

The Prohibition on Material Support and Its Impacts on Nonprofits

The U.S. counterterrorism framework impedes the work of legitimate nonprofit organizations (NPOs) in two ways: first, it prohibits anyone from engaging in a wide range of broadly defined activities that involve listed terrorist organizations, regardless of the purpose or intent behind such engagement. Violating “material support” laws can result in criminal prosecution, extensive jail time and fines.

Second, it allows the government to list U.S. charities as supporters of designated terrorist organizations and thereby seize their assets, including their donations, without the benefit of basic due process rights such as notification or adequate opportunity to challenge the listing. The limited humanitarian safeguards provided in U.S. law exacerbates the problem for NPOs, their beneficiaries, banks that provide the financial services necessary to support these programs, and government officials.

The Prohibition on Material Support of Terrorism

The legal prohibition on providing “material support” to officially designated terrorists—whether organizations, individuals or companies—is at the heart of many counterterrorism measures, affecting anyone operating in areas where terrorist groups are present. The U.S. definition of material support is the broadest among western democracies and has a particularly counterproductive impact on many essential, life-saving programs offered by NPOs, whose work is needed in conflict and disaster zones where listed groups may be present or control territory. This issue brief is intended to help nonprofits navigate these complex laws, point out areas where the law leaves unresolved questions and suggest ways to alleviate the problems current law creates.

Definitions

It is challenging to discern exactly what kinds of transactions or interactions with listed groups are legal and what is not, as the U.S. definition of material support is not limited to tangible goods or money and the humanitarian exemption is very narrow. To make matters more complicated, material support is defined somewhat differently in counterterrorism law than immigration law, and Executive Orders imposing sanctions on listed groups do not define it at all. The 2010 Supreme Court case [Holder v. Humanitarian Law Project](#) further muddied the waters.

The primary prohibition on material support of terrorism is in the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which prohibits material support to [Foreign Terrorist Organizations](#)

(FTOs) designated by the Secretary of State. The [AEDPA definition of material support](#)¹ which, in addition to prohibiting provision of funds, weapons and the like, also prohibits technical advice and assistance, training, personnel and services. It was amended in 2004² to provide some level of clarity to the definitions of these [non-tangible forms of support](#). USAID refers to it in the [anti-terrorism certification its grantees must sign](#).³

In addition to the FTO list, the material support prohibition also applies to a broader list of terrorist entities and individuals designated by the Department of Treasury under sanctions laws, primarily the International Emergency Economic Powers Act (IEEPA). Executive Orders issued under authority of various sanctions statutes have also included a prohibition on providing material support, without defining it. In the absence of a definition, the AEDPA definition is generally referred to for sanctions compliance purposes. [Treasury's Specially Designated Nationals \(SDN\) list](#) combines sanctioned persons and entities from the various sanctions programs, including terrorists (such as the Specially Designated Terrorist (SDT) and Specially Designated Global Terrorist (SDGT) lists, created by Executive Orders), drug kingpins and money launderers, and is much larger than the FTO list.

A U.S. Department of Justice [guidance document](#) on permissible forms of communication with members of listed terrorist groups that are intended to turn them away from violence seems, on its face, to be at odds with the U.S. Supreme Court's *Humanitarian Law Project* decision, leaving NPOs uncertain about the potential liability of their work abroad. The guidance document notes that "The Government's position on this issue clear: the material support statutes do not prohibit legitimate, independent efforts to counter violent extremism." It notes that the "Department of Justice has never prosecuted an individual or group for a legitimate effort to persuade others not to engage in violence..."

This brief focuses on the AEDPA definition, although NPOs should be aware that the [Immigration and Nationality Act \(INA\) also has a bar on material support](#),⁴ which is different from and somewhat broader than the AEDPA definition. It is sometimes used outside the immigration context.

Limited Safeguards

AEDPA's "humanitarian exception" is limited to the provision of medicine and religious materials to FTOs. It does not address the issue of support to civilians living under the control of an FTO. However, it is clear that FTOs cannot be used as local partners to deliver assistance other than medicine and religious materials. As a practical matter, it is not possible to access civilians living in territory controlled by an FTO without some form of interaction or transaction with them. Therefore, breadth of AEDPA's definition of material support creates significant logistical problems for NPOs. Another provision in AEDPA creates an exception to the

¹ 18 U.S.C. §2339A, <https://www.law.cornell.edu/uscode/text/18/2339A>

² Pub. L. 108-458, title VI, § 6603(a)(2), (b), Dec. 17, 2004, <https://www.govinfo.gov/content/pkg/PLAW-108publ458/pdf/PLAW-108publ458.pdf>

³ USAID Certifications, Assurances, Representations and Other Statements of the Recipient, Part I, <https://www.charityandsecurity.org/system/files/Issue%20Brief%20-%20Fact%20Sheet%20FCA%20Cases.pdf> at p. 6.

⁴ 8 U.S.C. 1182 (a)(3)(B)(iv)(VI), see <https://www.law.cornell.edu/uscode/text/8/1182>

prohibition on personnel, training, or expert advice or assistance to an FTO if approved by the Secretary of State but there is no established process to obtain this permission.⁵

IEEPA, which along with other statutes grants authority for the Executive Orders that created the SDT and SDGT lists, has an exception for “donations of food, clothing and medicine intended to be used to relieve human suffering.” However, it allows the President to cancel the exception if he or she determines that such donations would “seriously impair his ability to deal with any national emergency.”⁶ Since President George W. Bush used this power to cancel the exception in EO 13224, issued after 9/11 to designate Al Qaeda and associates as terrorist organizations, every terrorism-related Executive Order has include routine language cancelling the exception.

While international humanitarian law (IHL) should protect NPOs that adhere to [humanitarian principles](#)⁷ from risk of legal sanctions, clearly this is not the case. For development, peacebuilding, human rights and similar programs, the breadth of the material support prohibition creates similar risk, without the added protections of IHL. In particular, peacebuilding programs that provide training and technical assistance on how to engage in peace processes or to respect IHL are barred from providing such services to FTOs since the Supreme Court’s 2010 ruling in the [Humanitarian Law Project case](#). While that decision found that AEDPA’s prohibition could be applied to such training, technical advice and assistance, it left open a host of unanswered questions about what level of engagement or contact with FTOs would be permissible.

Designation and Asset Freezes

IEEPA grants the president the authority to [designate foreign and domestic individuals and organizations](#), including U.S. charities, as supporters of terrorism. In October 2001, the USA PATRIOT Act expanded this power, [allowing Treasury to freeze assets](#) “during the pendency of an investigation” into whether a person or entity should be designated.⁸ Treasury’s powers also include investigations, regulations, and control over the transactions.⁹ Since 2001, nine U.S. charities have been shut down and had their assets frozen. The appeals process is limited and two courts have found it to be unconstitutional.¹⁰ [To release frozen funds](#), a designated

Licenses

Transactions that would otherwise be prohibited by the material support prohibitions found in IEEPA and Executive Orders may be [permitted by licenses issued by Treasury’s Office of Foreign Assets Control](#). (Licenses do not authorize something otherwise prohibited under AEDPA.) There are two types of licenses¹:

- *General License* authorizing any member of the public to engage in categories of otherwise-prohibited transactions under specified terms and conditions.
- *Specific License* authorizing a particular actor to engage in transactions otherwise prohibited and not authorized by a general license.

⁵ 18 U.S.C. §2339B(j), see <https://www.law.cornell.edu/uscode/text/18/2339B>

⁶ Section 203(b)(2) of IEEPA, 50 U.S.C. §1702(b)(2), <https://www.law.cornell.edu/uscode/text/50/1702>

⁷ The humanitarian principles of humanity, neutrality, impartiality and independence, see https://www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf

⁸ See https://www.charityandsecurity.org/legislation/Designate_and_Freeze_Authority; see also https://www.charityandsecurity.org/background/legal_process_release_frozen_funds

⁹ “Presidential authorities,” 50 U.S.C. §1702(a)(1)(B), <https://www.law.cornell.edu/uscode/text/50/1702>

¹⁰ See, e.g., http://www.charityandsecurity.org/KindHearts_Litigation_Summary and http://www.charityandsecurity.org/litigation/Al_Haramain_v_Treasury_Summary

organization must apply to Treasury for a specific license, although this is extremely difficult.

Enforcement and Administration

Civil and criminal penalties for providing material support to proscribed groups, outlined in IEEPA and AEDPA, can be severe. IEEPA provides for civil penalties of up to \$250,000 or twice the amount of the illegal transaction. Criminal penalties include up to 20 years in prison and/or fines of up to \$1,000,000.¹¹ Penalties under AEDPA include fines and/or up to 20 years in prison (up to life if death results).¹²

Impact on NPOs

Numerous studies have documented the impact of counterterrorism laws and policies on principled humanitarian action as well as other nonprofit work abroad:

- Charity & Security Network, *Safeguarding Humanitarianism in Armed Conflict: A Call for Reconciling International Legal Obligations and Counterterrorism Measures in the United States* at <http://www.charityandsecurity.org/sites/default/files/Safeguarding%20Humanitarianism%20Final.pdf>
- UN Office for Coordination of Humanitarian Affairs, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* at https://www.unocha.org/sites/dms/Documents/CT_Study_Full_Report.pdf
- Norwegian Refugee Council, *Principles Under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action* at https://reliefweb.int/sites/reliefweb.int/files/resources/nrc-principles_under_pressure-report-screen.pdf
- Conciliation Resources, *Proscribing Peace: The Impact of Counterterrorism Measures on Peacebuilding* at https://www.c-r.org/downloads/Conciliation_Resources_Counter-terrorism_brief.pdf

There is **pressing need** for Congress to create enabling language for both aid and peacebuilding activities within the counterterrorism framework.

For further information, legal analyses, a list of legal experts and other expert resources contact the Charity & Security Network or visit our website at www.charityandsecurity.org

To learn more about our work, contact us at:
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¹¹ 50 U.S.C. §1705, <https://www.law.cornell.edu/uscode/text/50/1705>

¹² 18 U.S.C. §2339B(a)(1), see <https://www.law.cornell.edu/uscode/text/18/2339B>