



The Center for Public & Nonprofit Leadership

Panel Discussion

SAFEGUARDING CHARITY IN THE WAR ON TERROR

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Educating Leaders Who Change the World

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Dean Judy Feder: It will be a stimulating afternoon. My job is to do what I just did, which is say hello, thank you for coming into the cold out of the heat and to turn the program over to our Nielson Chair of Philanthropy, Terry Odendahl. We have been very lucky at the Public Policy Institute to have her with us this year. Terry is a distinguished scholar of philanthropy, known for her pursuit of socially responsive philanthropy. She is Chair of the National Committee on Responsive Philanthropy.

She is also the author of a number of books examining the role of philanthropy. She has spent her year here in her position as Waldemar A. Nielsen Chair in Philanthropy addressing and encouraging discussion of the kinds of issues we will be discussing today. And in that regard she has made an enormous contribution to Georgetown University, our Public Policy Institute and I would say, to the Nation.

So, Terry, with that, please lead us forward. Thank you.

Dr. Teresa Odendahl: Thank you all for coming out today. I think you're going to find this to be a very exciting forum on Safeguarding Charity in the War on Terrorism. Recent front page stories in the *Washington Post* document the Bush Administration's use of misleading statistics in the war on terrorism, lack of evidence for convictions, the difficulties of removing a name from a watch list once it has been added, and the heavy-handed use of immigration law.

Our program today focuses on a similar disorganized, unwarranted targeting of charity and philanthropy. Shortly after 9/11, a Treasury official declared, and I quote, "Our fight against the financing of terror has expanded to the abuse of charities." In November 2002 with Executive Order 13224 and the Patriot Act as the presumed legal basis, new government oversight of charities came in the form of anti-terrorist financing Guidelines, so-called voluntary best practices for U.S. based charities. These confusing Guidelines affect foundation funding, especially abroad, international charitable organizations, Muslim-American groups and potentially any nonprofit undertaking.

Grantee certification, as well as checking nonprofit board members, employees and even vendors against multiple terrorist lists is now commonplace. In the opinion of many, the onus of ferreting out terrorists and terrorist activities falls on grant makers and nonprofit groups rather than the U.S. Government as it appropriately would. The nation's Islamic foundations and public charities are under particular suspicion. The government has frozen the assets of several and placed them and their principals on terrorists watch list.

According to the 9/11 Commission, however, the government has not proven that these groups are guilty of any terrorism related crimes and there have been no convictions to date. Ironically, the Guidelines were released in response to Arab-American and Muslim-American organizations that asked Treasury for assistance on how to avoid legal penalties.

The Guidelines have been called unrealistic, impractical, costly, and potentially dangerous. In the course of interviews with ten of the largest international foundations, several indicated, and I quote, "Everyone agrees that the Voluntary Guidelines are impossible to deal with. It would be difficult to make any grants if you followed them." Yet the threat of liability, the penalty of

frozen assets, and the advice of attorneys have led most corporate funders, major foundations, international relief organizations, and large nonprofits to pay them serious attention, although there is no safe harbor.

While the largest foundations claim that their giving priorities and processes have not changed as a result of new security rules, they almost all check the watch list on a regular basis. Some do it daily, others weekly or monthly and on every current and potential grantee. Some of them check every contact a staff member makes. Watch lists and the names on them have been proliferating since enactment of the Executive Order 13224. Just today, however, you may have noted that the Justice Department's Inspector General confirmed that the country's main terrorist watch list contains incomplete and inaccurate information.

Most foundations have also changed the language in their grant letters, requiring that the organizations they fund sign a document certifying that they do not either willingly or knowingly permit any portion of the grant to go to terrorism or to violence. While there are subtle differences, many employ language that has been all but codified. Yet even while crafting these requirements, compliance officers at foundations scoff at the practice.

What does certification mean? Wouldn't a terrorist just sign a letter? There is a widespread sense that these administrative formalities are unlikely to yield effective results. Program officers view certification language as useless and embarrassing, damaging trust in their work with the very groups that could make a difference in improving the conditions that lead to terrorism.

In the course of my own and others' investigations, we have heard of numerous groups, particularly in the global south that have been defunded or believed that they are about to be or fear such action as a consequence of refusing certification. But these groups will not go on the record with us to document such trends because they are justifiably concerned that once identified this way they might lose even more scarce grant money.

Compliance with new regulations has come to mean a tacit agreement among grant makers and their grantees to ignore the inane and untenable. I've been referring to voluntary measures, but related developments are not always meaningfully voluntary. In the past three years, the Guidelines have cemented into de facto law. For example, USAID now requires certification of all its grantees.

No one is arguing that terrorism is not a real and dangerous threat. But by enforcing elaborate, draconian rules, Washington is doing mightily what it claims to be against: harming charities and the people they serve while doing little to stem terrorism.

It is my honor to introduce the program today and the distinguished panel of scholars and activists who will elucidate these matters. Their bios are in your program, so I'll be brief and you can hear from them. And then we'd like to have as much audience participation as possible.

We'll start with David Cole, a Professor at the Georgetown University Law Center and Constitutional Scholar who will give us an overview of the historical lessons and legal issues

involved. Nancy Billica will follow. She's a Political Scientist at the University of Colorado and Advisor to the Urgent Action Fund for Women. She's going to provide us with more insights into the impact of the Treasury Guidelines and related policy developments, especially on small funders and the organizations that they give grants to. Daniel Mitchell, McKenna Senior Fellow in Political Economy at the Heritage Foundation will speak next. He'll address the cost and effectiveness of these policies. And then Dr. Laila Al-Marayati, Chair of the Board of Kinder USA and Spokesperson and Past President of the Muslim Women's League will bring us up to date on the situation for U.S.-based Muslim charities.

Following their remarks, I may ask them a few questions, but will open the floor for comments and queries. Then they will each have a few moments to wrap up at the end of the session. So, David, would you like to start?

Mr. David Cole: Thank you. I want to thank Terry and Judy for putting on this conference. I think this is a critically important issue in the war on terror and one that gets not nearly as much attention as it deserves. I would suggest changing the title of the conference from Safeguarding Charity in the War on Terror to Safeguarding Freedom of Association in the War on Terror because I think that's at the bottom of what this is about. It's about the threat that attempts to cut off funding for terrorist activities pose to freedom of association, freedom of political association, freedom of charitable association.

I'm going to suggest this afternoon that in many respects, we have resumed the practices of an earlier period in our history, namely the McCarthy era: first by resurrecting the principle of guilt by association; second by employing broad based administrative measures as well as criminal measures to implement guilt by association more extensively throughout the culture; and third, by employing public/private partnerships, in essence, to ensure the broadest possible effect of the enterprise. Here I'm referring in the current period to the Voluntary Guidelines that Treasury issued and Terry referenced.

In the 1950s, much like today, we were afraid. Then we were afraid not of terrorism, but of communism. It was a threat that we saw backed by the world's second greatest superpower; a superpower that was armed with nuclear weapons directed at each of our cities. We fought wars; we engaged in espionage; we launched an arms race, but we also took preventive measures at home to try to respond to this threat.

Today, we again are fighting wars; we engage in espionage; the military industrial complex is going just as strongly as it was in the Cold War. And we have adopted at home a preventive paradigm in the words of our former Attorney General, John Ashcroft. And part of that preventive paradigm is the tactic of targeting support for terrorist activity.

The argument for prevention is understandable. We cannot wait until the next 9/11 happens to bring the law enforcement system to bear. That's too late, and it's especially too late if they're using biological, chemical, or nuclear weapons. We have to act before they take that next action. We have to cut them off at the pass. We have to use preventive measures that are forward looking rather than backward looking. One such preventive measure is to cut off funding for

terrorist groups so they don't have the money that they would otherwise be able to use to buy the weapons and recruit individuals and target us.

It's an understandable argument. But what happens when we employ the preventive paradigm in efforts to try to stop this kind of support? In the McCarthy era, to remind those of you who either weren't around or haven't studied it, the trademark substantive standard was guilt by association. It became a crime not merely to engage in espionage or terrorism or sabotage on behalf of the Communist Party, but to be associated with the Communist Party in any way, shape or form.

We used administrative measures to enforce this. There were a handful of criminal prosecutions, some very celebrated criminal prosecutions, for being a member of the Communist Party or for advocating Communism, but most of the real work of enforcing McCarthyism was done through administrative measures, through Executive Orders,

through the loyalty review boards, which subjected every federal employee to a loyalty review check and, of course, through HUAC, the House Un-American Activities Committee, which through Congressional measures called in suspects for "outing" in Congressional hearings. It was these administrative measures that really allowed the government to spread the chill as far as it did, ultimately reaching millions of Americans.

At the same time, there was a public/private partnership. HUAC couldn't punish someone who they identified as a Communist. It relied on private industry to punish them. It would "out" them, and then it would rely on Hollywood or private industry, including universities, to fire them after they had been "outed."

And I think today we see the same mechanisms in play. We see broad criminal substantive standards under the Material Support Statute, under the International Emergency Economic Powers Act. Under these laws, it is a crime not merely to support terrorist activity, but to support any group that has been blacklisted as a terrorist group, regardless of what your support consists of.

We see broad based administrative schemes, so that under IEEPA, the International Emergency Economic Powers Act the government can designate groups in secret and can then through administrative measures freeze the assets of any entity or individual in the United States without any showing or even an allegation that the individual or entity violated any law, merely on the ground that they're under investigation.

And finally, we see public/private partnerships, effected in particular and most extensively, I believe, through the Treasury Department's Voluntary Guidelines, which turn foundations and funders into enforcers of this regime of guilt by association.

The goal today, as in the Communist Party era, was in some respects a legitimate goal -- to cut off support for activities that attacked us in some fundamental way. But the means used to reach that end have the effect of chilling a broad scope of political activity, humanitarian activity and support that is not in fact furthering any specific terrorist activity, but is simply associated with a group that has been designated.

Our obligation, I'll suggest, is to fight this chilling effect, to insist on distinguishing between those who support terrorist activities, who should be punished, and those who support the lawful activities of groups that have been designated terrorists, who should not be punished because they are engaging in constitutionally protected activity. And finally I'll suggest our obligation is to resist a public/private partnership where that partnership treads on constitutional freedoms.

Let me briefly outline the way the statutes under consideration here work. There are essentially three statutory regimes that the government uses to enforce this effort to cut off funding for terrorism. The first is the Criminal Statute 18 USC Section 2339B, often called the Material Support Statute. It makes it a crime to provide material support to any group that the Secretary of State has designated as a terrorist group.

Material support is defined as money, but also such things as speech, expert advice or assistance, training, personnel and the like. In short, any sort of support that is provided to the group is criminalized. It doesn't matter what the purpose of the support is.

So I represent an organization in Los Angeles called the Humanitarian Law Project. It's a 30-year old human rights group. It had been providing human rights training to a group of Kurds in Turkey. Why? Because the Kurds in Turkey are a much abused minority group, because they have significant conflict with the Turkish government. Because this group, the Kurdistan Workers Party, is the principal political representative of the Kurds in Turkey and because my client, the Humanitarian Law Project, wanted to assist the Kurdistan Workers Party in pursuing lawful, peaceful means to resolve their disputes with the Turks rather than violence.

Well, when the Kurdistan Workers Party was designated a terrorist group, it became a crime for my client to urge the Kurdistan Workers Party to pursue lawful, nonviolent human rights activities in furtherance of the rights of the Kurds. It was no defense to say we weren't trying to further terrorism; we were trying to discourage resort to violence by encouraging lawful means. Another example is Sami Al-Hussein, a Saudi student who was prosecuted last summer by the Justice Department in Idaho for running a website. And on that website he had links to other websites. And on some of those other websites there were speeches, and some of those speeches advocated Jihad. The government claimed that running the website therefore constituted providing expert assistance to terrorist groups. He was acquitted by an Idaho jury that had more fealty to the First Amendment than our Justice Department did. But that's how broadly the government reads the statute.

On that theory, when the New York Times writes a story about Osama bin Ladin's most recent videotaped or audiotaped message and puts a link on its website to that message for those who want to see it, they've committed a crime by providing material support to Al Qaeda, a terrorist group.

How do groups get listed as terrorist? Under this statute, the designation process allows the Secretary of State to designate any foreign group that has ever used or threatened to use a weapon, whose activities undermine our foreign policy. If the group hears about its designation, it can file a challenge in the D.C. Circuit within 30 days of that designation.

But it can't provide any evidence to support its challenge. The government can defend its designation using secret evidence that the group has no opportunity to see or confront, and the critical criterion in the designation standard -- that the group's activities undermine our foreign policy -- is, according to the courts, not judicially reviewable. So essentially, the Secretary of State has a blank check as to who she designates, and it then becomes a crime for people to support those groups, regardless of the nature of their support. That's the Material Support Statute.

The second statute, the IEEPA, International Emergency Economic Powers Act, was never designed to be an antiterrorism statute. It was designed to give the government the power to put embargos on foreign nations. But President Clinton had the novel idea of using this not to target foreign nations, not to put embargos on nations, but to target political groups and individuals and to put embargos on political groups and individuals.

I'll give you one example, Mohammad Salah. Mohammad Salah is a U.S citizen. He found himself on President Clinton's specially designated terrorist list under IEEPA one day. What does that mean? That means that there is an embargo on Mohammad Salah. It is a crime for anybody to engage in any financial transaction with Mohammad Salah. It is a crime to give him a dollar. It is a crime to sell him a loaf of bread. It is a crime to provide him with any medical attention whatsoever. It is a crime to provide him a job. He lives in Chicago. He was never given a hearing. He was never given a trial. There were no charges. He was simply put on the list. And there are hundreds of people on the list at this point.

The third law is one that doesn't directly affect charities, but I think is worth noting, and that is immigration law. Immigration law goes even further because it makes it a deportable offense to have ever supported in any way any group, including groups that have never been designated, any group of two or more individuals that have ever used or threatened to use a weapon. And it does not matter why you supported the group; it does not matter how you supported the group. Under this law, the African National Congress is a terrorist organization; the Israeli military is a terrorist organization; the Palestinian Authority is a terrorist organization; the Mujahedin is a terrorist organization, as are the Contras and the FMLN. Any foreign national who has ever provided support to one of those groups is deportable. The government claims that the law is also retroactive, so it's no defense to say, "When I supported the African National Congress' anti-apartheid work, there was no law against it."

So those are the laws. They have both criminal and administrative or civil consequences, but the basic idea is to shut down support to proscribed groups, regardless of the nature of that support. Finally, I want to say a word about the public/private partnership, and then I will close. The HUAC public/private partnership was relatively informal. The HUAC public/private partnership was relatively informal. HUAC "outed" groups and individuals and then relied on universities, industries, and Hollywood to fire and blacklist those individuals once their names became public. Here we have Voluntary Guidelines, formally issued by Treasury, which suggest to foundations that they do much more than what the law requires, to check lists other than the government's watch lists, to require certifications from recipients and the like. None of that is required by the law. Yet Treasury seeks to employ private foundations to extend the chilling effect of its laws.

What the law actually provides is that you may not knowingly provide material support to a designated terrorist organization. It does not bar you from providing support to a group that turns

out to have individuals who without your knowledge support a terrorist organization. It does not bar you from providing support to a group that happens to employ someone who is on the list. It does not require you to get certifications from your grantees. And yet the Treasury Department has asked foundations to do all that. And as Terry suggested, many, many foundations have complied.

So what should we do in response to this resurrection of guilt by association? First, I think we need to stand up for the rights of donors and the rights of recipients by insisting on a distinction between support for terrorist activities, which should be proscribed, and support for lawful activities, which should be permitted even if the group has been designated by the government as a blacklisted group.

Second, we shouldn't be chilled. I think many in the foundation community, many in the donor community have been chilled by unrealistic assessments of what the law requires and are chilled from providing perfectly lawful support to organizations and groups by the atmospherics of this set of laws rather than by the laws themselves.

Third, we should not become part of this public/private enterprise, at least in so far as it treads on First Amendment rights.

And finally, we should object on constitutional grounds that insist that there is a basic principle here. It is a principle that was forged in the McCarthy era and that is that it is very dangerous to go down the road of guilt by association; that that's the way that innocent people are harmed; that's the way that political freedom is curtailed. What we need to do is target individual culpability, not engage in guilt by association. 9/11 changed a lot, but it shouldn't change that basic principle. Thank you very much.

Dr. Nancy Billica: Thank you. I come to you today as a scholar very interested in policy efforts underway to address issues of terrorism; and also as a consultant and advisor to a small philanthropic organization that is deeply concerned about the effects of rules changes on their program.

Urgent Action Fund for Women's Human Rights is an international grantmaking organization focused on supporting the defenders of human rights in their own communities around the world.

Before I proceed with my comments and analysis on policy developments, I want to point out that I really shouldn't be here as an advisor to an organization like Urgent Action Fund. Somebody like me, who primarily focuses on U.S. national politics, should have very little value to an international grantmaking organization like the Urgent Action Fund. This organization has no lobbying interests and no policy agenda. It is simply trying to provide critical support to the defenders of human rights wherever they are struggling around the world.

So then the question arises, why am I working with Urgent Action Fund to monitor U.S. politics? My being here signals the seriousness with which this organization takes these rules changes. Further, in many ways my presence on this panel today is symbolic of the deep concern being experienced by numerous small philanthropic organizations dispersed in communities across the

country. The ability of these organizations to function and contribute depends on a political environment that values, protects, and encourages the contributions of private citizens operating through nonprofit organizations. These are organizations that would simply like to get back to the business of pursuing their various philanthropic missions. But first, they need assurance that they'll be able to carry out their business. This is what remains unclear.

To be sure, these are challenging days for the philanthropic sector. There's no dispute about the need for effective counter-terrorism. Severing the lines of financial support to international terrorists is an important goal. Added to this are recent efforts on the part of Congress and the Administration to rid both the corporate and nonprofit sectors of fraudulent financial practices.

These dual goals have had significant impacts, and most especially on:

- (1) smaller organizations that have fewer resources for addressing increased administrative requirements; and
- (2) organizations engaged in international philanthropic efforts, especially international grantmakers whose funding decisions are subject to heightened scrutiny and the threat of being blocked altogether.

My primary focus today is on the stated purposes and realized effects of counter-terrorism measures, particularly on these small and internationally-focused philanthropic organizations.

My ultimate concern is with the costs to the philanthropic sector of vigorous pursuit of counter-terrorism, especially when there is no evidence that these organizations are in any way involved in the support of terrorism. Ultimately, the costs fall on the shoulders of all American citizens who have a long and proud tradition of support for charitable activities.

Analysis of the Impact of the Treasury Department's "Voluntary Best Practices Guidelines for U.S.-Based Charities", issued on November 7, 2002

We've now had well over two years to deal with these so-called Voluntary Guidelines, and experience has underscored many lessons, especially for small and international organizations.

1. Simply put, these Guidelines are **administratively onerous**: The Treasury Guidelines are said to be voluntary, and yet organizations simply cannot afford not to comply.

The Treasury Guidelines suggest that a grantmaker is responsible for grant monies until fully expended by the ultimate grantee. Unfortunately, small organizations lack the staff and other resources (including time, expertise and data collection, analysis and management resources) to conduct detailed and time consuming monitoring of every single expenditure. Given guidelines such as these, however, organizations are forced to divert an increasing share of their already limited resources to administrative overhead. To choose to proceed without compliance is to increase the vulnerability of many already vulnerable programs. A lawsuit or investigation, even if completely unfounded, would present itself as a huge cost burden.

2. Indeed, some have called these Voluntary Guidelines "**logistically impossible**" to implement; they require that no stone remain unturned. The Guidelines require a collection of very detailed information about not just foreign grantees – the direct recipients of U.S. charitable

funding – but also of foreign vendors and foreign financial institutions. The amount of monitoring and paperwork that is implied by this process is mind-boggling. Even if the organization does everything possible to follow the guidelines – it is acting honestly and in good faith – there is no guarantee that it will be found in complete compliance. Turning the many uncertainties of the world into certainties is impossible.

3. The Voluntary Guidelines promote a **narrow and ineffective approach to due diligence**. Among other very difficult requirements of these Guidelines are increased steps to demonstrate due diligence on the part of the granting organization. Due diligence is a process of investigation and evaluation into the details of a potential investment or funding decision. There is no question that careful due diligence is necessary in terms of evaluating potential grant recipients. Who wants to throw their money away to grantees who won't carry through on their promises?

The disagreement right now is on how the due diligence should be done. Recent policy efforts have largely settled on the establishment of lists of terrorist organizations and of those suspected of being tied to such organizations. Thus, due diligence in practice is largely about list-checking.

For responsible, experienced international grantmakers, list-checking is highly insufficient. Due diligence for most international grantmakers means building a relationship of trust with potential grantees. This involves conversation; settling on mutually understood terms of agreement. This involves checking references and endorsements, consulting with colleagues in the field, researching many sources of information. Further, different organizations have different procedures for investigating potential grantees. These different procedures have evolved through organizational history, and they reflect the differing organizational missions – for example, humanitarian relief versus educational and developmental grants versus human rights interventions. Organizations tailor their efforts to match their missions against their own organizational styles and resources. There are lots of different and equally effective models for due diligence. Can we really imagine that any system of “best practices” would match the need of every philanthropic organization? Can we really imagine that list-checking will lead to better knowledge?

4. These guidelines, too, are **politically unclear**: though published more than two and a half years ago, neither the Treasury Dept nor the IRS have issued clarification (though they've both solicited follow-up comments and have been promising further information for quite a while). It seems that nobody in the nonprofit sector really knows what direction the Treasury Department is headed with these so-called voluntary guidelines.

Further, even if and when revised guidelines are issued, it still remains politically unclear as to how they will be applied. Can a review process be completely objective?

5. Nonprofits find these Guidelines to be **organizationally threatening**. These conditions of great uncertainty and administrative burden have been overwhelming for many organizations such that some of the more experimental and innovative programs are being dropped; creativity is being stifled in the interest of avoiding scrutiny. Some organizations in response have suspended program activities with international partners. Uncertainty may be

reduced, and the administrative load might be lightened, but there are costs to these types of decisions as well. If we had decided that Americans should limit their involvement in world affairs, then shutting down international organizations is the right approach. But if we believe that American citizens should be actively engaged in the world, then this truly is a bad result. The building blocks of democracy depend on people getting and staying involved in the issues of public concern. We've gotten mixed messages on this from the president who, on the one hand, praised the outpouring of contributions from Americans in response to the December 2004 tsunami, and on the other hand, has worked through his administration to discourage international grantmaking.

6. The Voluntary Guidelines constitute an inappropriate transfer of law enforcement responsibility. Concern for grantees, for the folks working in the field, must be at the very core of any grantmaking program. Grantmakers have a commitment to protect their grantees. And yet, these Guidelines encourage transferring the burden of monitoring to the grantees themselves. At its best, this simply increases the administrative load for grantees. Of course, the burden may be so great as to make the grant more trouble than it's worth. At its worst, it invites unwanted attention to grantees who, in some cases, are engaged in new, unpopular and experimental programs. Potentially, grantees are made more vulnerable.

According to U.S.AID, grantees are now viewed as "extensions of the U.S. government." The U.S. is transferring the responsibility of monitoring for terrorism and other threats to national security to grantees.

Consider who these grantees include: Many are impoverished, or are still struggling to gain basic public health and educational services. Many are fighting to protect their environmental resources or their children or their livelihoods. Many lack political power, or represent minority groups, or face social instability and armed conflict. Some are risking their lives to speak truth to power.

Many, in fact, are quite vulnerable.

Is it fair, is it right, is it wise to pass on the responsibility for doing the monitoring work of the U.S. government on to grantees such as these? For many international grantmakers, the protection of grantees is fundamental. The Treasury Guidelines fail in this regard.

Thank you for being willing to consider how current government actions are putting the fundamental spirit of philanthropy at risk.

Mr. Daniel Mitchell: I'd like to thank Georgetown for putting on this program and having me here. I suppose I should first explain why a tax economist is participating in a program on terrorist financing. It is rather accidental, circuitous route that got me here.

One of the big developments in tax policy is tax competition, as expressed by labor and capital shifting from high-tax nations to low-tax nations. That's something the Heritage Foundation welcomes. The people who oppose tax competition say that it's wrong or immoral or even

illegal for labor and capital to cross national borders. So they want to classify it as money laundering, and that has forced me to get involved in money laundering issues.

As a result, I've now been dragged into ever more narrow slices of money laundering issues. And so therefore, here I am, even though five years ago I would have said this is the last place I would possibly be. But, there are some fundamental economic modes of analysis that we can apply to this issue. And these things should be, presumably are, completely non-ideological.

First and foremost is the common sense principle of cost benefit analysis. Do we want to make sure that if we're going to take a certain route, if we want to try to reduce the likelihood of terrorism, what are the best ways to allocate our resources so that that actually happens? Think about it in the sense of how Washington, D.C. might allocate its police force. Do you want one policeman for the entire city of Washington? I think we would all agree that that's not enough.

On a cost-benefit analysis, it's worth it to hire more policemen to make sure that we're reducing crime to a greater level. Yet, on the other hand, I think we would all realize that you're never going to completely get rid of crime, and even if you make every single person in Washington, D.C. a policeman. That's clearly going overboard. The cost, the taxes, all sorts of other implications, we would agree that that's too much.

So somewhere between one cop and making everyone a cop is going to be middle ground that the political process comes to as a result of people either consciously or subconsciously making cost benefit decisions. Not only on the number of cops, but how they're allocated, how many are on the robbery division; how many are on the homicide division; what are they doing; what are they focusing on; what shifts do they take; what neighborhoods do they patrol? Again, that's all cost benefit analysis, something that I think all of us, even if we might not agree with a particular decision, we're glad that it happens. We realize that this is a good idea.

Let's take this common sense principle of cost benefit analysis and let's apply it to some of these issues of terrorist financing. And before I get into the narrower issue of terrorist financing, let's touch on the broader issue of money laundering laws. And there, I think there's a pretty strong argument to be made that we're not getting good bang for the buck, that cost benefit analysis is not being very well applied. Notwithstanding all the laws, an incredibly large percentage of criminal money is being successfully laundered.

An article from a *Dissent*, a leftwing magazine, states: "Attempts to find laundered funds are usually dismal failures. According to Interpol, \$3 billion in dirty money has been seized in 20 years of struggle against money laundering, about the amount laundered in three days. U.S. Treasury officials say 99.9 percent of the foreign criminal and terrorist money presented for deposit in the United States gets into secure accounts. That means anti-money laundering efforts fail 99.9 percent of the time."

According to government statistics, only 2,000 people are convicted of money laundering offenses every single year. And about half of those, the money laundering offense is just an add-on to some underlying criminal offense. And that's the benefit side of it. What's the cost side of it? Well, the cost side is enormous. Billions of dollars of cost imposed on the private sector,

very heavy cost in terms of direct government actions. There also are issues that I'm not going to pretend to be very competent to comment on, since I'm not a lawyer. I assume the sweeping invasion of privacy that's involved with anti-money laundering laws has to be a cost of some kind, even if I can't measure it and can't quantify what it means.

And yet, we're not getting much benefit in exchange for these costs. If somebody could show, yes, we had shut down all the drug cartels and we had stopped murder, and we had stopped fencing operations all because of anti-money laundering laws, well then, even if there were constitutional issues, privacy issues, someone might say, okay, we have to weigh those costs and benefits and it's worth it.

But we're not seeing that. And one of the reasons I think we have a problem is that we're sort of turning upside down the traditional approach to law enforcement.

Let me quote a former member of the European Parliament. "There are two quite distinct approaches to the task of dealing with criminal activity. One starts at the other end of the chain, the generality of citizens and seeks to sift through the events of daily life to identify criminal activity. Another focuses on terrorists, criminals, or suspected terrorist or criminals themselves in attempts to identify pursue and prosecute them, the interdiction approach."

The first approach is obviously less focused, more labor intensive and more likely to raise problems of invasion of privacy, clogging of systems and interference with the lives of average and honest citizens. So what are we getting? Where is the allocation of resources and is it something that we want to justify?

A very good article from *Reason*, a libertarian magazine, quotes law enforcement officials or former law enforcement officials in trying to figure out are we getting the bang for the buck. Quoting from the article, "I consider all these measures [anti-money laundering measures] to be highly counterproductive, says John Yoder, Director of the Justice Department's Asset Forfeiture Office in the Regan Administration. It costs more to enforce and regulate them than the benefits that are received. You're getting so much data on people who are absolutely legitimate and who are doing nothing wrong. There is just so much paperwork out there that it's really not a targeted effort. You have investigators running around chasing innocent people trying to find something that they're doing wrong, rather than targeting real criminals."

Another quote from the same article, "Oliver Buck Revell, a highly decorated 30-year veteran of the FBI who supervised the Bureau's Counterterrorism Division in the 1980s and '90s, agrees that the sheer volume of data generated by these measures can overwhelm law enforcement efforts. 'You can be buried in an avalanche of information,' Revelle says, 'the total volume of activity makes it very difficult to track and trace any type of specific information'."

Well, let's shift from the general to the specific. Okay, maybe anti-money laundering laws in general haven't been very successful, but maybe there's something particular about terrorism financing that might generate better cost-benefit results. After all, the cost of a successful 9/11 type attack on America are much, much heavier than the cost of some corner drug dealer getting

a couple of people to set up phony accounts so he can launder the money he gets from selling drugs.

Again, we have to look at the specific details. What are we discovering? There's a special challenge with this, because traditionally, when you look at money laundering laws, we're taking people who are criminal, with criminal proceeds and those are people trying to take those criminal proceeds and clean them or launder them by putting them in the banking system.

With terrorist financing, we're dealing with something very different. We're dealing with people who, in many cases, presumably have no criminal record; they have legitimately obtained money, but they're planning in their minds to do something evil with the money. So the question is, how can you possibly design a system of surveillance and deputize banks to start spying on customers and get them to read the minds of people who have no criminal record and who have legitimately obtained money. How do you do that?

I'm a Conservative. I probably have a slightly different perspective than many people here in terms of fighting crime. But commonsense tells me you can't read people's minds. And unless you then want to start profiling and say that everyone who meets these criteria isn't allowed to open up a bank account, it's just not going to be very successful.

So again, the question becomes, how are you going to allocate your resources to make sure that you're actually going to be successful. Again, we all presumably share the goal we want to stop terrorism and make it difficult for people to conduct additional 9/11 type attacks. Let's make sure that our efforts and our resources are allocated in a way that makes that more successful.

But what are we seeing with terrorism financing? Again, there are a couple of quotes that I think say it much better than I could. This is from an article in the *Economist*. "No banker present challenged Mr. Aufhauser, the former counsel at Treasury, though some balked at the notion of treating all customers as potential criminals. Most banks these days do not voice such views openly for fear of being accused of not doing their best to cut off Al Qaeda sources of money. In private, however, bankers with long experience of financial crime say that many of the rules introduced since September 11th to keep terrorists out of the mainstream financial system will not achieve their aim. And in the end, customers will pay more for banking because of the high cost of making detailed checks.

"The heart of the problem from the bank's point of view is that the vast majority of financial transactions are so routine and prosaic. America's Federal Bureau of Investigation recently tried to design a profile of how terrorists might use a bank. It failed to come up with any more unusual activity than placing a big deposit and withdrawing cash in a series of small amounts. That profile, the anti-money laundering boss at a big American bank points out, fits a quarter of bank customers."

Another good quote and this is from Reuters's, "U.S. banks struggling with tough new laws to spot terrorism financing say they will be groping around in the dark until government officials provide more intelligence to narrow the search. Bankers, experts and industry advocates say that unlike money laundering, which dominated dirty money searches before the September 11th

attacks, terrorist cash flow has no unique characteristics that would help banks spot, track or avoid it.

“One government official said on condition of anonymity, ‘You’re looking for a needle in a haystack. Unless you already know who the terrorists are, it’s hard to figure out what would be a distinguishing birthmark. There aren’t any.’ ‘In all seriousness, I haven’t seen any typology that says this is a red flag for terrorism’, said one senior official at a large U.S. bank. ‘The only way so far that we can think of to identify terrorist financing is for the government to identify who the terrorist are’.”

Now, I don’t want to be completely critical of what the government is doing. Even though much of what the Patriot Act did in terms of imposing more anti-money laundering requirements was misguided, there is one kernel that might be a hopeful sign and I say this as someone who freely admits I’m not an expert on terrorism, not an expert on financial services, and I’m certainly not a lawyer who would understand what the constitutional implications are.

In the Patriot Act, Section 314a, something called the Pointer calls for the creation of a list of people with suspect backgrounds and obliges banks to report any of their transactions. So, in other words, instead of requiring banks to spy a little bit on everybody, it requires the banks to spy a lot on this discrete limited group of people.

Now, how people get on that list, whether that’s justified, whether there’s appropriate due process, these are all questions I can’t answer. But from the limited sense of cost benefit analysis, it’s much better to spy on these people who we have some reason to think may be bad guys.

And so rather than having mountains of paperwork, mountains of reports, millions of currency transaction reports and suspicious activity reports every year sitting in computer databases where nobody every looks at them until after the fact, we actually have a system where – for a limited group of people who we think might actually be the bad guys – we will have the instant reporting and therefore, enabling law enforcement resources to be more properly and effectively targeted at those people.

When the government created this program, they didn’t replace all the other obligations and regulations and requirements. They simply added this on top. But I’m hoping that many government officials want to do the right thing and that they want to see things succeed. And so over time, if we begin to see that Section 314a, Pointer Program yields good results, then maybe perhaps we’ll begin to cut back on the other obligations and have a more effective focus in terms of how law enforcement resources are allocated.

Well, now let’s go to the very specific narrow slice of terrorist financing. I’m involved with one tiny nonprofit organization. And I know as a board member for this organization that has only one employee, that it’s already a pain in the neck to deal with all the government requirements, and if you don’t have any experience with this and you don’t want to hire an expensive consultant, you almost are feeling around in the dark. You know that if you do something wrong and if the government really wanted to step on you, you’re in big trouble. Yet, on the other

hand, you don't want to spend \$10,000 to have some expensive lawyer look over all the details and make sure you've dotted every "i" and crossed every "t".

Now fortunately, this little nonprofit that I'm associated has nothing to do with terrorist financing or the Middle East. But I can imagine what these issues can mean for such organizations: You have a small organization; you have a limited budget. You have a great desire to make sure those resources are being used in the right way and that you already have existing obligations and requirements under all the nonprofit law. And then you have these additional Voluntary Guidelines, voluntary in the same sense I suppose that the Internal Revenue Code is voluntary.

Now, in looking at those Guidelines, a lot of them don't seem that terrible, things dealing with your Board of Directors and your reporting of information. It's not as if the government is trying to force people to do bad things. But the question is whether those things impose costs and we have to measure those costs against the likely benefit.

And when I read over those Guidelines and I thought, okay, if I was a bad guy, could I find three people who had completely clean records to be a Board of Directors. Would there be anything in those terrorism financing Guidelines that would stop a bad person who had a specific goal of committing one terrorist act from setting up a completely clean charity and then using it as a vehicle for committing a terrorist act?

I'm not an expert on these things, but I certainly didn't get the impression in reading the guidelines that that it would be that difficult for an intelligent person, albeit an evil intelligent person, from engaging in terrorism. After all, why would it be any more difficult to overcome the terrorist financing Guidelines than it is to get around the broad array of existing anti-money laundering laws?

Thank you.

Dr. Laila Al-Marayati: The discussion about how to safeguard charities in the post 9/11 era has been very interesting so far. I am grateful to be here today to offer the perspective on this issue from the point of view of the American-Muslim community. I would like to offer some background understanding of how we have viewed the issue of terrorist financing and the issue of charities, address the effect the government's actions have had on Muslims themselves, and then identify what may be some opportunities for the future.

Background

The Muslim community first heard about the Treasury Guidelines from Juan Zarate (UnderSecretary for Terrorist Financing at the Department of Treasury) at a convention held by the Muslim Public Affairs Council in Los Angeles in 2002 which is the year the Guidelines were issued. He told the audience that the US Government had devised these Guidelines "as a response to you, the Muslim community, who are seeking guidance on how to deal with the 'problem' of charities and terrorist financing." At the time, three out of our ten charities that did

international work from the United States had already been closed in the aftermath of 9/11 and after the Patriot Act was passed.

As a result of the closures, there was a sense, almost, of hysteria in the community because these were groups that had good reputations among the donors; the government's actions against them generated a great deal of confusion and uncertainty. Muslim groups like MPAC approached the government representatives asking how we should respond. We want to give, we need to give, it's our right as Americans, it's our duty as Muslims, therefore it's a matter of religious freedom, and, therefore, we need you to help make it possible for us to give without fear. At the convention he told us, "Here are the Guidelines; they're voluntary, and provide no guarantee but this is what we've done. Now it's up to you to take the next step."

A year later, the Treasury Department solicited feedback on the Guidelines from the non-profit sector. Because we in the Muslim community had perceived the Guidelines as designated mainly for our charities, we were somewhat astounded to find that we (KinderUSA) were one of only three Muslim organizations among about 20 other nonprofits addressing the issue of the Treasury Guidelines at a meeting at the Treasury Department in the spring of 2004. We truly believed that the Guidelines weren't designed for the general nonprofit community. We surmised that the Guidelines were made general in order to dispel the perception that the government was singling out Muslims in the first place.

But the targeting of Muslims specifically has been an unspoken understanding of what we are talking about when addressing charitable giving and terrorist financing. Interestingly, though, it has happened that many non-profit non-Muslim organizations doing international work view the Guidelines as relevant to them because the terms involved are so broad. Therefore, the government's policy as expressed in the Guidelines has snowballed into a much larger issue that has had huge implications that go far beyond the Muslim American community.

Getting back to the topic of terrorist financing with respect to Muslim charities, I would argue that the government has exaggerated and continues to exaggerate the role of American-Muslim charities in terrorist financing. Before 9/11/2001, there were 10 to 12 major Muslim charities in this country that were doing work internationally; Since then, four have been shut down and two became defunct during other kinds of investigations. The four closures occurred because the government designated the organizations as "SDTG's" (specially designated terrorist groups). Not a single non-Muslim nonprofit organization has ever received such a designation and had its assets frozen and operations terminated as a result.

So far, the Holy Land Foundation (HLF), Benevolence International Foundation, Global Relief Foundation and the Islamic-American Relief Association have been designated as SDGT's. Their assets have been frozen. But, so far, there hasn't been a single criminal conviction in any of those cases that confirms without a doubt the actual financing of terrorism or the participation in terrorist acts. The criminal case against the major individuals involved in HLF is currently pending and due to go to trial next year.

Despite all the fear and anxiety in the nonprofit sector, the government in all this time has not made any moves against any organizations other than Muslim-American charities. Of course it has frozen the assets of designated individuals (Muslim and non-Muslim) and some non-Muslim organizations were included in those designated as terrorist by President Clinton under IEEPA, (which was referred to earlier by Professor Cole). However, at that time, none of the groups were involved in non-profit charitable work. Since then, Muslims have experienced the brunt of the policy on terrorist financing.

Another important development has been the USAPATRIOT Act (Patriot Act) which has impacted Muslim American charities in two major ways. First, because of the Patriot Act, the government is able now to freeze the assets of an organization while an investigation is pending, regardless of the outcome of the investigation. The Treasury Department doesn't have to actually prove that you've done anything wrong at the outset; they could say they are looking into it, and, in the meantime, freeze your assets. As any logical person would realize, such action basically spells the end of your organization. You can't expect people to keep giving knowing that their donations are going into a frozen account.

In addition, the Patriot Act enables the government to use secret evidence in the process of designating charities as financiers of terrorism. In several of the cases mentioned above, the organization filed an appeal only to have the designation upheld, based in large part on the judge's interpretation of secret evidence, evidence which the defense had no opportunity to review or rebut. Despite this injustice and bias on behalf of the government, Treasury and Justice Department officials continuously refer to the judges' ruling in their favor as a validation of the attacks on the charities.

What's also important to realize is that the government has never presented a clear money trail in any of the cases above which shows how money was used to finance terrorist acts. The 9/11 Commission Report, specifically, the Staff Monograph on Terrorist Financing, exposes the weaknesses in the government's cases in this regard, particularly for Benevolence International and Global Relief.

As I mentioned earlier, there hasn't a single criminal conviction of terrorism by anyone involved with the designated charities. The only criminal conviction of any kind was against Enam Arnout, the director of Benevolence International, who was convicted of fraud for diverting funds to purchase boots, blankets and other items for Chechen soldiers.

None of the cases mentioned have had any relation to Al Qaeda or to the terrorist acts of 9/11. This is very important, because I believe that the whole focus on Muslim charities has to do more with what is politically expedient than with promoting national security. The government gets mileage out of these cases and there are several reasons why singling out Muslim charities has served as a useful political tool which continues into the present.

Perceptions of the Government's Case against Muslim American Charities

The belief that politics more than national security drive the campaign against Muslim groups has generated in our community perceptions of discrimination, of racial profiling and of the application of double standards. Interestingly, the Government Accounting Office came out with

a report a couple of years ago that said that the majority of terrorist funds do not come from charitable money; rather, they come from money laundering, narcotic trafficking, and other forms of criminal activity. The money frozen in this country of the Muslim charities probably does not exceed \$15 million, which is a small amount, even if indeed it had been used for nefarious purposes as the government alleges.

It's popular to target Muslim charities. Recent surveys confirm that strong anti-Muslim sentiment continues to prevail among Americans and may actually be on the rise. Government action against Muslim groups exploits anti-Muslim sentiment because it recognizes that there will be little to no resistance against these maneuvers among the general public. More specifically, the government's actions reveal a strong anti-Palestinian sentiment, because all of the organizations designated to date engaged in charitable efforts in the Occupied Territories. Part of the "evidence" used against them had to do with the fact that the group may have donated funds to HLF (another terrorist group) thus making it complicit, even when the donation was made before HLF was designated as a supporter of terrorism in the West Bank and Gaza. That relationship seemed to be a main factor of consideration in the government's case against the other charities.

In addition, it appears that the government is using information provided by organizations that have a clear track record of anti-Muslim and anti-Palestinian propaganda. Indeed, undermining Muslims and those who don't support the hard-line faction in Israel is their *raison d'être*. Stuart Levey, who is the Undersecretary in the Office of Terrorist Financial Intelligence at the Treasury Department, spoke this spring at the convention for the American-Israel Political Action Committee, AIPAC. His presentation, in my opinion, confirms some of these negative perceptions about how this issue is used for political purposes by the U.S. government.

Levey gave a presentation that was almost identical to his testimony before the House Financial Services Committee on Oversight and Investigation earlier in the year where he said that the Treasury Department has been "working with private sector watchdog groups to promote awareness of terrorist financing issues in the charitable sector." He didn't elaborate, but in May, 2005, there was a news report about two former officers of a now defunct charity called Care International, which sheds some light on which "watchdog" groups he was referring to.

The charity was not designated as a terrorist organization; it went out of business for other reasons; but the two former officers were indicted this year on federal charges accusing them of lying to authorities who were investigating the charity's alleged ties to a terrorist organization. .

Apparently, years ago, one of these individuals had donated \$360 to the al-Kifah Refugee Center in New York. Al-Kifah ultimately was linked to the initial bombing of the World Trade Center. The allegation against the Care International official was made based on a receipt obtained by the Investigative Project. The Investigative Project is the brainchild of Steve Emerson, who is a well-known, blatantly anti-Muslim "terrorist expert" who has a very strong political agenda that is designed to eliminate Muslims from the public sector in terms of participation in government, the military and other areas that affect US policy, domestic or foreign. ...unless the Muslims are hand-picked by others of his ilk who try to dictate who qualifies as a good or bad, moderate or extreme, Muslim.

The Muslim Public Affairs Council has exposed his political motives in a monograph called *Counterproductive Counterterrorism*. He clearly has a biased, prejudiced agenda. Based on the news reports mentioned above, I can only assume that his is the kind of group that the Treasury Department is referring to when it talks about working with “private watchdog organizations,” organizations that can help locate a \$360 receipt.

The officer from Care International may or may not be guilty of supporting terrorism. We only have one side of the story and hopefully, he will get a fair trial in a US court. To get so much mileage out of \$360 seems to me like a ludicrous waste of our resources. That’s how political expediency is manifested in the pursuit of Muslim charities and individuals such that the prosecution of a minor infraction, which may be valid, is transformed into a great victory in the so-called War on Terrorism.

Muslim Americans also believe that double standards are employed when it comes to addressing the diversion of charitable funds. Many of you may have heard about what happened with Jack Abramoff, who was a friend and supporter of Tom Delay in Texas. He was accused this year of defrauding casino owners from a certain American-Indian tribe who had made substantial donations to what they thought was the Capital Athletic Foundation. According to media reports, over \$100,000 of those funds had been diverted to an extremist Israeli settler group in the West Bank.

What did that money buy? Military equipment, night vision goggles and other items, which brought to mind the case of Benevolence International, whose executive director was convicted for providing similar military style equipment (which did not include weapons) to Chechen soldiers.

Have the assets of Abramoff’s charity been frozen? Not that I’m aware of. Is there an investigation of terrorist financing pending? Not that I’m aware of. Could his charity be designated as an SDGT because there is an investigation ongoing? It doesn’t seem to have happened. The Executive Order that Professor Cole talked about earlier, 12947, signed by President Clinton in 1995 said that groups will be designated as terrorists if they engage in grave acts of violence that disrupt the Middle East peace process. At that time, the Administration designated specific groups such as Hamas and Kahane Kai.

It seems to me that the financing of an extremist organization, whether Palestinian or Israeli, that’s engaged in violent acts in the Territories, would warrant some type of investigation into terrorist financing since the group in question meets the criteria mentioned under Executive Order 12947. There is little doubt that this has been a clear-cut case of abuse of charitable funds which has already generated legal action. But, when we look at how this fits into the larger picture of terrorist financing, we can only conclude that the government (particularly the Treasury Department) is targeting one group at the exclusion of others who are guilty of equal if not worse crimes. Clearly, we are left with many questions about the application of a double standard in this regard.

In his testimony Levey admitted that the effect on donors in the Muslim community was negative and that people were not giving as much as before because they were afraid. He particularly talked about the humanitarian crisis in the Occupied Territories. His solution is to give more money to the Palestinian Authority exclusively, which could result in the diminishment if not elimination of the nonprofit sector and nongovernmental organizations that help alleviate human suffering there. We know that giving all of your money to government officials, is not necessarily the best way to meet the needs of the people most affected by dire circumstances, especially when you have a government that already has major issues with corruption and doesn't seem to have cleaned its house quite yet.

Effects on Muslim American Community

In the aftermath of the closures in 2001 and since then, only two or three new Muslim American charities have emerged. In the community, there is fear and capitulation, i.e., whatever the government tells us to do we're going to do it. We don't want to get in trouble. Individuals experience extreme frustration: I wish I could give, I can't stand it that I can't give, but I'm afraid because I don't know what's going to happen to me if I do give.

There's an overwhelming desire for the government to tell them what to do. That's why many Muslims are asking for a "white list" of legitimate charities that the government accepts. To the community, that's a very simple idea that would solve everything. They don't understand some of the complicated factors that would go into the government endorsing organizations and what criteria they would use to do so, but that's what people are asking for.

Several organizations are seeking to develop a council of Muslim foundations thinking that will enable us to avoid trouble with the government because such a foundation will establish a vetting process. This approach is problematic because Treasury officials reiterate that neither vetting by a council of organizations or absolute compliance with the Treasury Guidelines will guarantee a "safe haven" and prevent the closure of an organization during the "pendency of an investigation" as mentioned in the Patriot Act.

People want guarantees, they want protection, and that's not coming. What that means is that they are not giving. They may give more to domestic organizations. They may have stopped giving altogether to Muslim organizations out of fear. They may give to groups that are helping overseas, but not to Muslim groups that are doing that kind of work. This is an extremely important issue from a religious perspective because for Muslims, charitable giving is a religious requirement, known as Zakat. Certain criteria must be fulfilled in order for one's contribution to qualify as Zakat.

Muslims often feel that Muslim organizations will know how to handle the money in a certain way and give such that it will fulfill those requirements. We don't have that reassurance when giving to non-Muslim organizations. Charitable giving of any kind, of course, has value in the great scheme of life in terms of doing good, but the issue of Zakat and its requirements is still an important point that many Muslims care very much about. In addition, they believe that they have the right, like Americans of other faiths, to establish organizations based on their religious tradition.

In addition, Muslim Americans experience a sense of exclusion from the whole picture of humanitarian aid. During the tsunami disaster, for example, the Associated Press issued a list of all the organizations you could give to. Not a single organization on that list of over 100 groups was Muslim. They had other faith groups listed there, which was good, but where were we?

One of the first organizations that was able to be on the ground to get services to the people of Aceh in Indonesia was Islamic Relief. They have offices in the US but are based in Great Britain. Many in our community believe that is why they haven't been shut down. They were not included in the AP's list and complaints to the newspaper fell on deaf ears.

Muslims also greatly fear that they will be targeted by the government for making donations to groups that are later designated as supporters of terrorism. They have a fear of being arrested, deported, etc. While the government has not indicted individual donors to date simply for donating, the media often uses the fact that donations were made as implications of guilt. Jesse Maali, a Muslim American millionaire of Palestinian heritage who recently passed away, was indicted in Florida for tax evasion and other forms of fraud. The media kept referring to the fact that he had made donations to HLF as part of the reason he was under investigation, even though such support was never brought up by the government before or during the trial of his business partner who was similarly charged. Donating to HLF wasn't a crime at that moment in time, but that was used against him by the media.

Several months ago, the media reported that Hakim Olajuwon gave somewhere between \$20,000 and \$50,000 to organizations affiliated with the main mosque in Richardson, Texas that has been named in some of these lawsuits. Olajuwon has never been investigated for anything. He's not being indicted for anything. As far as we can tell, the FBI is not coming after him. He hasn't done anything wrong.

What he did at the time was give to causes that were legitimate, lawful and at this point, may still be. It hasn't been proven otherwise. But he was basically indicted by the media, which you can imagine will have an extremely deterrent effect on him in terms of future giving to any group and possibly on other donors as well.

Finally, Muslim Americans perceive that we don't even have legal recourse anymore. There's a profound disappointment in the legal system. As Levey said in his testimony, "All the judicial challenges to our designations have failed." Why, because according to the monograph from the 9/11 Report mentioned above, the legal standard for overturning a designation is favorable to the government attorneys and officials because they can use secret evidence that can't be challenged. The judge primarily sees the government's point of view without the benefit of full disclosure which is the standard in other situations such as criminal cases. In addition, judges are excessively cautious on issues that they perceive to be related to national security.

Opportunities for the Future

The ideas that I have for how to improve the situation are the following: first, the government must depoliticize the issue of national security. This must be a bipartisan demand. It's much too important to have it any other way. I think that's something all of us as Americans should request. Politicization results in a waste of resources and a false sense of progress and safety,

that makes our lives more endangered because we think things are improving because the government keeps telling us about the progress they are making. If their efforts are not resulting in tangible improvements in security, they need to refocus, redirect and look at what would work instead, rather than making small efforts seem much more significant than they are.

Second, we should enhance the relationship between the government and the Muslim community not by turning us into spies on each other, which they've definitely been trying to do, or by seeking government endorsement, but by addressing the fears and sense of intimidation and by enabling us to restore our faith in the rule of law.

There should be some recognition for groups that do engage in due diligence, transparency, compliance, and accountability. They should be free at least from government harassment. Unfortunately, what happens more often than we would like to admit, is that an individual who has a grievance that has nothing to do with criminal activity but rather is of a personal nature will file a complaint or make a false accusation with the FBI which then opens an investigation. We also are concerned that, for political reasons, foreign governments may make baseless accusations that nevertheless must be followed up by the FBI. These abuses of the system should be prevented and should not automatically prompt invasive and intrusive investigative tactics against law abiding organizations or individuals. Certainly, the government must be vigilant, but that does not justify gross harassment and intimidation.

Third, the government should resist the urge to use secret evidence in cases related to charities simply because it can. As revealed in the 9/11 Report, the secret evidence used against Benevolence International and Global Relief turned out to be bad evidence that would be considered hearsay in a criminal court. It even included newspaper articles. Just as charities are expected to function with utmost transparency, so too should the US government which instead hide behind secret evidence which undermines our right to due process.

Finally, we should support the efforts of the private sector to police and monitor itself. Well-established nonprofit organizations have been committed to the notions of due diligence, accountability and transparency both in word and in deed, since their inception. They can provide essential guidance to the government and to other organizations who are seeking to protect their donors and secure the needs of their beneficiaries in accordance with the law. To that end, we at KinderUSA, have been proud to be a part of the Treasury Working Group which has drafted a set of Principles of International Charity that can be used as a guide for charitable giving overseas as a valid alternative to the Guidelines issued by the Treasury Department.

With that, I would like to conclude my remarks and thank you for the opportunity to address you this evening.

Question and Answer Segment

Question #1

Audience Member: Thank you very much. Now, in terms of background, what does it mean to be certified? What's the process that an organization has to go through to be classified as certified?

Dr. Odendahl: Certification actually simply means that you sign a statement saying that you're not knowingly diverting any money to terrorist causes. It's simply putting the officer of a nonprofit organization's signature usually on a grant letter, if it's from a foundation. Or if it's USAID, the Agency for International Development, it's a similar kind of contractual agreement.

Audience Member: So it's just between the grantee and the funder and this information is not sent to the government, other than the USAID contracts.

Dr. Odendahl: Yes. At present that's not happening, but there's the implication that by signing such a contract, the grantee organization is actually doing more to guarantee that nothing they do goes to terrorism, which involves, according to the Voluntary Guidelines, checking these lists. There are about 15 lists that could be checked and checking their employees, checking their board members, checking their vendors, checking their banking institutions.

Audience Member: And so your vendor could be the people that sell you paper.

Dr. Odendahl: Yes.

Audience Member: Or they could be anything that you use.

Dr. Odendahl: Right, or food and so on. So the example -- and by the way, the Executive Order that we've been discussing today and the Voluntary Guidelines are in direct contradiction with international law because international law provides for humanitarian assistance, for example, even to the children of terrorists. But these new policies would mean that you couldn't even feed children in orphanages and so on.

Audience Member: And do you know, is there a specific documentation on how much money Muslim charities have lost as a result of this and also how much giving has decreased to other non-Muslim charities? Is that tracked at all?

Dr. Odendahl: It's very difficult to track these quantitatively. I think about \$15 million in assets have been frozen of U.S. based Muslim charities. And around Ramadan there was a noted decrease in giving by Muslims to the traditional charities. So we know that there's been a decline, but to the best of my knowledge there hasn't been a study on it.

Audience Member: And earlier you said that foundations need to show the courage to show leadership that they need to protect their grantees. How would you recommend that they do that?

Dr. Odendahl: Well, I think they could be speaking up more. Foundations actually traditionally had a great deal of power in American society and they're a part of a political process. And it seems that instead of engaging in that process, they're trying to, as one of the panelists said, as nonprofit organizations are, they don't want to draw attention to themselves, so they're not stepping forward, but they're being quiet.

Audience Member: And regarding international charities, there are some news reports in Saudi Arabia that many wealthy families are giving money to charities that they believe were being funneled to terrorist activity. Do you have any sense of that's true?

Dr. Odendahl: I really don't know much of anything at all about it except for following the press on it. But I don't know if you want to talk to him, this other gentleman over here who represents some of Saudi charities. He could probably make a more informed comment.

Audience Member: Great. And then lastly, what do you think is the most critical element of this at stake? What is most in question for future giving and future nonprofit work as a result of these Guidelines?

Dr. Odendahl: It's actually something that none of us got to, which is that the very nature of so-called nonprofit enterprises might be changing. So that nonprofits are now becoming so risk adverse that they're weighing the risks rather than the benefits of the work that they might be doing. And another issue that we didn't pay as much attention to as I would have liked is that there might be a targeting of nonprofits on political grounds.

So that nonprofits that dissent would possibly not undertake certain projects that were critical of the government and so on for fear that their assets might be frozen. And you see the case of the NAACP right now as an example of that possibility.

Question #2:

Mr. David Lubell, Tennessee Immigrant and Refugee Rights Coalition: I guess I'm coming from a domestic perspective. We're a coalition of immigrant and refugee groups based in Tennessee and we work a lot with Muslim member groups in our coalition. I just want to understand more about what our legal responsibilities are, and if we are now supposed to be investigating the groups in our coalition? What can we do to protect ourselves from any sort of government abuse or investigation?

Mr. Cole: Well, I don't think you have any obligation to investigate your member groups. I think you have the right to work with your member group. What the law prohibits is knowingly providing material support to designated terrorist entities. So, two things are important there. One is, knowingly. So if you are unknowingly providing material support to a designated terrorist group, you are not criminally liable. You don't have an affirmative obligation to inform yourself, number one.

And the second thing is that with a very small set of exceptions, the designated terrorist organizations are foreign terrorist organizations, so that domestic groups are not going to be implicated with the exception of four or five Muslim charities in the United States that have been designated and one U.S. citizen, Mohammad Salah, who I earlier noted.

But even with Mohammad Salah, as I was saying before, it is a crime for anyone to provide him with a penny, a loaf of bread, literally if they enforce this law against him, he would starve to death. But if the baker sells him a loaf of bread and doesn't know who he is, doesn't know that he's designated, it's not a crime. It's only if he knowingly gives him bread, knowing that he is

designated.

So I think it's important to keep in mind, there is this chilling effect, which the government likes, but we need to fight against it. And one way of fighting against the chilling effect is by not exaggerating the nature of the criminal prohibition, by understanding the specific nature of the criminal prohibition and not extending it further. And that's what's so troubling about the Voluntary Guidelines.

The Voluntary Guidelines are explicitly voluntary. The reason they're voluntary is that virtually nothing in those Guidelines is legally required. Some of those Guidelines make sense. But you could ignore them entirely and you should not be subject to investigation, you should not be subject to criminal prosecution.

Question #3

Dean Judy Feder: David, you said at the outset that this issue is getting insufficient attention and you've all spoken eloquently on what your concerns are. I wonder whether either the panelists or people in the audience with similar concerns could talk about strategies for calling greater attention or creating behavior change.

I think, David, you've just addressed ways that people and organizations can be responsible and fight back, but I wonder if there have been any organized attempts, including litigation or any other kinds of organized activity, to work toward change.

Mr. Cole: Well, there is some litigation. The case I described in my opening remarks, Humanitarian Law Project versus Gonzales now is pending in California in the District Court. In that case, we have an Amicus Brief that the ACLU wrote on behalf of a handful of charitable organizations talking about the dangers that these kinds of laws pose to humanitarian efforts.

I was involved in a similar case prior to 9/11 involving a slightly different law, but the same principle. And we also submitted an Amicus Brief in that case/ We were able to get a least a dozen charitable organizations and foundations to sign on relatively easily. This time around, post 9/11, it took a lot of effort to get four relatively small groups to agree to sign on.

So there has already been a significant chilling effect within the foundation community, within the charitable organization community. So much so that they don't even want to associate themselves with a legal brief that simply argues that there are constitutional First Amendment principles at stake when you penalize people for providing human rights training to a group in Turkey.

So it's an uphill battle here, but I do think one that's incredibly important to the nonprofit community. As Laila suggested, the nonprofit community is not likely to get targeted immediately, because they're not Muslim. But the principles that are at stake even in the cases involving the Muslim charities, in the case that I'm handling in California, are ones that if they are established, could at some future point come back to hurt those groups. And so I think it would be very important if the nonprofit community could get behind it in the way that they got

behind the Istook Amendment and other initiatives. Because when they do get behind an issue, they're quite powerful.

Dr. Odendahl: I want to recognize Rob Buchanan. I think he's going to be speaking on this issue and before we get to him, I also just wanted to add that, of course, many of you might know that the Combined Federal Campaign this last year was requiring certification of the ten thousand charities that are a part of the government's give in the workplace campaign. And the ACLU and a number of other groups brought suit against the Combined Federal Campaign, and it looks like there's some backing off from the list checking requirements.

Mr. Rob Buchanan, Council on Foundations: I just wanted to respond to the question about organized activity going on around some of these issues. The Council on Foundations over the past year has been coordinating a group of about 40 organizations, nonprofit advisors, and legal experts in this field, including many people here today— Laila Al-Marayati, Greg Fields with Global Fund for Children, Kay Guinane at OMB Watch and Terry Odendahl. After having responded to the IRS's call for comments with arguments as to why the Guidelines are a disaster, we were invited by Treasury about a year ago to come up with an alternative, so that is the genesis of the Principles of International Charity document. There is a web link in your program and I encourage you to go take a look at it—we're very proud of what we have come up with. So there has been a concerted effort from within the nonprofit sector taking on the Treasury Guidelines, in particular.

And in terms of the status report, I think it was Nancy who said we don't know what's going to happen with the Treasury Guidelines, whether they are going to be withdrawn or become permanent.... I'm not here to speak for the Treasury Department. I don't know exactly what they're going to do, but they have received our Principles of International Charity document with some openness and appreciation.

What they are telling us unofficially at this point is that they are revising the Treasury Guidelines and reissuing them soon, drawing heavily on the Principles of International Charity document, taking out some of the features that we have been most critical about, such as the recommendation that nonprofits go out and investigate the potential money laundering activities of the banks of every grantee organization and things like that, things that nonprofits have no capacity to do whatsoever and get them into the law enforcement field.

So they have said that they are going to take some of that stuff out, and that they are going to build on the Principles of International Charity. They are also going to rename them Considerations and Suggestions or Suggestions and Considerations, one of those. Basically what they are saying is that they think we're going to be much more pleased with the end result.

Obviously, we have to see what it is they do. They could take our Principles of International Charity and wrap them up in a way we could be very unhappy with. So we have to wait and see. That's the latest that we know.

Question #4

Ms. Sharon Light: I'm actually an attorney at Caplin & Drysdale. I work with Rob Buchanan and Kay Guinane at OMB Watch, and we supported the Council in this working group of charities. I would like David Cole to talk a little bit more about this notion that the Treasury Guidelines require, even though they're voluntary, organizations to check lists.

The Principles of International Charity very carefully don't do that. It was probably the most debated discussed point in the development process. They present list checking as an option, one of many tools you can use to learn about your grantees.

The concern that we hear is that because there's a list out there, that failure to check the list could be considered knowingly funding an organization on the list. I've heard people argue it both ways, so I'm interested in hearing your perspective.

Mr. Cole: Well, I'm of two minds on this issue. First of all, what the Treasury Guidelines say is that you should check not only the United States lists, as it is a crime to support a group on the United States list, but that you should also check the UN list, the EU list, and any other official list available. I don't know what other official lists they're referring to... Al Qaeda's list? I don't know.

But there's absolutely no requirement that you check these other entities' lists. And I don't think there's any requirement that one checks the U.S. list, nor do I think the government could say that you knowingly supported a group simply because you didn't check the list. If you routinely checked the list for every other grantee, and then when there was a grantee that might be on the list, you didn't check the list for them, then the government might be able to show that you really knew they were on the list and that's why you didn't check the list.

But I don't think it's enough to say you didn't check the list to establish knowing support. And Congress made it very clear in the National Intelligence Bill, which amended the Material Support statute, that you do have to know either that the group is on the list or that the group engages in terrorist activities to be found to have violated the law.

So I don't think there's an obligation to check lists. That said, I'm not sure how difficult it is to check the list. If you're checking lists simply for purposes of making sure that you're not supporting a listed group. That's probably, of all the things that are in here, the easiest thing that they suggest that one do.

My view is that even if a group is on the list, in some circumstances you ought to have a right to support that group. But that's a view that the government doesn't agree with right now, and we're litigating to try to change that. Take, for example, my client, the Humanitarian Law Project. They knew that the Kurdistan Workers Party was put on the list. They believe that they still have the right to support the lawful, human rights activity of the Kurdistan Workers Party, even though it's on the list. But we didn't advise them to just go ahead and support those activities and pretend that they didn't know that this group is on the list.

What we said was, we will file a lawsuit for an injunction from the court ruling that you have the right to provide this support. And in fact, we obtained such a ruling, which was recently vacated

as a result of Congress having amended the statute in response to our lawsuit. We're now back in District Court, because we don't think the amendments are sufficient.

So, one, I don't think it's that difficult to check the Treasury list or the State Department list. Maybe people could correct me if I'm wrong on that. But, two, if you want to support a group that's on the list, you can fight for your right to support that group, if you believe that the group engages in lawful activities. There are many groups on the list that engage in a wide range of perfectly lawful activities.

Another group that is involved in our case in California is the Liberation Tamil Tigers of Eelam in Sri Lanka, which is a designated terrorist organization, but which also controls significant parts of Sri Lanka and provides all sorts of lawful support to the people in that region. They run hospitals, they run schools, they run economic development associations, and many of the regions that they control are the hardest hit from the tsunami in Sri Lanka. In order to get aid to those areas, you have to work with this group.

Well, some of our clients want to provide tsunami relief in those regions and they want to work with this group, not to support its terrorist activities, but to support its lawful, humanitarian activities. If you want to do that, you have to go to court and you have to seek an injunction.

Question #5

Mr. Greg Fields, Global Fund for Children: I confess I was intrigued by Mr. Mitchell's approach of cost benefit analysis to this whole range of regulations and the recent trends over the last two or three years that have really curtailed, so some extent, the ability of charities internationally to exert what we've come to see as the soft power the charities have to change social conditions at a basic level and also from a U.S. perspective, to show the United States, the people of the United States, the charitable intensions of the United States in a very beneficial light. I think there's a tremendous cost to anything that limits the ability to perpetuate what has been an ongoing part of our national tradition.

And I don't know whether this is a question or a comment, but in terms of cost benefit analysis of how effective these regulations are, I would urge that somewhere in there, this very non-quantifiable factor be given some play, be given some air. Because I think it's absolutely critical to the work that can be done in the field and the perception of the country that at least has the intension of providing that work.

Dr. Odendahl: I'd like to take the prerogative as moderator to just say a couple of things. One of them is that foundations and especially the larger foundations with considerable assets could be exercising more courage and leadership than they are.

Secondly, I think that my own opinions in the course of my research have changed somewhat. I find the lists to be quite troubling. But, I've at least come to the position where I can understand that foundations may decide that they need to check the list, but I believe they should not be passing that onto their grantees. I just want to second something that Nancy said, which is,

foundations have a responsibility to protect their grantees rather than to pass it on. So that's more or less my own opinion.

And now I want to invite each panelist to make their concluding remarks.

Dr. Al-Marayati: I can't really think of what else I have to say other than this has been an extremely personal journey for me, as an individual, somebody who was a donor to some of those organizations before, and then now as the chairperson of an organization that's been targeted for harassment by the FBI.

They have been conducting a very intrusive and disruptive kind of investigation, trying to get our employees to spy on us and so forth, to the point where it's created a lot of soul searching on my part to decide if I believe that it really is worth it to do this kind of work. My feeling was, when I started this organization that it's not about the government targeting Muslims because we're Muslims, it's about targeting people who are engaged in wrongdoing. And if we do everything right and aboveboard and follow all the rules, then nothing will happen.

I guess that's sort of a naive view of what it means to be an American; if you abide by the rule of law then you are a law-abiding citizen and there's no reason for any law enforcement agency to harass you. But that's certainly not the case, because throughout this investigative period that's gone on for about six months, we not only checked our donors against government terrorist lists, we subjected our needy children and orphans to the list because we couldn't figure out what it was that was prompting them to conduct this investigation so we tried to think of anything. We knew we had done nothing wrong and were in over-compliance with the rules that are there, because we knew we were going to be under excessive scrutiny by the government.

Again, people may think that's justified because of "the war on terror". I think it's a complete and total waste of government energy and funds and resources. Part of targeting us has to do with politics of the Middle East; as I said before, protecting our country from future acts of terrorism is to important an issue to subject to any political agenda.

So, not only have the closures of the charities that happened so far had a chilling effect, attacks on existing charities has had an even further detrimental effect on our community. This is a battle we cannot fight alone. We do not have the resources, the wherewithal, we are scrambling to figure out what to do, and so getting support from people involved in civil liberties issues and in philanthropy is extremely important for our community at this time.

Mr. Mitchell: I'll just shower people with pessimism in my closing statement. I've gone to the White House, to FinCEN, and to Treasury and made the cost benefit analysis argument to all of them. And more often than not, people will actually agree that we're not doing it right: the current paradigm doesn't work and it's not yielding good results. But we run up against the iron laws of bureaucracy. Bureaucracies want more power, government wants more information and politicians want to be risk adverse, as do bureaucracies.

Whether it's terrorist financing narrowly, whether it's anti-money laundering laws broadly, whether it's related issues, such as bureaucratic silliness when you want to go on an airplane - the entire political system is not going to be responsive to any of these concerns. Every politician and every bureaucrat wants to make sure that they can't be called to account after the fact if something bad happens.

So there's this impulse to impose more and more cost because that way you can say that you did something. And since, of course, the bureaucrats aren't the ones bearing the cost, these are generally costs imposed on the private sector or the nonprofit sector and because so many people in the for-profit and nonprofit sector don't want to look like they're not doing their fair share in the fight against terrorism, we have a very, very unpleasant dynamic where I suspect we're just going to get more intrusiveness, more requirements, more regulations, more information collection, more burdens without actually generating the positive results that all of us want.

Dr. Billica: I want to follow up on that. We are seeing a lot of requirements being added and in fact, at a recent gathering of a group of funders the point was made that maybe we're giving too much credit to government. We're adding all of these requirements and assuming that our bureaucrats and others can actually follow through, we're asking them to do a tremendous amount of work. .

But here's the concern. There is discretion in the application. The sector is huge, there's lots going on, so we find that there's discretion in choosing who will be looked at and who will be selected for investigation. That's one of the real concerns for a lot of organizations. They don't want to draw attention to themselves.

There was also the question, are people complaining, are they registering their dissatisfaction? There are, of course, coalitions, including that of the Council on Foundations, among others. But individual organizations are afraid to draw attention to themselves for fear that the government will choose them for the next investigation or the next audit, and that could have devastating effects on many of these organizations. So politics is one of my chief concerns.

Mr. Cole: I just want to echo something that Greg Fields said. I've talked a lot here about principle and it seems to me that there are some basic principles at stake. One is that one should not be treated as a terrorist because one provides human rights training to an organization that is disfavored. Two, is that we ought not go down the road of blacklists of proscribed groups. That's a road we've gone down before and we know that it's the wrong road. But it's not just a matter of principle.

I also think there's a matter of pragmatics and that is that this is ultimately the effort to stop a group like Al Qaeda from attacking us again in the way that they attacked us on September 11th. As the 9/11 Commission said, it is primarily a battle for hearts and minds.

It's not a battle we're going to win by cutting off money flows. It's not a battle we're going to win by policing. It's a battle we're going to win by winning hearts and minds. And it seems to me that one of the causes that leads people to engage in violence, to resort to violence is economic desperation. And if we adopt a tactic that ultimately leads to cutting off charitable giving to the

very areas of economic desperation where Al Qaeda is doing its best recruiting, we're shooting ourselves in the foot.

So I think both as a matter of security and as a matter of principle, we should insist that this is the wrong way to fight the war on terror. Thanks.

Dr. Odendahl: In conclusion, I want to thank the panelists for their very thoughtful presentations as well as you for listening so carefully and your good comments. I'd also like to thank the staff of GPPI and the Center for Public and Nonprofit Leadership, especially Amanda Horowitz and Rosemary Rita, who did all the logistics for this gathering and Kay Ganann for her sage counsel in helping to put the panel together of OMB watch.

Also, we have a couple of our funders in the audience and I want to particularly acknowledge the Ford Foundation and the C.S. Mott Foundation for their support of the Waldemar Nielsen Chair and forums such as this. Thank you very much for coming.