CHAPTER ONE

Eliminate unnecessary barriers to legitimate charitable work

I. The Problem:

At a time when the humanitarian aid and development programs and conflict resolution and human rights training offered by charities and foundations are needed the most, the combined effect of two U.S. laws has made it far more difficult for nonprofits to provide critical international aid and services. Rather than distributing aid on the basis of where the need and potential for positive impact are greatest, current counterterrorism measures have caused some nonprofits to avoid the very global hotspots that would benefit the most from their work. Indeed, in some cases these measures have damaged charities' relationships with the communities they serve, damaging the international goodwill and promise for stability that these relationships had helped to create. These laws are the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, amended by the USA PATRIOT Act, which bars material support for terrorism, and the International Emergency Economic Powers Act (IEEPA), which allows the government to designate U.S. charities as supporters of terrorism based on secret evidence and lacks due process protections. Funds of designated charities are frozen indefinitely.[i]

AEDPA prohibits any person or organization from knowingly providing, attempting, or conspiring to provide "material support or resources to a foreign terrorist organization," as designated by the U.S. government, regardless of the character or intent of the support provided. Beginning with Section 805 of the USA PATRIOT Act in 2001, the administration has incrementally expanded the notion of "material support" beyond direct transfers of goods or funds to include legitimate charitable aid to civilian non-combatants that may "otherwise cultivate support" for a designated organization. The Government has extended the notions of "material support," arguing that even non-monetary legitimate charitable aid is fungible and can support terror by allowing the group to conserve resources. The government has expanded and made vague the prohibition against providing material support to a "terrorist organization" so as to include organizations that are "otherwise associated" with designated terrorist groups; thereby criminalizing aid to any of those groups if the charity "should have known" that the group was associated with a group linked to violent activities.

Under the current statute, "any property, tangible or intangible," including the most fundamental of aid necessities such as water, sanitation equipment, all forms of shelter, and building materials, can be construed as "material support." The material support laws lack several crucial distinctions and as such undermine the ability of organizations to undertake legitimate, and necessary, charitable and humanitarian work. The statue makes no distinction between lethal and non-lethal aid, nor does it contain any general exemption for humanitarian assistance. Furthermore, the prohibition on "material support" is not limited to material objects, but rather includes "training" and "expert advice or assistance." Teaching medical workers to prevent the spread of disease and local volunteers to build adequate sanitation systems could all fall under this sweeping proscription. In a tragic example, aid organizations were forced to choose between providing desperately needed drinking water and blankets to victims of the tsunami in Sri Lanka, a criminal act because the territory is controlled by a designated terrorist

organization, and preserving their organization to support other humanitarian causes in the future. This is in clear violation of fundamental standards of nondiscrimination in humanitarian aid as defined by the Red Cross Code of Conduct.

IEEPA and Executive Order 13224 allow the president to designate terrorist organizations and block transactions and freeze their assets to deal with "unusual and extraordinary" threats originating "in whole or substantial part outside the United States." IEEPA was meant to be directed at nation states and organizations and individuals designated as terrorists. Using a tool created to freeze the funds of security threats presented by North Korea and the Taliban to regulate charitable organizations prevents law-abiding groups from providing critical humanitarian aid. The lack of due process and clear enforcement standards used against charities are at odds with the State Department's own *Guiding Principles on Non-Governmental Organizations.*

The law is administered by the Department of Treasury's Office of Foreign Assets Control ("OFAC"), which deals with embargoes, drug kingpins and money laundering. It has no expertise with the charitable sector. The standard for initiating a Treasury Department investigation is only "reasonable suspicion," and without deadlines for or, the requirement of, filing charges, nonprofits can be shut down without the chance to say a word in their defense. Moreover, charitable organizations are left without meaningful redress, since the courts will rule only on whether the Treasury Department's actions were "arbitrary and capricious," not on the merits of the department's evidence. The result is a climate of fear in which a host of nonprofit organizations fear that their charitable work will be misconstrued.

II. Proposed Solutions

A. Guiding Principles

The overbroad and discriminatory application of the "material support" laws undermines the ability of humanitarian organizations to provide essential services to those in the most dire straits. The use of designation and asset blocking laws without due process paired with draconian sanctions also impedes operations of grant makers and charities. Reforming the barriers of vague statutes, broad interpretations, and extremely limited redress will allow nonprofit organizations to return to performing their legitimate charitable work.

B. Proposed Measures

1. Executive:

a. **Improve the national security regulation of charities by ending the use of the International Emergency Economic Powers Act (IEEPA) to regulate charities and allowing the Department of State to develop a more effective and appropriate framework.** This framework must include fundamental due process rights, procedures and intermediate sanctions for charities and foundations. Process recommendations include:

   i. Cease and desist orders to charity from Treasury
   ii. Opportunity to cure: 60-90 days to sever a tie, restructure a program, fire employee, etc.
   iii. Administrative hearing to challenge designation that includes cross examination, ability to submit evidence, etc.

iv. Process for releasing funds to beneficiaries via another charity (including a time limit on frozen funds).

v. Ensure charitable funds frozen by the Treasury Department are ultimately released and used for charitable purposes

b. **Withdraw the Treasury Department's ineffective "Guidelines" and replace with real guidelines that help charities continue to meet critical needs while ensuring their scarce resources are used for legal and charitable purposes:** Withdraw Treasury's *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*. These vague and flawed quasi-voluntary guidelines demand burdensome investigation by charities into their partners, but do not serve the purported goal of preventing charities from diverting funds to terrorist or illegal purposes. Rather, the Guidelines prevent charities from delivering critical humanitarian services and provide them with no protection from legal sanction even if the Guidelines are painstakingly followed.

i. The Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors' *Principles of International Charity* and the Department of State's *Guiding Principles for Government Treatment of NGOs* are good starting points for developing guidelines that provide all charities with equal opportunity and access to good faith charitable giving and complement the extensive due diligence already being performed by grantmaking organizations to ensure that their grant funds are being used for charitable and legal purposes.

c. **Direct the Secretary of State to use his or her authority under 18 USC 2339B(j) to waive the material support prohibition for technical advice and assistance, training and personnel where no violent activity is involved.**

2. **Legislative**

a. **Amend the "material support" statute to include intent and make it consistent with Red Cross standards for humanitarian aid:** Repeal the amendments enacted in Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, which punishes support to a designated terrorist group regardless of whether the person providing that support intended, or in fact did, further the group's violent activities, and amend the law to require that the government prove that individuals charged actually intended to further terrorist activity when they provided humanitarian assistance. Further expand the exemptions beyond medicine and religious materials to include medical equipment and services, civilian public health services, food and food, water, clothing and shelter to noncombatants. In addition, human rights training and conflict resolution services should be entirely exempted.

i. **Amend 18 U.S.C. § 2339B(a)(1) to clarify impermissibly vague language of "expert advice or assistance":** This overly

vague language conflicts with First Amendment rights of speech and association by potentially criminalizing virtually all interaction with designated organizations, including Constitutionally-protected political speech and advocacy.

ii. **Amend 18 U.S.C. §§ 2339A(b)1-2339A(b)(3) to clarify vague language, including the insertion of an intent requirement into the definition of the provision of training and expert advice or assistance**

III. Allies*

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* These groups and individuals support the general principles expressed and the general policy thrust and judgments in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposed solution, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.

IV. Counter-Arguments and Rebuttal

A. *Don't we need these extreme powers because the Department of Treasury says charities are a significant source of terrorist financing and support?*

The Bush administration's has consistently justified its misplaced emphasis on nonprofits in its anti-terrorist financing efforts by claiming the sector is a "significant source of terrorist financing."[ii] But these broad brush accusations have never been supported by evidence. Instead OFAC cites "open source media reports" and refers to general information on its website.[iii]
In the 2006 Annex[iv] to its Guidelines Treasury claimed charities and individuals associated with them account for 15 percent of total Specially Designated Global Terrorists (SDGTs). This claim was based on 43 designated nonprofits worldwide and 29 designated individuals allegedly associated with them, totaling

72 nonprofit-related designations. The seven designated U.S. nonprofits only account for 1.4 percent of this total.

When the dollar value of blocked assets is used as a measure, it is even clearer that charities are a minor threat in the battle against terrorist financing. According to the 2007 OFAC *Terrorist Assets Report to Congress*[v] designated foreign terrorist organizations, charities and foundations, both U.S. and foreign, account for only 6.1 percent of total blocked assets. Treasury has blocked $336.2 million of seized assets, and of that, $20.7 million originated with foreign terrorist organizations, a category that includes charitable organizations. There is no public information on how much of this can be attributed to U.S. organizations. The remaining $315.5 million originated with designated state sponsors of terrorism, such as Iran and North Korea.

The Terrorist Financing Staff Monograph to the 9/11 Commission,[vi] said their investigation "revealed no substantial source of domestic financial support" for the 9/11 attacks. It further warns 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."[vii]

B. *If terrorist organizations are relieved of the financial burden of providing charitable programs won't the dollars saved be used for lethal attacks?*

The Bush administration has promoted a widely held but never proven assumption that charity dollars are fully fungible. As a result, the government's policy considers an entire organization tainted if any aspect of its work is associated with terrorism.

This fungibility assumption has never been subjected to factual scrutiny and U.S. organizations have never been consulted about the extent of this problem or possible appropriate solutions. The Bush administration policy has ignored differences between intentional diversion of charitable funds for lethal, terrorist activities and groups that work through a designated organizations to deliver aid when the terrorist organization controls territory and functions as a government in the area in need of assistance or in conflict zones where there are no practical alternatives for getting aid safely through.

The fungibility argument has not been applied to the for-profit sector. For example, on March 14, 2007 Chiquita Brands International was fined $25 million for paying 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 between 1997 and 2004.

The primary weakness of the fungibility argument is that it does not take public diplomacy into account. The U.S. reputation has suffered by freezing millions of charitable dollars. But when U.S. charities provide aid there is increased

goodwill. For example, surveys in Indonesia two years after the 2004 tsunami found that after more than $13.4 billion in U.S. humanitarian aid went to help victims[viii] 44 percent of respondents reported a favorable view of the U.S., compared to 15 percent before the tsunami.[ix] Support for Osama bin Laden was at its lowest level since 9/11. A similar survey after the 2005 earthquake in Pakistan[x] found that 75 percent of Pakistanis had a more favorable opinion of America, and most cited earthquake relief as the reason.

C. *Haven't the courts upheld all Treasury's actions in shutting down charities?*
In legal challenges to the first wave of designations of U.S. charities took several years the courts consistently deferred to Treasury because of national security concerns. In addition, their scope of review was limited to whether Treasury had acted arbitrarily, and the designated charity was never allowed to present or confront evidence.
Recently, that pattern has changed. On October 9, 2008 the U.S. District Court for the Northern District of Ohio issued a temporary restraining order barring Treasury from designating KindHearts for Charitable Humanitarian Development (KindHearts), a U.S. charity, as a supporter of terrorism without affording the organization basic due process.

D. *Doesn't the Terrorism Risk Insurance Act bar Treasury from transferring frozen funds to legitimate charities?*
No. Section 201(a) of the Terrorism Risk Insurance Act[xi] allows blocked assets to be used to pay judgments from litigation "against a terrorist party." It does not authorize funds to be held where no lawsuits have been filed or judgments rendered. Holy Land is the only designated U.S. organization involved in litigation under TRIA. Treasury has repeatedly said that allowing transfers for humanitarian and disaster aid is not in the national interest.

V. Recommended Documents for Further Information:

a. OMB Watch, "Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve," July 2008, *available at*: http://www.ombwatch.org/article/articleview/4290/
b. Ahilan T. Arulanantham, American Constitution Society, " 'A Hungry Child Knows No Politics:' A Proposal for Reform of the Law Governing Humanitarian Relief and 'Material Support' of Terrorism," June 2008, *available at* http://www.acslaw.org/files/Arulanantham%20Issue%20Brief.pdf
c. U.S. Department of State, "Guiding Principles for Government Treatment of NGOs," 14 December 2006, *available at* http://www.state.gov/g/drl/rls/77771.htm
d. Professor David Cole Testimony before U.S. Senate Judiciary Committee on May 4, 2005, *available at* http://www.bordc.org/resources/cole-materialsupport.php
e. Duke Law, Civil Liberties Online: "Prosecutorial Tools: Sharpening the Government's Prosecutorial Tools Against Terrorism," *available at* http://www.law.duke.edu/publiclaw/civil/index.php?action=showtopic&topicid=9
f. Stephanie Strom, *Small Charities Abroad Feel Pinch of U.S. War on Terror*, N.Y. TIMES, *available at* http://query.nytimes.com/gst/fullpage.html?res=9F0DE7DA1E3EF936A3575BC0A9659C8B63&scp=1&sq=small%20charities&st=cse

g. Treasury Guidelines Working Group of Charitable Organizations and Advisors, "Principles of International Charity," *available a*t http://www.usig.org/PDFs/Principles_Final.pdf

h. Ahilan T. Arulanantham, *A Hungry Child Knows No Politics: A Proposal for Reform of the Laws Governing Humanitarian Relief and "Material Support" of Terrorism*(June 2008), *available at* http://www.acslaw.org/files/Arulanantham%20Issue%20Brief.pdf

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[i] 50 U.S.C. §§1701-1706 (2000).

[ii] 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* fn.13.

[iii] 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 14-16.

[iv] 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.pdfhttp://www.treas.gov/press/releases/reports/0929%20finalrevised.pdf**.**

[v] U.S. Department of the Treasury, Office of Foreign Assets Control, "Terrorist Asset Report: Calendar Year 2007 Sixteenth 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/tar2007.pdf.

[vi] Terrorist Financing Staff Monograph to the 9/11 Commission National Commission on Terrorist Attacks Upon the United States, p. 3 (2004), *available at* http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf**.**

[vii] *Ibid*, at 9

[viii] http://www.internationaldonors.org/issues/pdf/tlp_exec-summary.pdf

[ix] http://www.terrorfreetomorrow.org/articlenav.php?id=82

[x] http://www.terrorfreetomorrow.org/articlenav.php?id=5#top

[xi] 107 P.L. 297, Sec. 201, Reauthorization Act of 2007, signed by President George W. Bush on Dec. 26, 2007