

Blocking Faith, Freezing Charity

CHILLING MUSLIM CHARITABLE GIVING
in the
“WAR ON TERRORISM FINANCING”



I.

Executive Summary *and* Introduction

a. Introduction

On September 24, 2001, President George W. Bush announced in the White House Rose Garden that, in “a strike on the financial foundation of the global terror network,” he had taken executive action, without consulting Congress, to expand the Treasury Department’s unilateral authority to freeze the assets of organizations it considered terrorist organizations. He declared, “Just to show you how insidious these terrorists are, they oftentimes use nice-sounding, non-governmental organizations as fronts for their activities. We have targeted three such NGOs. We intend to deal with them, just like we intend to deal with others who aid and abet terrorist organizations.”¹ Federal authorities announced they were investigating over 30 Muslim charities.²

Within the space of ten days in December 2001, the federal government froze the assets of the three largest Muslim charities in the United States—the Holy Land Foundation for Relief and Development, Global Relief Foundation, and Benevolence International Foundation—effectively shutting each of them down. The government seized these charities’ assets during the Muslim holy month of Ramadan, at the height of annual Muslim charitable giving. These charities, which had been operating without incident for years—and for over a decade in the case of the Holy Land Foundation—were not on any government watch list before their assets were frozen. Indeed, before it was shut down the Holy Land Foundation had made repeated requests to government officials for assistance in complying with the law, only to be rebuffed.

The government’s actions against these three charities were the start of a pattern of conduct that violated the fundamental rights of American Muslim charities and has chilled American Muslims’ charitable giving in accordance with their faith, seriously undermining American values of due process and commitment to First Amendment freedoms.

Without notice, and through the use of secret evidence and non-transparent procedures, the Department of the Treasury has closed six U.S.-based, American Muslim charities to date by designating them as terrorist organizations. The consequences of designation include the seizure and freezing of all financial and tangible assets, as well as significant civil and criminal penalties. The federal government has closed down a seventh U.S.-based, American Muslim charity by declaring the charity to be “under investigation” and freezing all its assets. In addition, at least six American Muslim charities have been raided. Although these six charities have not been designated as terrorist organizations or had their assets frozen pursuant to a Treasury Department blocking order, they have

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suffered as a result of publicly announced investigations, law enforcement raids, and intrusive surveillance; two of these charities have closed. In total, and as a result of these federal government actions, nine Muslim charities have been shut down in Texas, Michigan, Missouri, Illinois, Oregon, Ohio, Massachusetts, and New York.

Although the need to ensure that humanitarian aid and charitable donations are not diverted to support terrorism is a real and valid concern, both the terrorism financing laws and the government's interpretation of them raise serious constitutional and human rights concerns. The terrorism financing laws provide executive branch officials with practically unfettered discretion in target-

permit the Treasury Department to seize all assets of charities "pending investigation," pursuant only to a blocking order signed by a mid-level Treasury Department official.

Independent government studies of counterterrorism policies and court cases have exposed flaws in the evidence the Treasury Department relies on in exercising its designation power. In an independent review of terrorism financing laws, the Government Accountability Office (GAO) found that there is a lack of accountability for Treasury's designation and asset blocking.³ According to the 9/11 Commission staff, Treasury officials acknowledged that in the post-9/11 period, "some of the evidentiary foundations for the early designations were quite weak" and the haste to designate charities after 9/11 "might [have] result[ed] in a high level of false designations."⁴

Despite the often weak nature of the evidence, when it designated Muslim charities, indicted them criminally, or raided them, the Bush administration publicly trumpeted its actions as successes and made inflammatory and unfounded or exaggerated allegations about the charitable sector's connections to terrorism financing. The effect of these government actions is to create a general climate in which law-abiding American Muslims fear making charitable donations in accordance with their religious beliefs. Other specific federal law enforcement practices, including widespread interviews of Muslim donors about their donations without evidence of wrongdoing, also intimidate American Muslims about their right to make charitable donations.

The government's actions have chilled American Muslims' free and full exercise of their religion through charitable giving, or Zakat. Zakat is one of the core "five pillars" of Islam and a religious obligation for all observant Muslims. In interviews with American Muslim donors, the ACLU documented a pervasive fear that they may be arrested,

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ing groups for designation as terrorist organizations, and the federal government's enforcement of terrorism financing laws has disproportionately affected Muslim charities. Of nine U.S.-based charities whose assets have been seized by the Department of Treasury, seven are Muslim charities, and two are Tamil charities that provided humanitarian aid in Sri Lanka. In the majority of these cases, the government has not brought charges; only three designated U.S.-based Muslim charities have faced criminal prosecution, and only one has been convicted.

Today, the Treasury Department has virtually unchecked power to designate groups as terrorist organizations. Terrorism financing laws are overly broad and lack procedural safeguards that would protect American charities against government mistake and abuse. They do not require the Treasury Department to disclose the evidence on which it bases decisions to designate charities, not even to the accused charities themselves. The laws also

prosecuted, targeted for law enforcement interviews, subpoenaed, deported, or denied citizenship or a green card because of charitable donations made in fulfillment of their sacred duty to give Zakat (charity or alms). Many American Muslims reported that the climate of fear has made it impossible for them to fulfill their religious obligation to give Zakat in accordance with their faith and to associate with fellow Muslims. The United States has long been regarded as a beacon of religious freedom, and yet U.S. terrorism financing laws and policies developed under the Bush administration are inhibiting American Muslims' ability to freely and fully practice their religion.

This report documents the effect of U.S. government actions on American Muslims' exercise of their right to profess and practice their religion through charitable giving. This report is based on 120 total interviews, including 115 interviews the ACLU conducted with Muslim community leaders and American Muslims directly affected by the U.S. government's policies regarding Muslim charities and Muslim charitable donors. The ACLU's research shows that U.S. terrorism financing policies and practices are undermining American Muslims' protected constitutional liberties and violating their fundamental human rights to freedom of religion, freedom of association, and freedom from discrimination. These policies and practices are neither fair nor effective, and are undermining American values of due process and fairness.

b. Executive Summary

Terrorism Financing Laws Impose Guilt by Association and Punish Legitimate Humanitarian Aid

Terrorism financing laws cover (i) schemes under which the government may designate organizations as terrorist through an administrative action in which the government shuts organizations down, often without allegations of criminal wrongdoing (criminal charges are not always brought in such cases), and (ii) criminal prosecutions for material support for terrorism or to a terrorist organization. These regimes raise different issues, detailed below, but have in common a lack of fundamental due process safeguards and impose guilt by association. As a result, American Muslim organizations and individuals are unfairly targeted in violation both of their First and Fifth Amendment rights and international law.

The counterterrorism legal framework is inherently vulnerable to mistake and abuse, and charities run the risk of irreversible harm on the basis of unsubstantiated evidence and without even basic due process protections.

The laws prohibiting material support for terrorism are in desperate need of re-evaluation and reform to make them fair and effective. Intended as a mechanism to starve terrorist organizations of resources, these statutes instead effectively impose guilt by association and do not provide guidance about what is and is not prohibited. Although the need to ensure that humanitarian aid and charitable donations are not diverted to support terrorism is a real and valid counterterrorism

issue, both the material support statutes and the government's interpretation of the statutes raise constitutional and human rights concerns.

The laws prohibiting material support for terrorism contain deeply troubling constitutional flaws. Because the material support statutes impose punishment without regard for the intent or character of the support provided, these statutes punish wholly innocent assistance to arbitrarily blacklisted individuals and organizations, undermine legitimate humanitarian efforts, and can be used to prosecute innocent donors who intend to support only lawful activity through religious practice, humanitarian aid, speech, or association. The government has argued that those who provide support to designated organizations can run afoul of the law even if they oppose the unlawful activities of the designated group, intend their support to be used only for humanitarian purposes, and take precautions to ensure that their support is indeed used for these purposes.⁵ This broad interpretation of the material support prohibition effectively prevents humanitarian organizations from providing needed relief in many parts of the world where some designated groups control schools, orphanages, medical clinics, hospitals, and refugee camps.⁶

Because the material support statute contains no general exception for humanitarian assistance, many benign activities that are crucial for humanitarian aid and disaster relief are labeled material support, including provision of food aid, latrines, blankets, clothing, or tents.⁷ Other activities that arguably fall within the definition of material support include teaching English to nurses, public health experts' advice on creating clean water supplies in a refugee camp, conflict resolution programs, and doctors' training on how to test, treat, and contain contagious diseases. Under the material support statute, an organization can provide medication, but not clean drinking water with which to take the medication. The material support

provisions are so broad that, in theory, even the International Committee of the Red Cross could be prosecuted for the aid it provides.

The Terrorism Financing Legal Framework Denies Due Process to Charities

The counterterrorism legal framework denies charities due process, exposing them to mistake and abuse. The laws prohibiting material support for terrorism provide federal officials with wide discretion in choosing groups or individuals for designation, empower the Department of Treasury to seize the assets of charitable organizations with no notice and on the basis of secret evidence, and contain inadequate procedures for challenging designations. The laws allow the seizure and indefinite freezing of a charitable organization's assets "pending investigation" without charges, opportunity to respond, or meaningful judicial review. A 9/11 Commission staff report on terrorism financing found that the laws that allow the Treasury Department to designate and seize the assets of charities raise "substantial civil liberty concerns."⁸

The counterterrorism laws are inherently vulnerable to mistake and abuse, and charities run the risk of irreversible harm on the basis of unsubstantiated evidence and without even basic due process protections. There is a lack of accountability for Treasury's designation and asset blocking actions, and the limited independent review that has taken place reveals cause for concern and highlights the need for more robust oversight and due process protections for charities. Criminal prosecutions of Muslim charity leaders and associates, and government oversight review of some cases, have exposed flaws in evidence used to designate and shut down charities and have demonstrated a lack of persuasive evidence of terror financing by U.S.-based charities. Criminal prosecutions and independent review have revealed that the evidence used to designate Muslim charities has included

rank hearsay inadmissible in court, news articles that do not even mention the charity in question, or intelligence that has been inaccurately and prejudicially translated.

For instance, the 9/11 Commission staff pointed out troubling flaws in the evidence that served as the basis for designation of two U.S.-based Muslim charities, finding that the evidentiary foundation for designations “were quite weak” and “revealed little compelling evidence that either of these charities actually provided financial support to al Qaeda...despite unprecedented access to the U.S. and foreign records of these organizations.”⁹ The 9/11 Commission staff also noted:

In many cases, we can plainly see that certain nongovernmental organizations (NGOs) or individuals who raise money for Islamic causes...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.¹⁰

In addition, independent review conducted in the United Kingdom, Canada, Sweden, and Luxembourg has cleared some designated organizations, and government representatives and courts in these countries have chastised the U.S. government for its inability to show any proof of terrorism funding in the cases under review.

Discriminatory Enforcement of Counterterrorism Laws against Muslim Charities

The federal government’s enforcement of terrorism financing laws has disproportionately affected Muslim charities. The ACLU has documented nine U.S.-based, American Muslim charities that have closed as a result of government action or investigation. These charities were located in Texas, Michigan, Missouri, Illinois, Oregon, Ohio, Massachusetts, and New York. Of nine U.S.-based charities whose assets have been seized by the Department of Treasury, seven are Muslim charities (the two non-Muslim charities are Tamil Rehabilitation Organization-USA and Tamil Foundation, U.S.-based Tamil charities that provided humanitarian aid in Sri Lanka). To date, only three designated U.S.-based Muslim charities have faced criminal prosecution, only one of which has been convicted. Many American Muslim community leaders and members have pointed to the disproportionate enforcement of counterterrorism laws against Muslim charities as evidence of discriminatory, religion-based targeting of Muslims and their charitable organizations. Such practices have alienated American Muslims and undermined U.S. standing in the Muslim world, and have fueled often inflammatory allegations by radical groups that the United States is against Islam and Muslims.

Six Muslim charities have been shut down as a result of the Treasury Department’s designation of them: Al Haramain Islamic Foundation-USA (Oregon), Benevolence International Foundation (Illinois), Global Relief Foundation (Illinois), Holy Land Foundation for Relief and Development (Texas), Islamic American Relief Agency-USA (Missouri), and Goodwill Charitable Organization (Michigan). A seventh U.S.-based Muslim charity has closed due to an Office of Foreign Assets Control (OFAC) blocking order but still has not been designated over three years later: KindHearts for Charitable Humanitarian Development (Ohio).

In addition, at least six U.S.-based, American Muslim charities, including KinderUSA (Texas), Life for Relief and Development (Michigan), Al-Mabarrat (Michigan), Child Foundation (Oregon), Help the Needy (New York), and Care International (Massachusetts) have been declared under investigation or raided. These charities have not been designated nor had their assets seized pursuant to a blocking order, but have suffered as a result of government conduct, including publicly announced investigations, law enforcement raids, and intrusive surveillance. Two of these charities, Help the Needy and Care International, have closed. The ACLU has documented that raids of Muslim charities—conducted without the government’s even going through the designation or asset-blocking process—have substantially disrupted their operation, scaring off donors in the absence of indictable evidence of wrongdoing.

In some cases, the U.S. government has smeared the reputations of Muslim charities, Muslim community organizations, and associates of Muslim charities without affording these organizations and individuals their day in court or any other opportunity to clear their names. For instance, in one material support prosecution against a Muslim charity, government lawyers named individuals and organizations, including some of the country’s largest, mainstream Muslim organizations, as unindicted co-conspirators in the criminal case. Government lawyers made these inflammatory charges against individuals and organizations that have not been charged with any crime, without affording the named individuals and groups the ability to defend themselves or clear their names, in clear violation of these individuals’ and organizations’ constitutional right to presumption of innocence.



Pupils of the Al-Ihsan Academy, a Muslim school in Michigan, count food donated for Zakat. The government’s actions have chilled American Muslims’ free and full exercise of their religion through charitable giving, or Zakat, one of the core “five pillars” of Islam and a religious obligation for all observant Muslims. [Clarence Tabb Jr./Detroit News]

Intimidation of Muslim Donors by Law Enforcement

Federal law enforcement is engaging in practices that intimidate Muslim donors and create a climate of fear that chills American Muslims' free and full exercise of their religion through charitable giving. Many donors reported to the ACLU that the Federal Bureau of Investigation (FBI) has approached major donors to Muslim charities at their workplaces and homes for interviews about their charitable donations and knowledge of Muslim charities' activities locally and nationally. For example, in one coordinated action, the FBI interviewed about 60 Muslim donors in Flint, Michigan, about their donations to Muslim charities. Muslim donors also complained that upon return home from travel overseas, Customs and Border Protection agents subject them to detailed questioning about their donations to legal, U.S.-based Muslim charities. Furthermore, donors have been subpoenaed to testify in more than one charity-related grand jury investigation, further contributing to the community's fear.

In addition, numerous Muslim community leaders and Muslim donors told the ACLU that federal and local law enforcement and Treasury Department officials' refusal to reassure donors that they will not retroactively be held liable for donations compounds the climate of fear. Moreover, many interviewees reported that they believe that federal and local law enforcement has also approached community members about serving as informants in their mosques to monitor donations there. Several interviewees confirmed they had been approached in this manner, and while it is impossible for the ACLU to assess the extent of this practice, community members' perception that this is happening on a large scale contributes to the climate of fear that chills Muslims' charitable giving.

Chilling Effect on Muslim Charitable Giving and Impact on Religious Freedom

The government's designation, seizing of assets, and law enforcement raids of Muslim charities; interview of donors to Muslim charities; and criminal prosecution of Muslim charity leaders have created a chilling effect on American Muslims' charitable giving. The obligation to give Zakat (charity or alms) is one of the core "five pillars" of Islam, the five duties considered essential for all Muslims. The obligation to give Zakat is seen as a sacred duty for all observant Muslims. Many Muslims believe that the Zakat must be given to other Muslims and through Muslim charities that are familiar with the religious rules for the handling and distribution of Zakat, although there is not unanimity in this belief.

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In interviews with American Muslim donors, the ACLU documented a pervasive fear among Muslim charitable donors that they may be arrested, retroactively prosecuted for donations made in good faith to legal Muslim charities, targeted for law enforcement interviews for exercising their religious obligation to pay Zakat, subpoenaed to testify in a criminal case, subjected to surveillance, deported or denied citizenship or a green card, or otherwise implicated because of charitable donations made in fulfillment of their religious obligation to give Zakat.

Since 2002, media reports have suggested, based on anecdotal evidence, that the designation of Muslim charities has created fear among American Muslim donors and chilled their charitable giving. The ACLU conducted 115 interviews with Muslim community leaders and American Muslims directly affected by the U.S. government's policies regarding Muslim charities and Muslim charitable donors. The ACLU's research confirms previous anecdotal reports of this chilling effect.

In interviews with the ACLU, many Muslims reported that the climate of fear has made it impossible for them to fulfill their religious obligation to give Zakat in accordance with their faith. For these observant Muslims, the atmosphere of fear created by the government's treatment of Muslim charities and donors has directly impacted their ability to practice their religion. One Bangladeshi-American Muslim told the ACLU, "I am so concerned about giving money to a Muslim organization. It hurts me, because I myself am not able to practice Zakat...and I cannot practice my religion fully."¹¹ A U.S.-born Muslim man told the ACLU, "The implied threat and fear of reprisal regardless if the charity is a legal entity now stops our giving, prevents us from fulfilling our religious duty.... Limiting Zakat, it is like telling Christians they can't assemble on Sunday. To take away one-fifth of Islam, one of the five pillars of Islam, is to eat away at the religion."¹² According to a Pakistani-American Muslim man:

For six years I really have not been able to fulfill Zakat, I couldn't fulfill my religious obligation. [The Holy Land Foundation] was in the news and they painted all the Muslim charities with a very broad brush; for a very long time we haven't known what charity we could trust to give to.... It is an obligation we have as a Muslim: you have to pray, you have to go on Hajj, and you have to give Zakat if you can afford it. This is all part of being a Muslim, and we absolutely have not been able to practice our religion to the extent we are obligated to do so. This is why the Pilgrims sailed here, for religious freedom.

I don't have any religious rights anymore; I ask am I living in America? It is disheartening, disappointing. I feel that I sinned. My intention has been to give, but the circumstances are such that I cannot give.¹³

For some Muslims the ACLU interviewed, their failure to fulfill their obligation to give Zakat brings serious consequences for their religious standing, and many donors spoke poignantly of this personal impact of terrorism financing policies and practices. One Lebanese-American Muslim told the ACLU, "My religious standing is affected because the atmosphere of fear affects me. It depends on the person; not everybody is strong enough. For me, personally, this was a factor that affected me. I wasn't strong enough, so one of the pillars of my religion is not being fulfilled properly, as it should be.... If you are not fulfilling your pillar of Islam, your Zakat, it hurts you."¹⁴ Another donor explained, "Closing down the charities, you are getting to the spiritual essence of the human being. Every person needs to give to charities as a religious obligation, to feel good as a person, and the government has closed this off."¹⁵

American Muslims whose charitable giving has been affected by terrorism financing policies and practices articulated to the ACLU various consequences they feared if they give Zakat. For example, one Muslim donor told the ACLU that fear of accusations based on guilt by association has had a chilling effect on his practice of Islam through charitable donations:

The government is making accusations right and left, and this has had a chilling effect on our ability to practice our religion. I haven't been able to give. We have seen different natural disasters across the world, but when we wanted to give to a Muslim charity for religious purposes we couldn't. We have been afraid; there is a fear in the community, that if we give, we will be found guilty by association, we'll be caught in this big dragnet.... I am

one individual; how am I to protect myself if I am unfairly accused? I fear being dragged into an investigation, being labeled as someone who supports terrorism. Islam says if you see a Muslim in need you have to give him charity, but if you can't it definitely prevents you from practicing your religion.¹⁶

The ACLU does not suggest that the right to give donations in the name of Zakat is absolute, and neither does it maintain that donations made in the name of Zakat should be unrestricted in all cases, regardless of the circumstances. It is the chilling effect on charitable donations made in good faith and intended to be used only for humanitarian purposes that raises constitutional and human rights concerns.

Chilling Effect on Association with Muslim Community and Religious Organizations

The government's policies and practices toward Muslim charities and donors also have created a chilling effect on American Muslims' association with Muslim community and religious organizations. Mosques not only serve as prayer spaces, but as hubs for various facets of religious and cultural life. Mosques also serve as religious schools, charity distribution centers, Arabic language schools, and youth centers. ACLU research reveals that the atmosphere of fear created by the closure of Muslim charities, law enforcement interviews of Muslim donors and other Muslims, and criminal prosecution of some Muslim charity leaders for material support, is unfairly limiting American Muslims' freedom to associate with Muslim religious and community organizations, including mosques, Islamic schools, Arab and Muslim advocacy organizations, and Muslim charities.

Many American Muslims reported to the ACLU that the climate of fear created by the government's policies regarding Muslim charities and charitable

giving is affecting their participation in a wide range of religious activities. Muslim community leaders and members in Michigan and Texas described to the ACLU the chilling effect on Muslims' participation in religious activities such as congregational prayer at the mosque on Friday, Eid celebrations at the conclusion of Ramadan, or other communal religious rituals. This chilling effect implicates both freedom of religion and association, in contravention of constitutional and human rights protections.

The United States has long been regarded as a beacon of religious freedom. And yet U.S. terrorism financing laws and policies developed under the Bush administration are inhibiting American Muslims' ability to freely and fully practice their religion.

For example, an American Muslim man told the ACLU, "What they are affecting is the institutions through which I participate in my religion. How do I explain to my son that unlike a church that has a picnic in the park, we are unable to participate in such events?"¹⁷ An American Muslim woman said that she and her family now are too fearful to worship at their mosque. She explained, "We don't have as much outward participation in our religion as we used to.... Because of the government's intimidation, if we pray in congregation we fear more questioning: what is your connection to that person you were seen praying with? More people like us are choosing to pray at home instead of getting out and praying in the congregation."¹⁸

Collateral Consequences Undermine Counterterrorism Efforts

The ACLU's research documented several collateral consequences of U.S. terrorism financing policies and practices towards U.S.-based Muslim charities and Muslim donors that actually undermine counterterrorism efforts. The ACLU's research showed that these policies and practices are alienating Muslim Americans; are damaging America's reputation and diplomatic efforts in Muslim countries by giving the appearance of a war on Islam; are fomenting fear that drives Muslim Americans' charitable donations underground; and are creating a chilling effect on overseas humanitarian relief efforts. Each of these collateral consequences is counterproductive to the U.S. government's efforts to counter terrorism.

The ACLU found that instead of working with American Muslim donors as valuable allies in the "war on terrorism financing," the U.S. government's terrorism financing policies and practices have alienated Muslim Americans and engendered mistrust of law enforcement.¹⁹ Many American Muslims told us that the government's closure of Muslim charities and intimidation of Muslim donors has undermined their trust in federal and local government, including law enforcement authorities. One Muslim community leader in Texas told the ACLU, "A fissure has opened up between the government and our community, and this wound is not healing."²⁰ The 9/11 Commission staff found that terrorism financing policies "can undermine support in the very communities where the government needs it most," and "risks a substantial backlash."²¹

Terrorism financing policies are also undermining U.S. reputation abroad, especially in Muslim countries that are crucial allies in the "war on terrorism financing." In fact, Treasury Department-led terrorism financing efforts could undermine diplomatic efforts, just as President Barack Obama reaches out to Muslim countries. U.S. policies

give the impression that the fight against terrorism financing is a war on Islam, directly contradicting President Obama's recent announcement before the Turkish Parliament that "America's relationship with the Muslim community, the Muslim world, cannot, and will not, just be based upon opposition to terrorism."²²

The ACLU documented a significant rise in cash donations as a proportion of Muslim donors' donations. Fear of the consequences of donating to legal Muslim charities has led many Muslims to make donations exclusively in cash to mosques or their family members, in order to preserve their anonymity and protect themselves from reprisal. According to experts, this proportionate rise in cash donations may complicate U.S. government efforts to track flows of funds.

Finally, ambiguities of the policies on material support and the climate of fear these policies have created have impacted vital humanitarian work overseas and cost lives, counter to U.S. interests abroad. Overbroad and vague material support laws create risks for humanitarian aid groups seeking to provide aid to needy civilians in areas affected by civil war and natural disasters, where designated terrorist organizations control territory. Because there is no humanitarian exemption from material support laws (only the provision of medicine and religious materials are exempted), aid workers in conflict zones are at risk of prosecution by the U.S. government. Tragically, U.S. counterterrorism laws make it more difficult for U.S. charities to operate in parts of the world where their good works could be most effective in countering extremism and enhancing security.

Conclusion

The United States is shirking its commitments under international treaties that enshrine the rights to freedom of religion, freedom of association, and freedom from discrimination. As a state party to the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination, the United States must respect freedom of religious belief, practice, observance and worship, and must guarantee freedom of religion without distinction as to race, color, or national or ethnic origin. The United States also is undermining American Muslims' First Amendment rights to freedom of religion and freedom of association, and their right to equal protection under the law. As one U.S.-born Muslim told the ACLU,

The freedom of religion, that's why the Puritans came here to settle in the U.S. I believe in the Constitution that was set forth by our forefathers, who were so enlightened and had such broad minds to set forth the most basic rights in our Constitution. But for our government to go directly against that, against our right to practice our religion—because a fundamental tenet of our religion is being infringed upon—that's not the right thing to do.... Religious persecution was the first and foremost reason why people came to America. To restrict religious freedom is to erode a fundamental pillar of this country.²³

The United States has long been regarded as a beacon of religious freedom, and since the 1940s, the United States has played a prominent role in promoting the rhetoric of freedom of religion in the international arena. During World War II, Franklin Roosevelt identified "freedom to worship" as one of the "four freedoms" for which the allies were fighting.²⁴ And yet U.S. terrorism financing laws and policies developed under the Bush administration are inhibiting American Muslims' ability to freely and fully practice their religion.

c. Recommendations

There are clear measures the U.S. government should take to ensure American Muslims can freely and fully exercise their religion while protecting charities from mistaken targeting and abuse, and promoting national security and humanitarian aid. The ACLU calls on the U.S. government, including the President, Department of Treasury, Department of Justice, Federal Bureau of Investigation, Department of State, and Congress to implement a series of discrete legal and policy changes, outlined below.

i. To the President

- Repeal Executive Order 13224, which creates mechanisms for designating individuals and groups as "specially designated global terrorists," with respect to U.S. persons and entities, as well as foreign entities entitled to constitutional protections due to their substantial connections with the United States.²⁵
- Issue an executive order requiring watch lists to be completely reviewed within three months, with names limited to only those for whom there is credible evidence of terrorist ties or activities.
- Set time limits on frozen funds. Create a process for release of frozen charitable funds to beneficiaries. Ensure charitable funds frozen by the Treasury Department are ultimately released and used for charitable purposes in accordance with the original donors' intent.
- Adequately equip the Privacy and Civil Liberties Oversight Board, established pursuant to the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-408 (2004), and task the Board with conducting oversight of OFAC. The Privacy and Civil Liberties Board exercised oversight over the Department of

Treasury's Terrorist Financing Tracking Program as part of its mandate to monitor the impact of U.S. government actions on civil liberties and privacy interests.²⁶

- Issue an executive order prohibiting racial profiling by federal officers and banning law enforcement practices that disproportionately target people for investigation and enforcement based on race, ethnicity, national origin, sex or religion.
- Order the FBI, Department of Justice Joint Terrorism Task Force, and other federal agencies to cease public raids of charities under investigation, to cease intimidating interview of Muslim donors without suspicion, and to cease surveillance of charities and mosques without evidence of wrongdoing.
- Direct the Attorney General to thoroughly review the amended Guidelines on General Crimes, Racketeering Enterprise and to amend them to protect the rights and privacy of innocent persons (as detailed in the below recommendations to the Department of Justice).
- Direct the Attorney General to revise the Department of Justice ban on racial profiling in federal law enforcement to close the existing exemption for national security and border integrity activities.
- Work with Congress to establish a statutory investigative charter for the FBI that limits the FBI's authority to conduct investigations without specific and articulable facts giving reason to believe that an individual or group is or may be engaged in criminal activities, is or may be acting as an agent of a foreign power.

ii. *To the Department of Treasury*

- Swiftly create and implement a process for releasing frozen funds to beneficiaries via another charity for distribution in accordance with the original donors' intent and based on the nonprofit sector's proposed procedures.²⁷ Such a program may be based on powers existing in current regulations.²⁸
- For charities closed in the future, permit these charities to direct their seized funds to charities mutually approved by the frozen charity and the government.
- Ensure the right to counsel for designated charities, by allowing designated charities to use their own funds to pay for their defense.
- Withdraw the Office of Foreign Assets Control (OFAC) Anti-Terrorist Financing Guidelines / Voluntary Best Practices for U.S.-based Charities.
- Conduct public education and outreach with charities, so that charities can know how to carry out their missions while adhering to anti-terrorism laws, and avoid being blindsided by government enforcement.

iii. *To the Department of Justice*

- Do not retroactively target Muslim donors for enforcement or harassment on the basis of good faith donations made to lawful charitable organizations. Conduct effective outreach to reassure Muslim donors they will not retroactively be targeted for enforcement, even if charities are designated in the future.
- Cease naming unindicted co-conspirators (UCCs) in material support prosecutions.
- Publicly clear the UCCs in the HLF case. Expunge the names of organizations and individuals on the UCC list from any public record that identifies these groups as unindicted co-conspirators.
- Permit defendants charged with material support to challenge the underlying designation in their criminal cases.
- The U.S. Attorney General should thoroughly review the amended Guidelines on General Crimes, Racketeering Enterprise and amend them to:
 - Specifically prohibit the use of race, religion, national origin, or the exercise of First Amendment-protected activity as factors in making decisions to investigate persons or organizations.
 - Prohibit the FBI from initiating any investigative activity regarding a U.S. person absent information or an allegation that such person is engaged or may engage in criminal activity, or is or may be acting as an agent of a foreign power.
 - Prohibit the use of intrusive investigative techniques absent specific and articulable facts that give a reasonable indication that the subject of the investigation is engaging in a violation of federal law.
- Require the FBI to employ the least intrusive means necessary to accomplish its investigative objectives. In each investigation, the FBI should consider the nature of the alleged activity and the strength of the evidence in determining what investigative techniques should be utilized. Intrusive techniques such as law enforcement undercover activities and recruiting and tasking sources should only be authorized in full investigations, and only when less intrusive techniques would not accomplish the investigative objectives.
- Prohibit the FBI from collecting or maintaining information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an authorized criminal or national security investigation, and there are reasonable grounds to suspect the subject of the information is or may be involved in the conduct under investigation.
- Revise the Department of Justice ban on racial profiling in federal law enforcement to close the existing exemption for national security and border integrity activities.
- The U.S. Attorney General should create a mechanism for issuing subpoenas at the request of the Privacy and Civil Liberties Oversight Board. For example, this can be done through the creation of a *Memorandum of Understanding* between the Board and the attorney general in which the attorney general promises to enforce subpoenas issued by the Board's request unless he or she certifies that such a subpoena would be unlawful.

iv. *To the Federal Bureau of Investigation*

- Cease the use of race, religion, national origin, or the exercise of First Amendment-protected activity as factors in making decisions to investigate persons or organizations.
- Cease the use of intrusive investigative techniques absent specific and articulable facts that give a reasonable indication that the subject of the investigation is engaging in a violation of federal law.
- Cease initiating any investigative activity regarding a U.S. person absent information or an allegation that such person is engaged or may engage in criminal activity, or is or may be acting as an agent of a foreign power. A preliminary investigation opened upon such information or allegation should be strictly limited in scope and duration, and should be directed toward quickly determining whether a full investigation, based on facts establishing reasonable suspicion, may be warranted.
- In each investigation, employ the least intrusive means necessary to accomplish its investigative objectives. Consider the nature of the alleged activity and the strength of the evidence in determining what investigative techniques should be utilized. Intrusive techniques such as recruiting and tasking sources, law enforcement undercover activities, and investigative activities requiring court approval should only be authorized in full investigations, and only when less intrusive techniques would not accomplish the investigative objectives.
- Cease collecting or maintaining information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an authorized criminal or national security investigation, and there

are reasonable grounds to suspect the subject of the information is or may be involved in the conduct under investigation.

v. *To the Department of State*

- Implement the State Department *Guiding Principles on Non-Governmental Organizations* in the United States, including due process and protection of rights of speech and assembly.²⁹
- Review what is required to implement the *Guiding Principles* in the United States. Consult with the U.S. nonprofit sector to make recommendations on needed reforms that advance humanitarian work while protecting national security.
- The Secretary of State should exercise her power to grant exemptions through 2339B(j) waivers for specific technical advice and assistance, training and personnel where no violent activity is involved, to exempt these forms of assistance from the material support statute. Establish clear, ongoing policy under current law, using the humanitarian waiver or the general amendments to the statute. The statutory waiver authority could be used to signal that the U.S. will not prosecute people who are acting consistent with the rules of the International Committee of the Red Cross (ICRC).
- Create fair procedures for individuals to be removed from watch lists. These procedures should include deadlines for agency decisions and appeal rights. Support due process reforms for United Nations watch lists consistent with human rights and humanitarian law obligations.

vi. To Congress

- Reform the statutory scheme for designation of U.S. persons and entities, and of foreign entities entitled to constitutional protections due to their substantial connections with the United States,³⁰ as “specially designated global terrorists” (SDGT) under the International Emergency Economic Powers Act (IEEPA) to establish full due process protections, including:
 - Issuing transparent standards governing OFAC designations.
 - Creating a higher legal standard for designations.
 - Precisely defining the criteria for an individual or entity to be found an SDGT.
 - Enacting a (not over-broad) statutory definition of “specially designated terrorist” (SDT).
 - Providing timely notice including a full list of charges and statement of reasons.
 - Restricting the use of secret evidence.
 - Providing a meaningful opportunity to defend, including the ability to submit evidence and a hearing.
 - Requiring OFAC to provide a detailed statement of reasons for a decision to designate.
 - Providing judicial review of agency action.
 - Creating a statutory basis for challenging designations and asset freezing process.
 - Creating an effective redress program for individuals or organizations mistakenly flagged as a designated person.
- Generate intermediate sanctions for charities as part of a reformed regulatory framework for charities that includes fundamental due process protections. Such an intermediate process should include:
 - Issuing cease and desist orders to charities before taking disruptive action, to provide charities the opportunity to cure any issues and avoid sanctions by complying with the order. Such orders should provide detailed information about what actions or relationships are objectionable, and should include an opportunity for charities to contest the factual information or assumptions that led to the order.
 - Providing charities with an opportunity to cure before taking disruptive action. Such a process should allow charities a meaningful period of time to cure issues that would lead to designation or seizure of assets.
 - Creating an appeal process to challenge proposed actions, including:
 - Providing notice, including a full list of charges and statement of reasons.
 - Guaranteeing a right to a hearing, including fair trial or administrative hearing with cross examination and ability to submit evidence, to decide on designation.
 - Providing opportunity to present evidence in rebuttal.
 - Restricting the use of secret evidence.
- Amend the criminal material support statutes to require proof of specific intent to further an organization’s unlawful activities before imposing criminal liability. Amend 18 U.S.C. § 2339A and 18 U.S.C. § 2339B provisions, which punish

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, to instead require that the government prove that individuals charged specifically intended to further terrorist activity when they provided humanitarian assistance.

- Remove overbroad and impermissibly vague language, such as “training,” “service,” and “expert advice and assistance” from the definition of material support. Alternatively, amend 18 U.S.C. §§ 2339A(b)(1)-(b)(3) and 18 U.S.C. § 2339B(a)(1) to clarify this impermissibly vague language and insert a specific intent requirement into the definition of the provision of training, service, and expert advice or assistance.
- Expand the humanitarian exemptions to the material support statute beyond medicine and religious materials. Broader material support exceptions should include: medical equipment and services, civilian public health services, legal services, food, water, clothing, and shelter to noncombatants. Human rights training and conflict resolution services should be entirely exempted.
- Amend 50 U.S.C. §§ 1702(a)(1)(B) (as amended by Section 106 of the USA PATRIOT Act), striking language that authorizes OFAC blocking orders to freeze an organization's assets “pending investigation.”³¹ Alternatively, build in due process protections for charities under investigation (i.e. whose assets are frozen and seized pending designation).
- Require periodic OFAC reports to Congress, to promote transparency and accountability.
- Conduct Congressional oversight hearings on terrorism financing policies as applied to the charitable and nonprofit sector. Include

testimony from representatives of the charitable and Muslim communities in order to more accurately and completely evaluate the impact of the Department of Treasury's counterterrorism procedures.

- Request that the Government Accountability Office (GAO) conduct an investigation of frozen charitable funds to determine how much is currently blocked, what the original intent of donors was (by identifying and locating managers of the organizations involved), what barriers exist to transferring the funds for charitable purposes, and what that law provides for the eventual disposition of the funds.
- Pass the End Racial Profiling Act.
- Establish a legislative charter for the FBI, limiting the FBI's investigative authorities by requiring a factual predicate sufficient to establish reasonable suspicion before intrusive investigative techniques may be authorized, and prohibiting investigations based upon the exercise of First Amendment rights.
- Enact legislation to de-fund any FBI activities that chill the free exercise of First Amendment rights.

vii. *Regarding Proposals to Create a White List of Approved Charities*

While some individuals and groups have called for a government-created white list of approved charities, the ACLU is opposed to such a list. A white list would be deeply problematic, as it would be open to potential discrimination and abuse by government agencies, could be biased against some organizations and in favor of others based on religion or other factors, and would exclude smaller groups without the resources to get on the list. The executive director of KinderUSA told the ACLU, “I am totally opposed to the white list [proposal]. A white list, to me, is the same as a blacklist. If you start creating a white list you’ll have to comply with the ‘gang’ or be removed from the list.”³² According to Laila al-Marayati, president of the board of directors of KinderUSA, “If you don’t get on the white list then people would say we can’t give to you, so the government would be able to give legitimacy to those groups [on the list]. If you’re not on the list then would that mean that you were engaged in criminal activities?”³³