



### 3. CHARITIES ARE BEING SHUT DOWN THROUGH A SECRETIVE, ARBITRARY & UNFAIR PROCESS

*The process of designating individuals and entities as supporters of terrorism is unfair and un-American: vague, arbitrary, shrouded in secrecy and lacking oversight or appeal. The Executive Branch has almost unlimited power to freeze a charity's<sup>1</sup> assets based not only on fact but on vague suspicions, hearsay or an unfounded hunch – a problem compounded by the increasingly broad definition of terrorism the U.S. government applies. Once designated, the charity has no realistic chance of getting off the SDGT list: it can neither examine the evidence against it nor present evidence of its own. Congressional oversight has not filled the void; it allows State and Treasury to act without review, while people in need go unserved.*

**The current system allows the government virtually unchecked discretion to blacklist individuals and entities through a largely secret process which lends itself to error and abuse.** The process of designating an organization a terrorist supporter is secret; no public justification is necessary. Because Congress has failed to exercise its oversight responsibilities and because the judicial review is inadequate to nonexistent, there is no check on executive action, no significant standards of proof to be met, and no way to determine if the designation is the result of solid evidence, personal prejudice, tenuous connections, or simple human error. The Treasury Department acts both as prosecutor and as jury, the defendant has no representation at all and – unless their assets are frozen – may not even be aware that they are under investigation.

**The terms by which a group can be designated or prosecuted are so broad as to invite error and abuse.** Since 2001 Treasury's Office of Foreign Assets Control (OFAC) and the Justice Department have incrementally expanded their interpretation of the International Emergency Economic Powers Act (IEEPA) and what is considered prohibited "material support" of, or "otherwise associate[ing] with" designated terrorist organizations or individuals. Originally understood to be direct transfers of funds or goods, "material support" is now interpreted to include legitimate charitable aid that may "otherwise cultivate support" for a designated organization. Furthermore, "otherwise associated with" can now include indirect or past relationships, even when there is no claim that the relationship included aiding

terrorists or participating in terrorist plots or conspiracies.

This expansion of prohibited activity, coupled with the vague standards defining alleged terrorist associations, means charities have a hard time predicting what OFAC will deem illegal behavior and take action. Any activity that OFAC believes may cultivate support, such as providing disaster relief in a territory controlled by a designated terrorist organization, can cause OFAC to close a charitable organization and seize its assets. In 2006, KindHearts USA was shut down because its founders had previously been employed by organizations subsequently placed on the SDGT list, even though they themselves were never on the list and KindHearts was never accused of providing material support or associating with terrorist organizations.

**The process is inconsistent with the American values enshrined in the Constitution, imposing guilt by association and ignoring due process in violation of the First and Fifth Amendments.** The First Amendment gives Americans the right to freely associate with whomever they please. The Fifth Amendment's due process clause<sup>2</sup> requires a trial and proof of an illegal act before a criminal penalty can be imposed – a person cannot be prosecuted for associating with or even entering into a legitimate business partnership with a criminal, even if that person's criminal activity is known. However, counterterrorism laws allow a charity's assets to be frozen and its officers to be prosecuted for associating with a listed individual or organization

even when the association has a legitimate, non-terrorist purpose.

**Once Treasury makes its secret determination and adds an entity to the SDGT list, that determination cannot be effectively appealed or reviewed.**<sup>3</sup> Groups do not have to be notified in advance that they are under investigation or notified before their assets are frozen, limiting their ability to respond in their own defense and effectively imposing a severe penalty on them before any finding of guilt is made.<sup>4</sup> Treasury's enforcement office needs only to provide the entity with notice of the unclassified administrative record and an opportunity to provide responsive evidence in writing.<sup>5</sup> Classified evidence does not have to be shared<sup>6</sup> -- meaning that determinations may be made on hearsay and coerced testimony -- and nonprofits are not entitled to cross-examine witnesses or present witnesses of their own. In short, once designated, getting off the list is nearly impossible. Charities also cannot present evidence in an appeal to the federal courts.

**Congress has failed to halt the Executive Branch's circumvention of constitutional checks or to question asset-freezing even when organizations were clearly not providing terrorists with material support.** Hearings about anti-terrorist financing and is-

ssues relating to charities and terrorism have generally only included administration witnesses. Congress has never addressed the question of independent review of charities' designations or the disparate treatment of charities accused of material support (they can be shut down without a trial or appeal) and private companies (which pay a fine and move on, even when convicted). (See GNIN Issue Paper IV for more discussion of this double standard.) Nor has Congress questioned the unproven assumptions on which the Administration's actions are based and the widespread overreaction and persecutions it has engendered.

**GNIN believes that charities should enjoy the basic constitutional rights that ensure fairness and justice.** While dangerous times may demand extraordinary measures, compromising basic rights makes the entire process ineffective and illegitimate without achieving justice and security. If seizures and prosecutions are merited, the government should prove it. Affected charities should be given a genuine opportunity to appeal and to resume their important work, showing America's generous face to the world.

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<sup>1</sup> "Charities" refers to direct service organizations, advocacy organizations, foundations, and organizations supporting social change.

<sup>2</sup> "...nor be deprived of life, liberty, or property, without due process of law;"

<sup>3</sup> *People's Mojahedin Org. of Iran v. U.S. Sec. of State*, 182 F.3d 17, 23 (D.C. Cir. 1999), cert. denied, 529 U.S. 1104 (2000).

<sup>4</sup> *National Council of Resistance of Iran v. Dept. of State*, 251 F.3d at 205-06 (D.C. Cir. 2001).

<sup>5</sup> *Holy Land Foundation v. Ashcroft (HLF)*, 333 F.3d 156 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004); *National Council of Resistance of Iran*, 251 F.3d at 207.

<sup>6</sup> *HLF*, 333 F.3d at 164; *GRF*, 315 F.3d at 754.

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The Global Nonprofit Information Network (GNIN) was launched in March 2007 to foster information sharing focused on counterterrorism measures affecting charitable organizations and global civil society. The GNIN initiative is co-hosted by Grantmakers Without Borders ([www.gwob.net](http://www.gwob.net)), OMB Watch ([www.ombwatch.org](http://www.ombwatch.org)) and Urgent Action Fund for Women's Human Rights ([www.urgentactionfund.org](http://www.urgentactionfund.org)).



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(This is part three in GNIN's seven part series on charities and counterterrorism policy.)