

Pace Law Review

Volume 25
Issue 2 *Spring 2005*
*The Anti-Terrorist Financing Guidelines: The
Impact on International Philanthropy*

Article 5

April 2005

The Treasury Guidelines Have Had Little Impact Overall on U.S. International Philanthropy, but They Have Had a Chilling Impact on U.S.-Based Muslim Charities

Barnett F. Baron

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>

Recommended Citation

Barnett F. Baron, *The Treasury Guidelines Have Had Little Impact Overall on U.S. International Philanthropy, but They Have Had a Chilling Impact on U.S.-Based Muslim Charities*, 25 Pace L. Rev. 307 (2005)

DOI: <https://doi.org/10.58948/2331-3528.1174>

Available at: <https://digitalcommons.pace.edu/plr/vol25/iss2/5>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

The Treasury Guidelines Have Had Little Impact Overall on U.S. International Philanthropy, But They Have Had A Chilling Impact on US-Based Muslim Charities

Barnett F. Baron¹

My remarks this afternoon will comment on the Bjorklund-Reynoso paper within the context of three broader questions:

1. What did the Treasury Guidelines say? What were we concerned about?
2. Have the Guidelines had a measurable impact on international grant-making?
3. What do we know about contributions by U.S.-based charities to terrorist organizations?

I. What did the Treasury Guidelines say? What were we concerned about?

The actual text of the Guidelines issued in November 2002 is included in the background materials for this symposium, and we have already heard a bit about them from Mr. Poncy and Mr. Mitchell. I will therefore not review them in detail.

As you may know, the Treasury Guidelines provoked a great deal of discussion and controversy within the philanthropic sector in this country. The Council on Foundations, the Exempt Organizations Committee of the Tax Section of the American Bar Association, InterAction, Independent Sector, Grantmakers Without Borders, various corporate grantmakers, and others responded to invitations by the Treasury Department ("Treasury") and the Internal Revenue Service to comment on the Guidelines and on other measures that IRS might consider to strengthen due diligence and financial control requirements for both domestic and international grant-making.

¹ Barnett F. Baron is the Executive Vice President of the Asia Foundation.

While the comments differed in detail, their consistent central message was that charitable organizations are already governed by a comprehensive set of laws, regulations, and IRS rulings that effectively prevent the diversion of charitable funds for any illegal purpose. The Treasury Guidelines, in particular, were excessively burdensome and impractical given the realities of international charitable work; unlikely to achieve their goal of reducing the flow of funds to terrorist organizations, but very likely to discourage international charitable activities by U.S.-based organizations.²

What are the issues? To be clear, no one in the foundation community is in favor of providing funds to terrorists or terrorist organizations. None of us disputes the legitimate right of the U.S. government to take appropriate steps to ensure that funds intended for charitable purposes are not diverted to terrorist purposes.

In an article published in the *International Journal for Not-for-Profit Law*, which has been distributed as a background paper, I suggested nine issues related to the Treasury Department's Anti-Terrorist Financing Guidelines ("Guidelines").³ There isn't time to go over them here, so I invite those of you interested in the details to read the paper. In brief, the issues I raised are the following:

1. The voluntary versus mandatory nature of the Guidelines. Although the Guidelines are described as voluntary, they actually included both mandatory and suggested practices.⁴ Moreover, in the context of the war on terror, the fact that the Guidelines were issued by and reflected what a powerful agency of the U.S. government believed to be appropriate practice carried the implication that they had to be given more than mere voluntary deference. Many in the philanthropic community feared that the Guidelines might become the framework for congressional legislation.

2. There is a wide range of accepted "best practices" within the U.S. grant-making community, because that community and the grantees it serves are so diverse. Many intense hours of conference calls were spent haggling over the range of current due diligence and grant-making

2. The responses are available online at <http://www.usig.org> (last visited Feb. 7, 2004).

3. Barnett F. Baron, *Detering Donors: Anti-Terrorist Financing Rules and American Philanthropy*, 6 INT'L J. NOT-FOR-PROFIT L. (Jan. 2004), at http://www.icnl.org/journal/vol6iss2/ar_baron.htm.

4. See U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: *Voluntary Best Practices for U.S.-Based Charities*, available at <http://www.ustreas.gov/press/releases/docs/tocc.pdf> (last modified Jan. 29, 2005).

practices before we could produce agreed responses to Treasury.

3. The quality of the terrorist lists themselves, their dispersal among many government agencies, the civil liberties issues that are sometimes raised by non-transparent rules for inclusion on the lists, and the limited ability of named individuals or organizations to learn why they were included or what had to be done to be removed from the lists.

4. The vague and sweeping language of the Guidelines, with such undefined terms as “deal with,” “otherwise associated with,” or being “implicated in any questionable activity.”⁵

5. The Guidelines are silent on scalability, but one size cannot fit all. The same due diligence is apparently required for a \$150 employee matching gift as for a \$5 million grant. (More recently, public statements by some Treasury officials have endorsed a more nuanced “risk-based” approach to due diligence.)

6. Much of the required information is not readily or publicly available to grant-makers in most developing countries. None of the countries in Africa, Asia, Latin America, or the Middle East has the same public disclosure requirements for charitable organizations as the United States.

7. The information required in the Guidelines *may* be available to certain government agencies around the world, but foundations and other grant-makers should not be required to act as surrogate police, intelligence, or law enforcement agencies to obtain those data. In addition, most grant-makers lack the expertise required to analyze, for example, the banking relationships of prospective grantees in order to prevent money laundering, as suggested by the Guidelines.⁶

8. Intrusive information gathering, much of it not related to the project under consideration. The Guidelines suggest gathering a large amount of information on prospective grantees and the organizations of which they are part, including checking the bona fides of the potential grantees’ trustees and employees in every part of the host country or every other jurisdiction in which it operates, whether or not those individuals are directly involved in the project being funded.⁷ Grant-makers feared that the process of collecting such “unrelated” information is likely to raise questions about the grant-makers’ non-charitable intentions and may destroy the trust needed for effective grant-making.

5. *See id.*

6. *Id.* at § IV(C)(1).

7. *Id.* at § IV.

9. In seeking to do legitimate charitable work in such politically sensitive fields as poverty alleviation and the provision of economic opportunity; promotion of civil society, gender equality, and human rights; facilitating national, religious, or ethnic conflict management and similar sensitive subjects, one wants to engage as many parties as possible in dialogue, even those that may be considered “radical” or “questionable” in local contexts. Since the terrorist lists are constantly changing (and since the Guidelines refer not only to standard U.S. government and United Nations lists, but also “any other official list available”⁸ to the grant-maker), the Guidelines make this sort of outreach very risky.

Given all of these concerns, many in the philanthropic community were concerned that the Guidelines would have a chilling effect on grant-makers—not just the big foundations, but especially on less experienced or smaller foundations and even on corporate employee matching gifts. We feared that grant-makers would be so intimidated by the broad and uncertain scope of the Guidelines that many would choose to forego all international grant-making.

II. Have the Guidelines had a measurable impact on international grant-making?

Despite these fears, the limited evidence currently available suggests that aggregate levels of international philanthropic giving from the United States have not—or not yet—been negatively impacted by the anti-terrorist funding guidelines and associated rules. International grant-makers have had to absorb significant additional costs associated with list checking and higher levels of due diligence on potential grantees, but this does not yet seem to have reduced their commitment to international grant-making. It will take additional and more nuanced monitoring over several years to begin to see whether the anti-terrorist financing rules are having an impact at the aggregate level, and even then, it will be difficult to single out their impact from that of other contextual factors, such as general economic conditions, the stock market valuation of foundation endowments, and the impact in any given year of unforeseen events, such as major natural disasters.⁹

8. *Id.* at § IV(B)(2).

9. Although detailed data are not available, it appears that the anti-terrorist financing guidelines may have had a direct impact on the direction, if not yet the

Available Data

Giving USA estimated that organizations that focus on international affairs received \$4.6 billion in contributions in 2002, an increase of 9.7 percent over 2001; and that those organizations received \$5.3 billion in 2003, an increase of 12.1 percent over 2002.¹⁰

The most authoritative data on international grant-making by private foundations are found in the series produced by the Foundation Center. *International Grantmaking III: An Update on U.S. Foundation Trends*, published in November 2004, is the most recent report in this series.¹¹ The report compares international giving in 1998 and 2002 based on an analysis of all grants of \$10,000 and over made by a sample of 1,009 foundations in 1998 and 1,005 foundations in 2002. These foundations accounted for more than half of all foundation giving in 2002 and two-thirds of estimated international giving. The report also estimates international giving from all foundations in 2003 and, based on a May 2004 survey of 64 of the largest foundations, offers a qualitative assessment of likely funding trends in 2004 and beyond.

According to the Foundation Center's analysis, international grant-making by *all* U.S. private foundations peaked at an estimated \$3.3 billion in 2001, slipped to \$3.2 billion in 2002, and dipped further to approximately \$3 billion in 2002. The report attributes the downward trend mainly to the protracted stock market decline after 1999 which resulted in lower payouts, since most foundations base their payouts on a lagging three year average of the market value of their endowments.

aggregate amounts, of corporate employee matching gift programs. After Executive Order 13224 was published and at least two major corporations found that they had inadvertently matched small employee gifts to listed organizations, several corporations temporarily suspended their matching gift programs. American corporations have since spent millions of dollars to develop list-checking and other compliance mechanisms. Anecdotal evidence suggests that while employee matching gift programs have since resumed, some are reported to be moving in the direction of matching employee contributions only to a limited number of foreign charities approved in advance by the corporation or to a limited number of U.S. charities with programs abroad, in contrast to the earlier practice of matching contributions to organizations selected by employees themselves.

10. AAFRC TRUST FOR PHILANTHROPY, *Giving USA 2003* and *Giving USA 2004*, reporting on the previous year's contributions from individuals, bequests, foundations, and corporations. *Giving USA 2003*, at <http://www.ahmp.com/giving%202002/Giving%20USA%202002%20Full%20version.ppt> (last visited Jan. 31, 2005); *Giving USA 2004*, at <http://www.ahmp.com/resources.htm> (last visited Jan. 31, 2005).

11. THE FOUNDATION CENTER, New York, November 2004. Highlights of the report are available at http://www.fdncenter.org/research/trends_analysis/pdf/intlhlts.pdf (last visited Feb. 7, 2004).

Despite the three year decline, the \$3.0 billion in grants for international purposes in 2002 represents a 47 percent increase over the \$1.6 billion in comparable grants made in 1998.

The 1,005 foundations included in the Foundation Center's survey for 2002 contributed nearly \$2.2 billion for international purposes, nearly double the \$1.07 billion they contributed in 1998. Even excluding the Bill and Melinda Gates Foundation, which alone accounted for about half the increase in the 1998 – 2002 period, international giving by the major private foundations rose by 57 percent, exceeding the 53 percent increase in foundation giving for all purposes. The survey also found that more private donors were making international grants: 636 foundations in the 2002 sample compared to 576 in 1998. Grants to U.S.-based organizations that conducted international programs more than doubled to \$1.3 billion between 1998 and 2002, while cross-border giving (grants made directly to recipients outside the U.S.) nearly doubled to \$836 million. The share of direct giving to overseas recipients fell slightly between 1998 and 2002, to 38.5 percent, "*continuing a downward trend that started in the mid-1990s.*"¹²

The Treasury Department's Voluntary Guidelines were issued in November 2002, so the Foundation Center's analysis of international grants made in 2002 cannot capture the possible impact of the Guidelines. However, as noted above, the Center's estimate of international giving by all foundations in 2003 shows only a modest decline in funding, which the report attributes primarily to the impact of previous declines in the market value of foundation endowments. Moreover, the Center's May 2004 survey of 64 foundations, also reported in *International Grantmaking III*, found that almost 90 percent of the respondents expected their 2004 international giving to remain unchanged (50 percent) or to increase (38 percent).

At the aggregate level, then, *International Grantmaking III* provides no evidence that the Guidelines have had a chilling effect on international grant-making by the nation's largest private foundations. To the contrary, the Center found that international grant-making has *increased* as a percentage of all grants made by those foundations, from 11 percent in 1998 to 14 percent in 2002. Paradoxically, however, the survey also reported that about 80 percent of the 64 respondents agreed with the statement that "it is now more difficult to fund internationally due to a more demanding and uncertain regulatory environment," and

12. *Id.* at 2 (emphasis added).

almost 70 percent agreed that “the international ‘war on terrorism’ makes funding overseas more difficult due to increased security risks abroad.” Thus it appears that the respondents are aware of the anti-terrorist funding Guidelines and the additional costs imposed by them, but they remain optimistic about maintaining or even increasing their own international grant-making. The Foundation Center intends to examine these issues in more depth in future surveys, including differentiating between large and small foundations, since the latter have more limited resources to cope with more demanding regulations, and monitoring whether there is an acceleration of the long-term trend away from direct grants to overseas recipients in favor of more grants to the international programs of U.S.-based organizations.¹³

Another relevant source of data is the *Chronicle of Philanthropy*’s annual Philanthropy 400 survey, based on the charities’ Form 990 informational tax returns and a sample of follow-up interviews. Overall, the survey found that private contributions to the country’s 400 most successful fundraising organizations increased 2.3 percent in 2003, compared to a drop of 1.2 percent in 2002.¹⁴ The \$6.3 billion in private contributions for international programs represented a 38 percent increase over 2002, by far the largest increase among the 15 program categories covered in the survey and the third largest program category in dollar terms after education (\$15.2 billion) and youth and social services (\$7.7 billion).¹⁵ In follow-up conversations with the authors of the survey, I learned that while respondents cited several concerns that in their view could affect their future fundraising, including stock market fluctuations, the war in Iraq, the possibility of a terrorist attack, and possible fallout from increased congressional scrutiny of the charitable sector, not a single one of the 43 respondents with international programs mentioned the anti-terrorist funding rules as a factor in fundraising.¹⁶

In contrast to the substantial evidence that the anti-terrorist funding guidelines have not—or not yet—had a chilling effect on charitable donations and international grant-making at the aggregate level, there is anecdotal evidence that particular segments of the international grant-making community have been adversely affected, particularly U.S.-based

13. Interview at The Foundation Center, in New York, N.Y. (Nov. 10, 2004).

14. Holly Hall et al., *Giving Slowly Rebounds*, *The Chron. of Philanthropy*, Oct. 28, 2004, at 26, available at <http://philanthropy.com/free/articles/v17/i02/02002601.htm>.

15. *Id.*

16. Follow-up interviews at The Foundation Center, in New York, N.Y. (Nov. 10 & 11, 2004).

Muslim-American and Arab-American charities.

The Treasury Department's Anti-Terrorist Voluntary Guidelines were issued in November 2002, in response to requests from Muslim-American and Arab-American organizations seeking guidance on how to avoid legal penalties while still being able to perform *zakat* and contribute to Muslim charitable organizations in the United States and abroad during the holy month of Ramadan. Prior to Ramadan 2004, Treasury Secretary Snow issued another public statement "regarding the sanctity of charitable giving," which included the following advice:

Through Zakat, Muslims have helped countless people around the globe with their charity and kindness.

Sadly, some have preyed on the charitable spirit of Americans and our friends worldwide by using charities as a conduit to finance terrorist activity. Those who have corrupted the goodwill of donors do not represent the mainstream values of people of good faith, including Muslims. As President Bush has said, the face of terror is not the true faith of Islam; which is a religion of peace.

The Treasury Department is working to stop the flow of terrorist funds that infiltrate the charitable sector by identifying and designating charities that finance al Qaida, Hamas and other terrorist organizations. In addition, we continue to work closely with the Arab and Muslim communities, as well as the charitable sector at large, to develop voluntary guidelines and practices to help protect the integrity of the charitable sector and ensure confidence in the donor community.

When you open your hearts to charity during Ramadan, we encourage you to educate yourself on the activities of the charities to which you donate, to help ensure that your generosity is not exploited for nefarious purposes.¹⁷

Many people viewed the November 2002 Guidelines and the October 2004 statement as warnings directed primarily at the Muslim-American and Arab-American communities. Consequently, charitable contributions to the international activities of U.S.-based Muslim-American and Arab-American charities are believed to have declined substantially since 2001, although some of these donations appear to have been redirected to other Muslim charities that provide domestic social welfare services.¹⁸ Unfortunately, there has been no systematic

17. Press Release, Secretary Snow, United States Treasury Department, Charitable Giving During Ramadan (Oct. 19, 2004), at <http://www.treas.gov/press/releases/js2041.htm>.

18. Among many press reports, see, e.g., Laurie Goodstein, *Since 9/11, Muslims*

effort to collect data from those charities, so the evidence is limited to occasional estimates offered by those charities and community leaders.

III. What do we know about contributions by U.S.-based charities to terrorist organizations?

In remarks to the American Bar Association in May 2003, David Aufhauser, then Treasury's General Counsel and chair of the U.S. government's interagency Policy Coordinating Committee on Terrorist Financing, expressed the view that charities were the "second largest" source of funding for international terrorist activities. He was probably referring to Islamic charities in Saudi Arabia and the Gulf region. The role of Islamic charities in financing al Qaeda was further elaborated in the staff Monograph on Terrorist Financing prepared for the 9/11 Commission:

[A]l Qaeda was funded, to the tune of approximately \$30 million per year, by diversions of money from Islamic charities and the use of well-placed financial facilitators who gathered money from both witting and unwitting donors, primarily in the Gulf region *The United States is not, and has not been, a substantial source of al Qaeda funding, although some funds raised in the United States may have made their way to al Qaeda and its affiliated groups* (emphasis added).

....

... Al Qaeda's charities' strategy before 9/11 had two prongs. In some instances, al Qaeda penetrated specific foreign branches of large, internationally recognized charities. In many cases, lax oversight and the charities' own ineffective financial controls, particularly over transactions in remote regions of the world, made it easy for al Qaeda operatives to divert money from charitable uses. These large international Gulf charities donated money to end recipients, usually smaller in-country charities, whose employees may have siphoned off money for al Qaeda. In the second class of cases, entire charities from the top down may have known of and even participated in the funneling of money to al Qaeda.¹⁹

Look Closer to Home, N.Y. TIMES, Nov. 15, 2004, at F; Radio Interview with Monique Parsons, Muslims Turn to Local Charities, All Things Considered, National Public Radio (Nov. 12, 2004), at <http://www.npr.org/templates/story/story.php?storyId=4167703>; Teresa Watanabe, *U.S. Muslims Temper Ramadan Giving With Caution*, L.A. TIMES, Nov. 6, 2004, at B2.

19. JOHN ROTH ET AL., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES: MONOGRAPH ON TERRORIST FINANCING 4, 21 (2004), available at http://www.9-11commission.gov/staff_statements/911TerrFin_Monograph.pdf.

Executive Order 13224, issued on September 23, 2001, exercised the statutory authority of the International Emergency Economic Powers Act²⁰ ("IEEPA") to prohibit financial transactions with individuals and organizations designated by the government to be associated with terrorism and allows the government to freeze the assets controlled by those organizations and those who support them. The IEEPA's provision allowing the blocking of assets "during the pendency of an investigation"²¹ enabled the government to block the assets of designated individuals and organizations even before criminal charges could be brought against them.

As of September 30, 2004, the U.S. government had designated 387 individuals and organizations as terrorist entities or their supporters, and "over \$200 million of terrorist-related funds" had been frozen worldwide, including more than \$37 million in the U.S.²² The amount of funds frozen is quite small in relation to other potential sources of terrorist funding, which include:

- Large-scale investments in many legitimate businesses
- Extensive stock market holdings
- Trafficking in drugs, cigarettes, and alcohol
- Trade in weapons
- Trade in diamonds, gold, other precious metals
- And kidnapping, extortion, and armed robbery.²³

Documented evidence of charitable giving as a source of funding for terrorist organizations is relatively rare, and is certainly dwarfed in scale by the likely diversion of funds from other sources, including:

- *Hawala*, estimated at up to \$200 billion a year²⁴

20. 50 U.S.C. §§ 1701-07 (2004).

21. *Id.* at § 1702.

22. *Combating International Terrorist Financing: Hearing on Terrorist Financing and Financial Crimes Before the House Subcommittees on Domestic and International Monetary Policy, Trade and Technology, House Committees on Financial Services*, 108th Cong. 4 (2004) (statement of Juan Carlos Zarate, Assistant Secretary, Dep't of Treasury) [hereinafter *International Terrorist Financing*], available at <http://financialservices.house.gov/media/pdf/093004jz.pdf>.

23. U.S. GENERAL ACCOUNTING OFFICE, GAO-04-163, TERRORIST FINANCING: U.S. AGENCIES SHOULD SYSTEMATICALLY ASSESS TERRORISTS' USE OF ALTERNATIVE FINANCING MECHANISMS (Nov. 2003), at <http://www.gao.gov/new.items/d04163.pdf>; LORETTA NAPOLEONI, MODERN JIHAD: TRACING THE DOLLARS BEHIND THE TERROR NETWORKS (Pluto Press 2003); DOUGLAS FARAH, BLOOD FROM STONES (Broadway 2004).

24. NAPOLEONI, *supra* note 23; GAO, *supra* note 23; COUNCIL ON FOREIGN RELATIONS, TERRORIST FINANCING: REPORT OF AN INDEPENDENT TASK FORCE (2002), at

- *Remittances*, estimated at a minimum of \$150 million a year by the World Bank
- Unregulated Islamic banking institutions throughout the Middle East, which deal mostly in cash without systematic reporting requirements.²⁵

The staff Monograph on Terrorist Financing concludes that it has proven impossible to completely close off funding to terrorist organizations. Rather, “the current intelligence community approach appropriately focuses on using financial information, in close coordination with other types of intelligence, to identify and track terrorist groups rather than to starve them of funding.”²⁶ The Monograph underlines the contrast between the relative ease of establishing “[links] to terrorist [organizations] through common acquaintances, group affiliations, historical relationships, phone communications”²⁷ and the extreme difficulty of being able to prove in a court of law that the individual or organization so accused actually funded terrorist organizations. Given those difficulties, being able to seize a suspected organization’s assets without having to “prove” wrong-doing is a powerful administrative weapon in disrupting suspected terrorist activities.

In recent testimony before Congress, Assistant Secretary Zarate explained that being able to designate individuals and organizations as terrorist entities under Executive Order 13224 has value far beyond the limited amount of assets seized:

If used properly, designations can be valuable by: (1) shutting down the pipeline through which designated parties raise and move money; (2) informing third parties, who may be unwittingly financing terrorist activity, of their association with supporters of terrorism; (3) deterring non-designated parties, who might otherwise be willing to finance terrorist activity; and (4) forcing terrorists to use potentially more costly, less efficient and/or less reliable means of financing.²⁸

The staff Monograph noted that the government may have few alternatives to using the authority of Executive Order 13224 and the IEEPA, since it has proven so difficult to obtain evidence of terrorist financing that would stand up to legal scrutiny, but that the designation

http://www.cfr.org/pdf/Terrorist_FinancingTF.pdf.

25. See, e.g., NAPOLEONI, *supra* note 23, chs. 9 – 10.

26. ROTH, *supra* note 19, at 7.

27. *Id.* at 9.

28. See *International Terrorist Financing*, *supra* note 22.

process itself raises substantial civil liberty concerns when applied to U.S. citizens and organizations:

IEEPA's provision allowing blocking "during the pendency of an investigation" is a powerful weapon with potentially dangerous applications when applied to domestic institutions. This provision lets the government shut down an organization without any formal determination of wrongdoing. It requires a single piece of paper, signed by a midlevel government official. . . . Using IEEPA at all against U.S. citizens and their organizations raises potentially troubling civil liberties issues. . . . As the Illinois charities cases demonstrate, IEEPA allows the freezing of an organization's assets and its designation as a SDGT before any adjudication of culpability by a court. The administrative record needed to justify a designation can include newspaper articles and other hearsay normally deemed too unreliable for a court of law. A designated entity can challenge the designation in court, but its chances of success are limited. The legal standard for overturning the designation is favorable to the government, and the government can rely on classified evidence that it shows to the judge but not defense counsel, depriving the designated entity of the usual right to confront the evidence against it.²⁹

Against this background, the conclusions derived from the Bjorklund-Reynoso analysis of the two Illinois charity cases are particularly relevant. Those conclusions can be summarized as follows:

1. Although the anti-terrorist Guidelines and related rules are intended to apply to all U.S.-based charities, no non-Muslim or non-Arab-American charities have been indicted or are known to be under investigation for diversion of funds for terrorist purposes.

2. While it is relatively easy to establish ideological and communication *links* to terrorist organizations based on intelligence investigations, that information is insufficient to serve as compelling *evidence* that the indicted charities have actually funded terrorists, in part because once funds leave the United States, they are "virtually untraceable."

3. Despite intensive efforts in the BIF and GRF cases, the U.S. government "has not been able to make any criminal charges against GRF and resolved the case against BIF without a conviction for support of terrorism."

4. In both the BIF and GRF cases, "high-ranking employees and board members purposefully deceived donors and knowingly supplied

29. ROTH, *supra* note 19, at 122; *see also* David B. Ottaway, *Groups, U.S. Battle over "Global Terrorist" Label*, WASH. POST, Nov. 14, 2004, at A1.

funds for non-charitable activities.”

5. The authors conclude that diversion occurs when actors are criminally motivated, and that none of the cases reviewed in the paper involved the inadvertent failure of due diligence procedures.

The authors ask why there have not been more charges and allegations against U.S.-based charities, and conclude that several factors are responsible, including:

1. a long history in the U.S. of carefully defining what is and is not charitable activity;
2. federal, state, local press, donor and watchdog efforts to criticize (and publicize) improper behavior by organizational managers;
3. increased transparency through wire transfers, internet research, and information posting and reporting;
4. success of current best-practices and due diligence procedures (written grant agreements; references for new grantees; reviewing reports; questioning when reports are inadequate; and demanding restoration of funds in appropriate cases); and
5. good use of common sense, in particular using a risk-based approach under which the highest-risk grants or gifts receive a higher level of pre- and post-grant scrutiny.

Conclusion

The information in this paper leads me to conclude that Executive Order 13224 and the Treasury Department’s Voluntary Guidelines have succeeded in meeting their primary objectives. They have raised public awareness of the potential abuse of U.S.-based charitable organizations for terrorist purposes. They have provoked “mainstream” U.S. charities to re-examine their current due diligence and grant-making procedures and, in many cases, to tighten them. They have succeeded in “detering donors,” albeit selectively. The available data suggest that grants to “mainstream” international programs have not been greatly affected by the anti-terrorist funding Guidelines, while there has been a chilling impact on donations to Muslim organizations abroad and the international programs of U.S.-based Muslim charities. And, through the use of “naming and shaming” designations and asset freezing under the authority of the IEEPA and Executive Order 13224, they have disrupted the alleged terrorist-support activities of a small number of charities against whom sufficient evidence could not be obtained for successful prosecutions in a court of law.