Center for American Progress

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Unintended Roadblocks

How U.S. Terrorism Restrictions Make It Harder to Save Lives

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Introduction and summary

Over the last decade, a growing and convoluted number of U.S. counterterrorism measures have greatly restricted the work of humanitarian organizations working overseas. These groups are repeatedly subject to vaguely defined laws, a lengthening list of ever-evolving and almost Orwellian vetting requirements, and a stubborn reluctance by policymakers in Washington to issue clear guidance. The impact on the ground is profound—from significantly delayed service delivery to a complete inability to reach hundreds of thousands of people in need.

Aid groups that have long worked to help persecuted, displaced, and marginalized populations have zero desire to offer assistance or support to known terrorists. But the current U.S. regulatory regime is making it demonstrably more difficult for them to operate on the ground—even when their beneficiaries appear to have little or nothing to do with the fight against terrorism. Equally concerning is that many of the terrorism restrictions now being developed—including sprawling name-gathering databases by both the Department of Defense and the U.S. Agency for International Development—may not be very effective in actually combating terrorism.

The current U.S. regulatory regime is making it demonstrably more difficult for them to operate on the ground.

This growing network of legal and practical restrictions present a host of expensive compliance challenges for relief groups already grappling with the complexities of trying to help vulnerable populations in places where designated terrorists are also located.

Aid groups often find themselves trapped between a rock and a hard place in such circumstances—wanting to do more but unable to do so because of the potential for such assistance, tangible and not, to become criminalized. In the absence of greater legal clarity, some organizations are scaling back and/or restricting their own programs.

A few recent examples of these dilemmas include:

- In the aftermath of the 2006 election in which Hamas, a recognized terrorist group since 1993, became part of a unified Palestinian government, many aid organizations operating in Gaza stopped working with central and local government officials in order to continuing providing assistance in the region. If this step hadn't been taken the groups could have been found guilty of providing "material support" to a designated terrorist group.

- One aid group working in Afghanistan only accepts small U.S. government grants instead of larger, multiyear ones because doing so means they can avert the need to collect personnel information, which can undermine relationships with local communities. These programs, however, can have less of an impact because they reach less people and run for a shorter time period.

- A number of American NGOs seeking to scale up relief operations in parts of southern Somalia, which is controlled by the terrorist designated group al-Shabaab, remain unable to do so more than four months after a famine was declared because there have been no blanket humanitarian exemptions made. Legal guidance on what activities are permissible and what might run them afoul of the law remains ambiguous at best.

The complex legal prohibitions and web of U.S. government lists and regulations create a troubling climate of instability and unpredictability for aid groups. Elements of secrecy and perceived affiliations with the military make their job all that much harder. Indeed, without consideration for the broader foreign policy environment, the designation of entities as terrorist organizations undermines the work of relief groups. For those groups working in complex crises, such as Somalia, they are hit particularly hard because it's yet another hurdle to overcome.

One potential bright spot, however, is the recent terrorist designation of senior leaders in the Haqqani network, a deadly insurgent group that conducted international attacks throughout Pakistan and Afghanistan on multiple occasions.[1] While the designation of these top leaders sends a clear message that their support for violent terrorism is unacceptable, the administration's decision not to designate the entire network indicates a renewed potential for flexibility within the designation process.

With a future Afghan peace process requiring direct engagement with this network, the administration elected to keep the door open by not branding the entire group a terrorist organization. Given the Haqqani network's increasing role in fomenting violence in Afghanistan, their participation in any peace process will be important.

And while not the sole reason to keep them at bay, designating the entire group could have complicated efforts underway to realize such a process.

Remarkably, the same type of careful analysis is absent when it comes to more traditional humanitarian concerns, especially in parts of the world that are less prioritized. The policy priorities in Afghanistan and Pakistan certainly helped bring about an unusual flexibility. But it is a model worth considering for other settings as well. Such an approach is particularly relevant for the current crisis in Somalia, where hundreds of thousands of lives hang in the balance.

Of course, while Somalia remains in the spotlight, it certainly isn't the first time humanitarian and antiterrorism imperatives have clashed. The 2004 tsunami response in Sri Lanka and Indonesia, the 2006 conflict in south Lebanon, and the 2006 creation of the Hamas-Fatah unity government in the Palestinian territories all gave rise to similar concerns. The deteriorating political and humanitarian situation in Yemen is quite possibly the next front line.

The potential for more than 750,000 people in Somalia to be caught up in the current famine presents a fresh opportunity to look at the limits aid groups are facing and how they can be improved. Addressing bureaucratic bottlenecks in Washington certainly won't alleviate all obstacles for aid groups operating in complex environments. But it will help remove the ones controlled by the U.S. government.

This paper provides a comprehensive background on the terrorist-designation process, including the system—laws, lists, and policies—that enables the designation to occur and the authorities used to uphold it. It then explores the corollary mechanisms—such as USAID's growing information databases—that are increasingly billed as critical antiterrorism tools but appear only tangentially related.

In each section, the paper explores the legal and practical implications of these regulations and how aid groups are dealing with the myriad challenges, some of which include:

- Reluctance to access needy populations in certain areas because of unclear legal guidance
- Delayed service delivery—often to devastating ends
- Difficulty expanding programs into new areas because of legal ambiguities
- Comprised organizational impartiality and neutrality
- Strained relations with local communities
- Unhelpful divisions within the aid community and reluctance to coordinate amongst each other because of vetting concerns
- Overburdened and exposed staff
- Delayed and/or dwindling resources focused on growing administration burdens, legal restrictions, and vetting requirements—instead of critically needed operations

Finally, the paper concludes with a list of recommendations to bring renewed attention to the ways in which current roadblocks could be improved and future ones prevented. These recommendations, fully discussed at the end of the paper, call on the administration to:

- Ensure USAID participates in all U.S. terrorist designations
- Amend the International Emergency Economic Powers Act
- Amend the material support statute
- Amend Executive Order 13324 and related orders
- Expedite the issuance blanket licenses for urgent cases
- Scrap the partner vetting system
- Consult regularly with nongovernmental organizations to determine the likely impact of any terrorist designation
- Compile empirical data for a report that would examine how field operations are affected by current laws and policies and whether the current approach to terrorist designations is the most appropriate tool
- Craft a more flexible policy framework

How terrorist designations work

The practice of designating terrorist organizations is not new, but the events of 9/11 understandably brought a new urgency to such initiatives. The approach, however, has not been systematic. And so, over the last decade, the United States has developed an increasingly complex, multilayered web of legal restrictions, administrative regulations, agency policies, executive orders, and contract-based donor requirements. The combination of legal and policy tools creates a regulatory regime—enforced by the Departments of Treasury and Justice—that is simultaneously specific, vague, and poorly defined.

The impact of terrorist designations on humanitarian agencies working overseas is particularly adverse. While ensuring taxpayer dollars do not end up in the hands of the wrong people is vital, the current sanctions regime and legal restrictions are imbalanced and impractical for organizations working in complex crises.

Public designation lists

The modern, list-based approach for designating terrorists is rooted in Executive Order 12947, a form of presidential rulemaking enabled under the Constitution that carries the weight of law.

EO 12947 was issued in 1995 to prohibit transactions with terrorists who threatened to disrupt efforts at Middle East peace.[2] It made way for legislation the following year—the 1996 Antiterrorism and Effective Death Penalty Act, or AEDPA—which codified authorities to create a specific list of terrorist groups known as the Foreign Terrorist Organization, or FTO, list. To be designated as an FTO, an entity must pose a threat to U.S. national security, economic interests, or even just citizens.[3]

While the FTO list is managed by the State Department, all listed FTOs are also classified as Specially Designated Nationals, or SDNs—a list of narcotraffickers and terrorists sanctioned by the Treasury Department's Office of Foreign Assets Control, or OFAC.

Once the FTO designation is made, and the entity is added to the SDN list, their assets are blocked. From that point on, U.S. citizens are prohibited from any transactions with listed entities or individuals unless they apply for a license. (see text box on p. 7)

The governing authorities for all SDN designations are the International Emergency Economic Powers Act, or IEEPA, passed in 1977 to regulate commerce after the president declares a national emergency in response to any unusual foreign threat, and Executive Order 13224, issued in the wake of 9/11 in order to impede terrorist funding and activities.[4] EO 13224 enables the U.S. government to disrupt the financial support for terrorists while also blocking assets of individuals and entities that provide support, services, assistance, or even associate with terrorists and terrorist organizations. Notably, these are different but complementary to the FTO designation authorities.

With only 48 entities listed as FTOs, the State Department list draws strength from the ensuing sanctions and legal regime. Its power as a stand-alone public list of terrorist entities cannot be overlooked, either. The SDN list, also public, differs in that it is a larger compilation of thousands of individuals and entities subject to varying sanctions regimes and legal restrictions, including under IEEPA and EO 13224.[5]

The fact that the FTO list is at once unique from the SDN list while also a part of the larger list illustrates the labyrinthine bureaucracy associated with terrorist-designation enforcement.

Interestingly, when it comes to all terrorist designations, the Congressional Research Services notes that there are several "cooks in the kitchen:"

> *The intelligence community is an important player … [while] the Justice Department weighs the legal evidence before the designation is approved. The Department of Homeland Security is also consulted before designations are made. … the Treasury Department plays a significant role, including blocking organizational assets and the issuance of guidelines.*[6]

But, notably, USAID is not a participant in this process—an absence that makes it all too easy to overlook the practical and legal implications for humanitarian relief operations.

To be sure, these designations provide important authorities that disrupt terrorists by choking off financial networks. The sanctions regimes are extensive enough to

underscore the legitimate national security threat, to encourage other countries to consider the severity of the threat, and most importantly, to make it more difficult for these groups to access funds.

But the unnecessary collateral damage for humanitarian organizations remains high. Most if not all designations are not made with any recognition of the complex security environments in which many of these aid groups operate and the millions of innocent people potentially affected by the same designation process. In addition, the administrative burdens organizations face in order to check names against extensive lists takes away from time spent doing much needed relief work and shifts financial resources toward headquarters instead of operational programs.

One NGO official interviewed by CAP noted that the policy emphasized "name checking" instead of crafting workable solutions. The consequence of such a policy could mean some relief groups ultimately reject U.S. government funding because the conditions under which they are required to work because of the laws are too onerous, undermine staff security, or are not in the best interest of the people they are trying to help.

Licenses for aid groups working in countries with terrorists

The Department of Treasury Office of Foreign Assets Control, or OFAC, administers the nation's sanctions programs for State Sponsors of Terrorism, Foreign Terrorist Organizations, and Specially Designated Nations. Exemptions for doing aid work in countries where designated terrorist groups exist can be obtained through an OFAC-issued license, but the process is extremely opaque and notdnecessarily required.

Any transaction occurring in a country listed as a State Sponsor of Terrorism, or SST, requires a license. Here the process is clear: In order to legally do business in SST countries you must apply for and receive a license. But the requirement for working in an area where FTOs and SDNs are located is decidedly less clear because the license isn't always needed. There are two types of licenses:

General, which authorizes a particular transaction for a class of persons without the need to apply for a license.

Specific, which is a written document issued by OFAC to a particular person or entity authorizing a particular transaction. This license is issued in response to an application.

While OFAC consults with other agencies when making decisions on licenses, OFAC licenses apply solely to countries or individuals they sanction. They do not exempt organizations or commercial entities from criminal concerns relating to the Patriot Act's material support statute (more on this in the next section).

The difficulty in determining the criteria by which OFAC signs off on a license application means that sometimes applicants are forced to wait indefinitely to find out if their application has been approved or denied. These licenses could mean life or death in the case of urgent crises.

In a recent Senate hearing, Mercy Corp Policy Director Jeremy Konyndyk noted the impact of these delays:

> *In 2009, it was reported that USAID was seeking an OFAC license for its work in Somalia, but that the Treasury Department was reluctant to grant this. In the midst of a serious humanitarian crisis in much of the country, numerous US-funded humanitarian response programs were suspended as grant agreements expired and could not be renewed.*

Secret databases and lists

There are also an undetermined number of classified lists and databases in addition to the public terrorist designation lists discussed in the previous section. The criteria for adding a person or entity on one of these lists—and well as their ultimate purpose—are completely ambiguous. The consequences of working with someone found on a list appear to be a cessation of funds, but that too remains unclear.

Contrary to the FTO and SDN lists, these new databases remain secret and may be coordinated with the larger terrorist watch list, created in 2003, to centralize all federal, state, and local law enforcement watch lists. Aid organizations interviewed by CAP note that removal from these new databases is possible, but the process is unclear. As a result, who is on the list—and who is off—is confidential. Just like the terrorist watch list, without any indication of what criteria are needed to be removed, listed individuals may not know they're on the list, or how they can get off if they are. Their fate, in many ways, is at the government's mercy.

A government audit on the watch list raised this very concern in 2009, noting that the list contained over 1.1 million names, with some people listed multiple times under different spellings. This same audit also noted that the centralized list was so jumbled that it "often contained inaccuracies or [was] incomplete."[7]

Operational groups are particularly concerned by the recent creation of two databases that could be used in conjunction with, or similarly to the terrorist watch list. One is known as the Partner Vetting System, or PVS, and is managed by USAID. The other is called the Synchronized Pre-deployment Operations Tracker, or SPOT, and is managed by the Department of Defense.

Partner Vetting System

Notice of the PVS's creation was announced in a July 2007 Federal Register with the stated goal of requiring U.S.-funded nongovernmental organizations to "provide personal information on staff for the purpose of vetting by the U.S. government in order to prevent USAID funds from being diverted to terrorists."

The system was launched as a two-year trial despite a public campaign against it by many groups such as InterAction, the coalition of more than 200 membership organizations for U.S.-based international relief and development agencies.

Aid groups were unequivocal that PVS would present a significant risk to aid workers and undermine their internal due-diligence requirements.

Their uneasiness lies with the requirement to gather personal information from staff in order to receive U.S. government funds. The list of requested information includes full names, date and place of birth, mailing addresses, email addresses, and phone numbers of in-country staff. Once collected, this information is then turned over to USAID without any clear guidelines of how or for what purposes it will be used. USAID's request for information goes far beyond most NGOs' internal due-diligence procedures, which are crafted to maintain a balance between organizational neutrality and the "need to know" their partners.

The negative response to PVS continues to escalate. An International Center for Not-for-Profit Law letter to USAID in 2007 reinforced the personal information concern and flagged a number of others as well, such as the lack of due process to challenge inaccurate findings, potential privacy act violations, increased risk of danger to relief workers in country, and heightened administrative burdens.[8]

More recently, InterAction sent a letter to Secretary of State Hillary Clinton in March 2009 noting the absence of any clear goals for PVS. It expressed concern that the database was only tangentially related to counterterrorism efforts. The letter specifically addressed the need for organizations to "to turn over private information of their officers and employees to the government to be vetted against the classified lists of the Terrorist Screening Center—an expansive list that includes prominent civic and religious leaders and at least one former Secretary of State."[9]

One Washington-based relief worker interviewed by CAP noted that "the lack of clarity in terms of what we're actually being asked to look for, what our list is being checked against, and what is done with the information makes no sense."[10] Indeed, inevitable questions arise as to whether USAID, already painfully understaffed, can appropriately manage such a large amount of information.

Notably, in the aftermath of recent meetings with civil society groups to discuss the myriad problems with PVS, USAID still announced its intention to continue developing the program and implement it globally, albeit in a pilot phase. Ironically, two of the upcoming test countries will include Ukraine and Guatemala, neither of which is known as a hotbed for global terrorism.

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The Synchronized Pre-deployment and Operational Tracker

Another database fraught with similar problems for aid groups is the Pentagon's Synchronized Pre-deployment and Operational Tracker, or SPOT.

Congress took steps in 2008 to ensure that a number of different government agencies operating abroad did a better job managing and overseeing private contractors in Iraq and Afghanistan.[11] Members of the Armed Services Committees were frustrated that at a time when private security firms were running amuck, the Defense Department could not produce an accurate number of contractors in those countries.

Consequently, the Armed Service Committee required the State and Defense Departments, as well as USAID, to pool information on their contractors into a single database. The Pentagon's Synchronized Pre-deployment and Operational Tracker, or SPOT, an existing computerized system, served to store the data.

A provision in the Defense Authorization Act of 2010 expanded the requirement on contractor information to include personnel hired under grants, subgrants, and cooperative agreements with partner organizations. NGOs claim this development permits information to be collected under the guise of good government and national security concerns—not just as a coordination and management tool.

Further, because the SPOT database is managed by the Defense Department, many relief groups remain concerned that submitting the required information will associate them with military operations and could thereby undermine the effective delivery of aid and compromise legitimate development activities.

In effect, what began as a way for DOD to keep better track of armed, private-security operatives was expanded to collect personal data on Afghan health workers and Iraqi teachers' aides. Collecting personal information that will be sent back to the Defense Department means aid workers risk being perceived as part of a covert or military operation, particularly in conflict zones where the U.S. government is playing an active, impartial, and sometimes clandestine role.

In hostile environments the lives of the practitioners and anyone collaborating with them could be endangered. In less-hostile environments such practices could give rise to anti-American sentiment or warped perceptions about the intention of American relief operations.

So what seems in Washington to be a debate over executive orders, legislative language, and government lists quickly becomes a matter of life and death overseas.

The recent WikiLeaks scandal also illustrates the need for safety precautions given the potential for this information to be released far beyond its intended audience. Aid organizations are already working in some of the most dangerous places on earth, and many are working on the frontlines of conflict, despite pervasive insecurity. Another WikiLeaks-like scandal could mean information collected through SPOT, or any other database, would fall into the wrong hands—whether rogue governments or armed groups—making it even harder for these groups to operate securely.

Material support language

The current laws prohibiting "material support" to designated terrorist organizations are rooted in the Antiterrorism and Effective Death Penalty Act, or AEDPA, enacted in 1996 and later amended by the USA Patriot Act of 2001 and again in 2004. Under this law it is a crime for any person or organization to knowingly provide, attempt, or conspire to provide "material support resources" to a designated terrorist entity regardless of the character or intent of the support provided.

While current law does exempt religious materials and medicine, it does not clarify how—in conflicts or crises—relief groups can provide assistance such as water, shelter, food, or medical services to innocent civilians.

Specifically, the law defines "material support or resources" as:

> *… any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.*[12]

In other words, "material support" can be defined as almost anything under the sun, regardless of whether it is material or not. And despite a commitment by operational NGOs to uphold both international and national laws, pervasive insecurity tends to make crises response anything but orderly and clear-cut once on the ground.

So what seems in Washington to be a debate over executive orders, legislative language, and government lists quickly becomes a matter of life and death overseas.

Consider some of these examples:

- Aid workers delivering food to a refugee camp are stopped at a roadblock by insurgents on an antiterrorism list. The insurgents take three bags of food off the truck but otherwise allow the food distribution to go ahead. Should the aid worker be prosecuted for "materially supporting" a terrorist group?

- A USAID democracy grantee conducts a discussion on voter education in Gaza. A representative from Hamas, a Palestinian Islamist group designated as a terrorist organization in 1993, attends but is not identified as such. Should the democracy NGO be prosecuted for offering material support to a terrorist group?

- An American faith-based group offers assistance to orphans in Afghanistan. Some of these orphans had a parent involved with the Taliban. Is the church group materially supporting terrorists?

- A former U.N. official meets with affiliates of an armed group labeled as terrorists. The U.N. official counsels the group's leaders to lay down their arms and enter peace talks, and they do so. Should the former U.N. official be charged with a crime?

The answer is that all of these groups and individuals could be construed as offering material support to terrorists under the excessively broad language of the current material support statutes. Though the U.S. government does not often prosecute groups and individuals in such benign cases, it does reserve the right and ability to do so.[13] This means aid groups operate under a perpetual cloud of fear that they might be selectively or arbitrarily prosecuted by a U.S. government that reserves unchecked power for itself.

The examples above indicate that grey areas can emerge for good-faith aid organizations seeking to help innocent civilians. Humanitarian groups, as well as many development organizations, traditionally build strong relationships with key members of the community in which they work in order to do their job. But there may be instances in which they are required to deal with a terrorist designated group or individual in order to access populations in need.

The potential legal ramifications, combined with efforts to jealously guard their impartiality, make aid groups understandably disinclined to engage directly with designated groups. But the practical consequences of not doing so could mean hundreds of thousands of innocent people do not receive the help they need.

Take, for example, the devastating 2004 tsunami in Southeast Asia. The need for emergency assistance was tremendous. Complicating the situation was the 1997 designation of Sri Lanka's Liberation Tigers of Tamil Eelam—LTTE, or Tamil Tigers—and the fact that the Tamil Tigers controlled significant swaths of territory throughout the country.

As a result of the complex legal regime associated with designated terrorists, a very real possibility existed that any U.S.-funded relief group working in this area could be subject to prosecution. This was especially true given the lack of clear legal guidance and the unwillingness of Treasury's OFAC to issue a general license to operate in the area.

In the end, the half a million people living in Tamil Tiger-controlled areas of Sri Lanka were unable to receive humanitarian aid from U.S. individual or organizational donors.[14] Western aid groups' general absence in Tiger-controlled areas—driven partly by the terror restrictions—also meant virtually no international observers were on hand as the government of Sri Lanka prosecuted the end of the war with the Tigers while committing what appeared to be a series of war crimes on the ground.

Notably, the material support statute was amended in 2005 to include an exemption that enabled the secretary of state and attorney general to permit aid in cases of "training," "personnel," and "expert advice or assistance" but only if the secretary determines that such assistance cannot be used to carry out terrorism.[15]

This language could potentially be a precursor to a more explicit humanitarian exemption. But in and of itself, the 2005 amended language does not directly apply to the work of relief groups. In fact, exemption language that would enable aid organizations to operate within the bounds of the law would be narrower and less controversial. The fundamental aspect of any humanitarian exemption would be to affirm the right of aid providers to deliver assistance to vulnerable populations while keeping with the tenets of international humanitarian law: providing aid to those in need in a neutral and impartial manner.[16]

The U.S. government's response to the legal ambiguity posed by the material support statute in particular is ad hoc rulemaking and inadequate policy guidance—not concrete legislative clarifications. Such a reactive methodology ends up being subject to individual—and often unhelpful—interpretations of the law given the range of agencies involved in the designation process.

A 2008 report entitled "Collateral Damage" by OMB Watch and Grantmakers without Borders aptly notes that this approach to legal hurdles has led to "incremental expansion of what is prohibited activity, coupled with the vague standards defining alleged terrorist associations, making it increasingly difficult … to predict what constitutes illegal behavior. Consequently, the U.S. nonprofit community must operate without knowing what may spark OFAC to shut them down."[18]

Indeed, the system serves bureaucrats far better than anyone else by operating so opaquely. They can make decisions about what is feasible and what is not without any justification or explanation.

Further complicating current legal uncertainties is the 2010 Supreme Court decision *Holder* vs. Humanitarian Law Project (HLP), which upheld the ban against conflict mediation and peace-building activities that could help shift terrorist organizations away from violence.

The *Holder* decision doesn't place an outright ban on otherwise sanctioned overseas relief operations, but it does take an expansionist reading of current law and how it affects activity the Constitution traditionally protects.

The *Holder* decision has catalyzed a new level of cautiousness and concern among relief groups interviewed by CAP. They are rightly worried that it is an indication of the shrinking political space in which humanitarian organizations will be able to operate. While the decision does not restrict operational groups from providing "good-faith" humanitarian assistance, many fear that the Holder decision could become yet another tool to restrict the delivery of impartial aid.

David Cole, a well-known civil liberties expert and professor at Georgetown University Law Center, wrote in a 2010 New York Times op-ed that while *Holder* does not restrict relief groups from providing assistance to innocent civilians, "the

The fungibility argument

One of the main concerns raised by those who support a broad interpretation of the material support statute is that resources are "fungible." In other words, any resources—financial or otherwise—given to a designated terrorist, even if lawful, could free up their resources for otherwise illicit activities. Under this principle an aid group couldn't even negotiate with a designated terrorist group to reach innocent civilians in need of assistance.

The Supreme Court adopted this argument in its *2010 Holder v. Humanitarian Law Project (HLP)* decision, which clarified that the intention of assistance to a designated terrorist group is irrelevant as long as the assistance provider knows of their terrorist nature. The *Holder* decision notes that "material support meant to promote peaceable, lawful conduct can be diverted to advance terrorism in multiple ways."[17]

Congress doesn't agree. Current law still allows unlimited donations of medicine not just to civilians caught in the crossfire but to designated groups themselves.

government has argued in other cases that providing legitimate humanitarian aid to victims of war or natural disasters is a crime if provided to or coordinated as a foreign terrorist organization—even if there is no other way to get the aid to the region in need."[19]

In an interview with CAP, Professor Cole also noted that the terms of engagement are so broadly defined that organizations are inevitably vulnerable to legal action.[20] One NGO official interviewed by CAP also noted that the *Holder* decision continues the trend of chipping away at the vital "acceptance model" of security that relief groups adopt to do their work.[21] This model—adopted by many if not all of the largest and most reputable humanitarian organizations—is an approach to delivery aid that mitigates threats by building relationships with local communities and key actors. [22] In doing so, the organizations obtain local acceptance and consent to be present and do their work. Without it, they are unable to build legitimate partnerships or ensure the smooth delivery of assistance.

Assessment of how U.S. counterterrorism measures burden relief groups

The many overlapping and sometimes jumbled lists—whether FTO, SDN, PVS, or SPOT—mean aid groups must jump over a number of administrative hurdles to work in conflict zones where these terrorist groups are located. The addition of a complicated legal regime makes these challenges even more burdensome, especially when they have very real consequences that could result in death in the worst-case scenario.

Many organizations operating overseas already have well-developed internal "due diligence" processes that are often overlooked. Aid groups take significant efforts to avoid engaging with or providing unintended benefits to all parties of a conflict, including those considered terrorist organizations, such as Hamas, al-Shabaab, or the Maoists in Nepal.

To do this, some organizations use enhanced internal procedures to protect programs, staff, and resources from designated terrorist groups. Some agencies adopt additional protection measures including certification language in grant or subcontract agreements that require partners to "certify" that funds will not knowingly be used to support terrorism. Still others follow a more subdued approach, where they agree to work only with staff they've known for decades or partners with whom they've previously partnered. And they only accept small U.S. government grants.

Legitimate relief agencies are extremely careful to maintain their organizational integrity. They don't want to see their resources fall into the wrong hands any more than the U.S. government does. In fact, they would probably be more upset by it given the partnerships and networks they've developed over the span of decades.

A 2008 InterAction policy brief on this issue notes that "[f]ollowing decades of experience on the ground in communities devastated by violent conflict, political strife and natural disasters, NGOs have developed well-tested and proven security and vetting systems to safeguard their local and international staff."[23]

The administrative and security problems created by the multiple databases and sanctions regimes are underscored by the inability of each U.S. government agency to align their interpretations of the law.[24] In some cases, the awkward arrangement of implementing a policy directive that supports the provision of humanitarian assistance while grappling with an inflexible legal regime creates an unmistaken tension between the different U.S. agencies.

The recent case of Somalia's famine illustrates this inherent tension. Statements from Secretary Clinton clearly indicate the priority assigned to scaling up U.S. assistance to Somalia.[25] But the comments stand in stark contrast to the attorney general's silence on this issue. For many operational NGOs, the lack of specific comments from the Justice Department equals endorsement of the status quo, which only further entrenches concerns about how the existing legal regime undermines the humanitarian imperative to provide assistance to those in need.

The open-ended interpretation of what is and what is not feasible means there is no aligned position between the key agencies—a problem that can lead to policy deadlock and significant delays on the ground.

It's true that a number of government officials recognize that the administration's messaging could be better—and clearer—when talking about genuine aid efforts overseas. But the administration as a whole has done little to improve or clarify the grey areas given concerns that they would appear "soft" on terrorism. The very fact that they are encouraging aid groups to take on the risks of additional legal liability without providing any real guarantees that there will be no criminal enforcement is highly problematic.

Down the road the potential for aid groups to shift their donor base away from U.S. government sources is very real. But even if relief organizations rejected U.S. government funding in favor of assistance from other governments or private foundations, they might still be subject to legal restrictions and material support concerns.

In the end, the grey area within the law and among the ghostly realm of databases—both classified and not—undermines the great American tradition of humanitarian assistance. While the objectives of current U.S. antiterrorism measures are important, the current approach is insufficiently focused on the broader foreign policy implications, thereby unhelpfully affecting relief operations. Instead of engaging with NGOs to develop a coherent approach, the administration relies on an ill-informed process that does not incorporate humanitarian considerations and thus lacks the flexibility relief groups require, particularly in fluid and complex environments, to respond quickly and robustly.

Recommendations

This paper illustrates that the challenges relief organizations face are systemic and require a comprehensive response. Each time this issue emerges, whether in response to a natural disaster, a worsening conflict, or a deadly mix of the two, the core values that underpin our society and the generosity of Americans are threatened.

Clearly the United States cannot explicitly authorize payments to terrorists. But an alternate approach must be crafted. Relief organizations are watching the impartial "space" in which they work shrink severely while their ultimate goals—helping people in need and supporting international humanitarian norms—are consistently undermined.

Given the current political deadlock in Washington, and the many different layers of restrictions, a multipronged strategy is needed to roll back more than a decade of overly broad legal definitions and ad hoc agency positions. While not exhaustive, the following recommendations provide a starting point that could enable a range of policy changes.

Taken together, these recommendations would dramatically alter the legal and policy landscape in which relief organizations operate. Absent such a complete overhaul, however, the implementation of even a few would provide significant clarity for aid agencies without undermining the ability of the U.S. government to suppress financial terrorist networks.

- **Ensure USAID participates in all U.S. terrorist designations.** While the designation of terrorist organizations falls under the jurisdiction of the secretary of state, all recommendations for such designations come out of an interagency process led by the national security staff. Recent designation processes have not included USAID staff because there is not an explicit requirement for their participation. Consequently, there is no explicit consideration of how terrorist designations will impact humanitarian concerns. To remedy this problem, President Barack Obama should call explicitly for USAID to be included in the designation process thereby ensuring consideration of how relief operations will be affected.

- **Amend Executive Order 13324 and related orders.** Though a legislative fix is preferable, the president could make a narrow amendment to EO 13224 to enable relief organizations to explicitly provide food, shelter, water, and medical services to innocent civilians. This would exempt organizations performing these operations from prosecution under the material support statute.

- **Amend the International Emergency Economic Powers Act.** Authorities governing OFAC-enforced executive orders come from IEEPA, so one option to rectify these recurring challenges is to amend IEEPA to remove the language that enables the president from "regulating, directly or indirectly" donations to relieve human suffering. Congress, in consultation with operational NGOs and the executive branch, should draft narrow language that recognizes the need to provide basic assistance—food, water, shelter, and medical services—to innocent civilians caught up in conflict or crises where terrorist organizations reside without opening up IEEPA too broadly.

- **Amend the material support statute.** Working in close coordination with affected parties, Congress should draft language to amend and expand the material support statute to ensure an explicit exemption for humanitarian organizations. Material support exemptions should be defined more broadly than "medicine or religious materials" to include medical and public-health services as well as food, water, clothing, and shelter to innocent civilians.

- **Expedite blanket licenses for urgent cases.** While not a long-term or statutory response, an increased willingness by the Treasury Department to issue general licenses, in a timely manner, for "good-faith assistance" (genuinely neutral humanitarian assistance intended to help innocent civilians in need) will go a long way toward enabling relief groups to scale up their work in a timely fashion.

- **Scrap the partner vetting system.** USAID and nongovernmental organizations should work together to design an operational vetting system that is sensible and pragmatic. The current partner vetting system with which U.S.-funded relief organizations are expected to comply has poorly defined goals and is overly burdensome. USAID, instead of crafting a shadowy database system with increasingly global reach, should work closely with nongovernmental organizations to explicitly define vetting criteria, ensure adequate due process for organizations when staff are "red-flagged," and limit use of the vetting lists to countries where U.S. national security is threatened. A clearer understanding of why information is

being collected and how it will be used is needed. The current process undermines the impartiality and safety of relief groups and hampers project effectiveness.

- **Consult regularly with nongovernmental organizations to determine the likely impact of any terrorist designation.** While USAID should be part of the interagency terrorist designation process, operational NGOs should have the opportunity to meet regularly with relevant government agencies in order to discuss best practices for mitigating the impact of such designations. Regular conversations would be a helpful tool for relief groups in trying to better understand government policies and related legal regimes. Such meetings would ensure better information sharing and help coordinate common platforms.

- **Craft a more flexible policy framework.** The focus on whether or not an individual is on or off "the list" detracts from a flexible, broad-based policy to fight terrorism and from ensuring U.S. taxpayer dollars don't fall into the wrong hands. Given the growing number of innocent civilians caught up in conflicts and crises around the globe, an approach that better balances national security concerns with the need to provide independent humanitarian assistance should be considered.

- **Conduct an independent investigation into the effectiveness of current antiterrorism measures.** U.S.-funded relief groups suffered multiple delays since 9/11 in assisting innocent civilians caught up in a conflict or crisis. These impediments to the delivery of aid—whether in Lebanon or Nepal or Somalia—result from the remarkably incoherent legal landscape that surrounds terrorist designations. Ad hoc policies, licenses, or exemptions are merely a superficial response to a much deeper and systemic problem. An independent U.S. government report—from the Government Accountability Office, USAID's inspector general, or a congressionally mandated independent task force—would therefore be an important step toward looking comprehensively at the current approach, reflecting on its impact and effectiveness, and recommending measures for a more strategic plan of action.

Conclusion

The rigid list-based approach to fighting terrorism does more harm than good for overseas relief operations. Similarly, the broad interpretation of the material support statute for terrorists means that aid organizations operate in environments rife with physical insecurity and a growing legal insecurity as well.

In light of these problems the U.S. government should craft a more flexible terrorist designation process that incorporates humanitarian concerns and recognizes the fluidity of on-the-ground operations. The recent designation of the Haqqani network's senior leadership is an important indication of this approach. A similarly comprehensive approach can and should be applied to other cases, but particularly those where the humanitarian need is clear.

About the author

Sarah Margon is the Associate Director of the Sustainable Security and Peacebuilding Initiative at the Center for American Progress. Before joining the Center for American Progress, Sarah was a senior foreign policy advisor to Sen. Russ Feingold (D-WI) and also served as staff director to the Senate Foreign Relations Subcommittee on African Affairs. Prior to her time in the Senate, Sarah was a policy advisor for humanitarian response and conflict at Oxfam America. For many years, Sarah's focus has been on a number of conflicts in Africa as well as critical peace and security issues such as civilian protection, conflict prevention, and security sector reform. A term member at the Council on Foreign Relations, Sarah has a master's degree from the Walsh School of Foreign Service at Georgetown University's and an undergraduate degree from Wesleyan University.

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Endnotes

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13 The Justice Department maintains it has never prosecuted a humanitarian organization on criminal grounds. But in 2001 the Holy Land Foundation, or HLF, was shut down, had its assets frozen, and was indicted by the Bush administration for allegedly funneling millions of dollars to Hamas. Notably, at the time of trial in 2007, the Bush administration prosecutors admitted all the HLF money went for charitable aid but said the local charities that delivered the aid to Palestinians were controlled by Hamas, which got a public relations benefit as a result. A mistrial was declared that same year.

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23 Author copy of memo.

24 Many consider USAID's General Counsel to take the narrowest read on existing legal authorities but this may be because USAID has significantly more burdens as a result of its direct partnerships with USG organizations.

25 Many consider USAID's General Counsel to take the narrowest read on existing legal authorities but this may be because USAID has significantly more burdens as a result of its direct partnerships with USG organizations.

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