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SOFT POWER, STRATEGIC SECURITY, AND INTERNATIONAL PHILANTHROPY

GARRY W. JENKINS*

This Article examines a variety of regulatory rules, administrative responses, and legislative actions designed to prevent nonprofit organizations from unwittingly providing support to terrorist groups around the world. A combination of federal executive orders, legislation, and administrative guidelines is intended to enhance U.S. security interests, protect American charities from abuse, and ultimately keep U.S. citizens safe by stemming the flow of funds to terrorists. Although these may be laudable goals, the government's approach may actually have the effect of undermining U.S. security interests by inadvertently chilling the flow of charitable dollars overseas to address serious problems, including those associated with the root causes of terrorism, such as extreme poverty, inadequate access to health care, stalled economic development, and poor education systems. The central argument of this Article is that burdens placed on international philanthropy exact more than merely administrative costs from U.S. grantmakers; they also exact security costs affecting U.S. interests that have been underappreciated by policymakers. Specifically, overseas grantmaking serves as an ally in the war against terrorism by contributing to public diplomacy efforts supporting a positive image of the United States abroad through international humanitarian relief activities, and by generating U.S. "soft power" used to garner multilateral cooperation in foreign affairs. Only by recognizing and acknowledging international philanthropy's tangible contributions to the national security agenda will the federal government begin to shift its current regulatory approach to

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overseas grantmaking from focusing exclusively on conceivable charitable abuses by terrorists to a more balanced and strategic response. U.S. policy should address legitimate and well-founded concerns about terrorist financing while simultaneously ensuring and even encouraging U.S. charities' and private foundations' continued engagement in international programs and giving. International charity should not become a victim of the global fight against terrorism but should be treated as a front-line ally.

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INTRODUCTION

More than five years after the attacks of September 11, 2001, and three years after the release of *The 9/11 Commission Report*,¹ the United States is still engaged in a process of debating, considering, and now reconsidering strategies, approaches, and policies to effectively address the challenges of global terrorism. As we further understand the long-term nature of this struggle, we appreciate the constant need to develop new and strengthen existing relationships with allies, better utilize strategic advantages, and undertake sound policymaking to promote the short-term and long-term interests of U.S. citizens with respect to national security. Accordingly, current U.S. policy toward international grantmaking by private, independent charitable organizations warrants serious reconsideration.

The United States has long embraced a tradition of philanthropy.² American charitable organizations are responsible for a range of innovations that have improved humankind and aided

1. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* (W.W. Norton & Co. 2004) [hereinafter 9/11 COMMISSION REPORT].

2. Frenchman Alexis de Tocqueville on public associations in American civil life:

Americans of all ages, conditions, and all dispositions constantly unite together. Not only do they have commercial and industrial associations to which all belong but also a thousand other kinds, religious, moral, serious, futile, very general and very specialized, large and small. . . . I have frequently admired the endless skill with which the inhabitants of the United States manage to set a common aim to the efforts of a great number of men and to persuade them to pursue it voluntarily.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 596 (Gerald E. Bevan trans., Penguin Books 2003) (1835); see Peter D. Hall, *The Welfare State and the Careers of Public and Private Institutions Since 1945*, in CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY 363, 363–64 (Lawrence J. Friedman & Mark D. McGarvie eds., 2003) (noting the growth in the number of nonprofit organizations in the United States: 12,000 in 1940, 50,000 in 1950, 300,000 in 1960, 600,000 in the mid-1970s, and 1,500,000 by 2003). See generally CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY, *supra* (describing the history of American philanthropy and its importance in American society); Lester M. Salamon, *The United States*, in DEFINING THE NONPROFIT SECTOR: A CROSS-NATIONAL ANALYSIS 280, 280–88 (Lester M. Salamon & Helmut K. Anheier eds., 1997) (providing a general history of the development of the nonprofit sector in the United States).

people outside of the United States.³ Although most of the activity of U.S.-based private foundations and public charities has been focused on domestic concerns, international affairs and cross-border initiatives play a pivotal role in America's philanthropic activities.⁴ For example, generous Americans often respond to humanitarian crises all over the world,⁵ and a range of U.S.-based organizations carry out programs and provide charitable support in all corners of the globe. For some nonprofit organizations, involvement in cross-border philanthropy is an integral component of their charitable and strategic mission.⁶

3. For example, in the 1960s, the Ford Foundation and the Rockefeller Foundation were instrumental in creating research centers to develop improved production methods for wheat and rice. Two of the centers, the International Rice Research Institute in the Philippines and the International Maize and Wheat Improvement Center in Mexico, created new varieties of rice and wheat that greatly enhance crop yields, allowing developing populations to produce enough food to provide for their growing populations and prevent a world hunger crisis. See David S. Tilford, *Saving the Blueprints: The International Legal Regime for Plant Resources*, 30 CASE W. RES. J. INT'L L. 373, 389-92 (1998). Cures for several global diseases have been discovered due to the work of nonprofit organizations and the support of private foundations. See, e.g., John G. Simon, *Charity and Dynasty Under the Federal Tax System*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY 246, 254 (Susan Rose-Ackerman ed., 1986) (attributing Jonas Salk's discovery of the polio vaccine to a \$15,000 gift from the Sarah Scaife Foundation); Sabin Russell, *S.F. Nonprofit Helps Develop Low-Cost Cure for Black Fever*, S.F. CHRON., Nov. 9, 2004, at A6 (discussing the efforts of a nonprofit organization to provide a cure for black fever, which kills 200,000 people a year in poor countries, second only to malaria). Currently, U.S. funders are tackling equally vexing problems around the world, including the Bill and Melinda Gates Foundation's initiatives on infectious diseases and the Open Society Institute's extensive efforts to bring civil society to formerly authoritarian regimes. See BILL & MELINDA GATES FOUND., 2004 ANNUAL REPORT 6-10 (2005); Peter Baker, *Soros's Mission in Russia Ends, \$1 Billion Later*, WASH. POST, June 10, 2003, at A14; David Holley, *Soros Invests in His Democratic Passion*, L.A. TIMES, July 5, 2004, at A6; Donald G. McNeil, Jr., *Millions of Lives on the Line in Malaria Battle*, N.Y. TIMES, Jan. 5, 2005, at F6; Ian Wilhelm, *A View Inside the Gates*, CHRON. OF PHILANTHROPY, Nov. 11, 2004, at 12.

4. See CTR. ON PHILANTHROPY AT IND. UNIV., GIVING USA: 2004, at 11, 44 (2004) (reporting that international affairs organizations, including U.S. intermediaries, received an estimated \$5.3 billion in contributions in 2003, a growth of 14.8% from the previous year).

5. See, e.g., Elizabeth Becker, *U.S. Nearly Triples Tsunami Aid Pledge, to \$950 Million*, N.Y. TIMES, Feb. 10, 2005, at A3 ("Americans have given \$700 million to charities for the relief effort."); Stevenson Swanson, *Tsunami Aid Pledges Turn into Cash*, CHI. TRIB., June 26, 2005, at C9 (reporting that Americans have donated an estimated \$1.4 billion toward tsunami relief efforts).

6. See, e.g., THE FORD FOUND., 2004 ANNUAL REPORT 5 (2005) ("The Ford Foundation is a resource for innovative people and institutions worldwide. Our goals are to: strengthen democratic values, reduce poverty and injustice, promote international cooperation and advance human achievement."); THE GOLDMAN SACHS FOUND., 2004 ANNUAL REPORT 48 (2005) ("The Foundation's mission is to promote excellence and innovation in education and to improve the academic performance and lifelong

Although just a small portion of overall charitable activity,⁷ international giving is critically important to both the nonprofit sector and U.S. security interests.⁸ And for international giving by domestic U.S. private foundations, community foundations, and public charities, the past decade has presented the best and worst of times. On the one hand, both large and small U.S. funders, stimulated by globalization, an increasingly interconnected world, and global events, have a growing interest in supporting people and improving conditions outside the United States.⁹ On the other hand, the federal government's responses to September 11 have made international giving more burdensome in what grantmakers perceive to be a hostile regulatory environment.¹⁰ Furthermore, the U.S. policy approach on this issue has not evolved to a state in which international philanthropy is treated as a valuable ally with the means to enhance and strengthen governmental strategic interests. The conventional justification for the government's policy responses is that the administrative costs imposed are necessary to enhance U.S. security

productivity of young people worldwide."); THE ROCKEFELLER FOUND., 2004 ANNUAL REPORT 22 (2005) ("The Rockefeller Foundation is a knowledge-based global foundation with a commitment to enrich and sustain the lives and livelihoods of poor and excluded people throughout the world."); W.K. KELLOGG FOUND., 2005 ANNUAL REPORT 24 (2006) (stating its mission "to help people [in the United States, Latin America and the Caribbean, and southern Africa] help themselves through the practical application of knowledge and resources to improve their quality of life and that of future generations"); see also Nina J. Crimm, *Through a Post-September 11 Looking Glass: Assessing the Roles of Federal Tax Laws and Tax Policies Applicable to Global Philanthropy by Private Foundations and Their Donors*, 23 VA. TAX REV. 1, 17 n.36 (2003) (describing historical connections between private foundations and international grantmaking).

7. See CTR. ON PHILANTHROPY AT IND. UNIV., *GIVING USA: 2005*, at 170 (2005) (estimating giving devoted to international affairs at 2% of total charitable activity).

8. See *infra* Part I.

9. This is perhaps best reflected by the ascendancy of the Bill and Melinda Gates Foundation, the nation's largest private foundation, which has emphasized international programming. According to an October 2006 Foundation Center study, "[i]f the Gates Foundation were excluded from the sample . . . international giving would have decreased 4 percent." LOREN RENZ & JOSIE ATIENZA, FOUND. CTR., *INTERNATIONAL GRANTMAKING UPDATE: A SNAPSHOT OF U.S. FOUNDATION TRENDS 3* (2006), available at http://foundationcenter.org/gainknowledge/research/pdf/intl_update_2006.pdf. The June 2006 announcement that Warren Buffett would direct the majority of his personal fortune to be spent by the Gates Foundation on similar measures further highlights the prominence and positive trends of international giving. See Timothy L. O'Brien & Stephanie Saul, *Buffett To Give Bulk of Fortune to Gates Charity*, N.Y. TIMES, June 26, 2006, at A1.

10. See LOREN RENZ ET AL., FOUND. CTR., *INTERNATIONAL GRANTMAKING III: AN UPDATE ON U.S. FOUNDATION TRENDS*, at xiv (2004) (reporting that 78% of grantmakers believe international funding has become more difficult due to government regulatory initiatives since September 11); Jeff Jones, *Nonprofits Fear False Accusations of Terror Grants*, NONPROFIT TIMES, May 1, 2003, at 1.

and to protect citizens from terrorists.¹¹ However, this simple tradeoff fundamentally misperceives the debate. The full effect of the additional administrative costs placed on U.S. funders cannot be measured without considering the costs of the additional burdens for grantmakers, for their organizational effectiveness, and, significantly, for U.S. security interests. Not only is a robust cost-benefit analysis missing from this debate,¹² but, as a result, a full accounting of the security costs associated with the additional burdens remains unconsidered. The irony is that government efforts to make us more secure may actually leave us less safe. At the very least, the calculation used to determine the security benefits offered by greater regulation must be altered to ensure consideration for the corresponding security harms.

This Article details how international philanthropy advances U.S. security interests. Although the work undertaken by charitable organizations advantages its intended beneficiaries, it simultaneously generates several important byproducts that serve American interests. The United States as a whole also benefits from private overseas giving because philanthropy can be a powerful tool of public diplomacy: it enhances the U.S. image abroad, facilitates the sharing of ideas and values, and places U.S. institutions and people as partners in solving critical social ills. Scholars and policy analysts have increasingly recognized that it is in the United States's interest to see additional private resources brought to bear to assist developing countries build stable societies by addressing poverty, health crises, environmental degradation, economic development, educational challenges, and other global problems. In addition, it is through the support of private U.S. entities that foreign local nonprofit counterparts in the developing world can be sustained and strengthened so that they can contribute to the development of civil society. One central theme of this Article is that international

11. See *Counterterror Initiatives in the Terror Finance Program: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 178 (2004) (statement of Samuel W. Bodman, Deputy Secretary, U.S. Department of the Treasury) (acknowledging government efforts to "enhanc[e] ongoing due diligence efforts, while balancing the demands on [private and charitable] institutions"); U.S. Dep't of the Treasury, Response to Comments Submitted on the U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities 7 (2006), available at <http://www.treas.gov/press/releases/reports/0929%20responsetocomments.pdf> ("We recognize that the information-collection practices are expansive This type of information-gathering is essential for the charity to . . . be assured that its assets will not be diverted to terrorist organizations or their support networks.").

12. See Daniel J. Mitchell, *Fighting Terror and Defending Freedom: The Role of Cost-Benefit Analysis*, 25 PACE L. REV. 219, 231 (2005).

philanthropy, although independent from government control, helps to generate "soft power"¹³ for the U.S. government that is used to influence others and garner cooperation in global affairs. I take the position that the U.S. government policy should support international philanthropy not only for altruistic purposes but also out of enlightened self-interest.

Despite the many benefits generated by international philanthropy, U.S. public charities and private foundations with active international programs bear significant burdens imposed by antiterrorism measures enacted following the launch of the federal government's "war on terrorism."¹⁴ Significantly, a key element of the Bush administration's efforts to defeat terrorism has centered on attempting to stem the flow of funds to terrorist groups.¹⁵ In addition to focusing on global money laundering and freezing assets of known (and suspected) criminals,¹⁶ the federal government has also

13. JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS OF SUCCESS IN WORLD POLITICS* (2004); see *infra* Part I.C.

14. See President's Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 1301 (Sept. 11, 2001), available at <http://www.gpoaccess.gov/wcomp/v37no37.html>; President's Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001), available at <http://www.gpoaccess.gov/wcomp/v37no38.html>; President's Address Before a Joint Session of the Congress on the State of the Union, 39 WEEKLY COMP. PRES. DOC. 109 (Jan. 28, 2003), available at <http://www.gpoaccess.gov/wcomp/v39no5.html>. For a critique of the Bush administration's "war" rhetoric to describe the effort to fight terrorism, see Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1874-78 (2004); Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435, 452-58 (2005).

15. "The war against terrorism is a new kind of war being fought on many fronts. Nowhere is this truer than in the fight against terrorist financing. The President has directed me to take all measures necessary to deprive terrorists of funds." *The State of the International Financial System and the International Monetary Fund: Hearing Before the H. Comm. on Financial Servs.*, 107th Cong. 54 (2002) (statement of Paul H. O'Neill, Secretary, U.S. Department of the Treasury); see also 18 U.S.C. § 2339C (Supp. IV 2004) (outlining the prohibitions against the financing of terrorism); James B. Johnston, *Implementing New Jersey's Anti-Terrorism Laws To Prevent Terrorist Financing: A Statutory Analysis of the "Material Support or Resources" Provisions of the September 11, 2001 Anti-Terrorism Act and the "Freezing Funds and Assets Related to Terrorism" Legislation in the New Jersey Criminal Code*, 29 SETON HALL LEGIS. J. 85, 86 (2004) (noting that terrorist financing investigations have become "an integral part of America's counterterrorism strategy"); John Crewdson & Cam Simpson, *U.S. Zeroing In on Terror's Money Trail*, CHI. TRIB., Sept. 5, 2002, at N20 (reporting the scope and progress of government efforts to stop terrorist financing).

16. See Matthew Levitt, *Stemming the Flow of Terrorist Financing: Practical and Conceptual Challenges*, 27 FLETCHER F. WORLD AFF. 59, 61-62 (2003). For more on money laundering and the U.S. effort to obstruct terrorist financing, see Eric J. Gouvin, *Bringing Out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955 (2003).

attempted to prevent nonprofit organizations from being used, even inadvertently, to support terrorist activities. This Article analyzes the battery of new legal tools that the federal government has adopted in order to protect charitable organizations and their funds from diversion, including Executive Order 13,224 (“Executive Order”),¹⁷ the USA PATRIOT Act,¹⁸ and the *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (“Treasury ATF Guidelines” or “Guidelines”).¹⁹ Undoubtedly, the chief goals of these laws, regulations, and guidelines are to protect U.S. citizens, ensure that charitable assets are not diverted to terrorists, and weaken support for terrorism. However, these policies may inadvertently cause more harm than benefit because they fail to account for the unintended security costs. This gap is particularly problematic because the security costs are significant and affect the core of our nonmilitary strategies addressing the threat of terrorism. These policies not only burden international giving but also implicate U.S. soft power and governmental effectiveness on the world stage.

This Article argues that the federal government’s overall approach intended to protect charities from terrorism—particularly its emphasis on issuing guidelines constraining international giving—is undermining the efficacy of international philanthropic activities and thereby hindering the ability of private foundations and public charities to generate important security benefits for the United States. A barrage of criticism from the nonprofit sector since the Guidelines were issued in 2002 has prompted the Treasury Department to make modest changes to them.²⁰ Although the 2006 modifications to the Treasury ATF Guidelines have reduced some of the administrative burdens and addressed some of the specific objections from the nonprofit sector, the fundamental tensions remain. The government continues to pursue a policy approach that views international philanthropy through the prism of an exposed threat that requires containment rather than as a source of governmental power generating enhanced credibility and legitimacy.

17. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

18. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

19. U.S. DEP’T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2006), available at http://www.ustreas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf.

20. *Id.* at 2.

As the government coerces nonprofits to collect and report data as if they were government agents, nonprofits are pressured into taking on investigatory responsibilities for which they are ill-equipped.²¹ In addition, such actions begin to encroach on the charitable sector's independence from government and, accordingly, its claim to the high middle ground staked between the public and private sectors. These are not merely administrative costs or theoretical concerns; they also directly implicate organizational effectiveness and security interests. The government's approach affects nonprofit behavior²² and adds levels of bureaucracy to international philanthropy, creating ripple effects that must be considered as part of an integrated counterterrorism strategy that embraces overseas development, seeks to combat negative perceptions of the United States in the world, and values international cooperation and influence.

This Article is less about what the federal government can and cannot do, and more about what deserves consideration when weighing the costs of the regulatory regime against speculative benefits. Although the government may regulate charitable giving abroad by U.S. entities, strategic policymaking in this area offers opportunities to advance U.S. and humanitarian interests. To begin our examination, Part I identifies several strategic advantages for the United States associated with international grantmaking activities by independent U.S.-based private foundations and public charities. Essentially, this Part details the ways in which philanthropy supports U.S. security interests, such as the promotion of civil society in developing countries through the nourishment of foreign nonprofit organizations and support for efforts to address the root causes of terrorism. This in turn creates a positive image of the United States among foreign audiences and generates the soft power necessary to lead and influence foreign governments. This Part explains and expands on the theoretical origins of soft power as they relate to nonprofit organizations and governmental power.

Part II provides a brief explanation of the relevant tax laws and regulations concerning overseas philanthropic activity in place prior to September 11 that provide ample due diligence mechanisms to guard against abuses. This Part also describes the new legal and policy restrictions on international philanthropy adopted after September 11 to protect U.S. organizations from being duped by

21. See *infra* Part II.

22. See *infra* Part III.

foreign organizations. It also argues that the regulatory regime has misdirected its efforts by focusing on “indirect” charitable abuse, whereby legitimate U.S. charitable organizations purportedly are conned by foreign entities fronting terrorist operations.

Part III analyzes some specific problems with the policy approaches the federal government has followed. In particular, it explains how the seemingly modest suggestions put forward in the Treasury ATF Guidelines are not well-attuned to the realities and nuances of conducting philanthropy overseas and how they undermine the public perception of the nonprofit sector’s independence from government and impede the sector’s ability to generate the many aforementioned benefits of international philanthropy that can help enhance our long-term security.

Finally, Part IV concludes with a discussion of potential alternative policy prescriptions to balance the need to protect U.S. funders from unwittingly supporting terrorist activities while also supporting their efforts to engage in positive philanthropic endeavors across the globe that contribute to U.S. security. This Part argues for more expansive and formal cost-benefit analysis and the creation of safe harbors to protect U.S. charities engaged in international giving. It also explores reforms that might include altering new regulatory controls, such as the Treasury ATF Guidelines and the Executive Order, as well as revamping preexisting law governing procedures for international giving by private foundations.

In recent years, several commentators have criticized some of the government’s post-September 11 policies and urged changes on a wide range of issues.²³ With respect to international grantmaking, our current regime has focused primarily on the potential benefits from increased regulation of charities in order to curtail the financing of terrorism, but there has been a systematic disregard of the costs—the security tradeoffs—associated with encumbering international

23. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 958, 989 (2002) (criticizing the government for acting “as if we are free to ignore international norms whenever it serves our interests” as well as for “trading immigrants’ rights for our own purported security”); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1497–1500 (2003) (criticizing the Bush administration’s largely unilateralist approach to combating terrorism and violating international law in the process); Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT’L L. 375, 402 (2004) (criticizing the influence of “isolationism and exceptionalism” on U.S. foreign relations policy); John S. Richbourg, *Liberty and Security: The Yin and Yang of Immigration Law*, 33 U. MEM. L. REV. 475, 477–80, 506–07 (2003) (criticizing the development of U.S. “immigration policies on the basis of fear” after September 11).

philanthropy. Only by identifying the benefits generated by high levels of international philanthropy and the negative effects of additional regulation is it possible for our debate over appropriate policy choices to capture not just an understanding of the speculative security benefits from increased regulation but also a sense of some of the security costs. From that vantage point, a more accurate cost-benefit analysis can be developed, perhaps even leading to a more balanced and enlightened policy response that seeks to support, or even expand, opportunities for international engagement by American charities and grantmakers as a means of countering terrorism.

I. UNDERSTANDING THE CONTRIBUTIONS OF OVERSEAS GRANTMAKING

In today's complex world, U.S. security is bound up with global affairs and issues. In fact, in 2002, the Bush administration explicitly acknowledged foreign development aid as a key component of U.S. national security.²⁴ Of course, since World War II and throughout the Cold War, foreign aid has been an essential instrument of government policy.²⁵ After experiencing declines through the 1990s,²⁶ both military and nonmilitary development aid have increased significantly in the wake of September 11. Since those terrorist attacks of 2001, U.S. official development assistance ("ODA"), which represents nonmilitary support to developing countries for economic development and welfare, rose from approximately \$10 billion in 2000 to \$19 billion in 2004.²⁷ Despite this dramatic increase in funding,

24. See THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 21 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>; Gail Russell Chaddock, *A Bush Vision of Pax Americana*, CHRISTIAN SCI. MONITOR, Sept. 23, 2002, at 1.

25. See Carol C. Adelman, *The Privatization of Foreign Aid: Reassessing National largesse*, FOREIGN AFF., Nov.-Dec. 2003, at 9. Throughout the Cold War, however, development aid was often granted for geopolitical ends rather than strategic human development purposes. See Thomas Kleven, *Why International Law Favors Emigration over Immigration*, 33 U. MIAMI INTER-AM. L. REV. 69, 91 n.70 (2002); W. Michael Reisman, Commentary, *International Law After the Cold War*, 84 AM. J. INT'L L. 859, 863 (1990).

26. See Charles Babington & Thomas W. Lippman, *First Lady Joins Effort on Diplomacy Funds: Business, Other Groups Fighting GOP Budget Cuts*, WASH. POST, Apr. 14, 1999, at A25 (noting U.S. spending on foreign aid declined throughout the early and mid-1990s).

27. See LARRY NOWELS, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: FOREIGN AID: UNDERSTANDING DATA USED TO COMPARE DONORS 2 (2005), available at <http://www.fas.org/sgp/crs/row/RS22032.pdf>; Press Release, U.S. Dep't of State, The United States and International Development: Fostering Hope Through

which makes the U.S. government the world's leading donor in terms of overall volume, the United States ranks near the bottom (second to last) of the twenty-two major aid donor nations in terms of percentage of gross national income targeted to development assistance.²⁸ The U.S. ODA per capita contribution was more than forty percent lower than our continental counterparts in the European Union.²⁹

Although foreign aid architecture is complex, involving multiple partners, when it comes to measuring contributions from the United States to developing countries, substantial foreign aid is delivered outside official government aid channels, primarily through nonprofit organizations. Although exact measures of foreign contributions by charitable U.S. organizations are difficult to obtain, estimates of private international philanthropy from U.S.-based public charities and private foundations would unquestionably greatly augment levels of overall aid to the developing world donated by the U.S. government. Economist Jeffrey Sachs writes that U.S. nongovernmental entities provide approximately \$3 billion per year in development assistance.³⁰ The U.S. Department of State, however, estimated that U.S. private charitable sources donated nearly \$7 billion to developing countries in 2004.³¹ And recently, a private U.S. think tank—the Hudson Institute—issued a report compiling data on public and private engagement in the developing world.³² While the overall report included several means of engagement with the developing world, it estimated that private charitable organizations based in the United States donated approximately \$13.6 billion in 2004.³³

Growth 1 (May 31, 2005), *available at* <http://www.state.gov/documents/organization/47055.pdf>. Iraq's aid allotment accounted for approximately 16% and 37% of total U.S. development assistance in 2004 and 2005, respectively. *See* Press Release, U.S. Dep't of State, The United States and International Development: Partnering for Growth (May 10, 2006), [hereinafter Press Release, Partnering for Growth] *available at* <http://www.state.gov/r/pa/prs/ps/2006/66060.htm>.

28. *See* NOWELS, *supra* note 27, at 5.

29. *See id.* at 6.

30. *See* JEFFREY D. SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME 303 (2005) (citing figures from the Development Assistance Committee of the Organisation for Economic Co-operation and Development ("OECD")).

31. *See* Press Release, Partnering for Growth, *supra* note 27.

32. *See* HUDSON INST., THE INDEX OF GLOBAL PHILANTHROPY (Karina Rollins ed., 2006), *available at* <http://gpr.hudson.org/files/publications/globalphilanthropy.pdf>.

33. According to the report, private foundations contributed \$3.4 billion, public charities contributed \$5.7 billion, and religious organizations donated \$4.5 billion. *See id.* at 20–28. The report also measured corporate contributions, the monetary value of donated volunteer time, the value of university scholarships to American institutions, and

Although the estimates of giving may vary, the significance of private aid is undisputed. Even taking the smallest estimate of \$3 billion, the contributions of U.S. private foundations and public charities exceed the official development assistance aid of all but six of the twenty-two major government donors, including Sweden,³⁴ which is known as the “darling of the Third World”³⁵ because of the high amount of its foreign aid as a percentage of the country’s overall gross national product (“GNP”). Obviously, the larger estimates simply magnify the effects. Moreover, as voices from the left call for even larger U.S. aid contributions commensurate with the GNP levels³⁶ of our counterparts and voices on the right claim that criticisms of U.S. aid levels are unfounded in part because they fail to account for contributions from private sources,³⁷ international philanthropy takes on an increasingly important position as part of the United States’s international aid story. In many ways, even without a formal relationship, international philanthropy represents a form of a public-private partnership between government and charitable organizations through which the nonprofit sector is an ally in U.S. development assistance efforts. Accordingly, a strong public policy interest exists for encouraging international philanthropy.

Although these figures provide a sense of the monetary stakes, more than just money is at issue. As one commentator has noted, charitable organizations are “delivering more than just money to developing countries. They are delivering the values of freedom, democracy, entrepreneurship, and volunteerism.”³⁸ In addition, charitable assistance contributes to increased security both abroad and here at home. International grantmaking facilitates the development of civil society in the developing world, contributing to greater global security and enhancing the public image and public diplomacy efforts of the United States. Perhaps more important, it serves as a means of engendering cooperation with allies through the buildup of soft power.

private remittances. See *id.* at 22–34. However, I have excluded those amounts for the purposes of this analysis focused on international giving by charitable organizations.

34. See NOWELS, *supra* note 27, at 5.

35. See Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1689 (2003) (noting Sweden’s reputation in the developing world).

36. See, e.g., SACHS, *supra* note 30, at 288–303.

37. See, e.g., Adelman, *supra* note 25, at 9.

38. *Id.* at 14.

A. *International Philanthropy as a Facilitator of Civil Society*

International aid is a powerful weapon in promoting civil society and advancing social and economic development across the globe. To that end, development aid also advances U.S. security interests by alleviating some of the situational factors, such as poverty, political oppression, and social inequality, that may breed terrorists and produce weak states where terrorism thrives, and replacing them with conditions for economic growth, trade, and private investment.³⁹ As the United States seeks to understand and respond to security threats as well as prevent further conflict, development aid emerges as a key element of foreign policy.⁴⁰

The profound impact of the September 11 attacks and the resulting campaign against terrorism has led scholars and citizens alike to consider and debate the sources of anti-American terrorism and the proper responses to the challenges posed by such violence.⁴¹ Although various arguments and theories have been put forward, several scholars and commentators have noted the ways in which economic desperation, disease, and global poverty, among other socioeconomic deficiencies, contribute to the foundational origins of terrorism.⁴² Although there may not be a direct causal link,⁴³

39. See Stuart Eizenstat et al., *Rebuilding Weak States*, FOREIGN AFF., Jan.-Feb. 2005, at 134, 135-36, 139-41; Kevin J. Fandl, *Terrorism, Development, and Trade: Winning the War on Terror Without the War*, 19 AM. U. INT'L L. REV. 587, 599-600 (2004).

40. The case for foreign aid to developing countries has been put forward by a variety of economists, development experts, and political figures. See, e.g., SACHS, *supra* note 30, at 244-65, 329-46 (arguing that countries beset by instability and poverty can, with adequate financial assistance, be transformed into emerging market economies); Colin L. Powell, *No Country Left Behind*, FOREIGN POL'Y, Jan.-Feb. 2005, at 28, 30 (former U.S. Secretary of State arguing that development assistance is an essential element of U.S. national security policy and acknowledging that the Bush administration recognizes a "link between terrorism and poverty"). Foreign aid, however, has been criticized for advancing multinational corporate interests at the expense of poor countries, see, e.g., JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 525-26 (2d ed. 2004); Michael Dobbs, *Aid Abroad Is Business Back Home*, WASH. POST, Jan. 26, 2001, at A1, and for extreme waste and corruption, see, e.g., WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS* (2002); MICHAEL MAREN, *THE ROAD TO HELL: THE RAVAGING EFFECTS OF FOREIGN AID AND INTERNATIONAL CHARITY* (1997).

41. See, e.g., Graham E. Fuller, *Terrorism: Sources and Cures*, in A PRACTICAL GUIDE TO WINNING THE WAR ON TERRORISM 15 (Adam Garfinkle ed., 2004); Michael J. Kelly, *Understanding September 11th—An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283 (2002); John Quigley, *Identifying the Origins of Anti-American Terrorism*, 56 FLA. L. REV. 1003 (2004); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 329 (2002).

42. See, e.g., CORALIE BRYANT & CHRISTINA KAPPAZ, *REDUCING POVERTY, BUILDING PEACE* 26 (2005) (noting that al Qaeda and Osama Bin Laden's "support is strong among many poor who see him as working to fight the injustice they face in their

international development experts Coralie Bryant and Christina Kappaz persuasively argue that “poverty, inequality, and social exclusion create circumstances that lead to or abet violence.”⁴⁴ Put slightly differently, poverty, poor health, environmental degradation, and other social ills provide fertile ground for terrorism to thrive. If we take these views seriously, as I think we should, the promotion of poverty reduction, self-determination, and human rights must be an integral part of a complete strategy to defeat terrorism.

In its final report, the 9/11 Commission indicated that a “comprehensive U.S. strategy to counter terrorism should include economic policies that encourage development, more open societies, and opportunities for people to improve the lives of their families and to enhance prospects for their children’s future.”⁴⁵ Addressing the socioeconomic roots of the discontent and inequity that lead to extremism is an important part of the strategy to enhance national security.⁴⁶ Accordingly, policymakers should be especially cautious when developing policies that directly and indirectly implicate strategic support for overseas development.

lives”); PAUL R. PILLAR, *TERRORISM AND U.S. FOREIGN POLICY* 31 (2002) (discussing policy initiatives connected to root causes of terrorism); James Gomez, *September 11: Asian Perspectives*, 13 IND. INT’L & COMP. L. REV. 705, 712 (2003) (“Terrorism was seen as arising from surging global poverty and recommendations were made that this issue be dealt with effectively. In this respect, counter-terrorist strategies were urged to include the elimination of the root causes of poverty.”); Lee H. Hamilton, *Fighting Terrorism*, 12 IND. J. GLOBAL LEGAL STUD. 379, 382 (2005) (“We need a comprehensive strategy that balances and integrates all elements of American power. . . . [including] helping to reverse the causes of terrorism by promoting social and political rights, and the rule of law in repressive societies; working to reduce the poverty and unemployment that create an opening for terrorist recruitment; [and] promoting education abroad, so young Muslims have alternatives to radical and hate-filled teachings”); Shashi Tharoor, *September 11, 2002: Understanding and Defeating Terrorism, One Year Later*, 27 FLETCHER F. WORLD AFF. 9, 11 (2003) (acknowledging the role of “the scourges of poverty, of famine, of illiteracy, of ill-health, of injustice, and of human insecurity”); Adam Garfinkle, *The Impossible Imperative? Conjuring Arab Democracy*, NAT’L INT., Fall 2002, at 156 (arguing that poverty and disinformation in Arab countries contribute to terrorism).

43. See BRYANT & KAPPAZ, *supra* note 42, at 8; BRUCE W. JENTLESON, *AMERICAN FOREIGN POLICY: THE DYNAMICS OF CHOICE IN THE 21ST CENTURY* 407 (2004).

44. See BRYANT & KAPPAZ, *supra* note 42, at 159.

45. See 9/11 COMMISSION REPORT, *supra* note 1, at 379.

46. See JENTLESON, *supra* note 43, at 407; SACHS, *supra* note 30, at 330–31 (“Whether terrorists are rich or poor or middle class, their staging areas—their bases of operation—are unstable societies beset by poverty, unemployment, rapid population growth, hunger, and lack of hope. Without addressing the root causes of that instability, little will be accomplished in stanching terror.”).

U.S. private foundations and public charities,⁴⁷ in control of substantial capital resources, are well equipped and positioned to provide financial and human resources to address those root-cause issues.⁴⁸ Unquestionably, philanthropic capital remains limited, and nonprofit organizations cannot solve global poverty and related problems alone. However, such private aid is particularly and uniquely valuable because of the sheer magnitude of resources nonprofits offer, the greater flexibility they possess as compared to the government in the allocation of funds, and the instrumental role independent nonprofits have in building coalitions across sectors and coordinating strategy among grassroots nonprofit organizations.⁴⁹ Even in terms of cash, nonprofit donations offer advantages because much of U.S. government assistance is delivered through “tied aid” that links contributions to the purchase of services and goods from the donating country.⁵⁰ Therefore, development aid through nonprofits is both more efficient and actually worth more to recipients than equivalent government dollars.⁵¹

Importantly, philanthropic activity, in the developing world in particular, helps foster democratic governance by supporting and nurturing independent voices, building social capital to support democracy, and developing natural allies with like-minded

47. Both private foundations and public charities are tax-exempt organizations classified under the Internal Revenue Code. See I.R.C. § 501(c)(3) (2000). Private foundations are generally created, funded, and controlled by an individual, a family, or a corporation, and commonly engage in grantmaking as their primary activity. Public charities are nonprofits with financial support drawn from a broad base of donors, substantial government support, or some form of public control, and commonly operate their own charitable services or programs. See I.R.C. § 509; Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593, 631 (1999).

48. See Helmut Anheier & Adele Simmons, *The Role of Philanthropy in Globalization*, in RETHINKING PHILANTHROPIC EFFECTIVENESS: LESSONS FROM AN INTERNATIONAL NETWORK OF FOUNDATION EXPERTS 10, 23 (Dirk Eilinghoff ed., 2005); see also RENZ ET AL., *supra* note 10, at 19 (estimating that international giving by U.S. private foundations alone totaled \$3.2 billion in 2002).

49. See Anheier & Simmons, *supra* note 48, at 11.

50. See U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2005, at 102 (Charlotte Denny ed., 2005), available at http://hdr.undp.org/reports/global/2005/pdf/HDR05_complete.pdf (“According to OECD reports on tied aid to least developed countries, the United States tops the tied aid list . . .”); see also CURT TARNOFF & LARRY NOWELS, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: FOREIGN AID: AN INTRODUCTORY OVERVIEW OF U.S. PROGRAMS AND POLICY 18 (2004), available at <http://www.usinfo.state.gov/usa/infousa/trade/files/98-916.pdf> (“Most U.S. foreign aid is used for procurement of U.S. goods and services . . .”).

51. See U.N. DEV. PROGRAMME, *supra* note 50, at 102 (noting that tied aid reduces the value of assistance by 11% to 30%).

constituencies. For instance, in the Arab world, many local nonprofit organizations frequently provide alternatives to radical groups and ideas opposed to the United States.⁵² Consistent with the charitable goals of their U.S. funders, foreign grant recipients often pursue goals associated with U.S. interests or mainstream American values or both, such as advancing education, youth development, microfinance, economic development, the environment, and women's rights.⁵³ The local foreign nongovernmental organizations ("NGOs"), which are frequently small with strong community ties, help alter political and social landscapes and provide critical building blocks for civil society.⁵⁴ Close working relationships with experienced U.S. charitable organizations (something the U.S. government cannot offer) also can strengthen and educate a local foreign charity. Additionally, as explained above, private foundations in particular bring unique advantages in their ability to bring people together in ways that no formal U.S. government program is capable of doing.⁵⁵ In addition to providing altruistic benefit and helping address potential root causes of terrorism, international aid efforts to promote civil society and democratic governance advance U.S. security interests.⁵⁶

52. See, e.g., JANINE A. CLARK, ISLAM, CHARITY, AND ACTIVISM: MIDDLE-CLASS NETWORKS AND SOCIAL WELFARE IN EGYPT, JORDAN, AND YEMEN (2003) (examining the structure and dynamics of moderate Islamic institutions, including the Islamic Center Charity Society in Jordan and the Islah Women's Charitable Society in Yemen, and the social and political impact of the organizations); Sabrina Tavernise, *Iraqi Charities Plant the Seed of Civil Society*, N.Y. TIMES, May 23, 2006, at A1; Holly Yettick, *Locals Fund Real Dream: A Pakistani Schoolhouse*, ROCKY MOUNTAIN NEWS (Denver), Feb. 11, 2002, at A12 (describing a Pakistani school modeled after U.S. schools intended to provide an alternative to religious madrassas).

53. See generally RENZ ET AL., *supra* note 10, at 53–77 (describing the programmatic giving trends and habits of private funders engaged in international grantmaking).

54. See ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 336–49 (2000); Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL'Y 289, 291 (2004) (stating that "participation in voluntary associations is one of the principal methods for assuring an active citizenry"); Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 830–31 (2003) (describing the charitable sector's role in constructing and maintaining civil society).

55. See *supra* text accompanying note 49.

56. See THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 33 (2006), available at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf> ("Development reinforces diplomacy and defense, reducing long-term threats to our national security by helping to build stable, prosperous, and peaceful societies. Improving the way we use foreign assistance will make it more effective in strengthening responsible governments, responding to suffering, and improving people's lives.").

Finally, active engagement by and support from U.S. funders working with foreign nonprofits advances U.S. policy interests by helping developing countries achieve economic growth, establish stable middle classes, and actively engage in the global economy,⁵⁷ all of which lead to more stable states and potential strategic allies.⁵⁸ Of course, grantmaking programs and giving priorities are diverse, but studies have revealed that international grant support increasingly has targeted grassroots “community improvement, microenterprise development, primary health care, primary and secondary education, refugee and migration issues, women’s rights, resource conservation, and local media and communications.”⁵⁹ Moreover, this presumably advances U.S. interests because successful economic and political development abroad opens new, stable markets to U.S. goods and generates new opportunities for investment.⁶⁰ Thus, philanthropy’s increased support of development aid can provide the twin benefits of enhancing political stability and expanding markets for U.S. products as well as reducing the potential pool of human capital recruits for terrorist groups.

B. International Philanthropy as an Agent of Public Diplomacy

Another important means by which international philanthropic activity supports U.S. security interests is through building a positive image of the United States and enhancing U.S. public diplomacy efforts. As America engages in its global effort to fight the growth and support of terrorist activities, it is critically important for the

57. See Karin Aggestam, *Conflict Prevention: Old Wine in New Bottles?*, in MITIGATING CONFLICT: THE ROLE OF NGOS 12, 16–17 (Henry Carey & Oliver Richmond eds., 2003) (“NGOs have become significant actors in economic development [abroad], particularly in the last ten years . . .”); see also Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 323 (2006) (describing the “significantly enhance[d] . . . role of international donor agencies and NGOs in the regulation and negotiation of everyday life,” particularly in weak states).

58. Research has found a positive relationship between aid and growth. See Henrik Hansen & Finn Tarp, *Aid Effectiveness Disputed*, in FOREIGN AID AND DEVELOPMENT: LESSONS LEARNT AND DIRECTIONS FOR THE FUTURE 103 (Finn Tarp ed., 2000).

59. RENZ ET AL., *supra* note 10, at 53.

60. See Jose E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT’L L. 1, 12 (1989); Carl B. Kress, *The United States Government and Post-Conflict Economic Reconstruction*, 11 U.C. DAVIS J. INT’L L. & POL’Y 75, 94 (2004); see also SACHS, *supra* note 30, at 10–14 (discussing the success of nonprofit organizations in Bangladesh, including the Bangladeshi Rural Advancement Committee and Grameen Bank, at achieving economic growth and improvements in health and education and a place worthy of investment).

United States to secure the support of the peoples of the world. A successful campaign against terrorism will rely heavily on international intelligence, influence, and the cooperation of allies.⁶¹ One important tool for acquiring the necessary influence and cooperation is public diplomacy.⁶²

Public diplomacy captures a dimension of international relations beyond the official state-to-state diplomacy conducted through government officials. It seeks to inform and influence public attitudes of foreign citizens by generating understanding and goodwill, primarily through the delivery of information and communication outreach by government directly to the public, as well as through the promotion of direct dialogue between citizens (i.e., cultural and educational exchanges). Specifically targeted at a mass audience, public diplomacy is based on the recognition that public opinion abroad can exert influence on foreign governments and political systems.⁶³ Public diplomacy requires the effective communication of political messages and outreach aimed at generating goodwill.⁶⁴ As a result, the generosity of U.S. individuals and institutions helps develop positive reputational benefits and goodwill for all Americans and the country as a whole.

With respect to the attitudes of foreign audiences, the United States faces mounting difficulties.⁶⁵ Several studies and public

61. See generally PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 114–18 (2003) (discussing the importance of relations with allies).

62. See PHILIP SEIB, *BEYOND THE FRONT LINES: HOW THE NEWS MEDIA COVER A WORLD SHAPED BY WAR*, at xvi (2004) (explaining the importance of public diplomacy after September 11); Henry H. Perritt, Jr., *Iraq and the Future of United States Foreign Policy: Failures of Legitimacy*, 31 SYRACUSE J. INT'L L. & COM. 149, 223 (2004) ("Public diplomacy is an essential—one might say the most essential—tool in the American foreign policy arsenal."). Certainly, I would acknowledge that public diplomacy is only part of the solution. While U.S. communications and image may not be the sole source of national security threats, they contribute to our ability to deal with the challenges arising from substantive policy disagreements, socioeconomic disparities, and political and religious extremism, especially in the developing world.

63. See SHAUN RIORDAN, *THE NEW DIPLOMACY* 123 (2003) ("[P]ublics matter more than before. . . . [because] governments, at whatever level, have to win support and legitimacy from domestic publics for their foreign-policy positions; they must also win over foreign publics if they want to secure the agreement to policy positions from their governments.").

64. See *id.*; Joseph A. Keeler, *Genocide: Prevention Through Nonmilitary Measures*, 171 MIL. L. REV. 135, 145–46 (2002).

65. As recently as 2004, a U.S. Pentagon report declared U.S. public diplomacy to be in "a state of crisis." See U.S. DEP'T OF DEFENSE, *REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON STRATEGIC COMMUNICATION* 14 (2004), available at

opinion polls taken worldwide reveal that America's image abroad has suffered in recent years. Attitudes toward the United States are especially negative in the Muslim world.⁶⁶ In a recent study, a majority of citizens in five of six predominantly Muslim countries surveyed (Indonesia, Jordan, Lebanon, Pakistan, and Turkey) expressed unfavorable opinions of the United States; Morocco was the lone exception.⁶⁷ Importantly, this phenomenon is equally pronounced among Western countries, as a 2005 survey in Australia indicates:

[B]arely more than half the Australians polled had positive feelings about the United States, although 84 percent saw Japan positively, and 86 percent viewed the United Kingdom positively. Worse, 57 percent of Australians perceived America's foreign policies as a potential threat—equivalent to the percentage of Australians worried about the rise of Islamic fundamentalism.⁶⁸

Further, Australia is hardly an outlier. Public opinion polls of the peoples of France, Germany, Great Britain, Russia, Spain, and Turkey, among other nations, have reported similar declines.⁶⁹ More troubling, another report reveals that, in addition to the United

http://www.acq.osd.mil/dsb/reports/2004-09-Strategic_Communication.pdf; Robert Burns, *Panel: U.S. Actions Fuel Extremists*, CHI. TRIB., Nov. 25, 2004, at 30.

66. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-535, U.S. PUBLIC DIPLOMACY: STATE DEPARTMENT EFFORTS TO ENGAGE MUSLIM AUDIENCES LACK CERTAIN COMMUNICATION ELEMENTS AND FACE SIGNIFICANT CHALLENGES 1 (2006), available at <http://www.gao.gov/new.items/d06535.pdf>.

67. PEW GLOBAL ATTITUDES PROJECT, ISLAMIC EXTREMISM: COMMON CONCERN FOR MUSLIM AND WESTERN PUBLICS 14 (2005), available at <http://pewglobal.org/reports/pdf/248.pdf>; see also 9/11 COMMISSION REPORT, *supra* note 1, at 375 ("By 2003, polls showed that 'the bottom had fallen out of support for America in most of the Muslim world. Negative views of the U.S. among Muslims, which had been largely limited to countries in the Middle East, have spread.'" (quoting Press Release, Pew Global Attitudes Project, War with Iraq Further Divides Global Publics but World Embraces Democratic Values and Free Markets (June 3, 2003))); Farah Stockman, *US Image a Tough Sell in Mideast*, BOSTON GLOBE, Oct. 23, 2005, at A5 ("Opinion polls across the Muslim world suggest that favorability ratings of the United States have dropped into the single digits after the Iraq war, even in friendly countries like Egypt and Jordan.").

68. Joshua Kurlantzick, *The Decline of American Soft Power*, CURRENT HIST., Dec. 2005, at 419, 419.

69. See PEW GLOBAL ATTITUDES PROJECT, AMERICA'S IMAGE FURTHER ERODES, EUROPEANS WANT WEAKER TIES 1 (2003), available at <http://peoplepress.org/reports/pdf/175.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-323, U.S. PUBLIC DIPLOMACY: INTERAGENCY COORDINATION EFFORTS HAMPERED BY THE LACK OF A NATIONAL COMMUNICATION STRATEGY 5 (2005) [hereinafter GAO REPORT, U.S. PUBLIC DIPLOMACY 2005], available at <http://www.gao.gov/new.items/d05323.pdf> (noting that opinion polling data from Western and Muslim countries "indicate that the United States faces a chronic and widespread image problem").

States's overall image problems, foreign views about the American people have declined as well: "The favorability ratings of Americans have declined since 2002 in 9 of the 12 countries for which trend data exists"⁷⁰

Negative foreign attitudes should be of concern to policymakers because, as a recent federal government report noted, weak images abroad can "increase foreign public support for terrorism directed at Americans, impact the cost and effectiveness of military operations, [and] weaken the United States' ability to align with other nations in pursuit of common policy objectives"⁷¹ Thus, public diplomacy promotes U.S. national interests by informing, engaging, and influencing peoples around the world. Indeed, public diplomacy—with its long and rich history⁷²—is becoming increasingly important in light of the limitations of government-to-government diplomacy produced by globalization and technological advances in communications.⁷³ There is now an even greater need for direct dialogue and communication, requiring government-to-foreign citizen communication through public diplomacy.

Although there are multiple tools of public diplomacy, philanthropic support from the United States for foreign nonprofit organizations is a vital one. Government need not be the only generator of public diplomacy; private channels, sources, and entities can help address U.S. "image" problems. For instance, "Americans' perceived lack of empathy toward the pain, hardship, and tragic plight of peoples throughout the developing world"⁷⁴ may be offset by charitable support abroad. Evidence demonstrates that aid and philanthropic activity make a difference in creating positive relations and goodwill. For example, research indicates that U.S. tsunami relief efforts in Asia have generated more favorable attitudes toward

70. PEW GLOBAL ATTITUDES PROJECT, U.S. IMAGE UP SLIGHTLY, BUT STILL NEGATIVE 20 (2005), available at <http://pewglobal.org/reports/pdf/247.pdf>.

71. GAO REPORT, U.S. PUBLIC DIPLOMACY 2005, *supra* note 69, at 1.

72. See generally RICHARD T. ARNDT, *THE FIRST RESORT OF KINGS: AMERICAN CULTURAL DIPLOMACY IN THE TWENTIETH CENTURY* (2005).

73. SASKIA SUSSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION*, at xi–xii (1996) (explaining that traditional governmental institutions and relationships have been transformed by globalization and technology); Victor A. Kremenyuk, *The Emerging System of International Negotiation*, in *INTERNATIONAL NEGOTIATION: ANALYSIS, APPROACHES, ISSUES* 22, 23–24, 26–27 (Victor A. Kremenyuk ed., 2002) (discussing the importance of actors other than nation-states in international relations in light of growing interdependence on environmental, economic, and security matters).

74. Peter G. Peterson, *Public Diplomacy and the War on Terrorism*, *FOREIGN AFF.*, Sept.–Oct. 2002, at 74, 76.

the United States.⁷⁵ Admittedly, because nonprofit organizations operate apart from and independent of the U.S. government, they are only partly responsive to its concerns. Nonprofits, like other private entities or persons acting outside the control of government, may even engage in activities or practices that can undercut a positive image.⁷⁶ On balance, however, it seems likely that the benefits of philanthropy for public diplomacy outweigh the risks of harm.

If public diplomacy is to be truly effective in communicating and educating the world about the United States, it must fully embrace the major components of American organizational life, including nonprofit entities. The United States is more than just government and business, and the critically important—and oft-overlooked—nonprofit sector reflects the very essence and values of the country and its citizens.⁷⁷ More than merely talking or theorizing about the United States and its values, international philanthropy places them on display. Philanthropy and charity are an important part of the American story⁷⁸ and, ultimately, a part of modern diplomacy.⁷⁹

75. See CRAIG CHARNEY & NICOLE YAKATAN, COUNCIL ON FOREIGN RELATIONS, A NEW BEGINNING: STRATEGIES FOR A MORE FRUITFUL DIALOGUE WITH THE MUSLIM WORLD 6 (2005), available at http://www.cfr.org/content/publications/attachments/Anti-American_CSR.pdf (“[F]ocus groups demonstrate that Muslims view the United States more favorably when they learn about American aid. . . . U.S. tsunami relief has improved attitudes toward America in Indonesia . . .”); THE PEW GLOBAL ATTITUDES PROJECT, *supra* note 70, at 4 (“The U.S. tsunami relief effort led to more favorable views of the U.S. for most nations surveyed.”).

76. See Alastair Pennycook & Sophie Coutand-Marin, *Teaching English as a Missionary Language*, 24 DISCOURSE: STUD. IN CULTURAL POL. OF EDUC. 337, 337–38 (2003) (raising concerns about Christian evangelicals using the false pretense of English language education to conduct missionary outreach in foreign countries).

77. See Garry W. Jenkins, *The Powerful Possibilities of Nonprofit Mergers: Supporting Strategic Consolidation Through Law and Public Policy*, 74 S. CAL. L. REV. 1089, 1094–1102 (2001).

78. For a discussion of the role of philanthropy in U.S. history, see CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY, *supra* note 2.

79. See RIORDAN, *supra* note 63, at 122.

As globalization changes the world,⁸⁰ our approach to diplomacy must evolve to engage the benefits of both traditional government-to-government communication and public diplomacy, which demands sophisticated operations on both governmental and nongovernmental levels. Promoting linkages—a means of direct connection—between American institutions and foreign NGOs encourages the dialogue, sharing of ideas, and personal and institutional relationships that should be part of the new framework of our national diplomatic policy to support long-term security interests.

C. *International Philanthropy as a Source of Soft Power*

International philanthropy can also provide a valuable source of power benefiting the United States. While related to, yet different from, public diplomacy, the concept of soft power both captures and broadens the benefits and effects associated with positive image abroad. Several experts and scholars have argued that an effective counterterrorism policy must rely on more than just strength. Political scientist Joseph Nye argues that to succeed in international politics, America must use both hard power (e.g., military and economic might) and soft power, which he defines as the ability to co-opt others to want the same outcomes as you through intangible attraction to shared values, thereby shaping the preferences of others.⁸¹ Although hard power is well understood and often utilized on the world stage, soft power is less understood and, with respect to the United States, on the decline.⁸² Professor Nye contends that the United States cannot defeat terrorism without attracting moderates

80. See, e.g., ANTHONY GIDDENS, *RUNAWAY WORLD: HOW GLOBALIZATION IS RESHAPING OUR LIVES* (2000); SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* (1998); Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243, 246–47 (2000); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 551–52 (2005); Laura Spitz, *The Gift of Enron: An Opportunity To Talk About Capitalism, Equality, Globalization, and the Promise of a North-American Charter of Fundamental Rights*, 66 OHIO ST. L.J. 315, 338–41 (2005); Gary Minda, *Globalization of Culture*, 71 U. COLO. L. REV. 589, 591 (2000) (reviewing DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD* (1998)).

81. See NYE, *supra* note 13, at 5.

82. See Joseph S. Nye, Jr., *The Decline of America's Soft Power*, FOREIGN AFF., May–June 2004, at 1; see also Robert Cooper, *The Goals of Diplomacy, Hard Power, and Soft Power*, in AMERICAN POWER IN THE TWENTY-FIRST CENTURY 167, 167 (David Held & Mathias Koenig-Archibugi eds., 2004) (“America seems to be hard power incarnate and Europe the embodiment of soft power.”); Kurlantzick, *supra* note 68, at 420–21 (describing the decline of American soft power).

around the world⁸³ and that the Bush administration may have “focused too heavily on hard power and not taken enough account of soft power.”⁸⁴

Although power has been defined many different ways, the definition typically includes an ability to influence or control others.⁸⁵ Rather than exercising power over others through military and economic strength, countries may also rely on indirect methods to achieve their goals, namely attracting and persuading other governments and publics to adopt the same goals.⁸⁶ Soft power reflects this indirect ability to elicit cooperation through attraction to shared values, common aspirations, and the inspiration they ignite in others.⁸⁷ Drawn from a country’s values, culture, and foreign policies,⁸⁸ soft power is built through a combination of government action and action by nonstate actors. Ultimately, nations with significant soft power “find that citizens of other countries aspire to share their values and institutions, and leaders of foreign countries view their policies as legitimate and want to follow their lead.”⁸⁹

Examining the level of transparency can help to differentiate soft power from public diplomacy. Efforts to influence foreign publics

83. See NYE, *supra* note 13, at 131.

84. See Joseph S. Nye, Jr., *Hard Power, Soft Power, and “The War on Terrorism,”* in AMERICAN POWER IN THE TWENTY-FIRST CENTURY, *supra* note 82, at 114, 124.

85. See, e.g., JEFFREY PFEFFER, MANAGING WITH POWER 30 (1992) (defining power as “the potential ability to influence behavior, to change the course of events, to overcome resistance, and to get people to do things that they would not otherwise do”); Peter Blau, *Differentiation of Power*, in POLITICAL POWER: A READER IN THEORY AND RESEARCH 293, 293 (Roderick Bell et al. eds., 1969) (“[P]ower refers to all kinds of influence between persons or groups”); Jamison E. Colburn, “Democratic Experimentalism”: A Separation of Powers for Our Time?, 37 SUFFOLK U. L. REV. 287, 304 n.48 (2004) (“‘[P]ower’ can take an infinite number of forms Many are best described as modes of influence.”); Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 354–55 n.40 (noting that “the definition of power involves the ability to control or influence other’s behaviors”); Nye, *supra* note 84, at 117 (“[P]ower is the ability to get the outcomes you want, and to affect the behavior of others to make this happen.”). See generally Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 154–60 (2005) (discussing definitions of power).

86. ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 220 (3d ed. 2001) (defining soft power as “the ability to get desired outcomes because others want what you want” and “the ability to achieve desired outcomes through attraction rather than coercion”).

87. See JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD’S ONLY SUPERPOWER CAN’T GO IT ALONE 8–9 (2002).

88. See NYE, *supra* note 13, at 68 (“The image of the United States and its attractiveness to others is a composite of many different ideas and attitudes. It depends in part on culture, in part on domestic policies and values, and in part on the substance, tactics, and style of our foreign policies.”).

89. Kurlantzick, *supra* note 68, at 420.

through public diplomacy are overt and focused on direct communication, whereas soft power, with its focus on attraction to values and ideals, exercises influence through more subtle, diffuse, and indirect means. To use an analogy to the corporate world, public diplomacy is more like public relations and soft power is more like brand image. Sophisticated corporations attempt to win customers through communication via the media and other sources using public relations, but they also devote substantial resources to developing a brand identity and image that commands awareness, meaning, and esteem. The best brand marketers ensure that all of their actions, communications, and other choices reinforce the brand image so that audiences understand and are attracted to the brand because of what it represents and because of its ability to tap into an individual's aspirations or self-image.⁹⁰

Although governments certainly use soft power, it is not something that exclusively belongs to or is controlled by the province of government. To the contrary, both public and private sources can wield their own soft power, and Nye's interpretation of the concept recognizes that private, nongovernmental forces and institutions can enhance governmental soft power.⁹¹ With respect to nonstate actors, Nye and others have focused largely on the influential role that culture⁹² and commerce play in "getting others to want the outcomes

90. See generally DAVID A. AAKER, *MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME* (1991); DOUGLAS B. HOLT, *HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING* (2004); KEVIN LANE KELLER, *STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY* (2d ed. 2003); Susan Fournier, *Consumers and Their Brands: Developing Relationship Theory in Consumer Research*, 24 J. CONSUMER RES. 343 (1998).

91. See NYE, *supra* note 13, at 10.

92. With respect to culture as a source of soft power, the United States's image and its attractiveness are shaped and expressed by mediums such as literature, art, education, and popular culture. See NYE, *supra* note 13, at 11; see also Josef Joffe, *Who's Afraid of Mr. Big?*, NAT'L INT., Summer 2001, at 43 ("U.S. culture, low-brow or high, radiates outward with an intensity last seen in the days of the Roman Empire—but with a novel twist. Rome's and Soviet Russia's cultural sway stopped exactly at their military borders. America's soft power, though, rules over an empire on which the sun never sets."). These and other forms of U.S. cultural values are most obviously conveyed through mass entertainment but also through commerce, personal contacts, and citizen visits and exchanges. See NYE, *supra* note 13, at 44–55. The influential German foreign policy analyst and magazine editor Josef Joffe has argued that cultural attraction, ideology, and agenda-setting have become significant currencies of power in modern times compared to more traditional currencies tied to military strength. See Josef Joffe, *America the Inescapable*, N.Y. TIMES, June 8, 1997, § 6 (Magazine), at 38.

that you want.”⁹³ For example, Nye notes that American soft power has been largely created by cultural forces transmitted through mediums such as popular films and television, multinational corporations, brand icons, and even celebrities and sports figures.⁹⁴ Since culture is crafted and deployed by a variety of forces—including those outside the control of government—it makes sense that cultural attractiveness is, in part, dependent on the products and efforts of private entities.

Nye’s analysis of private interests contributing to a nation’s soft power emphasizes contributions from corporations and Hollywood movie studios.⁹⁵ With respect to nonprofit organizations, he primarily stresses how charitable institutions exercise their own soft power to influence others on behalf of their own interests.⁹⁶ A more subtle point that Nye acknowledges, but one I wish to highlight and expand here, is the role that U.S. public charities and private foundations play in enhancing the interests—that is, the soft power—of the United States.⁹⁷

Nye primarily views international nonprofit organizations as attracting their own followers, giving them clout to influence governments.⁹⁸ To the extent that Nye is principally conceiving of NGOs as large, multinational public charities, his assessment is surely accurate. However, that perspective requires reformulation when thinking about the broader spectrum of private foundations and smaller public charities. A nonprofit organization that is able to

93. NYE, *supra* note 13, at 5; see also Josef Joffe, *How America Does It*, 7 FOREIGN AFF., Sept.–Oct. 1997, at 13, 24 (describing soft power as stemming from cultural and economic strength).

94. NYE, *supra* note 13, at 17 (“Much of American soft power has been produced by Hollywood, Harvard, Microsoft, and Michael Jordan.”); see also KISHORE MAHBUBANI, *BEYOND THE AGE OF INNOCENCE: REBUILDING TRUST BETWEEN AMERICA AND THE WORLD* 3–5 (2005) (discussing the power of American culture, icons, and brands to influence and inspire foreign citizens); Josef Joffe, Editorial, *Looking Out for No. 1 by Looking Out for Others*, PALM BEACH POST, Sept. 28, 1997, at E1 (“[The United States] is definitely in a class of its own in the soft power game. . . . All [of Europe, Japan, China and Russia’s] movie studios together could not break the hold of Hollywood. Nor could a consortium of their universities dethrone Harvard et al., which dominate academia while luring the best and the brightest from abroad.”).

95. See NYE, *supra* note 13, at 12–13. Of course, actions by corporations and film and production studios may also work against government interests. For instance, “Hollywood movies that show scantily clad women with libertine attitudes . . . undercut government efforts to improve relations with Islamic nations.” *Id.* at 15.

96. See NYE, *supra* note 87, at 11 (“[N]ongovernmental groups develop soft power of their own . . .”).

97. NYE, *supra* note 13, at 73 (“[N]onstate actors . . . also possess soft power that can be used to help or hinder the United States’ achievement of its preferred outcomes.”).

98. See *id.* at 90–91.

generate its own soft power is the rare exception. Indeed, perhaps only a small handful of major "brand name" nonprofit organizations with substantial resources, such as Human Rights Watch, the Ford Foundation, the Bill and Melinda Gates Foundation, and a few others, can mobilize publics and attract their own followers, thereby accruing their own soft power. Most nonprofit organizations, however, especially smaller and less well-known funders acting abroad, directly contribute to the goodwill and attractiveness of their home governments based on the national affiliation of grantors. Simply put, when an American foundation gives money for a humanitarian project, beneficiaries are likely to associate the end product as produced by "American aid," rather than narrowly as generated by a specific foundation. For example, in the late 1970s when U.S.-based Rotary International embarked on a campaign to eradicate polio in the Philippines by immunizing six million Filipino children,⁹⁹ the philanthropic nature and reputation of the United States as a whole was enhanced. Today, Accion International's support for microfinance¹⁰⁰ and the Global Fund for Women's focus on educational opportunities for girls¹⁰¹ in the world's least developed countries accrue reputational benefits to the United States.

In fact, many of the largest and most active international grantmakers are not particularly well-known and do not wield substantial independent soft power. For instance, the listing of the twenty largest international donors among U.S. private foundations includes such unfamiliar organizations as the Freeman Foundation, Lincy Foundation, and Harry and Jeanette Weinberg Foundation.¹⁰² Moreover, the Foundation Center reports that the median grant dedicated to international affairs is \$50,000,¹⁰³ indicating that many grants are of such a small size that they are unlikely to generate enough attention and visibility to create a separate brand identity for the nonprofit donor. Accordingly, the collective efforts of little-known and smaller foundations are more likely to create cumulative soft power for the U.S. government rather than for those organizations individually.

99. See Anheier & Simmons, *supra* note 48, at 15–16.

100. See ACCION INT'L, 2004 ANNUAL REPORT (2005), available at http://www.accion.org/pdf/2004_annual_report.pdf.

101. See RENZ ET AL., *supra* note 10, at 4.

102. See *id.* at 35 (citing 2002 figures).

103. See CTR. ON PHILANTHROPY AT IND. UNIV., *supra* note 7, at 177 (citing 2003 figures).

Given this link, the United States, in order to fortify its soft power, should value international philanthropy and grantmaking by U.S. private foundations and public charities as a contributing source to its soft power. Recent foreign public opinion trends¹⁰⁴ and the lingering negative public relations effects associated with the “war on terrorism” have diminished U.S. attractiveness and standing, and limited its power to persuade on moral principle.¹⁰⁵ Thus, the United States should pursue a variety of means to attract others because that attraction is a form of power. Persuasion through soft power can yield more concession, cooperation, and enduring support for desired U.S. policy outcomes than coercion alone.¹⁰⁶

As one commentator has noted, “in the old adage of catching flies, soft power is the honey and hard power is the vinegar.”¹⁰⁷ Nye and others seem to have it right: hard power and soft power are both essential elements of sound U.S. policy on national security.¹⁰⁸ Our government policies, however, must be designed in a way that does not undercut our strategic interests, which requires taking international philanthropy into account as a valuable component in enhancing soft power.

Paradoxically, the contributions of nonprofit organizations to government soft power are, in part, a direct result of the sector’s independence from government. As distinct from the state, the nonprofit sector can leverage altruistic values without being beholden to the government, its policies, or its geopolitical interests (which are often advanced through hard power). As a result, not only does the sector’s independence enhance the effectiveness of its own philanthropic efforts¹⁰⁹ (and the attendant reputational contributions of the work), but this independence also allows nonprofits to contribute to governmental soft power. Put differently, international philanthropy—precisely because of its independence from the state—

104. See *supra* text accompanying notes 65–70.

105. For example, the “abuse of prisoners in Guantanamo Bay and Abu Ghraib . . . [has] devalued the attractiveness of American values.” Kurlantzick, *supra* note 68, at 421; see also MAHBUBANI, *supra* note 94, at 130–34 (discussing the United States’s decline in legitimacy and moral authority attributable to the detention of accused terrorists at Guantanamo and comparing that to the impact of the 1989 Tiananmen Square incident on China).

106. See NYE, *supra* note 13, at 129.

107. Louis Klarevas, *W Version 2.0: Foreign Policy in the Second Bush Term*, 29 FLETCHER F. WORLD AFF. 165, 168 (2005).

108. See NYE, *supra* note 87, at 141 (“Soft power is crucial, but alone not sufficient.”); MAHBUBANI, *supra* note 94, at 196 (arguing that “[t]here must be an alignment between the impact of American ‘hard power’ and ‘soft power’”).

109. See Anheier & Simmons, *supra* note 48, at 23–24.

offers a direct, tangible, and genuine manifestation of culture, values, and people through action on the ground. This production of attractive cultural values, in turn, produces benefit—in the form of soft power—that inures to the state writ large.

II. GRANTMAKING ABROAD

Even prior to the September 11 attacks, making grants to institutions outside of the United States was considered extremely challenging.¹¹⁰ Despite its long tradition, cross-border philanthropy was deemed to be among the most difficult, the most time-consuming, and the most onerous forms of grantmaking for private foundations.¹¹¹ The set of tax laws and regulations governing such grants, in place long before September 11, provide detailed due diligence requirements to ensure that grantmakers are thoroughly familiar with non-U.S. recipient organizations and that grants are used for legitimate charitable purposes. To this end, private foundations, in particular, may choose one of two methods to facilitate cross-border giving. First, they may employ the process of “equivalency determination.”¹¹² This entails a structured assessment of a foreign entity akin to the review conducted by the Internal Revenue Service (“IRS”) for domestic organizations to determine whether the grantee is the equivalent of a U.S. public charity. Alternatively, they may opt to exercise “expenditure responsibility,”¹¹³ which involves following a strict set of rules established by Congress requiring extra scrutiny and oversight management. Regardless of the selected methodology, the U.S. funder faces weighty procedural and recordkeeping requirements and detailed oversight by grantmakers and, frequently, legal counsel beyond the norm for traditional grants to U.S. entities.

Following September 11, the U.S. government altered the regulatory regime regarding international philanthropy.¹¹⁴ Although the tax laws governing international grantmaking remained in force,¹¹⁵ the executive branch adopted several important new measures, including an Executive Order permitting the indefinite freezing of assets of entities, including charitable organizations,

110. See JOHN A. EDIE & JANE C. NOBER, *BEYOND OUR BORDERS: A GUIDE TO MAKING GRANTS OUTSIDE THE UNITED STATES* 1 (2002).

111. See Crimm, *supra* note 6, at 124.

112. See *infra* notes 132–40 and accompanying text.

113. See *infra* notes 141–46 and accompanying text.

114. See *infra* Part II.B.

115. See *infra* Part II.A.

deemed to have connections with terrorism.¹¹⁶ In addition, the PATRIOT Act added penalties for providing material support to terrorists,¹¹⁷ and the Treasury Department issued a set of voluntary guidelines outlining additional diligence measures and information U.S. funders should collect related to overseas giving.¹¹⁸ Although designed as reasonable recommendations to provide added security for the United States and its citizens, these collective actions have created an inadvertent chill that impedes effective grantmaking in unforeseen ways and may paradoxically decrease our collective security. The heightened due diligence requirements in the Treasury ATF Guidelines, although voluntary, have a coercive effect when read in conjunction with the PATRIOT Act, the Executive Order, and other sources of antiterrorism authority from the U.S. government. As a result of the nonprofit sector's fear of severe penalties and its concerns about the high stakes associated with any potential misappropriation of charitable funds, the Treasury ATF Guidelines are beginning to acquire quasi-legal status.¹¹⁹

A. *Legal Requirements for Cross-Border Grants*

In order to understand the ways in which the U.S. government has followed an approach that undermines its strategic interests with regard to international grantmaking, it is first necessary to review the state and structure of current tax law regulating cross-border philanthropy. The specific legal rules governing overseas grantmaking vary depending on the legal classification of both the receiving charity and the grantmaking organization. The differing legal procedures to facilitate a grant to a foreign organization—each with administrative, recordkeeping, and due diligence requirements—depend on whether the foreign grant recipient is recognized by the IRS, as well as the legal status of the U.S. grantmaking entity as either a public charity or a private foundation under U.S. law.

116. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

117. See 18 U.S.C. § 2339A(a) (Supp. IV 2004).

118. See U.S. DEP'T OF THE TREASURY, *supra* note 19.

119. See Press Release, Nat'l Comm. for Responsive Philanthropy, Philanthropic Grantmaking Institutions Must Refrain from Placing Inappropriate, Ineffective, and Unnecessary Responsibilities for Anti-Terrorism Enforcement onto the Shoulders of Nonprofit Grant Recipients (June 28, 2005), available at <http://www.ncrp.org/anti-terrorism.asp> (noting that some funders have "overreacted to the [Guidelines]" and treat them as "mandatory").

1. Grants by Public Charities and Private Foundations to Foreign Organizations Recognized by the Internal Revenue Service

Procedurally, the least onerous method for a U.S. funder, either a public charity or a private foundation, to support a foreign entity requires the foreign charitable organization to apply to the IRS for recognition of exempt status under § 501(c)(3) of the Internal Revenue Code.¹²⁰ A foreign organization receiving such recognition from the IRS becomes eligible to receive grants from both U.S. public charities and private foundations on the same basis as U.S.-based recipient organizations with a determination letter from the IRS.¹²¹

While legally permitted to do so, most foreign charities in practice do not apply for IRS determination letters.¹²² Although this procedure may ease burdens for the U.S. grantmaker, it places substantial burdens on the foreign grant recipient. The legal costs, administrative burdens, and language barriers associated with applying for 501(c)(3) recognition, as well as the fees connected with the continuing reporting requirements necessary to maintain exempt status, serve as significant deterrents, especially for smaller foreign organizations.¹²³ As a result, for most overseas grantmaking, both U.S. public charities and private foundations must rely on an alternative set of rules governing contributions to organizations that are not recognized by the IRS. I first examine the rules applicable to public charities giving abroad and then turn to private foundations making donations overseas.

2. Grants by Public Charities to Foreign Organizations

Public charities enjoy greater freedom to operate and make grants abroad than do private foundations. Public charities seeking to engage in foreign activities may choose either to establish and manage their own programs abroad or to make grants to foreign organizations.¹²⁴ In order to ensure that the public charity's donors maintain deductibility for any contributions directed to the foreign entity, a public charity's governing board must make certain that any

120. See Rev. Proc. 92-94, 1992-46 I.R.B. 34 ("Private foundations generally want their grants to foreign grantees to be treated as qualifying distributions for purposes of section 4942 of the Internal Revenue Code This treatment is assured if the foreign grantee has a[n IRS] ruling or determination letter"); EDIE & NOBER, *supra* note 110, at 8.

121. See FRANCES R. HILL & DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS* § 36.03[2] (2003).

122. See EDIE & NOBER, *supra* note 110, at 8.

123. See *id.*; Crimm, *supra* note 6, at 75.

124. See Rev. Rul. 71-460, 1971-2 C.B. 231.

funds it donates to a foreign organization are used for charitable purposes.¹²⁵ Generally, with any grant made to an organization with an IRS determination letter recognizing exempt status, a charitable purpose is presumed.¹²⁶ Otherwise, including instances when foreign charities not recognized by the IRS receive grant funds from a public charity, the grantor carries the burden of proving the grant was made in furtherance of an exempt purpose.¹²⁷ This requirement can be satisfied by demonstrating that the grant was made freely, without control either by the foreign beneficiary or by donors earmarking the distribution.¹²⁸ Accordingly, a U.S. public charity must be able to prove—upon IRS audit—that the charity maintained adequate discretion and control over the grant funds.¹²⁹

3. Grants by Private Foundations to Foreign Organizations

Private foundations may choose to be involved in international philanthropy either by making direct cross-border grants to organizations overseas or through indirect support to U.S.-based organizations with operations abroad. Some foundations, seeking fewer administrative requirements, choose the indirect route—providing “international” support through gifts to a U.S.-recognized or U.S.-based organization with special expertise implementing programs outside of the United States.¹³⁰

However, many foundations active in global philanthropy seek to offer direct support to projects and organizations of their own choosing that are not recognized by the IRS or organized under U.S. law. In such circumstances, to make direct grants to foreign organizations and avoid being subject to certain federal excise taxes,

125. See EDIE & NOBER, *supra* note 110, at 20.

126. See HILL & MANCINO, *supra* note 121, § 36.03[2].

127. Cf. Rev. Rul. 68-489, 1968-2 C.B. 210 (finding that an organization will not jeopardize its 501(c)(3) status by distributing funds to a nonexempt organization so long as it retains control over the funds and discretion over their use).

128. See Rev. Rul. 66-79, 1966-1 C.B. 48; Rev. Rul. 75-65, 1975-1 C.B. 79.

129. See Rev. Rul. 66-79, 1966-1 C.B. 48; Rev. Rul. 68-489, 1968-2 C.B. 210; EDIE & NOBER, *supra* note 110, at 20.

130. For example, organizations such as Give2Asia, the Global Fund for Children, and the International Youth Foundation serve as financial intermediaries receiving gifts from individual donors, corporations, and foundations to regrant funds abroad. See GIVE2ASIA, SOLUTIONS FOR GIVING TO ASIA, *available at* <http://www.give2asia.org/pdfs/brochure.pdf>; GLOBAL FUND FOR CHILDREN, ANNUAL REPORT AND RESOURCE GUIDE 2004–2005 (2005), *available at* http://www.globalfundforchildren.org/pdfs/GFC_Annual_Report04-05.pdf; INT’L YOUTH FOUND., 2004 ANNUAL REPORT (2005), *available at* <http://www.iyfnet.org/uploads/2004IYFar.pdf>; see also EDIE & NOBER, *supra* note 110, at 4.

the foundations must elect to follow one of two procedural processes: (1) equivalency determination or (2) expenditure responsibility.¹³¹

Using the equivalency determination process permits a private foundation to make a grant to a foreign organization, without adverse tax consequences, after making a determination that the foreign charity is the "equivalent" of a U.S. public charity.¹³² The test for equivalency demands strict adherence to the detailed standards applicable to § 501(c)(3) of the Internal Revenue Code and does not provide any flexibility to adjust to alternative cultural or legal structures. In other words, equivalency in this context does not mean "roughly comparable" based on the social organization or the national, local, or customary laws of the foreign country. Rather, the foreign organization must meet the rigid requirements of § 501(c)(3)¹³³ and be deemed a public charity under § 509(a),¹³⁴ including being organized and operated exclusively for purposes described in § 501(c)(3);¹³⁵ meet the prohibitions against private inurement, substantial legislative activities, and political campaign intervention;¹³⁶ and satisfy certain tests concerning the grantee's sources of support.¹³⁷

Such a determination may be made by relying on a written opinion of legal counsel establishing that the foreign organization meets the relevant tests to be deemed a public charity equivalent, or the grantor may make its own determination without the assistance of counsel based on information provided by the foreign grantee in a written affidavit.¹³⁸ The process of determining that a foreign organization is equivalent to a public charity, however, is often time-consuming and expensive. Determining that a foreign charity is equivalent to either a U.S.-based public charity or a private foundation requires a detailed analysis of organizational documents,

131. See I.R.C. § 4945(d) (2000).

132. See Treas. Reg. § 53.4945-5(a)(5) (as amended in 1973).

133. See Treas. Reg. § 53.4945-6(c)(2)(ii) (as amended in 1972).

134. See Treas. Reg. § 53.4945-5(a)(5) (as amended in 1973).

135. See I.R.C. § 501(c)(3) (requiring that a charitable entity be "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes").

136. See *id.* (stating that a corporation is exempt from taxation if "no part of the net earnings of [the corporation] inures to the benefit of any private shareholder or individual, no substantial part of the activities of [the corporation] is carrying on propaganda, or otherwise attempting, to influence legislation . . . and [the corporation] does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office").

137. See I.R.C. § 509(a)(2).

138. See Rev. Proc. 92-94, 1992-46 I.R.B. 34.

financial records, and applicable foreign law, which may often require translation into English.¹³⁹ Generally, whether an organization relies on an opinion of legal counsel or its own determination process, in practice, a detailed grantee affidavit is required.¹⁴⁰

Alternatively, a U.S. private foundation seeking to grant funds abroad may elect to follow a specific set of oversight and monitoring procedures with regard to the grant known as expenditure responsibility.¹⁴¹ The expenditure responsibility rules involve the following steps:

- the grantor must conduct a pre-grant inquiry to determine whether the proposed grantee is reasonably likely to use the grant for the specified purposes;¹⁴²
- the grantor and grantee must sign a written grant agreement with specific terms;¹⁴³
- the grantee must maintain the grant funds in a segregated bank account;¹⁴⁴
- the grantee must submit a written progress report to the grantor at least once a year during the term of the grant

139. *See id.* For example, in order to establish public charity equivalency, many organizations must demonstrate that they would pass the mathematical public support test, which requires the analysis of at least four years of financial statements. *See* Treas. Reg. §§ 1.170A-9(e)(2), (e)(4)(i) (as amended in 2002).

140. A qualified affidavit, which must be written in English, *see* Rev. Proc. 92-94, 1992-46 I.R.B. 34, contains certain detailed information and representations similar to what a U.S. nonprofit would include on its application for recognition of exemption (Form 1023) and its annual information return (Form 990). *See* EDIE & NOBER, *supra* note 110, at 28. For instance, the affidavit requires a description of the organization's past and future activities, copies of its charter, bylaws, or other relevant documents, representations that the organization does not permit private inurement, substantial lobbying, or political intervention, information regarding distribution of assets upon dissolution, and detailed financial information for some types of organizations. Rev. Proc. 92-94, 1992-46 I.R.B. 34. Foreign organizations relying on the mathematical public support tests for public charity equivalency, which include most foreign grant recipients other than certain religious organizations, formal educational institutions, and certain medical institutions, must provide information regarding the sources and levels of their gifts, grants, and contributions from all sources, membership fees, and other income covering a period of four consecutive fiscal years so that the grantor or the legal counsel can determine that the grantee meets the tests detailed in I.R.C. § 509(a)(2). *Id.* In addition, the affidavit must be regularly updated. *Id.*

141. *See* I.R.C. § 4945(d)(4)(B).

142. *See* Treas. Reg. § 53.4945-5(b)(2) (as amended in 1973).

143. *See* Treas. Reg. §§ 53.4945-5(b)(3), (b)(5) (as amended in 1973). The agreement must specify the charitable purposes of the grant and commit the grant recipient to repay funds not used for the grant's purpose, to submit annual reports, to maintain books and records available to the grantor, and not to use the funds for lobbying, political campaign activities, or other noncharitable purposes. *See id.*

144. *See* Treas. Reg. §§ 53.4945-5(c)(3)(ii), 53.4945-6(c)(2) (as amended in 1973).

indicating how funds are used, progress toward grant goals, and compliance with grant terms;¹⁴⁵ and

- the grantor must report each expenditure responsibility grant on its annual Form 990-PF filed with the IRS as long as grantee reports are required.¹⁴⁶

B. The New Legal Environment After September 11

After the September 11 attacks, the federal government pursued a variety of policy responses intended to protect America and its allies from future attacks. A campaign to curtail the financing of terrorist groups, including funds channeled through charities, emerged as a top government priority.¹⁴⁷ As a result, several new tools were added to the government's arsenal to address terrorist financing, notably Executive Order 13,224, the USA PATRIOT Act, and the Treasury ATF Guidelines, all of which affect philanthropic organizations engaged in overseas giving. In addition, Congress has considered a variety of other proposals directly addressing terrorist financing or otherwise affecting the ability of certain U.S. funders to engage in overseas grantmaking.¹⁴⁸ These policies were surely

145. See Treas. Reg. § 53.4945-5(c)(1) (as amended in 1973).

146. See Treas. Reg. § 53.4945-5(d) (as amended in 1973). The reports must contain the name and address of the grant recipient, the date and amount of the grant, a description of the purpose of the grant, the amount expended by the grantee, disclosures regarding any diversions of the funds, dates of reports received from the grant recipient, and the date and results of any verification of grantee reports. See *id.*

147. See *supra* note 15 and accompanying text; see also President's Radio Address, 37 WEEKLY COMP. PRES. DOC. 1397 (Sept. 29, 2001), available at <http://www.gpo.access.gov/wcomp/v37no40.html> ("We have also launched a strike against the financial foundation of the global terror network. Our goal is to deny terrorists the money they need to carry out their plans. We began by identifying 27 terrorist organizations, terrorist leaders, and foreign businesses and charities that support or front for terrorism.").

148. See H.R. 3162, 107th Cong. §§ 314(a)(1), (a)(2)(A) (2004) (granting the Secretary of Treasury authority to adopt regulations to create procedures for cooperation and information sharing among financial institutions focusing on "matters specifically related to the finances of terrorist groups . . . [that] transfer funds . . . through the use of charitable organizations, nonprofit organizations and nongovernmental organizations"). Also, as recently as 2005, the U.S. Senate passed a bill placing restrictions on donor-advised funds (a type of U.S. public charity) that would, among other things, limit such funds to providing grants to only those foreign nonprofit organizations approved by the IRS. See Tax Relief Act of 2005, S. 2020, 109th Cong. § 331 (2005). For more on donor-advised funds, see Malvin E. Bank, *Community Foundations: Are 'Donor-Directed' Funds New Vehicles for Utilizing Community Foundations?*, 7 EXEMPT ORG. TAX REV. 42 (1993); Evelyn Brody, *The Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future*, 29 SETON HALL LEGIS. J. 471, 528 (2005). Specifically, the provision, which was included in the Senate-passed tax relief bill, prohibits grants from a donor-advised fund to any entity not described in § 170(b)(1)(A) of the Internal Revenue Code. S. 2020, 109th Cong. § 331(e)(1)(A)(i). Due to the fact that only a small number of foreign charitable

implemented to create a regulatory regime that would enhance national security, but through their effects on U.S. public charities and private foundations that work closely with foreign organizations, they have changed the security calculus in unintended ways. Ironically, in the years following September 11, international philanthropy has become both more necessary and more difficult than ever before.

1. Executive Order 13,224

Within days of the September 11 attacks, President Bush signed Executive Order 13,224, which declared a national emergency and imposed economic sanctions under the International Emergency Economic Powers Act of 1977 ("IEEPA").¹⁴⁹ The Executive Order blocks property and property interests in the United States of persons and entities listed in the annex of the order.¹⁵⁰ These are foreign persons and entities the Secretary of State determines pose risks of committing acts of terrorism; persons and entities the Secretary of Treasury determines assist, sponsor, or provide support for acts of terrorism or for people on the annex list; or persons deemed to be owned or controlled by or who act on behalf of, or otherwise associate with, the aforementioned.¹⁵¹ Furthermore, Executive Order 13,224 prohibits U.S. persons or entities from making contributions of funds, goods, or services for the benefit of those subject to the Executive Order or so designated as subject to the order at a later date.¹⁵²

organizations seek or receive an IRS determination of their status under § 170(b)(1)(A), see EDIE & NOBER, *supra* note 110, at 8, this provision, if passed, would substantially alter the ability and flexibility to use donor-advised assets to make grants to NGOs organized outside the United States. It seems unclear whether the donor-advised funds could use processes currently used by private foundations to determine that foreign NGOs are equivalent to § 170(b)(1)(A) organizations, but even if such an option were available it seems unlikely that the donor-advised funds or their clients would undertake the expense associated with doing so. My point here is that such a change would impact overseas grantmaking, and perhaps an assessment of the security tradeoffs would impact a determination regarding whether such a shift is warranted or beneficial, but currently such an analysis or debate does not appear to have occurred. In this case, neither the security costs nor the benefits connected with the policy proposal seem to be on the table.

149. Pub. L. No. 95-223, 91 Stat. 1625 (codified at 50 U.S.C. §§ 1701-06 (2000)); see Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). For a more detailed discussion of the presidential emergency powers and terrorism-support laws, see Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 4-21 (2005).

150. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

151. See *id.*

152. See *id.*

The Executive Order authorizes the federal government to freeze the assets of anyone associated with terrorism, including charitable organizations that may have knowingly or unwittingly provided support to or associated with a terrorist organization.¹⁵³ The Executive Order does not require that a person or charitable organization that may be charged have any knowledge or intent in order to block their assets.¹⁵⁴ Therefore, assets can be frozen without any showing or allegation that the individual or entity violated any law. Professor David Cole has argued that this approach permits punishment based on guilt by association.¹⁵⁵ Perhaps intended to stop prohibited transfers, the laws in practice make it not just a crime to support terrorist activity, but also to support any group blacklisted as a terrorist group. Moreover, nonprofits are concerned that challenging a designation is extremely difficult because the federal government can deny blocked entities sufficient notice, an adversarial hearing on the underlying merits, and access to classified evidence used to justify the government's actions.¹⁵⁶

2. The USA PATRIOT Act

Supported by an overwhelming majority in Congress and signed into law by President Bush in October 2001, the PATRIOT Act contains a variety of measures intended to strengthen the federal government's ability to obstruct terrorism. Most relevant to international grantmaking, the Act increases criminal sanctions and permits civil actions against U.S. organizations that knowingly or intentionally provide material support for terrorism or terrorist organizations.¹⁵⁷

153. See *id.*

154. For a more detailed history of the use of economic sanctions against terrorist organizations and Executive Order 13,224, see Nina Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1354-73 (2004).

155. See DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 58-64 (2003); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 2 (2003). See generally David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203.

156. See Nicole Nice-Petersen, Note, *Justice for the "Designated": The Process That Is Due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L.J. 1387 (2005) (arguing that the courts and Congress have permitted the executive branch to strip charities of due process protections under the guise of fighting terrorism).

157. See 18 U.S.C. § 2339A(a) (Supp. IV 2004).

The Act defines material support broadly to include charitable grants, microfinance loans, and technical assistance.¹⁵⁸ Although the Act requires a knowing or intentional violation,¹⁵⁹ philanthropic organizations are concerned that, despite their best efforts to develop procedures to prevent inadvertently supporting a terrorist organization, if their grants can be linked to such an organization or person, they may be found to have knowingly or intentionally provided material support.¹⁶⁰

Such concerns may be reasonable for organizations operating in less-developed parts of the world. For example, organizations engaged in large-scale regranteeing may be especially vulnerable.¹⁶¹ Suppose a U.S. private foundation makes a grant to a foreign organization working in Africa for the purpose of promoting community-based entrepreneurship and development through microfinance.¹⁶² The foreign grant recipient receives a single large grant (perhaps of \$500,000) and then redistributes funds to local individuals or community cooperatives (in small amounts of approximately \$250 to \$750) to assist them in starting their own small businesses. What if a handful of the several thousand small grants reach the wrong hands?

Or, suppose an organization providing humanitarian aid in a war-torn or politically unstable region finds it necessary to interact with or offer goods to a group with questionable ties (or even a U.S. government-designated terrorist organization) in order to ensure that

158. See *id.* § 2339A(b) (defining material support).

159. See *id.* § 2339A(a).

160. See Jones, *supra* note 10, at 1 (noting that nonprofits fear false accusations of making grants to support terrorism).

161. Foundations making grants in foreign countries sometimes work with local foreign grantmaking organizations because those groups often have better access to information about which projects are most likely to be helpful or effective, or they are better able to administer programs. Under this structure, a foundation makes a grant to a local entity (the initial grantee) that in turn regrantees the funds to other smaller local organizations or individuals (the secondary grantees).

162. Frequently operated in developing countries, microfinance programs provide financial services to low-income people without access to traditional forms of capital and credit. Generally, microfinance programs combine small loans with business education/counseling to support entrepreneurial business enterprises and alleviate poverty. Examples could include small retail kiosks, sewing workshops, carpentry shops, and market stalls. For a more detailed discussion, see Michael S. Barr, *Microfinance and Financial Development*, 26 MICH. J. INT'L L. 271 (2004); Lucie E. White, *Feminist Microenterprise: Vindicating the Rights of Women in the New Global Order?*, 50 ME. L. REV. 327 (1998).

aid trucks are not destroyed en route to the needy.¹⁶³ These are genuine areas of concern for U.S. funders active in the developing world where grantmaking is complex and precarious.

3. The Department of the Treasury Anti-Terrorist Financing Guidelines for Charities

Most regulations and guidelines concerning nonprofit organizations are issued by the IRS. However, in November 2002, the U.S. Department of the Treasury's Office of Foreign Assets Control released the *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* to assist nonprofit organizations engaged in international philanthropy.¹⁶⁴ The Treasury ATF Guidelines outline procedures for governance, disclosure and transparency in governance and finances, financial practices and accountability, and antiterrorist financing procedures. The Treasury Department revised and updated the Guidelines in December 2005¹⁶⁵ and September 2006.¹⁶⁶

The official name given by the Treasury Department seems to belie the status of the Guidelines. Commentators have noted that the Treasury ATF Guidelines are referred to as "best practices," but they actually represent a variety of new practices introduced by the Treasury Department that were never consistent with common practice in the nonprofit sector. As the Council on Foundations notes, "There is no consensus within the charitable sector as to what constitutes 'best practices'" regarding international grantmaking

163. For instance, in Sri Lanka, U.S. funders provide charitable support to people in geographic regions "controlled by the Tamil Tigers, a named terrorist organization. Trucks delivering [aid] cannot drive on roads controlled by the Tigers without at least their implicit permission." Barnett F. Baron, *Detering Donors: Anti-Terrorist Financing Rules and American Philanthropy*, INT'L J. NOT-FOR-PROFIT L., Jan. 2004, at 12, available at http://www.icnl.org/JOURNAL/vol6iss2/ar_baron.htm; see also Sally Buzbee, *Warlords Hold Unity at Gunpoint: Old Ways Pose New Dangers*, RICHMOND TIMES-DISPATCH, Jan. 9, 2002, at A6 (noting the practice of regional Afghan warlords exacting bribes from foreign aid trucks for safe passage).

164. U.S. DEP'T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2002) (on file with the North Carolina Law Review) [hereinafter ORIGINAL ANTI-TERRORIST FINANCING GUIDELINES].

165. U.S. DEP'T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2005) (on file with the North Carolina Law Review) [hereinafter 2005 REVISED ANTI-TERRORIST FINANCING GUIDELINES].

166. U.S. DEP'T OF THE TREASURY, *supra* note 19.

activity.¹⁶⁷ Practices in the field vary according to the type, size, and resources of the grantmaking organization. The Treasury ATF Guidelines fail to account for these differences, and, in many respects, the Guidelines recommend practices far more exhaustive than those previously employed by international funders.

Interestingly, the Treasury ATF Guidelines do not have the force of law and impose no penalties for failure to comply. Conversely, compliance with the Guidelines does not provide immunity from asset blocking under the Executive Order or prosecution under the PATRIOT Act. Despite their formal status as non-law, the Guidelines continue to receive significant deference in the field from nonprofit managers and their advisers. This is not because the sector views the Guidelines as likely to help prevent funds from being diverted to terrorists, but because it feels coerced.¹⁶⁸ The effect of the government's current regulatory approach—combining unclear voluntary rules with the uncertainty stemming from the possibility that the U.S. government may hold charitable organizations accountable for unknowingly funding terrorism¹⁶⁹—has led to overcompliance by funders.¹⁷⁰ In part because they were issued by a government agency with the ability to freeze assets, the Treasury ATF Guidelines, despite their designation as “voluntary,” are beginning to acquire quasi-legal status.¹⁷¹ Even nonbinding guidelines can exercise a degree of constraint on certain activities when promulgated by a powerful government agency. Operating as they do against the backdrop of the PATRIOT Act and the Executive Order,

167. See Letter from Dorothy S. Ridings, President and Chief Executive Officer, Council on Foundations, to David Aufhauser, Gen. Counsel, U.S. Dep't of the Treasury (June 20, 2003) [hereinafter Council on Foundations Letter], available at http://www.cof.org/files/documents/legal/treasury_comments_06.03.pdf. The Council on Foundations is a national membership organization of grantmakers promoting philanthropy.

168. Editorial, *Charity Screening: Post-9-11 Rules Could Stifle Legitimate Giving*, DETROIT FREE PRESS, Sept. 8, 2004, at A8 (“Though the [Treasury ATF G]uidelines are voluntary, foundations fear retribution from the government for not complying—especially since the executive order implies culpability for even unknowingly passing along funds that end up being used by an organization that aids terrorist causes.”).

169. See Tamara Audi, *Charities Do Detective Work in War on Terror: They Scour Watch Lists To See If Grant Recipients Turn Up*, DETROIT FREE PRESS, Sept. 6, 2004, at A1 (“Foundations fear that even an unintentional or indirect link to a terror group could ruin their reputations and cause the federal government to freeze assets.”).

170. See generally John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 966 (1984) (arguing that uncertain legal standards deter activities that may bestow social benefits).

171. See Press Release, Nat'l Comm. for Responsive Philanthropy, *supra* note 119 (noting that some funders have “overreacted to the [Guidelines]” and treat them as “mandatory”); Editorial, *supra* note 168.

the Treasury ATF Guidelines manage to conflate recommended practices with regulation. The quasi-legal status of these Guidelines has been bolstered by the fact that the Treasury Department has stated in the Federal Register that charities, at “a minimum, should follow the U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities.”¹⁷²

This perception of the Guidelines as an integral part of the regulatory apparatus governing international philanthropy is a widely-held view. Even senior Treasury Department officials have acknowledged and informed Congress that the Treasury ATF Guidelines are being treated as more than just voluntary recommendations. In his 2004 Senate confirmation hearings, Juan C. Zarate, who was subsequently confirmed as Assistant Secretary for Terrorism Financing at the Treasury Department, stated that “the guidelines . . . frankly have been treated as regulatory guidance by the charities.”¹⁷³

Moreover, despite their title, the Treasury ATF Guidelines do not merely suggest procedures commonly employed by experienced foundations attempting to follow existing law regarding overseas giving.¹⁷⁴ Rather, they proffer several new administrative tasks that, to a great extent, pressure charitable organizations to engage in efforts to ferret out potential terrorist activity. Many of the recommendations are burdensome and severely impact the independence, operations, and interactions of U.S.-based nonprofit organizations.¹⁷⁵ Although the government may certainly encourage citizens to remain vigilant and watchful to prevent terrorist activity, citizens (individuals or entities) should not be tasked with intelligence-gathering duties more appropriate for the U.S. government.¹⁷⁶ As one of the largest associations of nonprofits has written, “Almost without exception, the grantmaking community

172. Solicitation of Federal Civilian and Uniformed Service Personnel for Contributions to Private Voluntary Organizations—Sanctions Compliance Certification, 70 Fed. Reg. 67,339, 67,340 (Nov. 7, 2005) (to be codified at 5 C.F.R. pt. 950).

173. *Nominations of John O. Colvin, Stuart Levey, and Juan C. Zarate: Hearing Before the S. Comm. on Finance*, 108th Cong. 15 (2004) (statement of Juan C. Zarate, Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, U.S. Department of the Treasury), available at <http://www.finance.senate.gov/hearings/95478.pdf>.

174. See *supra* note 167 and accompanying text.

175. See *infra* Part III.A.

176. See *infra* Part III.B.

finds the Voluntary Guidelines unproductive, unrealistic and detached from the real-life experiences of the charitable sector.”¹⁷⁷

4. Cases of U.S. Charity-Terrorist Connections

Naturally, any effective prescription to resolve a problem requires a clear understanding and diagnosis of the actual abuses. An understanding of the facts and circumstances of the cases of alleged charitable abuses by terrorists provides significant guidance and a starting point for operating assumptions. Although policymakers always need to consider new risks and new abuses, a review of the available evidence regarding actual cases and patterns presented by past cases may inform decisionmaking on whether the current regulatory regime is working to protect security interests.

The government’s approach, especially the Treasury ATF Guidelines, is clearly intended to provide mechanisms to prevent grants made by legitimate U.S. charitable organizations to foreign organizations from being inadvertently diverted to terrorist purposes, what I call “indirect charitable abuse.” Significantly, however, neither the government nor the charitable sector itself has reported such cases of diversion.¹⁷⁸ Instead, the paradigmatic cases, if anything, suggest concerns about “direct charitable abuse,” in which senior officers and directors of U.S. charities purposefully engage in deceptive fundraising, primarily from individuals, and then knowingly use the funds for noncharitable purposes.¹⁷⁹ Since September 11, the federal government has frozen the assets of five U.S.-based charities it suspected of funneling money to terrorists: the Global Relief Foundation, the Benevolence International Foundation, the Holy

177. See Grantmakers Without Borders, Post 9-11 Grantmaking: Anti-Terrorism Policies and International Grantmaking, <http://www.gwob.net/advicegm/911.htm> (last visited Feb. 17, 2007).

178. See Victoria B. Bjorklund et al., *Terrorism and Money Laundering: Illegal Purposes and Activities*, 25 PACE L. REV. 233, 234 (2005) (noting that “if such diversions have been undertaken by U.S. donors or charities . . . the activities have been hidden and not well known to the charitable sector. . . . [Such diversion] is beyond the experience of almost all U.S. charities . . .”).

179. See *id.* at 239. Experts studying terrorist financing have determined that terrorists committed to laundering money through charities may attempt to use several different means, including the raising of funds through legitimate charities using formal fundraising, raising funds through informal cash collections, transferring funds through charities to terrorist groups, and establishing charities as direct covers for terrorist organizations. See FIN. ACTION TASK FORCE, REPORT ON MONEY LAUNDERING & TERRORIST FINANCING TYPOLOGIES 2004–2005 (2005), available at <http://www.fatf-gafi.org/dataoecd/16/8/35003256.pdf>; see also 9/11 COMMISSION REPORT, *supra* note 1, at 170–71 (describing how al Qaeda used corrupt charities to provide financial support for its operations).

Land Foundation, the Islamic American Relief Agency, and KindHearts.¹⁸⁰ Each of these cases allegedly involves direct charitable abuse.

Furthermore, each of the five cases involves Muslim charities. All nonprofits, however, remain at risk. Two of the charities—the Global Relief Foundation¹⁸¹ and the Benevolence International Foundation¹⁸²—were alleged to have connections to Osama Bin

180. See *infra* notes 181–85 and accompanying text.

181. In December 2001, the Treasury Department froze and seized the assets of the Global Relief Foundation (“GRF”) pending investigation into its ties to terrorism. See *Global Relief Found., Inc. v. O’Neill*, 207 F. Supp. 2d 779, 784–85 (N.D. Ill. 2002). Founded in 1992 as a U.S. public charity and headquartered in Illinois, GRF was organized to provide humanitarian relief to Muslims overseas, primarily in war-torn regions such as Bosnia, Kashmir, Afghanistan, Lebanon, and Chechnya. See JOHN ROTH ET AL., NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION 88–89 (2004), available at http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

The U.S. government alleged that the founders of GRF were formerly associated with Osama Bin Laden through an organization Bin Laden co-founded prior to al Qaeda for the recruitment and financial aid of mujahideen (resistance fighters) fighting the Soviets in Afghanistan throughout the 1980s. See Bjorklund et al., *supra* note 178, at 235. Although the FBI determined that GRF distributed substantial funds for humanitarian relief, the agency also believed that GRF supported terrorists by acquiring and shipping “large quantities of sophisticated communications equipment, [providing] humanitarian cover documentation to suspected terrorists and fund-raising for terrorist groups under the cover of humanitarian relief.” ROTH ET AL., *supra*, at 91. In October 2002, GRF was designated a specially designated global terrorist (“SDGT”) by the Office of Foreign Assets Control (“OFAC”), a division of the Department of the Treasury, pursuant to Executive Order 13,224. See *Additional Designations of Terrorism-Related Blocked Persons*, 68 Fed. Reg. 399, 400 (Jan. 3, 2003).

182. Founded in 1992, Benevolence International Foundation (“BIF”), a U.S. public charity, described its mission as “relieving the suffering of Muslims around the world.” See ROTH ET AL., *supra* note 181, at 94–95. BIF’s major programmatic activities included support for health initiatives, orphan sponsorship, and refugee aid to Muslims in Afghanistan, Bosnia, China, Pakistan, and Russia. See Matthew J. Piers, *Malevolent Destruction of a Muslim Charity: A Commentary on the Prosecution of Benevolence International Foundation*, 25 PACE L. REV. 339, 344 (2005).

BIF’s founding board of directors included Sheikh Adel Abdul Jalil Batterjee. See ROTH ET AL., *supra* note 181, at 94–95. According to the U.S. government, Batterjee was also “affiliated with a group of wealthy donors from the Persian Gulf region” that provided support to resistance fighters in Afghanistan under the leadership of Bin Laden in the 1980s (an effort supported by the U.S. government). *Id.* at 94; see also Lisa Getter et al., *Islamic American Nonprofits Face Increased Scrutiny in U.S.*, L.A. TIMES, Nov. 4, 2001, at A1. In 1993, one year after its creation, the original directors were replaced by three new directors, and Enaam Arnaout became the new executive director. See ROTH ET AL., *supra* note 181, at 94–95. Although Batterjee was formally removed from the board, the U.S. government contended that Arnaout allowed Batterjee to dominate operations from behind the scenes. *Id.*

In 2002, the FBI conducted a search of BIF’s offices in Bosnia, where it reportedly uncovered evidence of “links” between BIF’s leadership, Bin Laden, and al Qaeda. See *id.* at 102. The material seized included “minutes of al Qaeda meetings, the al Qaeda oath, al

Laden. Three of the charities—Holy Land Foundation,¹⁸³ Islamic American Relief Agency,¹⁸⁴ and KindHearts¹⁸⁵—allegedly maintained ties to Hamas.¹⁸⁶

Qaeda organizational charts . . . and letters between Arnaout and Bin Laden.” *Id.* at 102–03. *But see* Piers, *supra*, at 351 (explaining that Arnaout’s connections to Bin Laden and al Qaeda were tenuous and dated back to the 1980s, when both men were involved in efforts to defeat the Soviet invasion of Afghanistan, a goal supported by the U.S. government). OFAC designated BIF as an SDGT pursuant to Executive Order 13,244. *See* Additional Designations of Terrorism-Related Blocked Persons, 68 Fed. Reg. 399, 399 (Jan. 3, 2003). Subsequently, in 2003, Arnaout was charged with criminal activity, but the indictment contained no claims that BIF provided any funds to al Qaeda. *See* ROTH ET AL., *supra* note 181, at 104.

Rather, the charges focused on BIF’s support of Chechen and Bosnian fighters with “fraudulently solicited and obtained donations by falsely representing that the funds would be used solely for humanitarian purposes.” *Id.* Arnaout pled guilty to one count of racketeering conspiracy for fraudulent diversion of \$315,624 in charitable donations by providing tents, boots, medical supplies, and other similar resources to overseas combatants in Chechnya and troops in Bosnia. *See id.* at 108. While this constitutes a misuse of charitable funds, it did not amount to supporting terrorism because neither the Bosnian Army nor the Chechen separatists who benefited from the BIF supplies were considered terrorists by the U.S. government. *See Current Situation and Future of Chechnya: Hearing Before the U.S. Comm’n on Security and Cooperation in Europe*, 108th Cong. 5 (2003) (statement of Steven Pifer, Deputy Assistant Secretary, Bureau of European and Eurasian Affairs, U.S. Department of State) (“[W]e do not share the Russian assessment that the Chechen conflict is simply and solely a counterterrorism effort. We think it is a much more complex question. While there are terrorist elements fighting in Chechnya, we do not agree that all separatists can be equated as terrorists.”); *Congress Funds Bosnia Mission*, ST. LOUIS POST-DISPATCH, Dec. 14, 1995, at A1; Elizabeth Sullivan, *Fears of New Danger Rise amid Hopes for Peace*, PLAIN DEALER (Cleveland, Ohio), Sept. 2, 1995, at A5.

Although Arnaout was sentenced to more than eleven years, the court rejected the government’s request to apply sentencing enhancement for crimes of terrorism because “Arnaout does not stand convicted of a terrorism offense. Nor does the record reflect that he attempted, participated in, or conspired to commit any act of terrorism.” *United States v. Arnaout*, 282 F. Supp. 2d 838, 843 (N.D. Ill. 2003).

183. Once one of the largest Muslim charities in the United States, the Holy Land Foundation for Relief and Development (“HLF”), a Texas-based public charity in operation for more than a decade, was established to provide aid to Palestinian Muslims in Israel and other parts of the Middle East. *See* Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 64 (D.D.C. 2002). Pursuant to Executive Order 13,224, OFAC designated HLF as an SDGT based on its alleged “acts for or on behalf of” Hamas in December 2001. *See* Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 160 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004). The U.S. government contends that HLF has funneled more than \$12 million to Hamas-controlled entities and other Palestinian organizations that the United States considers sponsors of terrorism. *See* Toni Heinzl, *Indictment: Group Aided Terrorists; Holy Land Foundation Sent Millions to Hamas, Feds Say*, FORT WORTH STAR TELEGRAM, July 28, 2004, at A1.

However, Muslim advocates have challenged the government’s characterization and argue that HLF’s challenged donations, made to various local “zakat” committees throughout the West Bank and Gaza, were legitimate. *See* Laila Al-Marayati, *American Muslim Charities: Easy Targets in the War on Terror*, 25 PACE L. REV. 321, 324–25 (2005). HLF’s defenders claim that the committees are local grassroots entities that include

community leaders of various social and political affiliations, including the region's ruling political party (Hamas) and insist that HLF's humanitarian grants were not directed to Hamas, even if some individuals associated with grantees may also have ties to Hamas. *Id.* None of the zakat committees were designated as terrorist groups by the United States. As a result of the designation, however, HLF ceased its operations in 2001. *See* Heinzl, *supra*.

184. In October 2004, the Treasury Department designated the Islamic American Relief Agency ("IARA"), based in Columbia, Missouri, an SDGT and blocked the organization's assets. *See* *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 40 (D.D.C. 2005). Recognized as an exempt organization by the IRS in 1985, IARA operated for more than nineteen years providing "charitable and humanitarian aid to refugees, orphans, victims of human and natural disasters, and other poor and needy persons and entities throughout the world, without regard to faith or political affiliation." *Id.* IARA was originally founded under the name Islamic African Relief Agency, but the organization changed its name when it began expanding its charitable activities beyond the continental borders of Africa. *Id.*

The Treasury Department has alleged that IARA and its senior officers maintained ties to both Hamas and the Islamic African Relief Agency of Sudan. *See* Press Release, U.S. Dep't of the Treasury, Treasury Designates Global Network, Senior Officials of IARA for Supporting bin Laden, Others (Oct. 13, 2004), available at <http://www.ustreas.gov/press/releases/js2025.htm>. IARA claimed that it did not support terrorism and had no connection to the Sudanese organization with the similar name. *See* *Islamic Am. Relief Agency*, 394 F. Supp. 2d at 40. Despite IARA's protestations, the U.S. district court upheld the Treasury Department's designation based upon its review of unclassified and classified information, much of which was not made available to IARA, determining that "the agency's decision to block the IARA-USA's assets was not arbitrary and capricious, but . . . supported by substantial evidence." *Id.* at 45. As a result of the government designation, IARA has ceased operations. *See* Peter Shinkle, *Case Shines Light on Columbia, Mo.*, ST. LOUIS POST-DISPATCH, Apr. 24, 2005, at B1.

185. On February 19, 2006, the U.S. Department of the Treasury froze the assets and blocked all property interests of KindHearts for Charitable Humanitarian Development, Inc. ("KindHearts"), a Toledo, Ohio-based nonprofit organization. *See* Cary Spivak & Dan Bice, *Questions Arise About Muslim Scholar*, MILWAUKEE J. SENTINEL, May 19, 2006, at A2. Founded in 2002 after Treasury designated some of the nation's largest Muslim charities supporters of terrorism, KindHearts quickly became a prominent U.S. Muslim charity, raising more than \$5 million by 2004 and distributing grants to Lebanon, Pakistan, and Gaza and the West Bank. *See* Amanda Garrett, *Muslim Charity Drawing Scrutiny; Group with Ohio Ties Denies Terror Connection*, PLAIN DEALER (Cleveland, Ohio), Dec. 6, 2005, at A1.

The Treasury Department has claimed that KindHearts contributed funds to Hamas, including more than \$250,000 to the Lebanon-based SDGT Sanabil. *See* Press Release, U.S. Dep't of the Treasury, Treasury Freezes Assets of Organization Tied to Hamas (Feb. 19, 2006), available at <http://www.ustreas.gov/press/releases/js4058.htm>. Although KindHearts was not designated an SDGT as of the publication of this Article, pursuant to the Executive Order its assets have been blocked pending an investigation that has effectively closed the organization's operations and prevented the millions of dollars in contributions from reaching their intended recipients—humanitarian projects in the developing Muslim world.

186. Hamas is a Palestinian group—designated a terrorist organization by the U.S. government—accused of dozens of suicide bombing attacks in Israel. *See* Stephen Braun, *Texas Charity, Leaders Are Charged with Aiding Hamas*, L.A. TIMES, July 28, 2004, at A8; Press Release, U.S. Dep't of the Treasury, Shutting Down the Terrorist Financial Network (Dec. 4, 2001), available at <http://www.ustreas.gov/press/releases/po841.htm>. In 2006, it

Assuming the facts of the five cases of alleged charitable abuse involving U.S.-based entities to be true, the story that emerges is unconnected to the injury the Guidelines have been designed to prevent: namely, an incident of a U.S. charity being duped by a foreign organization that heightened diligence would have prevented. Instead, these actual cases describe criminally motivated individuals directly using U.S. public charities (not foreign organizations) for noncharitable purposes in violation of law and the charities' own representations.¹⁸⁷ Perhaps the scarcity of incidents of indirect abuse indicates that the existing, rigorous diligence standards under federal tax law in place prior to September 11 have been and continue to be effective at rooting out illicit activity.¹⁸⁸ Or, perhaps the problem of indirect abuse is overstated.

As of the publication of this Article, none of these cases has resulted in any terrorism-related criminal conviction, although legal proceedings appear to have been concluded or do not appear forthcoming in four of the five matters.¹⁸⁹ All that can be said is that it is possible that some or all of the organizations may have been associated with terrorists groups, but it is also equally possible that they were not. Even more important for policy purposes, however, the facts of the cases do not suggest that additional diligence by the charitable sector would have prevented diversion of funds. Because all of these entities were organized under U.S. law, filed with and had all their paperwork approved by the IRS, and acquired an IRS determination letter, the government was best positioned to uncover these alleged charitable fronts. If the allegations are true, they all describe, in various forms, cases of direct charitable abuse in which illegitimate U.S. charities chose to purposefully deceive donors, an abuse not addressed by the Treasury ATF Guidelines. Again, the Guidelines would be relevant only to a case in which a legitimate U.S. grantmaker makes an imprudent grant to a foreign recipient organization engaged in illegal activities. Authors of a recent law review article, after reviewing cases involving U.S. charities and

also became the majority ruling party of the Palestinian Authority. See Steven Erlanger, *Hamas Routs Ruling Faction, Casting Pall on Peace Process*, N.Y. TIMES, Jan. 27, 2006, at A1.

187. Even despite the reported links, investigations of GRF and BIF have not proven that either charity provided financial support to al Qaeda after the U.S. government designated it a terrorist organization in 1999. See ROTH ET AL., *supra* note 181, at 111.

188. See Bjorklund et al., *supra* note 178, at 244.

189. Criminal charges were filed in the HLF case and a trial date is still pending. See Michelle Mittelstadt et al., *Muslim Charity, Leaders Indicted: U.S. Says Holy Land Foundation Funneled Money to Hamas*, DALLAS MORNING NEWS, July 28, 2004, at A1.

terrorist connections, concluded that their research revealed no incident “involv[ing] a diversion of funds granted by a U.S. grantmaker to a foreign recipient organization . . . where the diversion would have been uncovered but for the lack of appropriate due diligence and oversight procedures.”¹⁹⁰

While any allegations are troubling, notably the government has not substantiated claims that U.S.-based nonprofits are significant sources of terrorist financing. The evidence to date does not demonstrate that charitable grants from legitimate U.S.-based public charities and private foundations provide a significant source of support for al Qaeda or terrorist activities.¹⁹¹

III. DEFICIENCIES OF THE CURRENT REGULATORY REGIME

At first glance, the post-September 11 reforms may seem benign, modest, or even eminently reasonable. However, the charitable sector has criticized the reforms primarily because they impose new administrative burdens, on top of an existing regulatory regime providing for substantial diligence, without a clear indication of how the additional reforms—particularly the Treasury ATF Guidelines—aid nonprofits in distinguishing between legitimate foreign charities and illegitimate ones. Essentially, the nonprofit sector sees a disconnect between the new regulatory regime and its articulated purposes. The federal government, acting out of fear of further attacks and moral outrage that charitable funds might be diverted for terrorist uses, has pursued executive and legislative actions, including the Treasury ATF Guidelines, since September 11 to protect and aid U.S. charities.¹⁹² What is lacking in the debate about administrative costs and the speculative nature of the security *benefits* from increased regulation is discussion of the security *costs* of the new regulatory environment.

In particular, many of the specific guideline terms increase burdens on what is already viewed as a cumbersome diligence process, thereby creating a marginal chill, at least for some funders, on international giving. Furthermore, the regulatory environment

190. Bjorklund et al., *supra* note 178, at 244.

191. See ROTH ET AL., *supra* note 181, at 4.

192. See U.S. DEPT OF THE TREASURY, *supra* note 19, at 2 (“[T]he Guidelines are intended to assist charities in developing . . . a risk-based approach to guard against the threat of diversion of charitable funds . . . by terrorists and their support networks.”). But see Jon Frandsen, *The Right Takes Aim at NGOs*, 63 CQ WEEKLY 1417, 1417 (2005) (noting that groups associated with a conservative political agenda are mobilizing “to trim the powers of international aid, development and advocacy groups”).

may impact the effectiveness of nonprofits in the field by changing relationships and perceptions between foreign grantees and U.S. grantors. Also, the government's approach has unintentionally created incentives that skew preferences in the form in which international aid is distributed in ways that undermine security. With the root causes of terrorism still at issue, U.S. public diplomacy suffering, and American soft power at stake,¹⁹³ the deleterious impacts of the various guideline requirements take on a new urgency once understood as security costs rather than merely as administrative burdens. So, although more diligence may or may not lead to information reducing the likelihood that charitable funds will inadvertently reach terrorists, the consequences of these added requirements must be measured as part of an overall calculus of whether the tradeoffs warrant the new regime.

A. The Chilling Effects on Nonprofits

Since the release of the original version of the Treasury ATF Guidelines, several commentators and advocates for nonprofit organizations engaged in international grantmaking have criticized the Guidelines and questioned the likelihood that they will actually impact terrorist financing, especially when the end users of the information collected do not recognize it as valuable or useful.¹⁹⁴ As one commentator has noted, "Guidelines, reporting requirements, and other obligations imposed on large populations are unlikely to be effective. . . . [C]ollecting too much information means looking for a needle in a haystack. Making the haystack bigger may complicate the job"¹⁹⁵ Many grantmakers, even those with substantial resources, will have difficulty obtaining and analyzing much of the information outlined in the Guidelines.

For instance, the antiterrorist financing section of the Treasury ATF Guidelines suggests that, before any charitable funds are distributed to a foreign recipient organization, the U.S.-based funder should collect the names and addresses of any subcontracting organizations working with the foreign organization and background

193. See *supra* Part I.

194. See Crimm, *supra* note 154, at 1440; Piers, *supra* note 182, at 352–53 ("It is hard to see how the government's activities with regard to . . . charities have had any positive effect on targeting terrorism."); Council on Foundations Letter, *supra* note 167, at 8; see also Fred Stokeld, *Charitable Groups Draft Plan To Curb Terrorist Funding*, 46 EXEMPT ORG. TAX REV. 150, 150 (2004) ("Exempt organizations practitioners have . . . criticized the [Treasury ATF Guidelines] provisions they say would be burdensome . . .").

195. Mitchell, *supra* note 12, at 231.

information about grantee board members and key staff.¹⁹⁶ The original version of the Guidelines also directed U.S. funders to collect information on banking affiliations of foreign grant recipients,¹⁹⁷ while this particular element has been removed from the modified version of the Guidelines, the overall thrust of the exercise remains. For U.S. charitable organizations that support a large number of overseas organizations, this level of detail could be extensive, especially considering that the information sought on subcontractors extends beyond those persons directly related to the proposed grant. Additionally, once collected, to be useful this information must be documented, stored, and presumably analyzed by someone within the organization. All of these activities require additional staff resources to manage and organize. At least one commentator has observed that the measures described in the Guidelines “would require a great expenditure of resources on the part of the charities, something that would be very difficult, especially for smaller organizations.”¹⁹⁸ Also, as U.S. grantmakers pass along the burdens of heightened information requests to grantee recipients, groups in the developing world suffer the consequences.¹⁹⁹

Additionally, the Guidelines are not attuned to the realities of the recordkeeping and information available abroad. As Barnett F. Baron, then the executive vice president of the Asia Foundation, observed, “The Guidelines erroneously assume that comprehensive and detailed information about prospective grantees is generally available and can be readily collected in the ‘developing world,’ just as in the United States.”²⁰⁰ For example, the Guidelines provide that funders should require copies of “official registry documents, annual reports, and annual filings with the pertinent government.”²⁰¹ Unfortunately, all too frequently in the developing world this information either does not exist or may be considered confidential.²⁰²

196. See U.S. DEPT OF THE TREASURY, *supra* note 19, at 9–12.

197. The Treasury Department originally suggested that charities should “determine the identity of the financial institutions with which the foreign recipient organization maintains accounts [and] . . . seek bank references” See ORIGINAL ANTI-TERRORIST FINANCING GUIDELINES, *supra* note 164, at 7. This provision was removed when the Guidelines were revised in 2005.

198. Al-Marayati, *supra* note 183, at 330.

199. See Stephanie Strom, *Small Charities Abroad Feel Pinch of U.S. War on Terror*, N.Y. TIMES, Aug. 5, 2003, at A8 (“[G]roups in the developing world say that acquiring the data needed to allow their benefactors to meet the standards is too onerous a task”).

200. See Baron, *supra* note 163, at 10.

201. See U.S. DEPT OF THE TREASURY, *supra* note 19, at 10.

202. See Lester M. Salamon, *The Rise of the Nonprofit Sector*, FOREIGN AFF., Jul.–Aug. 1994, at 110; Adriana Ruiz-Restrepo, *Active Without Recognition: Obstacles to*

Moreover, in some regions of the world, communications systems make gathering and transmitting such information impractical. Some overseas charitable activities occur in places where access to copy machines, fax machines, the Internet, or even electricity is either intermittent or nonexistent, making compliance difficult.²⁰³ In addition, some foreign nonprofit organizations operate without formal legal recognition because the benefits of official registration are minimal, registration does not exist, registration is denied to silence independent voices, or they prefer to remain outside the scope of corrupt government control.²⁰⁴ For instance, the U.S. Department of State has acknowledged that some governments, such as Belarus and China, have denied registration or deregistered certain legitimate NGOs based on their willingness to discuss human rights abuses.²⁰⁵ China uses the registration process to control nonprofits by imposing burdensome requirements and high fees on registration so that entities without adequate government ties and support cannot register.²⁰⁶

As another example, the list checking prescribed by the Guidelines²⁰⁷ poses challenges and questions of efficacy. The original

Development of the Colombian Third Sector, INT'L J. NOT-FOR-PROFIT L., Feb. 2005, at 17, 20, available at <http://www.icnl.org/JOURNAL/vol7iss2/IJNL%20vol%207%20no%202.pdf>.

203. See Paula D. Johnson et al., *Promoting Philanthropy: Global Challenges and Approaches*, in RETHINKING PHILANTHROPIC EFFECTIVENESS: LESSONS FROM AN INTERNATIONAL NETWORK OF FOUNDATION EXPERTS, *supra* note 48, at 25, 27 (noting that foreign nonprofits frequently face capacity impediments because of weaknesses in supporting infrastructure).

204. See Kimberly Bulkley, *Analysis of Nonprofit Organizations in Kazakhstan*, 3 OR. REV. INT'L L. 3, 5 (2001); Milton Cerny & Michael W. Dunham, *Tsunami: NGO Response: Now and the Future*, 47 EXEMPT ORG. TAX REV. 181, 184 (2005); Kareem Elbayar, *NGO Laws in Selected Arab States*, INT'L J. NOT-FOR-PROFIT L., Sept. 2005, at 3, 18–19, available at http://www.icnl.org/knowledge/ijnl/vol7iss4/ijnl_vol7iss4.pdf; Tatshat Stepanyan, *Armenian Governmental Commission Regulating Charitable Programs*, INT'L J. NOT-FOR-PROFIT L., Jan. 2006, at 23, 23, available at http://www.icnl.org/knowledge/ijnl/vol8iss2/ijnl_vol8iss2.pdf.

205. See *The Essential Role of Non-Governmental Organizations in the Development of Democracy: Hearing Before the S. Comm. on Foreign Relations*, 109th Cong. (June 8, 2006) (statement of Barry F. Lowenkron, Assistant Secretary for Democracy, Human Rights, and Labor, U.S. Department of State) [hereinafter Lowenkron, *Testimony Before S. Comm. on Foreign Relations*], available at <http://www.state.gov/g/drl/rls/rm/2006/68658.htm>.

206. See *id.*

207. See U.S. DEP'T OF THE TREASURY, *supra* note 19, at 11–12 (“With respect to key employees, members of the governing board, or other senior management at a [foreign] grantee’s [organization] . . . [a U.S.] charity should assure itself that none of these individuals is subject to OFAC sanctions. . . . Charities should be aware that other nations

version of the Guidelines called upon U.S. charities to verify that potential foreign grantees and their affiliates, as well as the people associated with them, such as their board members and senior staff, were not on any of the various terrorist watch lists maintained by the U.S. government, the United Nations, or the European Union.²⁰⁸ Although the revised version of the Guidelines no longer asks U.S. domestic nonprofits to consult as many lists, it still calls for checking against the U.S. lists.²⁰⁹ Several problems remain with relying on such lists—even the OFAC master list of Specially Designated Nationals—for use by the general public. The watch lists are long and many of the names on them are so generic (equivalent to “John Smith” in certain foreign countries) that they fail to provide sufficient detailed assistance to narrow down the identity of individuals with whom to avoid dealings.²¹⁰ In addition, innocent persons frequently appear on such lists, either by error or because they share names with nefarious persons.²¹¹ Because the watch lists continually change, some foundations have developed timely and costly procedures under which multiple lists are checked on a daily basis.²¹² Of course, even if lists are checked regularly, clever terrorists intent on duping unknowing charities would likely attempt to thwart the watch list system by changing names or using assumed identities to avoid detection. Accordingly, the list checking carries significant financial and staffing burdens. By pushing U.S. charities and foundations to rely on these watch lists, “substantial cultural, political, and economic costs, in both the short and long term”²¹³ are levied against nonprofits

may have their own lists of designated terrorist-related individuals, entities, or organizations . . .”).

208. See ORIGINAL ANTI-TERRORIST FINANCING GUIDELINES, *supra* note 164, at 6–7.

209. Compare U.S. DEP’T OF THE TREASURY, *supra* note 19, at 11–12, with ORIGINAL ANTI-TERRORIST FINANCING GUIDELINES, *supra* note 164, at 6–7.

210. See Strom, *supra* note 199.

211. See Peter M. Shane, *The Bureaucratic Due Process of Government Watch Lists*, 75 GEO. WASH. L. REV. (forthcoming 2007) (on file with the North Carolina Law Review) (criticizing the accuracy of secret watch lists and the availability of redress measures for individuals affected); Daniel J. Steinbock, *Data Matching, Data Mining, and Due Process*, 40 GA. L. REV. 1, 3–9, 21–23 (2005) (criticizing terrorist watch lists as overbroad and lacking a sufficient process by which those on them can review and appeal their status); Anthony D. Romero, Editorial, *You, Too, Could Be a Suspected Terrorist*, WASH. POST, Aug. 17, 2004, at A15.

212. See Audi, *supra* note 169 (noting that because of the Treasury ATF Guidelines the Ford Foundation, which funds more than 4,000 grantees worldwide, checks every charity against ten different watch lists each day).

213. Shane, *supra* note 211 (manuscript at 4).

to the extent false positives generated by such lists burden their charitable work.

U.S. public charities and private foundations are not the only American entities transferring funds across borders where risks of terrorist diversion exist. Nonetheless, the Treasury Department has not suggested that all financial institutions, for example, collect the names and home addresses of all board members and staff of every foreign corporation as well as those of any subcontracting business or organization working with the foreign corporation.²¹⁴ There are two plausible reasons for this disparate treatment. First, there may be a general reluctance to chill operations affecting corporate profits. Second, in the context of multinational corporations, it may seem intuitively obvious that the burdens of regulating all U.S. foreign transactions in the name of defeating terrorism so far exceed any conceivable benefits that such measures are impracticable, if not nonsensical.

Defenders of the Guidelines might argue that they are simply encouraging greater diligence to further reduce the chance that any monies will reach the hands of terrorists. However, no legitimate U.S. charity wants its charitable funds to be used for any noncharitable purposes, especially not for terrorism, and thus both government interests and the interests of U.S. public charities and private foundations are aligned on this point. It does not seem clear that the government needs to assert its authority to prevent legitimate charities from engaging in uninformed grantmaking. In this context, additional diligence is not purely good. Too much diligence and too many procedural requirements can hinder or chill charitable activity or use up resources otherwise available for philanthropy implicating security interests.

To be sure, cross-border giving will not dry up completely as a result of the Guidelines or the regulatory regime. However, the administrative burdens of the Guidelines, which reach beyond the preexisting detailed diligence requirements, encumber cross-border giving for all U.S.-based international grantmakers and may especially deter some funders, particularly smaller organizations, from pursuing direct foreign giving. In fact, initial evidence seems to

214. However, the Bank Secrecy Act requires financial institutions to have comprehensive anti-money laundering programs to identify and report suspicious financial transactions to the Treasury Department. *See* 31 U.S.C. §§ 5311–30 (Supp. III 2003); *see also* Mitchell, *supra* note 12, at 222–24 (discussing anti-money laundering laws in the aftermath of September 11 and questioning the benefits in light of the private sector costs).

indicate that direct cross-border giving has decreased as a result of the government's post-September 11 reforms.²¹⁵ Even though some funders, especially large, committed donors, can be expected to absorb the costs associated with heightened diligence, that does not justify the costs. Although a 2002 study of international grantmaking activity revealed that compliance cost estimates were not readily available,²¹⁶ the costs imposed on organizations by these measures are not insubstantial; this is especially true in light of the fact that international philanthropy has always been considered a costly endeavor for U.S. funders.²¹⁷ The Guidelines have also been criticized on other grounds.²¹⁸

B. Impacts on Nonprofit Relationships and Effectiveness

Because of the Treasury ATF Guidelines, invasive background checks on foreign nonprofit board members, employees, and subcontractors, detailed information requests about banking relationships, and attempts to gather information and examine data on foreign recipient organizations' sources of income are becoming commonplace.²¹⁹ This has had the effect of turning U.S. charitable funders engaged in international activities into agents of the government, effectively conscripting grantmakers into service in the war against terrorism. Although the Guidelines do not require nonprofit organizations to pick up arms, they do enlist philanthropic entities to conduct intelligence gathering activities on the government's behalf.²²⁰

215. See *infra* Part III.C.

216. Crimm, *supra* note 6, at 124 ("Not one private foundation had maintained records from which it could discern its compliance costs . . .").

217. See *id.* (reporting that foundations perceived international grantmaking to be "significantly more . . . financially costly than domestic grant-making").

218. For additional analysis of the original version of the Guidelines, see Crimm, *supra* note 154, at 1440-46; Joseph Younker, Note, *The "U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best-Practices for U.S. Based Charities": Sawing a Leg Off the Stool of Democracy*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 865 (2004); Council on Foundations Letter, *supra* note 167, at 3 (noting the Guidelines contain provisions that are "internally inconsistent and/or contrary to federal and state laws"); Memorandum from Betsy Buchalter Adler & Thomas Silk, Silk, Adler & Colvin to an Unidentified Client 2 (Nov. 14, 2002), available at <http://www.usig.org/PDFs/TreasuryGuidelinesMemo.doc> (criticizing the Guidelines for seeking to impose "a federal corporate governance standard, which conflicts with the laws of many states governing non-profit corporations").

219. See Jones, *supra* note 10, at 1.

220. In congressional testimony, the then-Deputy Secretary of the Treasury Department indicated that "[t]he private sector serves as the front-line in the campaign against terrorist financing. . . . [Treasury] will continue . . . working with . . . the charitable

One of the key strengths of nonprofit institutions and a source of their effectiveness stems from their independence. Because they are neither government nor business, nonprofit organizations occupy a unique space between the public and private sectors, unfettered from both the constraints of the political system faced by government and those of market ownership faced by corporations.²²¹ Although the sector's activities may generate advantageous and even important byproducts for government or business,²²² and some charitable organizations frequently work directly with government or business, nonprofits remain independent and apart from their public and corporate sector brethren. Even the nomenclature encapsulates this fundamental feature, as the term "nongovernmental organization," emphasizing such organizations' unique role apart from government, has gained global acceptance.²²³ Because of this independence, international funders are able to use their position to bring diverse coalitions together: foreign governments, the private sector, other funders, and citizen stakeholders who are normally excluded from decisionmaking processes.²²⁴ Since U.S. security interests are linked to the development of civil societies and stable states abroad, policies exact security costs when they undermine—even marginally—the unique contributions that American nonprofits make in advancing overseas development. The Guidelines are contributing to the erosion of the vital independence and separateness from government that has been a hallmark of the nonprofit sector.

sector . . . to enhance their abilities to detect and report possible terrorist financing and money laundering activities." *Counterterror Initiatives in the Terror Finance Program: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 17–18 (2004) (statement of Samuel W. Bodman, Deputy Secretary, U.S. Department of the Treasury).

221. See PETER FRUMKIN, *ON BEING NONPROFIT: A CONCEPTUAL AND POLICY PRIMER* 1–5 (2002). Clearly nonprofits have their own set of stakeholders, but no one group can claim exclusive ownership the way voters and shareholders stake claims over government and business. *Id.* at 5.

222. For example, nonprofits aid government by providing social services that would otherwise be provided by government or by generating soft power, and the nonprofit sector may produce beneficial byproducts for the private sector by providing an educated workforce or a rich arts and cultural region to attract employees.

223. See Rubem Cesar Fernandes, *Threads of Planetary Citizenship*, in *CITIZENS STRENGTHENING GLOBAL CIVIL SOCIETY* 319, 332 (Miguel Darcy de Oliveria & Rajesh Tandon eds., 1994) ("The expression nongovernmental organization comes originally from United Nations vocabulary to designate a special category of participants in the U.N. system The term is well known in the Western areas of Europe, as well as in Asia, Africa, and Latin America.").

224. See Anheier & Simmons, *supra* note 48, at 24.

There are three principal problems with these efforts to conscript funders into carrying out these investigatory functions: (1) the process does not provide the transparency and fairness that typically accompanies government processes; (2) nonprofit organizations, especially smaller organizations, are not equipped to effectively carry out investigatory functions; and (3) the process diminishes the credibility of nonprofits operating abroad. The role thrust upon nonprofits by the Treasury ATF Guidelines is not comparable to those instances in which private entities choose to conduct certain functions traditionally associated with the state;²²⁵ here nonprofits are *coerced* into the role without corresponding benefit to themselves or society.

As previously noted, most nonprofit entities feel compelled to follow the Guidelines because of the catastrophic effects of having their assets frozen if the government were to deem the organization uncooperative.²²⁶ This enlistment of private citizens (i.e., charitable organizations) to gather information—essentially to undertake an investigatory function—represents a partial shifting of traditional governmental functions and responsibilities. Significantly, the supplemental data that the Treasury ATF Guidelines ask nonprofits to collect are not necessary or helpful to improve the quality of grantmaking.²²⁷ In practice, most funders find that they can gather enough information about the potential grantee, its leadership, its track record, and its uses of funds without the additional steps and information outlined in the Guidelines. As such, the information gathering in accordance with the Treasury ATF Guidelines appears to be for investigatory purposes on behalf of the government with the burdens and expenses placed on the nonprofit sector. Moreover, since the prescribed efforts generate no additional benefit for the nonprofit sector and speculative benefit, at best, for society, the government has not adequately justified the coercion of charitable organizations. Such coercion is troubling: transferring a public function to NGOs leads to a less transparent process, both to the public as a whole and to the constituency under investigation, and as

225. For discussion of issues associated with voluntary public-private partnerships, see MARTHA MINOW, *PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* (2002); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397 (2006).

226. See *supra* notes 168–72 and accompanying text.

227. See Strom, *supra* note 199 (quoting a philanthropic executive as saying, “‘It’s unclear how all this information [from the Treasury ATF Guidelines] would help us and what it has to do with our grant-making’”).

a result potentially makes it more difficult to hold the government accountable. To the extent that potential grantee organizations investigated would like to challenge the results, criticize the manner of investigation, or even subject the process of the required investigation to public scrutiny or inquiry, the government has immunized itself from complaints regarding the ways such investigations are handled by shifting responsibilities to private charitable organizations doing work that more suitably falls under the government's direct purview.

Assigning investigatory tasks to nonprofits is ill-conceived because nonprofits are not likely to be well-equipped or effective investigatory agents. The Guidelines place nonprofits in the position of carrying out functions beyond those usually required to ensure the efficacy of charitable uses of grant funds. The suggested "data mining" tasks from the Guidelines fall outside the usual due diligence measures and expertise of charitable organizations.²²⁸ Such organizations cannot be viewed as agents of the U.S. government if they are to effectively carry out their work. Several international philanthropists have expressed concern that the information collection activities will undermine the reputation of nonprofit organizations "for impartiality and operational independence from governments," which is a significant source of organizational strength that permits nongovernmental organizations to operate effectively in disaster areas and places of armed conflict.²²⁹ Extensive government entanglement in ways that undermine independence may blur the lines between legitimate NGOs and less-respected government-organized NGOs ("GONGOs").²³⁰

228. Although the Guidelines call for the collection of certain data and information on foreign grantees, *see* U.S. DEP'T OF THE TREASURY, *supra* note 19, at 9–12, they do not offer any direction or reveal how a grantmaking organization should analyze the data, once received. So, effectively the Guidelines have imposed a burden of collecting data on nonprofits without providing useful guidance on its uses.

229. *See* Grant Williams, *Safe and Sound? Charities That Work Abroad Caution That Antiterrorism Guidelines Could Hinder, Not Help, Their Efforts*, CHRON. OF PHILANTHROPY, Aug. 7, 2003, at 8 (quoting a joint statement of InterAction and Independent Sector on the Treasury ATF Guidelines).

230. Certain human rights-violating governments have created "nonprofit organizations" that turn out to be GONGOs used to manipulate public opinion by advocating on their government's behalf or defending their government at the United Nations or other international conferences or events. *See* Lowenkron, *Testimony Before S. Comm. on Foreign Relations*, *supra* note 205 (noting Tunisian government intelligence members attending conferences and monitoring individuals and China's use of GONGOs at the United Nations); Melissa E. Crow, *From Dyad to Triad: Reconceptualizing the Lawyer-Client Relationship for Litigation in Regional Human Rights Commissions*, 26 MICH. J. INT'L L. 1097, 1132–33 (2005) (discussing GONGOs).

The programmatic effectiveness of international funders depends, to a great extent, on relations with key stakeholders. Grantmakers often find that “[s]takeholder interactions improve the ability of foundations to achieve their missions in ways that help people and communities.”²³¹ However, some recommendations of the Treasury ATF Guidelines seem to exacerbate tensions of cross-border philanthropy and underestimate the potentially delicate relationships at stake. For instance, the Guidelines direct grantors to generate lists containing background information (names, nicknames, nationality, citizenship, place and date of birth, residential information, etc.) on staff and board members at foreign recipient organizations.²³² Requesting the type of information recommended, however, could undermine relationships between grantors and prospective grantees.²³³ In many parts of the world, “there appears to be a pervasive lack of trust and confidence in nonprofit organizations,”²³⁴ which may lead some U.S. grantmakers to be viewed with greater suspicion; these invasive inquiries can support the perception that the nonprofit is working on behalf of foreign or domestic governments. And these fears may actually be warranted. In fact, in some countries, seeking the background information suggested may be misinterpreted as “intelligence-gathering” efforts on behalf of hostile local government officials, and may actually place organization staff at risk.²³⁵ In addition to harm by insurgents, many foreign nonprofit employees around the world fear physical abuse at the hands of their government if their affiliation with certain humanitarian or pro-democracy NGOs were made public. For instance, in recent congressional testimony, a senior U.S. State Department official acknowledged unjust government harassment,

231. Thomas E. Backer et al., *Who Comes to the Table? Stakeholder Interactions in Philanthropy*, in RETHINKING PHILANTHROPIC EFFECTIVENESS: LESSONS FROM AN INTERNATIONAL NETWORK OF FOUNDATION EXPERTS, *supra* note 48, at 111, 111.

232. U.S. DEP'T OF THE TREASURY, *supra* note 19, at 11.

233. See Strom, *supra* note 199 (quoting a nonprofit executive who explained that the Treasury ATF Guidelines place U.S. charitable organizations “in the position of seeming like police agents or spies”).

234. Johnson et al., *supra* note 203, at 26–27.

235. See Council on Foundations Letter, *supra* note 167, at 15; see, e.g., Adrian Blomfield, *Aid Crisis as Charity Is Forced Out of Darfur*, DAILY TELEGRAPH (London), Dec. 22, 2004, at 10 (noting the murders of humanitarian aid workers from the British charity Save the Children in Sudan, the French charity Medecins Sans Frontieres (Doctors Without Borders) in Afghanistan, and the American charity Iraq for Care in Iraq).

beatings, and arrests of local NGO employees in Asia, Africa, and the Middle East.²³⁶

Further, because of the unequal power dynamics in the funding relationship and the perception of U.S. foundations as elitist, U.S. grantors have been seeking to develop symbiotic partnership relationships with their grant recipients.²³⁷ When they follow these measures and request a written certification that the foreign organization does not deal with terrorists or “support terrorism,”²³⁸ grantmakers may jeopardize the working relationship with their new partners before it even begins. This issue is particularly sensitive in dealings in certain parts of the world, such as the Middle East. Moreover, obtaining certification regarding terrorist support is a futile exercise because it is unlikely to deter a nefarious grantee seeking to dupe a U.S. charitable organization into donating funds that can be diverted to support terrorism.

Insofar as regulatory reforms interfere with grantor-grantee relationships between U.S. funders and foreign recipient organizations, charitable effectiveness may be undermined, thus lessening the ability of nonprofit organizations to contribute to America’s soft power. Global nonprofits draw strength and influence from their ability to “represent[] broad public interests beyond the purview of individual states.”²³⁹ The credibility and trustworthiness that nonprofits bring to communities are just as important, perhaps even more important, to the long-term success of funded projects as their funds and resources.²⁴⁰ Much of that virtue is a function of their independence from national governments. If they become an extension of government or even perceived as such, nonprofits forsake the high middle ground between the public and private spheres.²⁴¹ Paradoxically, much of the benefit that nonprofits confer

236. See Lowenkron, *Testimony Before S. Comm. on Foreign Relations*, *supra* note 205 (noting that the government in Uzbekistan has “harassed, beaten and jailed” nonprofit workers and that “NGO employees have been convicted of criminal offenses for their work making it virtually impossible for them to find other jobs” and describing similar actions in Sudan and Syria).

237. See Backer et al., *supra* note 231, at 111 (noting that foundations are often perceived by stakeholders as “elitist institutions”); *id.* at 117 (addressing power differentials between grantor and grantee).

238. U.S. DEP’T OF THE TREASURY, *supra* note 19, at 10.

239. NYE, *supra* note 13, at 90.

240. See Crimm, *supra* note 6, at 119.

241. See Anheier & Simmons, *supra* note 48, at 23–24 (“Foundations tend to be viewed as ‘apolitical’ or more neutral organizations and can therefore engage local actors more easily. . . . Thanks to their independence, foundations can serve as catalysts and bring all types of groups together.”).

on government through the enhancement of soft power is dependent on the theoretical and actual separation between private nonprofit associations and official government entities. Security interests, it would appear, are thus tied into the effectiveness and the independence of charitable organizations.

C. Reducing and Skewing Direct Funding to Foreign Charities

Unfortunately, the federal government's current approach²⁴² has created incentives for U.S. philanthropic organizations to steer "international-related" grants toward U.S.-based intermediary organizations with operations abroad, instead of awarding grants directly to foreign nonprofit organizations. The initial evidence seems to indicate that shifts away from direct overseas giving are continuing, in part because of the regulatory environment. Data from the Foundation Center, which tracks trends in philanthropy, show that the proportion of international grant dollars awarded directly overseas versus given to U.S.-based intermediaries operating abroad declined by nearly five percentage points between 1994 and 2002.²⁴³ Moreover, recent data covering the period between 2002 and 2004 revealed that total direct cross-border giving dollars by U.S. foundations to foreign charities declined an additional 3% with the actual raw number of such grants declining by 9% (compared to a 3% decline in the number of grants to U.S.-based recipients).²⁴⁴ The downward trend data support findings from surveys of grantmakers suggesting that the Executive Order and the PATRIOT Act were partly responsible for the behavioral shifts causing funders to favor U.S.-based intermediaries.²⁴⁵

The creation of incentives to funnel grants through U.S. intermediaries is troubling because such a shift impacts not only the nature of philanthropy but also U.S. security interests. Security interests are implicated in two important ways. First, as compared to indirect international grantmaking carried out by intermediaries or U.S. entities, direct grants to local foreign nonprofits offer advantages with respect to institution-building and the development of civil society. For instance, local foreign recipient organizations offer a more sophisticated appreciation of local customs, a deep understanding of local problems and networks, and a permanent staff

242. See *supra* Part II.B.

243. See RENZ ET AL., *supra* note 10, at 43.

244. See RENZ & ATIENZA, *supra* note 9, at 4.

245. See RENZ ET AL., *supra* note 10, at 13, 15.

committed to the region. In addition, local foreign organizations may be better positioned to partner with local foreign governments to maximize resources and strategic responses. As a result, direct foreign grants help build the capacity of local, sustainable civil organizations abroad, and evidence indicates that such institutions are critical to the long-term success of development efforts.²⁴⁶ While U.S. public charities conducting work abroad may serve local communities in valuable and significant ways, when the actual work is done by U.S. entities, rather than by a sustainable local organization, the nonprofit does not make the same contributions to the creation of social capital and civil society: teaching the skills of self-government, instilling the values of tolerance and civility, and mediating the space between the individual, government, and business.²⁴⁷ This problem is magnified by the fact that, when it comes to individual giving, U.S. tax laws already offer strong incentives to U.S. citizens to favor U.S.-based charities over foreign organizations by limiting tax deductions to donations made to domestically organized charities.²⁴⁸ Accordingly, because foreign NGOs have traditionally received much of their American financial support from philanthropic organizations, rather than from individuals, the new giving environment created by the federal government has the effect of redirecting the flow of institutional charitable funds away from foreign organizations, which can be especially crippling.

Second, private foundations face increased incentives to support international programs through U.S. intermediaries (rather than giving directly to the foreign charity). Ironically, such incentives may actually lead to less due diligence with respect to foreign grant recipients, thus undermining security interests. Consider this hypothetical: A U.S. foundation seeks to donate \$50,000 to combat HIV in a remote township in South Africa. The foundation identifies the sole nonprofit service provider working in the region as Ubuntu HIV Relief, an entity organized under South African law and run by native South African men and women. The foundation can choose to make the \$50,000 grant either directly to Ubuntu or through the South African HIV/AIDS Fund, an intermediary organized under U.S. law as a public charity headquartered in New York City that

246. See U.S. AGENCY FOR INT'L DEV., U.S. FOREIGN AID: MEETING THE CHALLENGES OF THE TWENTY-FIRST CENTURY 12 (2004), available at <http://www.usaid.gov/policy/pdabz3221.pdf>.

247. See Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J.L. & PUB. POL'Y 555, 571-78 (1998).

248. See I.R.C. § 170(c)(1), (c)(2)(A) (2000).

raises funds in the United States and makes grants to deserving organizations in South Africa, and would make a \$44,000 contribution to Ubuntu (using the remaining \$6,000 to cover its general and administrative expenses). Under current law, if a private foundation makes grants directly to a foreign recipient organization, the foundation must follow a comprehensive set of laws and regulations requiring detailed due diligence, through the structured equivalency determination or the expenditure responsibility process.²⁴⁹ However, if those same grant contributions are shifted to U.S. intermediaries, which are invariably public charities, the monies flowing overseas become subject to the less rigorous due diligence standards for U.S. public charities because the stricter foundation requirements do not apply.²⁵⁰ To the extent that the foundation is concerned about the regulatory environment, it has incentives to resist direct giving to Ubuntu, with the effect that the amount of overall due diligence conducted on the foreign recipient might actually decrease (because the U.S. intermediaries receiving funds would be public charities), and fewer charitable dollars would actually reach the developing world, thus limiting the potential benefits.

D. Undermining American Values

If our national security interests rest, even in part, on “halt[ing] the creation of new terrorists by dealing, to the extent possible, with those grievances that are driving radicalization”²⁵¹ or on winning the struggle for the “hearts and minds” of peoples around the world through attraction to shared values, vision, and principles, or on both, we must consider the consequences of adopting policies that undermine our efforts to achieve those goals. The U.S. government’s current approach to international philanthropy undermines long-term American interests, specifically its interests in enhancing public diplomacy and soft power, in several important ways.

The attraction that forms the basis for soft power is greatly influenced by a variety of factors, including the perception of the values for which the United States stands.²⁵² An image is shaped by

249. See *supra* Part II.B.3.

250. See *supra* Part II.B.2. However, public charities as a matter of best practice in the field maintain diligence procedures designed to ensure that funds are only used for legitimate and charitable purposes. See EDIE & NOBER, *supra* note 110, at 20–21.

251. DANIEL BENJAMIN & STEVEN SIMON, *THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT* 197 (2005).

252. See NYE, *supra* note 87, at 9 (“Soft power arises in large part from our values. These values are expressed . . . in the policies we follow inside our country . . .”).

more than just official press statements and media sound bites. Treatment of U.S. citizens, especially Arab-Americans, affects global perceptions of whether or not the United States lives up to the values it espouses. With respect to international philanthropy, all U.S. nonprofits are burdened by the new regulatory enforcement regime, but none more so than Muslim organizations.²⁵³ This disparate impact raises deep concerns about civil liberties and abuses of power.

More than just soured relations and public image are at stake; the government's approach also implicates the civil liberties of Muslim citizens and those who donate to charities committed to serving Islamic communities around the world. The changes in the law—especially the PATRIOT Act and the Executive Order—have permitted federal authorities to close large U.S.-based Muslim charities with minimal evidence and minimal attention to due process.²⁵⁴ The evidence is not strong enough to support criminal convictions but suggests guilt by association. Additionally, the process is a secret one with limited court review,²⁵⁵ and the accused nonprofit is denied access to much of the evidence used against it. As Professor Peter Shane notes, this type of governmental power, particularly when used against a specific targeted group, “strain[s] against the norms of openness and transparency on which democratic legitimacy is based.”²⁵⁶ This kind of governmental action reinforces the Muslim community's perception of ethnic profiling²⁵⁷ and signals a willingness to saddle Arab-Americans and their supporters with the burdens of a “racial tax.”²⁵⁸ Thus, we have a variety of important

253. See *supra* Part II.B.4.

254. See *supra* notes 181–86 and accompanying text.

255. Under the Administrative Procedure Act, the standard of review for the courts is quite limited. See 5 U.S.C. § 706(2)(A) (2000). Accordingly, the charities with their assets frozen have turned to the courts but have failed to prevail not because the courts have made determinations that these entities were terrorist fronts, but rather because the courts could not determine that the agency action was arbitrary and capricious. As such, the courts did not conduct their own factfinding. See *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 44–45 (D.D.C. 2005); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

256. Shane, *supra* note 211 (manuscript at 4) (referencing secret government programs).

257. See, e.g., OMB WATCH, MUSLIM CHARITIES AND THE WAR ON TERROR 5 (2006), available at http://www.ombwatch.org/pdfs/muslim_charities.pdf; Al-Marayati, *supra* note 183, at 328–29.

258. See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 138–63 (1997) (arguing that profiling imposes a “racial tax”); see also JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 13–18 (1997) (describing a “Black tax” faced by African Americans due to racial stereotypes); Robert S. Chang, *Closing Essay: Developing a Collective Memory To Imagine a Better*

values at stake worthy of consideration on their own merits. The negative impacts on public diplomacy and soft power also expand the costs beyond those borne solely by Muslim charities and their supporters to costs for U.S. security priorities.

IV. FROM COERCION TO COOPERATION: AVENUES FOR A NEW REGULATORY REGIME

Once we recognize and acknowledge the valuable contributions of international philanthropy to our security interests, we can begin to develop a more complete picture of the security costs (not just the administrative burdens) and tradeoffs associated with the current regulatory approach. Doing so could lead to a shift in how nonprofits are viewed in the global fight against terror. Instead of being seen as weak links in the security chain, they should be considered front line allies. In a complex world, the U.S. government should adopt policies that take account of the security costs associated with regulating international philanthropy and the importance of building soft power, encouraging public diplomacy, and reducing terrorism and its root causes. Terrorism remains a dangerous threat, but also a multifaceted one that must be addressed on multiple fronts. The Bush administration's focus on the prevention of further attacks is understandable, but foreign assistance is also part of the solution. As legal scholar and terrorism expert Professor Philip Heymann notes, "We have to maintain our foreign alliances, formal and informal."²⁵⁹ International aid, through the U.S. government and through private institutions, contributes to those important relations.

A variety of potential avenues for reform might open if U.S. policy began to reflect the security-enhancing value that U.S. nonprofit organizations offer. Although the federal government and the nonprofit sector should certainly work in collaboration to prevent charitable funds from reaching terrorists, the response fashioned should be commensurate with the risks and reflect the new cost-benefit analysis advocated in this Article. Some potential policy changes might include the following.

A. *Subjecting Policies to Cost-Benefit Analysis*

Since the Reagan administration, the executive branch of the federal government has required a formal assessment of the costs and

Future, 49 UCLA L. REV. 1601, 1609 (2002) (stating that the detention and questioning of thousands of men of Middle Eastern ancestry constitutes a "racial tax").

259. HEYMANN, *supra* note 61, at 14.

benefits of major regulation.²⁶⁰ By issuing the Treasury ATF Guidelines as voluntary recommendations, these unofficial regulations have avoided the typical cost-benefit scrutiny required of significant regulatory action. Such avoidance is particularly ironic due to the fact that the George W. Bush administration has been a vocal proponent of using cost-benefit analysis to justify regulatory action.²⁶¹ At a minimum, given the impact the Guidelines have on behavior, it seems unjustified, if not hypocritical,²⁶² to avoid this important analysis when the charitable sector is affected rather than business. Since the entire thrust of the cost-benefit balancing process aims to minimize net social costs, the avoidance of such an analysis in this case seems to conflict with the dominant grain of administrative law governance.

Accordingly, private foundations and public charities should advocate for a formal cost-benefit review of the Guidelines. The introduction to the revised version of the Guidelines presents a thin veneer of consideration of costs and benefits by at least acknowledging "the vital importance of the charitable community in providing essential services around the world."²⁶³ However, this approach is far too superficial and in many ways seems merely symbolic without any elaboration of the actual stakes. In particular, it

260. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

261. See John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Executive Office of the President, Remarks Delivered at the Brookings-AEI Conference on "Risk, Science, and Public Policy: Setting Social and Environmental Priorities" (Oct. 12, 2004), http://www.whitehouse.gov/omb/inforeg/speeches/101204_risk.html ("I believe President Bush's first term, when studied by historians, will be considered a period of refinement and reinforcement of the cost-benefit perspective. At OMB . . . [we] have reaffirmed the important cost-benefit principles . . ."); Cindy Skrzycki, *Future of Federal Rulemaking Caught Up in Election*, WASH. POST, Nov. 2, 2004, at E1 ("It is widely understood that the Bush administration thinks federal regulation should play a limited role in the economy and that costs and benefits of a rule are carefully considered. A chief proponent of that philosophy is John D. Graham . . . [who] has instituted strict guidelines for reviewing the costs and benefits of proposed rules, has sent rules back to agencies for more justification, and has allowed third parties to challenge the data behind rules.").

262. Critics charge that cost-benefit analysis has been primarily deployed as an anti-regulatory tool to advance business interests. See, e.g., ROBERT PERKS ET AL., *REWRITING THE RULES: THE BUSH ADMINISTRATION'S ASSAULT ON THE ENVIRONMENT* 24 (2002); David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 335-36 (2006) (contending that cost-benefit analysis "has almost always proven anti-environmental in practice. . . . [Cost-benefit analysis] favors industry . . ."); Barton H. Thompson, Jr., *What Good Is Economics?*, 37 U.C. DAVIS L. REV. 175, 179 (2003) ("Opponents of environmental regulation have been the principal proponents of cost-benefit analysis . . .").

263. U.S. DEPT OF THE TREASURY, *supra* note 19, at 3.

fails to account for the critical role of nonprofit organizations in building alliances around the world and generating soft power and other benefits for the U.S. government. Specifically, it would be in the nonprofit sector's interests to insist upon a review that includes consideration of the security benefits, administrative costs borne by charitable organizations, and security costs of the Guidelines. The philanthropic community has gained some traction in its efforts to convince the federal government to make at least cosmetic revisions to the Guidelines addressing some administrative elements and including references to understanding the complexities of charitable work overseas. However, there has been no indication that a larger shift of the type I call for is underway to account for the security interests and social benefits implicated by the interplay between public diplomacy, soft power, and international philanthropy.

Clearly, such an analysis of the costs and benefits would require an assessment of more than just the quantified costs and the quantified benefits.²⁶⁴ The intangible burdens and the broader social impacts also need to be adequately and seriously considered.²⁶⁵ A formal and thorough cost-benefit review might be especially helpful in this instance because "[t]o the extent that people's emotions are getting the better of them, by producing massive concern about small risks, cost-benefit analysis should help put things in perspective, and at the same time might help to calm popular fears."²⁶⁶

B. Revisiting Post-September 11 Reforms

Although they were revised in December 2005 and again in September 2006 to address some of the concerns raised by the philanthropic community,²⁶⁷ the Treasury ATF Guidelines continue

264. When reviews are formally conducted by the Office of Management and Budget, agency analysts are instructed to at least consider "non-quantified benefits or costs . . . in the context of the overall analysis." See OFFICE OF MGMT. & BUDGET, REGULATORY ANALYSIS, CIRCULAR A-4, at 2 (2003).

265. See Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1498 (2002) ("[C]ost-benefit analysis requires a full accounting of the consequences of an action, in both quantitative and qualitative terms.").

266. *Id.* at 1502.

267. See U.S. DEP'T OF THE TREASURY, *supra* note 19, at 2. For example, the 2005 revised version of the Guidelines suggested organizational records and minutes should be made available to any government authority upon request. See 2005 REVISED ANTI-TERRORIST FINANCING GUIDELINES, *supra* note 165, at 4. Several commentators, including this author, have noted that in failing to at least acknowledge traditional due process safeguards designed to protect civil liberties (e.g., warrant requirements and subpoenas) the Guidelines might have been read as an attempt to ease the process

to constrain and stifle international grantmaking activity. Consequently, as we weigh the speculative security benefits against the administrative and security costs, the Treasury Department might heed the nonprofit community's call for the retraction of the Guidelines.²⁶⁸ Simply put, international philanthropy is just too important to be chilled by a set of measures based on untested assumptions.

Too many of the "best practices" suggested by the Guidelines are unworkable and unlikely to prevent the diversion of charitable contributions. In some cases, following the Guidelines may pose safety risks to international aid workers abroad²⁶⁹ or undermine the effectiveness of nonprofits altogether. Although well-intentioned, the Treasury ATF Guidelines exact security costs while providing only speculative benefits. As I have argued, the nonprofit sector's independence from government, its ability to work and contribute effectively to global, social, and political development, and its contributions to U.S. soft power and public diplomacy are too important to be diluted without due cause. Further, the guideline approach in this area is too likely to become de facto compulsory in light of the regulatory environment. In light of the subtle yet important security complexities at work, the Guidelines and their emphasis on indiscriminate data collection take on a different and costly character that may make them less relevant and worthwhile.

Additionally, the terms of the IEEPA and the Executive Order should be revisited to place limitations on the length of time assets may be frozen. Several million dollars of charitable assets earmarked for the Muslim world have been held by the government. Even if the government determines that freezing assets is required to prevent imminent transfer while an investigation is ongoing, such a freeze need not and should not be indefinite. In all five of the cases involving U.S. public charities accused of terrorist connections, the

burdens associated with procedural due process for the Treasury Department and law enforcement agencies seeking the information collected by the private funders. I have argued that this previous impression drawn from the language and the pressure nonprofits feel to comply with the Guidelines seemed to provide the government with information and cooperation through coercion under the guise of voluntary language and promoting "best practices," placing the perception of nonprofit independence from government at risk. The 2006 modification to the Guidelines calls for such cooperation with the government "[w]hen served with process or when other appropriate authorization exists." U.S. DEP'T OF THE TREASURY, *supra* note 19, at 5.

268. See Caroline Preston, *Charity Coalition Urges Government To Scrap Antiterrorism Guidelines*, CHRON. OF PHILANTHROPY, Mar. 9, 2006, at 38.

269. See *supra* notes 234–36 and accompanying text.

nonprofits received donations with the expectation that the funds contributed would be used to serve charitable purposes, primarily in the Islamic world.²⁷⁰ The U.S. government should ensure that those funds ultimately are used for such purposes. After a reasonable period of investigation, perhaps three years, funds should be released so that they may reach the charitable stream as intended by the original donors.

C. Reconsidering the Restrictions of Equivalency Determination

Acknowledging the many benefits of international philanthropy and the ways in which it can enhance our national strategic interests may lead the U.S. government to do more than simply roll back regulation. Indeed, such a shift may lead to reconsideration of existing tax laws to affirmatively facilitate and encourage international philanthropy. Proactive changes to current tax laws governing philanthropy can promote overseas giving without placing our security at risk. Most notably, the requirements for equivalency determination should be liberalized to remove impediments affecting the ability of U.S. private foundations to support foreign organizations.

Many of the Internal Revenue Code rules that apply to the determination of a foreign NGO's equivalency status are both unnecessarily formalistic and fail to consider the effects of promoting charity abroad. For instance, nonprofit law scholar Nina Crimm has argued that the requirements constraining nonprofit lobbying reflect domestic concerns and considerations unrelated to foreign nonprofits, alternative political cultures, and contemporary policy goals.²⁷¹ To advance certain articulated U.S. government policy objectives such as the promotion of democratization efforts abroad, she calls for a liberalization of the lobbying restriction as applied to U.S. grantmakers supporting foreign organizations.²⁷²

I support Professor Crimm's proposal and would further suggest additional reforms that broaden acceptable standards of equivalency to facilitate international grantmaking. Ultimately, I would advocate overhauling the equivalency determination process to permit inclusion of foreign entities that are "comparable" to their public

270. For discussion of the cases, see *supra* notes 181–85 and accompanying text.

271. See Nina J. Crimm, *Democratization, Global Grant-Making, and the Internal Revenue Code Lobbying Restrictions*, 79 TUL. L. REV. 587, 599 (2005) ("[E]xisting [Internal Revenue Code] lobbying restrictions . . . were developed with only domestic considerations in mind . . .").

272. *Id.* at 655.

charity counterparts in the United States, rather than requiring that the foreign entity be an identical clone. While certain key aspects of what it means to be a public charity should be respected by all nonprofit organizations and equivalents, regardless of their country of origin (e.g., the nondistribution constraint²⁷³ and the purpose requirement²⁷⁴), other elements of the test should be relaxed. If another country makes different policy choices regarding the ability of their charitable organizations to express political opinions or regarding the specific percentage cutoffs for different types of support to be generated from the public, those choices should be respected to permit a broader conceptualization of equivalency. For instance, in addition to removing the lobbying restrictions with respect to foreign organizations, I would also provide more flexibility with regard to the political campaign ban²⁷⁵ and the public support test.²⁷⁶ Although the limitations on political campaign intervention and the calculations of levels of public support may make sense for the regulation of domestic charities, they hardly seem to reach the core values defining nonprofit status, but rather reflect policy judgments used to define and police the parameters of the domestic nonprofit sector.

Importantly, liberalization in these areas would not seem to pose any risks that terrorists could more easily dupe U.S. funders into supporting their efforts. Even under my proposal, the level of due diligence and the process related to “getting to know the grantee” would not change even if some of the legal standards were relaxed, and it is through this process that U.S. funders become familiar with

273. See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838–40 (1980) (noting that the “nondistribution constraint,” which prohibits the distribution of net earnings and other forms of private benefit from nonprofit activity, is the defining characteristic of a nonprofit organization); James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 225 (2003) (stating that the nondistribution constraint is the fundamental distinction between a charitable nonprofit and a business corporation).

274. Section 501(c)(3) exempts only organizations “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals.” I.R.C. § 501(c)(3) (2000).

275. Section 501(c)(3) organizations are barred from “participat[ing] in, or interven[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.” *Id.*

276. A grantee other than a church, hospital, or educational institution must show that it meets the public support test, one or more of a series of tests to prove that an organization is entitled to public charity status (rather than private foundation status). See I.R.C. §§ 170(b)(1)(A), 509(a)(2). The tests are based on mathematical formulas combined with subjective factors requiring detailed analysis of financial information based on a rolling four-year formula. See Treas. Reg. § 1.509(a)-3 (as amended in 2002).

foreign grantee recipients and their activities to assess their legitimacy. Accordingly, adjusting Internal Revenue Code restrictions could expand international philanthropy and magnify its positive effects. While a fuller analysis and the details of such a reform to the tax code and the equivalency determination rules are beyond the scope of this Article, the very idea of the reform reveals new possibilities and policy shifts that could flow from a more robust recognition of the benefits of international philanthropy and its contributions to soft power. Policy decisions motivated by an interest in using international philanthropy to produce soft power would provoke different reforms to federal law.

D. Adopting Safe Harbors and Mechanisms for Multinational Signaling of Legitimate NGOs

To the extent that the government's cost-benefit analysis determines a need to further regulate cross-border giving beyond existing tax law, it should pursue a different strategy reflecting recognition of the security benefits nonprofits and international grantmaking provide. The U.S. government's current approach, which coerces private funders into conducting their own investigations and relies on a "black list" of potential terrorists, neither enlists the cooperation of multinational partners nor leverages the benefits of collective research. Instead, the government could adopt a different approach creating safe harbors for private foundations and public charities funding activities abroad. The detailed basis for the safe harbor could take a variety of forms, but the real benefit would be to provide a formal mechanism offering incentives to funders to follow certain procedures and ensuring that assets would not be seized or frozen, nor individuals criminally prosecuted, if they followed the procedures.²⁷⁷ Such an approach would treat nonprofits as allies and engender their cooperation.

A safe harbor could be either "funder-focused," dependent on the funder's grantmaking process meeting prescribed procedures, or "grant recipient-focused," dependent on the actual destination of the charitable funds. For instance, consider a system structured according to the first method. The safe harbor could be centered on a process-oriented set of standards to be followed by funders (e.g., a

277. See Peter P. Swire, *Safe Harbors and a Proposal To Improve the Community Reinvestment Act*, 79 VA. L. REV. 349, 375 (1993) (stating that safe harbors may be particularly attractive under circumstances when entities encounter uncertain standards or are especially risk-adverse).

modified and more practical version of the Guidelines or some other set of explicit standards designed to regulate due diligence concerning foreign grants). Private funders choosing to follow the procedures established by the safe harbor would have the confidence and peace of mind that they could engage in international philanthropic activity without fear or risk of adverse government action against them. Such a system could achieve the purpose of preventing potential diversion of charitable funds while still encouraging international grantmaking, especially funding activity in the developing world, the Middle East, and other high-risk places where the aid may be most needed.

Alternatively, another option for structuring a safe harbor could focus on grant recipients themselves. Specifically, an authorized governmental body would spearhead an effort to create a pre-cleared list of NGOs (a "white list"), certified after review of a foreign recipient organization's compliance systems, financial controls and relations, and other pertinent practices sufficient to determine the legitimacy of the charitable entity.

The benefits of such a white list would be numerous. First, the investigatory work examining an organization's finances, leadership, and organizational links could be conducted by trained professionals with substantial expertise rather than by the untrained staff of U.S. nonprofits. Second, such a system would save each potential funder from incurring the costs in staff time and resources associated with conducting its own review, thereby providing shared cost savings across the sector. Similarly, this would minimize the burdens on foreign charities by requiring one review and all of its associated requests, as opposed to dealing with multiple equivalency determination and expenditure responsibility demands. Third, inclusion on such a white list would provide the foreign NGO a reputational benefit by offering a positive signal to potential grantmakers, as opposed to the current system that in effect encourages funders to treat all foreign nonprofits as terrorist fronts until proven otherwise.

Such an affirmative certification of charities would, of course, also pose risks. A primary concern would be that the system might be used for political purposes. One could imagine that a charitable organization might be denied certification unjustly because of its

political stances or influence. Of course, the current use of a black list system is equally subject to political influences and similar abuses.²⁷⁸

More important, the use of a grant recipient-based safe harbor raises the question of which government authority would be responsible for creating and maintaining the white list. The U.S. government might well desire to maintain control of such a process. However, if the decisions were made in cooperation with other governments through a multilateral process, we might avoid the specter of politicized decisionmaking, as compared with the current system under which the U.S. Secretary of State makes such determinations.²⁷⁹ If a multilateral approach were developed, through either the United Nations or some other collaboration, sufficient staff personnel and resources to efficiently administer such a system would need to be devoted to the project.²⁸⁰ However, under the white list proposal, charitable organizations in multiple countries engaged in overseas giving, various U.N. and governmental agencies, and other multilateral funders could benefit from the collective vetting of organizations that would take place.

Finally, there is a concern that negative inferences might be drawn about entities that have not yet been vetted for inclusion on such a white list or that some small organizations would actually prefer not to be included on such a list, out of fear that inclusion may create a stigma or make them a target of their home government. In many respects, for a foreign organization to be on an approved U.N. or multilateral list may be less stigmatizing than to be on a list created solely by the United States. While an implicit black list may emerge, there are benefits associated with a shift toward a system with a positive legal consequence (i.e., a safe harbor for grantmakers) that still maintains the flexibility to make grants to those not on the list, after ample due diligence and a weighing of risks. If adopted, such a system could meet the U.S. government's goal of ensuring more aggressive reviews of foreign charitable organizations, but it could also permit U.S. funders to do what they do best—make grants to

278. See Lowenkron, *Testimony Before S. Comm. on Foreign Relations*, *supra* note 205 (noting that some governments "resort to extralegal forms of intimidation or persecution [against nonprofits] . . . justify[ing] their actions by accusations of . . . terrorism").

279. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

280. However, it is worth noting that the U.N. already devotes resources to create and maintain its own terrorism watch list, which has received the endorsement of the U.S. government. See Memorandum from Mara T. Paternoster, Dir., Office of CFC Operations, to Local Fed. Coordinating Comms. et al. (Nov. 24, 2004), *available at* <http://www.opm.gov/cfc/opmmemos/2004/2004-12.asp> ("Although not required, OPM continues to encourage [charitable] organizations to consult the United Nations list.").

worthwhile organizations meeting their philanthropic goals, such as working to alleviate poverty, protect the environment, and provide relief.

Regardless of whether the safe harbor is funder-focused (emphasizing pre-grant due diligence) or grant recipient-focused (emphasizing a white list), a shift to a safe harbor approach would eliminate much of the uncertainty and angst grantmakers currently face and thereby encourage private foundations and public charities to actively engage in international philanthropic activity to the maximum level each funder seeks.

CONCLUSION

Writing about the legal and policy environments post-September 11, one legal scholar has eloquently noted that “[w]e live in a time of expanded possibilities and expanded fears.”²⁸¹ More than five years after those devastating attacks, countering terrorism remains the nation’s top national security concern. But, if time has taught us anything, it is that the threats posed by terrorism have challenged the United States to pursue a strategic, comprehensive, long-term campaign to protect our country and share our values with the world. With respect to international philanthropy, rather than meeting those challenges, our policies seem to be governed by fears. After September 11, government policymakers focused on measures they intuited would support the war on terrorism, yet the ramifications of the antiterrorist financing campaign for charities and the accompanying cost-benefit analysis may not support their intuitions.²⁸²

Since September 11, U.S.-based international funders have become at best collateral damage and at worst targets in the government’s campaign against terrorist financing. The terms of the debate and the thinking about nonprofits need to be revised. The perception that the regulation of international grantmaking pits security benefits against administrative costs misframes the stakes. Federal measures affecting international philanthropy entail security costs as well. U.S. public charities and private foundations working abroad should be viewed as essential, strategic allies in the effort to enhance the United States’s global influence and strength and as such should be encouraged by both rhetoric and policy.

281. Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 101 (2003).

282. Cf. Mitchell, *supra* note 12, at 222–24 (making this point in the context of examining anti-money laundering laws post September 11).

Although only a small fraction of foreign grants might be at risk of diversion to the support of terrorism,²⁸³ the current federal government approach burdens all international grants. Undoubtedly, grantmakers and grant recipients active where U.S. charitable support is most needed—in the developing world of Africa, Asia, and the Middle East—are most affected. Philanthropy helps promote political and economic development and addresses the root causes of terrorism so that it can ultimately be defeated. Moreover, American NGOs are important and powerful actors and critical image influencers around the world, and initiatives that undermine their work and their independence exact security costs; policymakers must account for those costs as we consider the tradeoffs associated with greater regulation. The current regulatory treatment of U.S. funders discourages international giving, leading to a more isolationist philanthropic policy.

While the U.S. government has been focused on its hard power in recent years, its soft power has waned, and other countries are taking notice. In fact, the European Union, China, and even Islamic countries in the Middle East are seeking to attract converts to their values. For instance, the European Union has pooled its economic power to compete with the United States, and the EU's success in commerce, public diplomacy, and progressive social and political models is increasing its attractiveness.²⁸⁴ In addition, China has achieved success in strengthening its own soft power, particularly in Asia, presenting its own political values and culture while investing in

283. Again, the lack of documented evidence of U.S. entities making charitable contributions to terrorist fronts seems to indicate that legitimate U.S. funders using standard diligence practices have not been unwitting sources for terrorist funding. Although any diversion is to be avoided, due to the average size of grants and the level of resources potentially raised from diversion from unwitting donors, it seems that legitimate U.S. charitable grants would be unlikely to generate substantial resources for terrorist organizations because of the small scale and sustainability of financing. See, e.g., *Nominations of John O. Colvin, Stuart Levey, and Juan C. Zarate: Hearing Before the S. Comm. on Finance*, *supra* note 173, at 21 (statement of Sen. Bob Graham, Member, S. Comm. on Finance) (“[In discussing] terrorist financing, there is almost an inevitable gravitational pull to start talking about charities . . . but that is not where I see the real problem. . . . [T]he real problem is when governments . . . are providing the financial assistance.”); U.S. GEN. ACCOUNTING OFFICE, GAO-04-163, *TERRORIST FINANCING: U.S. AGENCIES SHOULD SYSTEMATICALLY ASSESS TERRORISTS’ USE OF ALTERNATIVE FINANCING MECHANISMS* 9–12 (2003), available at <http://www.gao.gov/new.items/d04163.pdf> (noting that other sources of terrorist funding include trading in illicit drugs, weapons, cigarettes, and diamonds).

284. See Marc Champion, *EU Tries Again on Foreign Policy: Reinvigorated Drive for Unified Action Draws Notice in Washington*, WALL ST. J., Jan. 26, 2005, at A14.

public diplomacy and development aid.²⁸⁵ What does this mean for the United States? Europe and China will not push aside the United States, but their success underscores the point that soft power should not be ignored. A decline of soft power means the U.S. government loses persuasive powers, places itself in a weaker bargaining position with allies, and engenders less international cooperation.²⁸⁶

The 9/11 Commission highlighted the central role of U.S. foreign aid and public diplomacy in the long-term success of the fight against terrorism.²⁸⁷ Accordingly, the federal government should adopt policies and develop an approach that marshal the expansive resources of the nonprofit sector to its side. International philanthropy is an important piece of the puzzle, and the United States should devote resources and develop policies to produce soft power. Public diplomacy, soft power, and concern for democratic institutions and human rights abroad are not peripheral, naïve, or insubstantial distractions. U.S. military strength is unsurpassed, and we have not been afraid to use it; our philanthropic strength is equally remarkable, and we should not be afraid to use it to even greater ends. We should not injure our own long-term security interests, or the interests of our friends, by overreacting to the fear of aiding our enemies.

285. See Kurlantzick, *supra* note 68, at 422–23 (“China has emerged as a potential rival to American soft power as . . . Beijing begins to enunciate its values and market its institutions and culture. To their Asian neighbors, Chinese officials . . . support[] a multipolar world in which nations do not aggressively interfere in other nations’ affairs. . . . Public sentiment across Asia has become more favorable toward China . . .”).

286. Hard power alone does not always achieve desired results. Even a dictator must balance hard and soft power. Cooperation matters because, as Joseph Nye writes, “[o]ther countries’ governments are quite often better placed to identify and arrest terrorists. Their cooperation is essential, and obtaining it will depend on both our hard and soft power.” Nye, *supra* note 87, at 164.

287. See 9/11 COMMISSION REPORT, *supra* note 1, at 363–64 (finding that U.S. success against terrorism “demands the use of all elements of national power: diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense”).