financing Staff Monograph to the 9/11 Commission*, p. 3 (2004). Available at http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

¹¹⁰ *Ibid.*, at 9

¹¹¹ Martin Weiss, “Terrorist Financing: The 9/11 Commission Recommendation,” Congressional Research Service Order Code RS21902, updated February 2005.

valuable intelligence. This recommendation was made in part because the Commission found that the most effective overall asset-blocking occurred in the first three months following the 9/11 attacks and because a 2003 Government Accountability Office (GAO) report¹¹² found that terrorists increasingly are using informal methods of raising money, such as money transfers, cash couriers, and sale of contraband. The GAO report points out that the extent to which terrorist networks have turned to alternative funding mechanisms is unknown. It recommends that the Federal Bureau of Investigation (FBI) and other relevant agencies collect and analyze information to learn more.

Other studies suggest that policies that penalize the nonprofit institution, rather than individuals within the institution that are guilty of wrongdoing, are overly harsh and misguided. The 2004 report *Terrorism and Money Laundering: Illegal Purposes and Activities*¹¹³ found no overt conspiracy by U.S. charities to divert funds to terrorism.

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Instead, it discovered problems typically occur when an individual acts out of ideological and criminal motivation. None of the cases studied found a diversion of funds to a foreign organization by a U.S.-based organization “where the diversion would have been uncovered but for the lack of appropriate due diligence...” and evidence of “links” to terrorist organizations has not resulted in criminal convictions. In other words, large-scale conspiracies to fund terrorism are not coming from the nonprofit sector. Instead, small-scale violations by rogue individuals are primarily to blame for what diversion for non-charitable purposes has occurred. The scale of the government response should be commensurate with this limited involvement.

Nonprofits Object to Continued Misrepresentations by Treasury

These facts have not deterred Treasury from continuing to spread its unsubstantiated claims. In turn, the allegation has been picked up and repeated by other agencies, transforming the false assumption into a widely accepted myth.

For example, in May 2007, the Treasury Inspector General for Tax Administration (TIGTA) based an entire report on Treasury’s unsubstantiated allegations. *Screening Tax-Exempt Organizations’ Filing Information Provides Minimal Assurance That Potential Terrorist-Related Activities Are Identified*¹¹⁴ primarily focused on perceived inefficiencies in the IRS’ terrorist screening process, including the manual screening of selected tax-exempt applications (Form 1023) and annual information reports (Form 990) for “[m]iddle eastern sounding names.” TIGTA concluded that the IRS is finding few terror links because the IRS limits itself to the SDN list maintained by OFAC. Instead, the report said the IRS should use an automated system to check all nonprofit

¹¹² General Accountability Office, Report GAO-04-163, *Terrorist Financing: U.S. Agencies Should Systematically Assess Terrorists’ Use of Alternative Financing Mechanisms*, November 2003.

¹¹³ Victoria Bjorklund, Jennifer I. Reynoso, and Abbey Hazlett, “Terrorism and Money-Laundering”: Illegal Purposes and Activities,” September 19, 2004, paper delivered for National Center on Philanthropy and the Law. Available at http://www.law.nyu.edu/ncpl/library/publications/Conf2004_Bjorklund_DRAFT.pdf.

¹¹⁴ U.S. Department of the Treasury, “Screening Tax-Exempt Organizations’ Filing Information Provides Minimal Assurance That Potential Terrorist-Related Activities Are Identified,” May 21, 2007, Available at <http://www.treas.gov/tigta/auditreports/2007reports/200710082fr.pdf>. Reference Number: 2007-10-082.

filings with the Terrorist Screening Center's (TSC) list, which is a consolidated list of all government watch lists, thereby "increas[ing] the possibility of identifying individuals already known to be or suspected of being involved in terrorist-related activities."

Unfortunately, TIGTA's conclusion assumes that nonprofits are in fact a "significant source of alleged terrorist activities." Several nonprofits, including OMB Watch and Grantmakers Without Borders, immediately wrote a letter¹¹⁵ to Treasury Secretary Henry Paulson to express concern and called upon the Treasury Department to retract this claim, saying, "Treasury needs to recognize that charities are part of the solution and not part of the problem."¹¹⁶

The letter argues that Treasury has never provided information that proves a considerable portion of charitable funds are diverted to terrorist organizations and, in addition, "does not respect the positive role charities play in the world." It also noted several steps the nonprofit sector has taken to guard against diversion of funds to terrorism, including the 2005 publication of the *Principles of International Charity*.¹¹⁷

A separate letter¹¹⁸ sent in July 2007 to Michael Phillips, Deputy Inspector General of Audit at the Department of Treasury, by Steve Gunderson, President and CEO of the Council on Foundations, on behalf of the Treasury Guidelines Working Group, requested a meeting to discuss the problems regarding Treasury's allegations about the nonprofit sector. There was no response.

Not all public officials have blindly accepted these allegations. On July 24, 2007, the House Ways and Means Subcommittee on Oversight hosted a hearing on tax-exempt organizations. Congressman Bill Pascrell (D-NJ) questioned Treasury's repeated allegation, citing the lack of evidence and commenting that Treasury seems to be painting the sector with a "wide brush."¹¹⁹

OFAC: The Wrong Agency to Oversee Nonprofits

Treasury's incorrect assumptions may be the inevitable result of a bureaucratic mismatch. OFAC, which enforces criminal money laundering laws that target drug trafficking, organized crime, and economic embargos against nations, has no knowledge or experience with the nonprofit sector. It is not familiar with what it takes to administer disaster relief programs or make grants for aid and development. In addition, OFAC is set up to administer sanctions programs, not monitor or investigate financial transactions or the charitable sector.

¹¹⁵ See OMB Watch Letter to Henry Paulson, Secretary of the U.S. Department of Treasury, June 8, 2007. Available at http://www.ombwatch.org/npadv/TIGTALetter_Paulson.pdf.

¹¹⁶ *Ibid.*

¹¹⁷ Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors, "Principles of International Charity," March 2005, coordinated by The Council on Foundations. Available at http://www.cof.org/files/Documents/International_Programs/Principles_Final.pdf.

¹¹⁸ Council on Foundations, Letter from Steve Gunderson, President and CEO, to Michael R. Phillips, Deputy Inspector General for Audit, U.S. Department of Treasury, July 23, 2007. Available at http://www.usig.org/PDFs/tigta_letter.pdf.

¹¹⁹ House Committee on Ways and Means Subcommittee on Oversight Hearing on Tax-Exempt Charitable Organizations, July 24, 2007. Transcript available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6507>.

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In contrast, the United Kingdom is developing much of its charitable financial controls in partnership with the Charity Commission, similar to the tax-exempt division of the Internal Revenue Service. This is a much more thoughtful approach that respects the realities of nonprofit operations. In addition, the Charity Commission has relied on research on charitable ties to terrorism conducted by the Central Office of Information for the Home Office and HM Treasury. A recently released report found that, “[i]n respect of terrorist exploitation of the charity sector, the Commission’s experience is that actual cases of sham charities or the abuse of legitimate charities are rare.”¹²⁰ Furthermore,

It is important to recognize the significant contribution that third sector organizations make in addressing some of the underlying causes of disaffection often quoted as a reason why people turn to extremism or even terrorist activities. By promoting social inclusion and building stronger communities, organizations active in minority or marginalized communities in particular can offer a constructive, legitimate channel for disaffection. Charities operating overseas can also present a positive impression of British civil society and values, helping to building goodwill and furthering international relations.¹²¹

The Charity Commission’s acknowledgement of the charitable community as an ally in the war on terror contrasts significantly with the approach taken by Treasury.

Experts Question Effectiveness of “Financial War on Terror” Strategy

Some U.S. money laundering experts are also questioning the government’s overall approach to fighting terrorism by blocking its financing, arguing that it is not cost effective. In 2005, Daniel Mitchell, the Heritage Foundation’s McKenna Senior Fellow in Political Economy, told a panel at Georgetown University that this is not an ideological issue, pointing out that the anti-terrorist financing campaign has cost the private sector billions of dollars and has entailed a sweeping invasion of privacy, yet there is “nothing much to show for it.”¹²² In addition, he said the government’s approach defies common sense and has turned traditional law enforcement upside down. As a result, the FBI has not been able to develop a terrorist financial profile that is any different from a regular banking customer. Without specific targets, the U.S. government is overwhelmed with data it cannot use, and the banking sector inefficiently “look[s] for a needle in a haystack.”

Other experts agree that these policies are not making Americans any safer. In an article entitled *Fighting Terror With Error*, Professor Nikos Passas of the College of Crim-

¹²⁰ “Review of Safeguards to Protect the Charitable Sector (England and Wales) from Terrorist Abuse,” http://www.homeoffice.gov.uk/documents/cons-2007-protecting-charities/Charities_consultation.pdf?view=Binary.

¹²¹ *Ibid.*, at 10.

¹²² Georgetown Public Policy Institute Panel Discussion “Safeguarding Charity in the War of Terror,” June 14, 2005. Transcript available at http://cpnl.georgetown.edu/doc_pool/Charity061405.pdf.

inal Justice, Northeastern University ¹²³ shares the results of research funded by the U.S. National Institute of Justice and the World Bank. The study sifts through evidence about informal financial transfer systems, demonstrating that U.S. federal and state regulations frustrate security, crime control, and economic policy objectives by being ill-conceived and unrealistic.

In addition, Ibrahaim Warde of Tufts University argues in his book *The Price of Fear* that the flawed logic of federal anti-terrorist financing programs make

it possible to reduce the complex world of Islamic NGOs to the funding of terror. Intent and consequence, the legitimate and the illegitimate, the deliberate and the unwitting, [are] all blurred. Donors [are] penalized for the sins of recipients. If a sum had been diverted to benefit a terrorist group, if an employee had crossed the line from humanitarian work to militancy, then the entire charity – indeed, every one of donors – could be held accountable. Countless charities [are] branded as “terrorist fronts.” Prosecutors ... go on fishing expeditions in search of infractions – often innocent mistakes or unrelated irregularities – to justify increasingly harsh punishments.¹²⁴

Warde goes on to say, “Reforming the Islamic charities system was long overdue, yet post-September 11 policies proved mostly counterproductive; they weakened mainstream, ‘controllable’ charities, while building up informal, unchecked, and potentially dangerous charitable and donor networks.”¹²⁵

¹²³ Nikos Passas, “Fighting terror with error: the counter-productive regulation of informal value transfers,” *Journal of Crime, Law and Social Change*, Vol. 45, Nos. 4-5 (May 2006).

¹²⁴ Ibrahaim Warde, *The Price of Fear: The Truth behind the Financial War on Terror*. (Berkeley: University of California Press 2007), p. 130.

¹²⁵ *Ibid.*, at 147.

**Double Standard:
Chiquita Pays Fine, Continues Operation – Charities Shut Down**

The experience of Chiquita Brands International provides a valuable example of the different treatment afforded to the for-profit sector for activities that clearly violate counterterrorism law.

- Between 1997 and 2004, Chiquita Brands International paid approximately \$1.7 million to two U.S.-designated terrorist organizations, the United Self-Defense Forces of Colombia (AUC) and the leftist Revolutionary Armed Forces of Colombia (FARC), for protection in a dangerous region of Colombia.
- In 2003, outside attorneys for Chiquita notified the company that the payments violated U.S. counterterrorism laws and should not continue. However, payments to the groups continued until Chiquita sold its Colombia subsidiary, Banadex, in June 2004.
- On April 24, 2003, a board member of Chiquita disclosed to Michael Chertoff, then assistant Attorney General, Chiquita's clear violation of counterterrorism laws. Allegedly, Chertoff told the Chiquita representatives that the activity was illegal, but they should wait for more feedback. Three of Chiquita's officers were then placed under investigation by the Justice Department for authorizing and approving the payments, but in September 2007, the investigation ended without any criminal charges.
- On March 14, 2007, Chiquita Brands International agreed to pay a \$25 million fine. With annual revenues of approximately \$4.5 billion, Chiquita's operations are unlikely to be affected. Had a charity engaged in this type of activity, it likely would have been shut down, its assets frozen indefinitely; Chiquita continues to operate, and none of its assets have been frozen by Treasury or any other agency.

Sources:

1. "Chiquita agrees to fine for paying terrorists," *USA Today* (March 14, 2007). http://www.usatoday.com/money/industries/food/2007-03-14-chiquita-terrorists_N.htm.
2. "In Terrorism-Law Case, Chiquita Points to U.S.," *Washington Post* (Aug. 2, 2007). <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/01/AR2007080102601.html?hpid=topnews>.
3. "Ex-Chiquita Execs Won't Face Bribe Charges," *Washington Post* (Aug. 12, 2007).
4. "Chiquita fined for Colombia payments," *Los Angeles Times* (Sept. 18, 2007).