

*Congress of the United States,
 begun and held at the City of New York, on
 Wednesday the fourth of March one thousand seven hundred and eighty nine.*

*The Constitution of a number of the States being at the time of their ratification, expressed a desire, in order to prevent
 any encroachment on the rights of justice, that public trials and restriction of trials should be settled, and the execution of public business in the government will
 be conducted in the most judicious manner.*

*Resolved by the Senate and House of Representatives of the United States in Congress assembled, That the following Article be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States, in any of which Article, when
 ratified by three fourths of the said Legislatures, to be valid in all Contracts and Papers, as part of the said Constitution.*

*Article 2. In addition to, and as a part of, the Constitution of the United States of America, proposed by Congress, and ratified
 by the Legislatures of the several States, a proposal to the following Article of the said Constitution.*

*Article the First. For the first Congress chosen by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall
 have reached one hundred, after which the proportion shall be regulated by Congress, that there shall be not less than one hundred Representatives, until there
 shall be forty thousand Persons, until the number of Representatives shall amount to six hundred.*

Continuing Attacks on Nonprofit Speech

Death By a Thousand Cuts II

Article the Eighth. No Bill shall be passed in any Contract Case, unless private Property be taken for public Use, without just Compensation therefor.

Article the Ninth. No Bill for raising or extending any Tax on Imports or Exports, shall be passed, unless the same shall have been proposed by one, and no Amendment thereto, shall be made, unless by a majority of two thirds of the whole House of Representatives.

Article the Tenth. No Bill for raising or extending any Tax on Imports or Exports, shall be passed, unless the same shall have been proposed by one, and no Amendment thereto, shall be made, unless by a majority of two thirds of the whole House of Representatives.

Article the Eleventh. The Constitution of the United States, shall not be amended, unless by Congress, or by the Legislatures of three fourths of the several States.

Article the Twelfth. The power not delegated to the United States by the Constitution, nor prohibited to the States, is reserved to the States respectively, or to the People.

Approved: 1789

John Jay Clerk of the House of Representatives
Samuel B. Mifflin Secretary of the Senate
John Adams Speaker of the House of Representatives
John Adams Vice President of the United States and President of the Senate

The General Assembly of Delaware

Resolved, That the Senate and House of Representatives of the United States, be and they are hereby authorized to ratify and confirm the above said Constitution of the United States, as a part of the said Constitution of the United States, in any of which Article, when ratified by three fourths of the said Legislatures, to be valid in all Contracts and Papers, as part of the said Constitution.

Witness my hand and the Seal of the Senate, this 12th day of September, 1789.

John Adams Speaker

Continuing Attacks on Nonprofit Speech: Death By a Thousand Cuts II

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OMB Watch is a nonprofit research and advocacy organization dedicated to promoting government accountability, citizen participation in public policy decisions, and the use of fiscal and regulatory policy to serve the public interest. Located in Washington, DC, OMB Watch was founded in 1983 to lift the veil of secrecy shrouding the powerful White House Office of Management and Budget (OMB). The organization has since expanded its focus to include the substantive areas that OMB oversees: federal budget, taxation and government performance; information and access; nonprofit action, advocacy, policy and technology; and regulatory policy.



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Continuing Attacks on Nonprofit Speech: Death By a Thousand Cuts II

By Robert O. Bothwell and Kay Guinane

Executive Summary	5
Retaliatory Action against Government Grantees to Limit or Stop Debate	5
Pushing the Limits of the Global Gag Rule.....	6
Federal Speech Police? Selective Enforcement Affecting Nonprofits	6
Introduction.....	8
Part I	
Retaliatory Action against Government Grantees to Limit or Stop Debate on Issues	10
<i>Speaking Out Can Lead to Retaliation.....</i>	<i>10</i>
Advocates for Youth	10
Center for AIDS Prevention Studies	11
Head Start Program Attacked Again, Fights Back.....	11
Disability Advocates Faced Loss of Technical Assistance Contracts	13
California Rural Legal Assistance Undergoes Politically Inspired Audit	14
Istook’s Punitive Action on Drug Policy Issues	15
<i>Stifling Free and Open Debate on Issues</i>	<i>16</i>
Global Health Council.....	16
Centers for Disease Control Imposes Censorship of Conference Agendas	17
Government Takes Information Off Websites.....	17
Part II	
Pushing the Limits of the Global Gag Rule.....	19
<i>Background.....</i>	<i>19</i>
Population Action International.....	20
Reproductive Health for Refugees Consortium	21
The Western Hemisphere Region of IPPF	21
<i>A ‘Back Door’ Domestic Gag Rule</i>	<i>22</i>
Proposed Regulations Would Censor Privately Funded Communications	22
The STOP AIDS Project.....	22
<i>Dictating Policy</i>	<i>23</i>

Part III

Selective Enforcement: Speech Police? 24

<i>Nonprofits Threatened with Criminal Prosecution</i>	24
Project On Government Oversight	24
Justice Department Prosecutes Greenpeace	24
<i>Policy-Active Nonprofits Targeted for Audits</i>	25
The Land Stewardship Project	25
National Education Association	26
<i>Protest Zones</i>	27

Part IV

Overbroad Implementation of Homeland Security Policy Creates Chilling Effect 30

<i>Background</i>	30
<i>What Dangers Do Charities Actually Pose as Agents of Terrorism?</i>	31
GAO Report on Terrorist Financing	31
<i>Has Government Action Toward Charities Been Proportionate to the Potential Dangers They May Pose?</i>	32
Tax-Exempt Status Can Be Suspended Without Due Process	32
Criminal Charges May be Based on Faulty Evidence	33
9/11 Commission Finds Concerns about Charities' Shutdown	34
Treasury Department Guidelines to Prevent Terrorist Financing Miss the Mark	35
<i>What Impact Has Misdirected Homeland Security Policy Had on Charities and Other Nonprofits?</i>	36
Chilling Impact on Groups and Their Members	36
Muslim Community Association of Ann Arbor	37
Bridge Refugee and Sponsorship Services	37
House Bill Would Have Limited Open Discussion in Academia	38
<i>Certification and List Checking Divert Attention from Real Dangers</i>	38
Foundations Pushed to be Government's Enforcers	38
Combined Federal Campaign Becomes a Homeland Security Battleground	39
US AID Certification Expands List Checking to Those Receiving Training and Advice	40

Conclusion 42

Executive Summary

In July 2003, OMB Watch published *An Attack on Nonprofit Speech: Death By a Thousand Cuts*, which documented a pattern of attempts to limit the policy voice of nonprofits by the Bush administration and its conservative allies. Over the past year this trend has not only continued, but also expanded.

In our newest publication, *Continuing Attacks on Nonprofit Speech: Death By a Thousand Cuts II*, we found:

- Retaliatory action against government grantees that engage in controversial policy discussions or active advocacy that includes points of view different from the administration's;
- Aggressive application of the global gag rule, and signs of a back door "domestic gag rule" that illegally imposes government rules on private funds of grantees;
- Selective enforcement of laws against nonprofits engaged in direct action; and
- Overbroad implementation of homeland security policy that chills nonprofit action.

This report provides a number of case examples that demonstrate the government's willingness to force its point of view on nonprofits and take punitive action toward those that raise questions about those viewpoints. Taken one by one, these examples may not seem to have a broad impact beyond those directly involved. But taken together, they mean major trouble for the nonprofit sector. When nonprofits are silenced it indicates a crisis for democratic government.

Most of the groups described in this report have defended their rights through litigation, advocacy and determination to stick to their principles and plans of action. This comes at great risk, often resulting in both some loss of funding and a drain on scarce resources used to defend free-speech rights. These retaliatory and chilling government tactics must end. Public discussion of issues should be based on the merits and include all those who want to be heard – without fear of retribution. Our country deserves an aggressive, sustained public debate on key issues of the day by an unbowed and engaged nonprofit sector.

Retaliatory Action against Government Grantees to Limit or Stop Debate

- **Federal agencies have used audit and other powers to take action against federal grantees** that exercise their right to advocate on issues with their private funds. Government funds and resources have also been used as a wedge to limit open debate and availability of information to inform policy discussions. Some government actions have been based on ideological objectives, ignoring sound science, adding to the frustration and consternation of the nonprofit sector.
- Examples over the past year of how **speaking out can lead to retaliation and stifle free and open debate** include:
 - **Advocates for Youth**, which has been the target of three Department of Health and Human Services audits in a year and had their funding cut after the organization criticized the administration's abstinence-only policies.
 - **Center for AIDS Prevention Studies** which nearly lost its grant.
 - **Head Start grantees** who first received an illegal letter from the Department of Health and Human Services saying they could not lobby with private funds on reauthorization of

the Head Start program and then were required to submit an onerous survey that appeared to be an act of intimidation.

- **Disability advocates**, which faced loss of technical assistance contracts.
- **California Rural Legal Assistance**, which dealt with a politically inspired audit when it challenged new dairy products.
- **Global Health Council**, which lost federal funding for its 31st annual conference because the government was unhappy with some of the conference speakers.
- *Centers for Disease Control and Prevention*, which imposed a new censorship rule on nonprofits requiring conference agendas be pre-approved "to make sure there are no subjects that would embarrass the Government or be an improper use of funds"
- **Removal of information from government websites** including data about what is happening to American women.

Pushing the Limits of the Global Gag Rule

The "Global Gag Rule" provides a case study of how the federal government can clamp down on the free speech of government grantees and the consequences for such actions.

The Global Gag Rule bans federal family planning assistance to nongovernmental organizations (NGOs) that perform, provide counsel about, or lobby for legal abortions, even if the funding for abortion services comes from private sources. First adopted in 1984, it was suspended by President Bill Clinton in 1993 and reinstated by President George W. Bush in 2001. Overly aggressive application of the rule has threatened to chill advocacy by NGOs involved in reproductive health issues. Additionally, the rule has recently been applied to domestic programs through use of retaliatory audits and other means.

Federal Speech Police? Selective Enforcement Affecting Nonprofits

This report provides several examples of selective enforcement of laws against nonprofits engaged in direct action, including:

- **Nonprofits Threatened with Criminal Prosecution.** Two groups, the Project on Government Oversight (POGO) and Greenpeace, faced criminal prosecution in carrying out their mission. Both prosecution efforts failed.
- **Policy Active Nonprofits Targeted for Audits.** The IRS audits of two groups, the Land Stewardship Project and the National Education Association, raise concerns over whether the actions are politically motivated.
- **Protest zones** have become a standard way for the Secret Service to stifle free speech of individuals and nonprofit organizations, which have a different policy or political persuasion from the administration's positions.

Overbroad Implementation of Homeland Security Policy

In November 2003, the Government Accountability Office (GAO) released a report on terrorist financing, citing charities as one among many mechanisms used to launder money for terrorist purposes. Unfortunately, government has increasingly focused on nonprofits in the war on terror –

a proposition that is vastly disproportionate to the dangers presented. Homeland security actions are making it more difficult for charities, especially international groups, to carry out their missions; they are putting unnecessary constraints on foundations and others that provide philanthropic support for international work; and they are creating a counterproductive chill that ultimately results in cutting back on the kind of humanitarian work that makes people less desperate and susceptible to recruitment by terrorist organizations.

Here are several examples of how nonprofits are affected by changes in homeland security:

- **Concerns Raised about Government Actions to Shutdown Charities** – The report by the independent 9/11 Commission raised “substantial civil liberty concerns” regarding the government’s 2001 shutdown of two Chicago-area Islamic charities. It also found that many suspects are denied due process and organizations have been closed without formal evidence that they actually funded al Qaeda or other terrorist groups. The report also notes “the investigation ... revealed little compelling evidence ... these charities actually provided financial support to al Qaeda – at least after al Qaeda was designated a foreign terrorist organization in 1999.” At the same time, the IRS has begun to implement a 2003 law, recently revoking the tax-exempt status of two related nonprofit organizations without any due process.
- **Treasury Department Guidelines to Prevent Terrorist Financing Miss the Mark** – The Treasury Department published guidelines to prevent diversion of charitable assets to terrorism, in 2003 sought public comment on the guidelines, and is now working on final guidelines. The guidelines have been criticized because they are much broader than is necessary to prevent diversion of assets to terrorists and reach into the operations of nonprofits having nothing to do with terrorism.
- **Certification and List Checking Divert Attention from Real Dangers** – Increasingly, foundations are checking charities against government watch lists before releasing funds, as they have begun to fear that even an unintentional or indirect link to a terror group could ruin their reputations and cause the federal government to freeze assets. Some think the need to check watch lists is mandated by the Treasury Department guidelines identified above. Additionally, thousands of charities are impacted by the Combined Federal Campaign (CFC)'s new policy requiring all charities seeking eligibility to sign a certification that they would not knowingly employ people whose names appear on several government terrorism watch lists. The lists are vague, replete with errors, and do not provide means to correct false identification. Finally, the U.S. Agency for International Development now requires its grantees to sign a certification that requires monitoring of individuals receiving assistance.
- **Chilling Impact on Groups and Their Members** – The threat that extensive PATRIOT Act power could be used against nonprofits has had a chilling effect on the exercise of free speech and association. Some groups, particularly those serving Muslims, have reported decreases in membership activity, fundraising, and attendance at prayers and community events because of fear that the government could get the organizations’ records and target members for investigation. For example, the Muslim Community Association of Ann Arbor sued the Justice Department, challenging the search and seizure provisions of Section 215 of the PATRIOT Act. MCA is concerned that their advocacy activities will result in their members becoming the focus of government investigations. One of its active members was arrested, held in solitary confinement and deported, although no criminal charges were ever brought against him.

Introduction

In July 2003, OMB Watch published *An Attack on Nonprofit Speech: Death By a Thousand Cuts*, which documented a pattern of attempts to limit the policy voice of nonprofits by the Bush administration and its conservative allies. Over the past year this trend has not only continued, but also expanded. This report chronicles actions to limit debate on public policy, retaliatory governmental action against nonprofits that speak up or promote open debate, selective enforcement and the chilling effect caused by over broad implementation of homeland security policy. It also notes a new and disturbing trend – use of government grants and resources to stifle nonprofits that sponsor discussion of controversial issues.

Last year's report found that, instead of a single legislative or regulatory proposal that would limit nonprofit speech, the Bush administration and conservative allies have proposed or begun implementing a number of proposals that are akin to a death by a thousand cuts. This has not changed. Over the past year a series of incidents involving one nonprofit at a time have accumulated to point out the government's willingness to force its point of view on nonprofits and take punitive action toward those that raise questions. Taken one by one, these examples may not seem to have an impact beyond those directly involved. But taken together, they mean major trouble for the nonprofit sector.

In *Continuing Attacks on Nonprofit Speech: Death By a Thousand Cuts II*, we document:

- Retaliatory action against government grantees that engage in controversial policy discussions or active advocacy that includes points of view different from the administration;
- Aggressive application of the global gag rule, and signs of a back door domestic gag rule that illegally imposes government rules on private funds of grantees;
- Selective enforcement of laws against nonprofits engaged in direct action; and
- Overbroad implementation of homeland security policy that chills nonprofit action.

When nonprofit speech is limited it has a reverberating impact on our democracy. Our civil society is comprised of a nonprofit sector that partners with government in the delivery of services while speaking out on some of the most controversial issues of the day. Many of our most prominent national policies – from civil rights to environmental protections – are the result of nonprofit advocacy.

This report about continuing attacks on nonprofit speech coincides with a period in government where secrecy and the release of misleading information have grown dramatically. Taken together, the result is a time and place where government research is less trusted and subjected to claims that politics supersedes science. When government removes information from websites – such as information about use of condoms -- because it defies ideological positions and then threatens retaliatory actions against nonprofit grantees for speaking out on such issues or for basing its service delivery on prevailing science, it feeds on the notion that science is taking a second seat to faith and ideological aspirations.

It takes great risk by nonprofits to tell their stories of retaliatory actions by government. The storytelling invites even more attention by government, and almost certainly there are consequences for their actions. Under laws like the Patriot Act, there is not simply a chill on speech but a freeze on nonprofit actions. Executive directors and boards fear reprisals ranging from freezing assets to seizing of equipment and materials – and all cloaked under secrecy. A number of nonprofits told us of stories but were too fearful of having them reported here. One group chose to withhold publishing a report critical of Bush administration policy because the executive director feared an audit for a

contract it had for another part of the organization. This is precisely the concern we have – nonprofits becoming too fearful to do the critically important jobs they are there to do. These who tell their stories in this report are hoping to correct a wrong-headed governmental policy of silencing dissent by nonprofits. Protecting these First Amendment rights is noble, if not heroic.

Part I

Retaliatory Action against Government Grantees to Limit or Stop Debate on Issues

Unlike 1983, when the Reagan administration unsuccessfully tried to limit privately funded nonprofit advocacy by federal grantees¹ and unlike 1995, when Rep. Ernest Istook (R-OK) and other congressmen failed to do the same thing through legislation, the Bush administration has sought to limit the advocacy voice of nonprofits that disagree with it by retaliation against individual grantee organizations. This has occurred in two ways. First agencies have used audit and other powers to take action against grantees that exercise their right to advocate on issues with their private funds. Second, government funds and resources have been used as a wedge to limit open debate and availability of information to inform policy discussions.

Last year agency retaliatory audits of grantees and misinformation about grantees' legal rights to advocate were the major abuses we found. This year attempts to silence nonprofits have expanded to include withdrawal of funding for a meeting that planned to present two sides of a controversial issue and de-funding of groups that have been on the other side of policy debates from the administration. Grantees in one national program, Head Start, were forced to conduct a time consuming survey in a failed effort to gather information that was intended to discredit the program. The message from the administration is clear: it's our way or the highway.

Speaking Out Can Lead to Retaliation

Advocates for Youth

Abstinence-only programs “censor young people’s access to information about the health benefits of contraception,” said James Wagoner, president, Advocates for Youth, in the summer of 2003.²

¹ OMB Circular A-122

² James Wagoner, “Advocates for Youth Calls HHS’ Continued Support of Unproven and Ineffective Programs Irresponsible,” Advocates for Youth, July 2, 2003.

Soon after this public statement, the organization, a federal grantee for 15 years, was subjected to its third HHS audit in one year. The two previous audits found no problems.³ Advocates for Youth is a national, nonprofit organization that creates programs and supports policies that help young people make safe, responsible decisions about their sexual and reproductive health.

HHS had already taken a hostile stance against the group. In July 2001, the *Washington Post* published a leaked memo from HHS in which Advocates for Youth was described as ardent critics of the Bush administration. This charge, according to Wagoner, apparently came from the fact that Advocates for Youth had criticized the administration’s abstinence-only policies for “having no grounding in science-based public health.”⁴ In the leaked memo, it was also suggested that the Advocates for Youth programs did not go over well with HHS because the secretary [Tommy Thompson] is a devout Roman Catholic.⁵

The third audit of Advocates for Youth was conducted by the Centers for Disease Control and Prevention (CDC), “in response to a complaint by Rep. Joseph Pitts (R-PA), an abstinence-only advocate. Pitts sponsored an amendment to [the 2003] international AIDS bill that requires one-third of federal HIV/AIDS prevention funds to be spent on abstinence-only programs.”⁶

Wagoner criticizes “the increases to unproven abstinence-only-until-marriage

³ OMB Watch, “More Evidence of Retaliatory Grant Audits Emerges,” 08/26/2003

⁴ Email from James Wagoner to author, 9/16/2004.

⁵ OMB Watch, “In Honor of Bill of Rights Day: A look at the First Amendment,” 12/15/2003.

⁶ OMB Watch, 08/26/2003, op. cit.

program dollars included in President Bush's proposed FY 2005 budget." These programs interfere with organizations' capacity for free speech. They "prohibit youth from being taught that condoms can help to prevent pregnancy" and sexually transmitted diseases, says Wagoner.⁷

"Since 1998, nearly a billion in federal and state taxpayer dollars have been spent on these programs,"⁸ he adds. "Never has so much money been spent in so many states with so little effect⁹ ... It's time to get real and quit allowing ideology to trump public health science."¹⁰

Advocates for Youth has another problem beyond its third audit. The organization expects to feel the budget ax in fiscal year 2005. Wagoner projects a loss of roughly \$700,000 in CDC AIDS prevention funding in fiscal year 2005 compared to fiscal year 2004. While there is no "smoking gun" linking the reductions directly to Advocates' opposition to the administration's assault on public health science, Wagoner says there is little doubt among the staff that politics and ideology are at play.¹¹

Center for AIDS Prevention Studies

Advocates for Youth "was not the only organization to face new reviews. Last year, the Center for AIDS Prevention Studies at the University of California in San Francisco was among four grant applicants for which Republican members of Congress sought unsuccessfully to rescind financing after it had already been approved."¹²

⁷ Advocates for Youth, press release, "Ideology Trumps Science in FY '05 Budget: More Taxpayer Dollars Allocated for Unproven Abstinence-Only-Until-Marriage Programs," Feb. 2, 2004.

⁸ Ibid.

⁹ James Wagoner, "New Report Details Money Wasted on Ineffective Abstinence-Only-Until-Marriage Programs," Advocates for Youth, June 22, 2004. .

¹⁰ Advocates for Youth, press release, Feb. 2, 2004, op. cit

¹¹ Email from James Wagoner to author, Sept. 16, 2004.

¹² Mireya Navarro, "Experts in Sex Field Say Conservatives Interfere with Health and Research," *New York Times*, July 11, 2004.

Head Start Program Attacked Again, Fights Back

During 2003, the battle for reauthorization of the Head Start program was fought, with the Bush administration seeking to hand Head Start over to the states, thereby gutting the national program and its standards which, in Marian Wright Edelman's words, have "been so successful in helping poor children get ready for school." While the House of Representatives passed the president's proposal by one vote in July, the Senate Health and Education Committee passed a bill in October that left out the administration proposal, and the matter has never reached the Senate floor.¹³

Retaliation against Head Start program operators for their active roles in opposing the administration's reauthorization plan became the order of the day while the legislative battle was being fought. Early in 2003, the Department of Health and Human Services (HHS) threatened Head Start grantees with sanctions for lobbying against the proposal, even if they used private funds for this purpose.¹⁴ In early Fall 2003, the *San Antonio Express-News* reported high salaries for local Head Start directors; the article was entitled, "Mamas, let your babies grow up to be Head Start executives." This became the ostensible basis for Rep. John Boehner (R-OH), chair of the House Committee on Education and the Workforce, and Rep. Mike Castle (R-DE), chair of the House Subcommittee on Education Reform, to request that HHS do a "review of financial

¹³ Children's Defense Fund, press release, "Children's Defense Fund Responds to Senate Action Today on Head Start Legislation," Oct. 30, 2003. Also, telephone conversation between Maureen Thompson, Hastings Group, consultant to the National Head Start Association, and the author, Sept. 10, 2004.

¹⁴ OMB Watch, "HHS Proposes Survey of Head Start Salaries," 11/17/2004.

management of Head Start grantees nationwide.”¹⁵

HHS soon proposed a salary and benefit survey of all 2,700 Head Start grantees.¹⁶ The National Head Start Association president, Sarah Greene, said, “The only real Head Start pay scandal today is the low salaries that Head Start teachers are paid – and would continue to be paid under the legislation now pending before the U.S. House and Senate.”¹⁷ The association thus opposed the proposed survey as “burdensome, duplicative and unjustified” and as a “violation of federal law.”¹⁸ OMB Watch believes the survey was proposed “in retaliation for the strong campaign Head Start advocates ... waged against the Bush reauthorization proposals.”¹⁹

OMB Watch filed comments at OMB opposing the survey, noting that the HHS request and Boehner/Castle letter omitted the fact that Head Start is just one program operated by the San Antonio agency, which had an \$45.5 million budget in FY 2002. Using IRS data to compare executive salaries in the region, OMB Watch found the results suggest the “salary is in line with nonprofits of comparable size. For example, United Way of San Antonio, though 24 percent smaller than Parent/Child Inc., pays its president 8.5 percent more”²⁰

¹⁵ Representatives Boehner and Castle, letter to Honorable Tommy G. Thompson, Secretary, U.S. Dept. of Health and Human Services, Oct. 2, 2003.

¹⁶ OMB Watch, “HHS Proposes Survey of Head Start Salaries,” 11/17/2004.

¹⁷ National Head Start Association, press release, “Head Start Scandal: Teacher Pay Already Too Low to Keep, Attract Instructors Will Be Made Worse by House, Senate Bills,” Washington, DC, Nov. 25, 2003.

¹⁸ Edward T. Waters, Feldesman Tucker Leifer Fidell LLP, letter to Hon. Tommy G. Thompson, Secretary, U.S. Dept. of Health and Human Services, Dec. 1, 2003.

¹⁹ Kay Guinane, OMB Watch, Memo to Charles Barone, Ruth Friedman and Mark Zuckerman on the minority staff of the House Committee on Education and the Workforce, Nov. 21, 2003.

²⁰ OMB Watch Comments to OMB, December 8, 2003, Proposed Information Collection: Administration for Children and Families, “Survey of Salaries and Other Compensation of Head Start Grantees and Delegate

Nevertheless, the survey was conducted. Rep. George Miller (D-CA), the senior Democrat on the House education committee, commented on the survey results, saying, “What this and other HHS surveys clearly show is that the vast majority of Head Start grantees use their federal dollars wisely ... However, the Republicans are choosing to take advantage of the misdeeds of a select few by using them as an excuse to try to fundamentally alter and weaken this important program by pushing a Head Start proposal that would create less, not more, accountability.”²¹

Meanwhile, “Federal staff and [Head Start bureau contractors were] telling Head Start staff [across the country that] they should not participate in NHSA conferences ... [A Booz Allen contractor] made it clear that the Administration prefers [local Head Start] programs to find local options [for training] rather than traveling to national conferences ... In addition to this, numerous Head Start staff called before the [upcoming national NHSA] conference and talked with us during the conference stating [that] federal staff informed them that they should not attend the conference.”²² Communications with Wade Horn, Assistant Secretary of HHS, eventually led to an HHS disavowal of these efforts,²³ but much damage had already been done.

As the foregoing was unfolding, National Head Start Association uncovered

Agencies Nationwide,” 68 Fed. Reg. 64351 (Nov. 13, 2003) <http://www.ombwatch.org/npa/Headpercent20Startpercent20Comments.pdf>

²¹ Rep. George Miller, press release, “Vast Majority of Head Start Grantees Use Federal Dollars Wisely, Says New Report,” May 13, 2004.

²² Ron Herndon, chairman, and Sarah M. Greene, president and CEO, NHSA, letter to Wade Horn, Assistant Secretary, Administration for Children and Families, HHS, May 12, 2004.

²³ Sarah M. Greene, president and CEO, NHSA, letter of invitation to all local Head Start directors, to the Salt Lake City 21st annual national Parent Training Conference.

documents showing “major rules violations by Windy Hill at Head Start agency in Texas prior to [her] elevation by Bush to federal office.”²⁴ “The association called for the resignation of [Hill], the U.S. Head Start bureau chief ... on April 13 ... HHS’ independent review listed 29 major concerns that were later confirmed by an outside audit. The Texas Head Start program, Cen-Tex Family Services (Cen-Tex), among other things, was found to be in violation of a host of standard agency policies ... Under Hill’s tenure, the U.S. Head Start Bureau has been prominent in state and local media attacking Head Start program directors by name with little to no factual information.”²⁵ The *New York Times* reported July 1 that Hill “has been under investigation by the inspector general’s office at [HHS] for several months.”²⁶ Hill remains on the job.²⁷

Disability Advocates Faced Loss of Technical Assistance Contracts

The National Association of Protection and Advocacy Systems (NAPAS), a premier provider of legal services for people with disabilities since 1980, just signed training and technical assistance contracts worth \$1,750,000, after a dance with the administration on whether or not small business should be getting the money. As it is, NAPAS got contracts only for one year, instead of the usual three years and NAPAS must spend 25 percent on small business.

Curt Decker, executive director of NAPAS, feels this attempt to tightly enforce small business set-asides is more than a small business issue. He thinks the Small Business Administration is using set-aside rules to take contracts away from

nonprofits, which often disagree with administration policy. He feels it is a direct attack on NAPAS because the organization has been very aggressive in lobbying Congress on issues related to people with disabilities, often against administration initiatives. For example, NAPAS opposed a \$1.5 billion cut in HUD Section 8 housing vouchers proposed by the administration this year. They also fought an administration Medicaid proposal to convert the program into block grants or place global caps on it and a redefinition of disability for Social Security that would result in a loss of benefits for many individuals.

Decker also chairs the Consortium for Citizens with Disability (CCD), with 110 member groups, which similarly has been aggressive on Capitol Hill (www.c-c-d.org). The lawyers in the NAPAS member organizations also fight state battles. Decker thinks the administration’s focus on small business may be a sophisticated new defund-the-left strategy.

Sixty percent of NAPAS’ \$3.5 million budget is from federal training and technical assistance contracts. The organization has been building its capacity for 18 years, and has received these federal contracts since 1986. The Protection and Advocacy Systems that comprise the membership of NAPAS receive federal government monies under eight different statutes, with five federal agencies administering the programs. NAPAS receives federal contracts to provide training and technical assistance to these various programs.

In June, an RFC (Request for Contract) was circulated for training and technical assistance for the three main Protection and Advocacy programs.²⁸ Only small businesses were allowed to submit applications. Four did. Generally, this is not a problem for NAPAS, because, in the past,

²⁴ Hastings Group, news advisory, “NHS to call for resignation of Head Start bureau director, will reveal documents showing cover-up of financial management,” April 13, 2004.

²⁵ OMB Watch, “National Head Start Association Calls for Bureau Chief’s Resignation,” 4/19/2004.

²⁶ Diana Jean Schemo, “Head Start Group Accused Program Official of Ethics Violations,” *New York Times*, July 1, 2004.

²⁷ <http://directory.psc.gov/acf/1406.html>.

²⁸ PADD—Protection and Advocacy for People with Developmental Disabilities; PAIMI—Protection and Advocacy for Individuals with Mental Illness; and PAIR—Protection and Advocacy for Individual Rights.

small businesses have not demonstrated the capacity to do what NAPAS does. The RFC would then be reissued for open bidding. However, this year, in conjunction with the Small Business Administration (SBA), HHS ruled that the four small businesses could qualify for the RFC contract awards, meaning that NAPAS, says Decker, would effectively be prevented from competing.

The Protection and Advocacy members around the country complained to Congress and Members of Congress raised concerns, resulting in a revised RFC that was an open solicitation. However, it included a significant small business set aside, allowing for-profit firms with up to 500 employees to compete with smaller nonprofits. Even though NAPAS won the contract, the process caused damage. Four of their key staff resigned for greener, more stable pastures than the one-year contracts NAPAS was eventually awarded.

California Rural Legal Assistance Undergoes Politically Inspired Audit

California Rural Legal Assistance (CRLA), with offices throughout the Central Valley in California, provides legal assistance to farm workers and other low-income residents. Auditors from Legal Services Corporation (LSC) claimed attorneys violated federal rules meant to confine their activism. According to the *Fresno Bee*, the LSC audit report charged CRLA with doing prohibited legal work by subsidizing rent, shared staff and common work spaces with CRLA Foundation. CRLA denied all wrongdoing.

The *Bee* reported that the CRLA Foundation had become particularly controversial among farmers after one of the foundation's projects – the Center for Race, Poverty and Environment – challenged new dairy projects in the San Joaquin Valley, and that this prompted Valley lawmakers and the Modesto-based Western United Dairywomen to request the audit.²⁹ Jose Padillo, CRLA executive director, confirms this. “The long and short of it,”

²⁹ Michael Doyle, “Auditors criticize rural legal aid group: the federally funded unit’s ties to another organization are hit,” *Fresno Bee*, Jan. 21, 2004

he writes, “is that the Dairy Industry – working through three rural Congressmen – has had us investigated twice on the same matter, trying to show that CRLA ... is funding the work of CRPE” [Center on Race, Poverty and the Environment], a CRLA Foundation project.³⁰

The dairy business is big in California. According to CRLA, the state overtook Wisconsin in 1993 “as the largest milk producer in the U.S. covering more than 20 percent of the country’s milk in 2002. Dairy is the largest of California’s commodity groups producing \$4.6 billion in sales.”³¹

CRLA reports that the audit took more than two years from start to finish, required “production of hundreds of case files; CRLA’s transmission to Washington of thousands of pages of case and advocacy materials plus hundreds of pages of specially-prepared legal memoranda between and after visits and literally thousands of hours of CRLA staff time in responding to [LSC’s] document and information requests.”³²

“In the middle of the Audit, (mid-2002),” writes Padillo, “the [LSC Inspector General] recommended that our funding be suspended (about \$200,000 per month) until we released documents in a case funded not by the Feds, but by the state. We resolved the matter ... with the help of Congressman Howard Berman.”³³

Finally, on the day Padillo testified about the audit before the House Subcommittee on

³⁰ Jose Padillo, email to author, Sept. 21, 2004.

³¹ CRLA, “Summary of WESTERN UNITED DAIRYMENT and center on race poverty and the environment (CRPE),” provided by CRLA executive director, Sept. 21, 2004.

³² CRLA, “Summary of political issue regarding CRLA & WESTERN UNITED DAIRYMEN: WUD Demand for DOJ Intervention Is Third Attack on CRLA: Congressman Nunes Defunding Request Is Fourth,” provided by CRLA executive director, Sept. 21, 2004.

³³ Padillo, *Ibid.*

Commercial and Administrative Law, its findings and background, March 31, LSC's Acting Inspector General (IG), Leonard Koczur, announced that the IG's office would not pursue a criminal investigation of CRLA. Koczur said, "our extensive and thorough audit did not disclose any evidence of criminal conduct by CRLA ... and we consider the matter closed."³⁴

Nevertheless, the IG's office, while generally confirming "the propriety and regularity of CRLA's operations," found some minor problems with CRLA. Not enough to recommend that any penalties be imposed. The IG's office proposed, as a remedial solution for the minor infractions, that "CRLA should staff any case co-counseled with the [CRLA] Foundation with only our *least-experienced* lawyers. Co-counseling in litigation has previously never been identified by LSC as a program-integrity factor. During the two-year [IG] review period, CRLA co-counseled with 26 law firms in bringing litigation to remedy often widespread and appalling injuries to low-income workers, seniors, children and disabled, including advocacy regarding farm labor camps ... fieldwork settings ... squalid housing complexes ... subsidized housing projects ... elder-abuse cases ... illegal displacement ... local housing moratoriums ... disability discrimination ... illegal chemical application ... [and] unpaid wage cases"³⁵

Istook's Punitive Action on Drug Policy Issues

Rep. Ernest Istook (R-OK) came back last year in another attempt to quash nonprofit speech. Congress solidly defeated Rep. Istook and his infamous Istook Amendments in 1995 and 1996; the amendments sought to limit the privately funded free speech of nonprofit organizations accepting federal grants and contracts. In late 2003, Rep. Istook became incensed when he saw ads in Washington, DC's subway system (Metro) pushing legalization of marijuana. Outraged, Rep. Istook began taking steps in retaliation. In a Nov. 10 letter to Jim Graham, chairman of the Metro

board, Rep. Istook wrote that Metro had "exercised the poorest possible judgment, so I must assure that [Metro] will learn the proper lessons from this experience and will only accept appropriate ads in the future."

At this time Metro was giving free ad space to nonprofits. Change the Climate, a Massachusetts-based nonprofit, sought ad space for marijuana reform. The ad (see www.changetheclimate.org) shows a picture of a man holding a woman in his arms with a tag line, "Enjoy better sex. Legalize and Tax Marijuana."

Metro had initially rejected the ad. The Americans Civil Liberty Union (ACLU) threatened to sue on behalf of Change the Climate. Metro realized that a lawsuit, if filed, could take years and cost considerably more than the ad space. They knew this because other transit authorities have faced similar lawsuits. As a result, they allowed the ad to run.

Rep. Istook added language to the Consolidated Appropriations Act of 2004 that would have cut \$92,500 from Metro's budget (an amount double the foregone cost of the ad), because he wanted to send a message to Metro and other transit agencies. His rider included language that would have prohibited any transit agency receiving federal funds from running advertising from groups that want to decriminalize marijuana and other Schedule I substances for medical or other purposes.³⁶ Congress approved the rider.

On February 18, 2004, a coalition of national drug policy reform groups – including the American Civil Liberties Union, Change the Climate, the Drug Policy Alliance and the Marijuana Policy Project – brought suit against Secretary of Transportation Norman Mineta and the United States to challenge the rider. They argued that their free speech right to advocate on behalf of policy issues was being violated, noting that the law:

³⁴ Brennan Center for Justice at NYU School of Law, *Beltway Bulletin*, "Legal Services Structure," April 9, 2004.

³⁵ CRLA, "Summary of political issue ... " op. cit.

³⁶ OMB Watch, "Istook Strikes Back – Another Attack on Nonprofit Speech," 12/15/2003.

1. Imposed impermissible content- and viewpoint-based restrictions on speech in a public forum in an effort to silence one side's message in a serious political debate
2. Imposed restrictions that are unconstitutionally vague and overbroad
3. Was an unlawful exercise of Congress' spending power because it violates an independent constitutional prohibition on the conditional grant of federal funds.

Judge Paul L. Friedman of the U.S. District Court for the District of Columbia ruled that the government's attempt to censor the ads was illegitimate and constitutionally impermissible.³⁷ He issued a permanent injunction against Istook's appropriations rider, saying that, "there is a clear public interest in preventing the chilling of speech on the basis of viewpoint." The injunction prohibits the enforcement of the law.³⁸

As a result, Change the Climate and other groups can again display their ads – criticizing drug policies – on the subways and at bus stop shelters. However, according to Steve Fox of the Marijuana Policy Project, the administration has appealed the decision. In the meantime, Metro has discontinued its free ad program for nonprofits. While some believe that Metro stopped the program because it was too controversial, Metro says that they just did not have enough money to give away the space.

Stifling Free and Open Debate on Issues

Global Health Council

This spring, the administration bowed to political pressure and pulled funding from Global Health Council's 31st annual conference of international public health professionals. This was the first year government money did not partially support the annual conference. Despite withdrawal of

³⁷ American Civil Liberties Union, et. al. v. Norman Mineta, et. al., United States District Court for the District of Columbia, Civil Action No.04-0262 (PLF)

³⁸ OMB Watch, "Judge Strikes Down Law Censoring Marijuana Ads," June 14, 2004.

\$360,000 in federal funds, the Global Health Council held the conference.

The federal government has subsidized the conference for decades, and federal officials have often participated, including the Secretary of HHS in 2001, the Administrator of the Agency for International Development in 2002 and the Director of the Centers for Disease Control in 2003. The \$1 million, four-day conference attracts about 2,000 health experts and advocates from around the world. At least a portion of the federal funds were to be spent to cover travel costs of 50 public health professionals from developing countries that were scheduled to present papers at the conference.

The conference agenda was to include groups with differing views on sex education and reproductive health issues, including speakers from International Planned Parenthood Federation (IPPF) and the United Nations Population Fund. This free and open discussion of issues was enough to cause House Republican aides Sheila Maloney and John Casey to send an email alert to pro-life groups. The result was a campaign by the Traditional Values Coalition and others asking USAID and HHS to withhold the money. Twelve members of Congress also wrote HHS objecting to the conference funding. An aide to Senator Patrick Leahy (D-VT), who spoke at the conference, commented, "this was a manufactured issue, handled opportunistically by the White House to satisfy some of their political base."

Conservatives also claimed that federal dollars given to fund the event would be used to lobby. HHS made this contention to the council, but weak facts supported it. The conference's "Advocacy Day," which included visits to Capitol Hill, took place the day before the conference officially opened. The conference agenda included no further activity that could be viewed as lobbying. And Dr. Nils Daulaire, Global Health Council's president, maintains the council does not use federal funds for prohibited activities.

Nevertheless, Bill Pierce of HHS told the press that the council was “unable to delineate for us, breaking it out, how our money was going to be spent and not commingled with lobbying activity,” that the council was unable to demonstrate that federal funds had not been used for lobbying. This approach put the council in the impossible position of having to prove a negative. Federal regulations do not require grantees to use a specific accounting method or keep federal funds in segregated accounts.

Daulaire, reacted to the funding cancellation by saying that the council is careful to have balance in the viewpoints presented. He said there were also speakers on the agenda that support abstinence only strategies and a representative from the President’s Advisory Committee on HIV/AIDS. “There are many things that the professional community has divergent views on,” Daulaire said, “and we believe the best way to deal with this is to have a free and open exchange.”

HHS and USAID bowed to a small group of right-wing extremists, Daulaire said, “Not one person in that clique has ever spent a day in a clinic in a developing country ... And they have clearly never spent a minute reflecting on the global cost in human lives that might result from acting out their Washington-centric games.” He also said, “we have a responsibility to stand up and challenge those who hold positions of public trust when they are wrong – and on this, they are wrong. And challenge them we will, not because of our one conference, but because of who might be next”.³⁹

The Global Health Council has had its lawyers seek clear legal justification from HHS and USAID for their actions in denying the council funding for its 31st annual conference. They do not think the funding decisions can be upheld. But so far, there has been no response from the government lawyers.⁴⁰

³⁹ OMB Watch, “HHS Bows to Political Pressure, Pulls Funding from Conference,” 5/3/2004, and OMB Watch, “Global Health Council Condemns HHS Funding Cut,” 6/14/2004.

⁴⁰ Telephone conversation, Dr. Nils Daulaire with author, Sept. 21, 2004.

Centers for Disease Control Imposes Censorship of Conference Agendas

On August 28, 2003, the Centers for Disease Control and Prevention (CDC) published a Notice of Availability of Funds for Public Health Conference Support Grant Program in the Federal Register which states, “Congress has required that there will be active participation by CDC/ATSDR [Agency for Toxic Substances and Disease Registry] in the development and approval of the conference agenda to make sure there are no subjects that would embarrass the Government or be an improper use of funds ... 90 percent of funds [awarded] will be released ... upon approval of the final agenda ... CDC will reserve the right to approve or reject the content of the full agenda, press events, promotional materials (including press releases), speaker selection, and site selection.”⁴¹

But what is the cost of such a speech controlling policy? While government has always had the right to fund or not fund organizations, usually objective criteria were made public when inviting proposals. Non-federally funded portions of conferences were not subject to federal regulation. This new policy goes beyond what most previous administrations have ever attempted.

Government Takes Information Off Websites

Government has used its resources to limit information available to the public. This makes informed debate on public policies more difficult. For example, the National Council for Research on Women (NCRW) issued a troubling research report in the spring of 2004, *Missing: Information about*

⁴¹ HHS CDC/Agency for Toxic Substances and Disease Registry, Program Announcement 04004, “Public Health Conference Support Grant Program; Notice of Availability of Funds,” Federal Register, Aug. 28, 2003 [Notices] [Page 51781-51785].

Women's Lives.⁴² The report documents, "A series of decisions by federal agencies to delete, delay, alter, or spin data about what is happening to American women," said NCRW President Linda Basch. "Over the last four decades, researchers and citizens – under both Republican and Democratic administrations – have been able to trust and depend on a vigorous flow of reliable data from federal agencies. This is no longer true. Politics and ideology are trumping science on important issues that affect women's daily lives, resulting in the loss or manipulation of information critical to women and girls as they make decisions about their health, careers and safety. Without accurate information, research suffers; women and girls suffer; our society suffers."⁴³

For example, 25 key publications of the Department of Labor are no longer available on the Women's Bureau website. In Basch's words: "*Missing* is a wake up call to the nation that a nonpartisan legacy of government is being destroyed. Decisions to distort or withhold information have a cumulative negative effect for women and girls that is serious and detrimental and must not be left unchecked ... Distortion of information and omissions deny researchers critical facts and impede our ability to craft solutions and develop strategies to address the pressing challenges of our times. When data and analysis are obscured and regular reports withheld, women – and women's research and policy centers – are left in the dark."⁴⁴

Rep. Henry Waxman (D-CA), ranking Democrat on the House Committee on Government Reform, publishes a website, "Politics and Science: Investigating the State of Science under the Bush Administration." According to the site: "In pushing an 'abstinence only' agenda ... the Bush Administration has consistently distorted the scientific evidence about what works in sex

education. Administration officials have never acknowledged that abstinence-only programs have not been proven to reduce sexual activity, teen pregnancy or sexually transmitted disease ... Instead, HHS has changed performance measures for abstinence-only education to make the programs appear successful, censored information on effective sex education programs, and appointed to a key panel an abstinence-only proponent with dubious credentials."⁴⁵

⁴² National Council for Research on Women, *Missing: Information about Women's Lives*, Executive Summary, Overview, April 2004, www.ncrw.org/misinfo/summary.pdf.

⁴³ Quoted in National Council for Research on Women, press release, "National Council for Research on Women Releases *Missing: Information about Women's Lives*," April 28, 2004.

⁴⁴ Ibid.

⁴⁵ www.house.gov/reform/min/politicsandscience/ (Click under Public Health, "Abstinence-Only.")

Part II

Pushing the Limits of the Global Gag Rule

Background

Since 1984 most nonprofits receiving federal grants for domestic programs have been free to use their private funds as they see fit, including paying for advocacy and legislative lobbying, although federal funds cannot be used to lobby. Congress has consistently rejected attempts to extend restrictions on federal funds to the private funds of nonprofits, recognizing both the constitutional rights at stake and the importance of nonprofits in public policy debates.

However, the situation with funding for international programs working on reproductive health programs has been different. President Ronald Reagan first imposed the global gag rule, also known as the Mexico City Policy, in 1984. The rule banned U.S. family planning assistance to foreign nonprofits, commonly referred to as nongovernmental organizations (NGOs), which use funding from *any* source to: perform abortions in cases other than a threat to the life of the woman, rape, or incest; provide counseling and referral for abortion; or lobby to make abortion legal or more available in their country. The U.S. Agency for International Development (USAID) could pull funding for any group found in noncompliance.

President Bill Clinton rescinded the policy in 1993 and in January 2001 President George W. Bush reinstated it by Executive Order. NGOs worldwide had a choice to either sign the gag order and continue receiving USAID funds, or not sign and lose the funds. NGOs that refused to sign also lost access to U.S. donated contraceptives, which could ultimately prevent recourse of abortion and protect the community from sexually transmitted infections.⁴⁶

The administration blurred the line between government funded and privately funded work of nonprofits. In his 2001 executive memorandum to USAID, which administers family planning aid

to overseas groups, President Bush stated, "It is my conviction that taxpayer funds should not be used to pay for abortions or advocate or actively promote abortion either here or abroad." However, it was already illegal for international groups to use federal funds to provide abortions, and had been since 1973. The global gag rule had no effect on that ban. However, it extended federal restrictions to privately funded activity.

The global gag rule remains controversial. In July 2003 the Senate voted 53-43 in favor of an amendment to a foreign aid bill that would allow federal grantees doing international work to use non-grant funds to provide information about abortion or advocacy on abortion rights.⁴⁷ Although the House did not pass a similar repeal, the vote indicates soft support for the rule.

"Never have we experienced a climate of intimidation and censorship as we have today," says James Wagoner, president of Advocates for Youth. "For 20 years, it was about health and science, and now we have a political ideological approach."⁴⁸ *The New York Times* identifies Wagoner as one of "the professionals in sex-related fields who have started speaking out against what they say is growing interference from conservatives in and out of government with their work in research, education and disease prevention. A result, these professionals say, has been reduced financing for some programs and an overall chilling effect on the field."⁴⁹

⁴⁷ S. Amdt. 1141 to S. 925, An original bill to authorize appropriations for the Department of State and international broadcasting activities for fiscal year 2004 and for the Peace Corps for fiscal years 2004 through 2007, and for other purposes. Congressional Record S9156-9157

⁴⁸ Navarro, op. cit.

⁴⁹ Ibid.

⁴⁶ OMB Watch, "International NGOs are Gagged from Saving Lives," 10/6/2003.

Over the past two and a half years, the Center for Reproductive Rights studied the implementation of this global gag rule. “Many of the people interviewed for [the center’s study] said that the gag rule has created a climate of fear, censorship and distrust that forces them to avoid any conversations about unsafe abortion....

[An NGO in Peru said,] “We used to hold debates, invited medical doctors, produced research publications. We cannot speak as freely now. No one knows at what point it becomes prohibited speech. USAID told us that we couldn’t lobby for abortion liberalization or decriminalization – that, for example, if we attend a general conference and the issue of abortion comes up, we *can* speak. But we don’t know how much we can talk about it before it crosses over to not being permitted anymore. We, for example, can do research on unsafe abortion. But if we draw conclusions, someone can say ‘that’s lobbying.’”⁵⁰

According to the *New York Times*, “The administration ... has privately warned ... groups, like UNICEF, that address health issues that their financing could be jeopardized if they insist on working with the ... United Nations Population Fund ... [which] has long been a favorite target of abortion opponents in Congress and in religious-based organizations ... The critics prevented American financing of the fund for most of the last two decades ...”⁵¹

Population Action International

In addition to harming foreign NGOs, the global gag rule has also negatively impacted the funding, programs and free speech of U.S.-based nonprofits that conduct international public and reproductive health programs.

Population Action International’s report *Access Denied*, completed a year ago, reports that

⁵⁰ Center for Reproductive Rights, “Breaking the Silence: The Global Gag Rule’s Impact on Unsafe Abortion,” Executive Summary, Oct. 22, 2003, www.crlp.org.

⁵¹ Christopher Marquis, “U.S. Is Accused of Trying to Isolate U.N. Agency,” *New York Times*, June 21, 2004.

“many NGOs operate a family planning facility and HIV/AIDS prevention facility under the same roof. When the family planning operation loses funding, the whole healthcare clinic gets shut down. Planned Parenthood of Ghana, Marie Stopes International Kenya, Family Guidance Association of Ethiopia, and the Planned Parenthood of Kenya are just a few NGOs that had to stop programs dealing with HIV/AIDS prevention because of Bush’s global gag rule. Some of the de-funded programs teach youth about how to be responsible parents, protect against HIV/AIDS and other sexually transmitted infections, and provide services for [infection] screening, treatment, HIV testing and counseling, along with other basic reproductive health care.”⁵²

Wendy Turnbull, PAI’s legislative policy analyst, tells of deepening problems in reproductive health internationally. “Advocacy around decriminalizing or legalizing abortion has come to almost a complete stop in many countries,” she reports, “as NGOs fear the global gag rule’s termination of USAID funding.”⁵³ As Advocates for Youth’s Wagoner says, “... the conservative powers in our government have pushed proven public health strategies aside in order to advance an ideological agenda.”⁵⁴

⁵² OMB Watch, “International NGOs are Gagged from Saving Lives,” 10/6/2003. See also Population Action International, www.populationaction.org: *What You Need to Know About the Global Gag Rule and U.S. HIV/AIDS Assistance: An Unofficial Guide*, 2004; *Emergency Contraception and the Global Gag Rule: An Unofficial Guide*, 2003; news release, “Bush Administration’s Global Gag Rule Jeopardizing Health Care, Weakening HIV/AIDS Prevention and Endangering Lives,” Sept. 24, 2003; policy fact sheet, “Why the Global Gag Rule Undermines U.S. Foreign Policy and Harms Women’s Health,” April 2003.

⁵³ Telephone conversation Wendy Turnbull with author, `Sept. 28, 2004

⁵⁴ James Wagoner, “Advocates for Youth Calls HHS’ Continued Support of Unproven and Ineffective

Reproductive Health for Refugees Consortium

In August 2003 the administration officially withdrew funding for a consortium of seven NGOs serving refugee women and women in conflicts – two of the world’s most vulnerable and disenfranchised populations. Since 1995 the consortium has been working, with U.S. government support, to deliver emergency obstetric care, HIV/AIDS prevention services, emergency contraception and education to prevent violence against women in war-torn countries. But in October 2002 the State Department put a hold on U.S. funding because of allegations that one member of the consortium, Marie Stopes International, had violated the Kemp-Kasten law. This law, enacted in 1985, forbids U.S. foreign aid funding for any organization that, as determined by the President, “supports or participates in the management of a program of coercive abortion or involuntary sterilization.”

In August 2003, the administration presented the consortium with an ultimatum – drop Marie Stopes International or relinquish all U.S. support. Recognizing that the joint activities of all the members were crucial to quality care, the consortium chose to decline U.S. funding, saying that the allegations against Marie Stopes International were “unfounded.”

According to the consortium, “The real tragedy of the cut in funding [by the Bush administration] is the effect on refugee women and youth in conflict areas. The factors that accompany forced displacement – exposure to violence, acute poverty, lack of protection and disruption of health services – are the same factors that often contribute to an increase in the transmission of HIV ... During the last eight years, we have successfully provided refugee women and children with access to critical health care in 70 sites in 30 countries, including

Programs Irresponsible,” Advocates for Youth, July 2, 2003.

Angola, Democratic Republic of Congo, Liberia and Sri Lanka.”⁵⁵

The Western Hemisphere Region of IPPF

In 2001 International Planned Parenthood Federation refused to stop advocacy for legal abortion, as the global gag rule demanded, and was denied \$12 million from USAID, according to Carmen Barroso, regional director. She labeled the rule as “unethical restrictions on her organization’s freedom of speech,” adding that the “people affected by the gag rule [are] poor women in Latin America and the Caribbean who rely on family planning clinics for basic medical as well as reproductive health services.” IPPF has not accepted any USAID money since, though, according to Barroso, 10 independent affiliates have. The needs on the ground are so great, she says, that to accept or decline the money is a Hobson’s choice. However, accepting the money has led to several “horrible cases of USAID interference ... and the affiliates are afraid” to discuss these cases publicly.⁵⁶

⁵⁵ Reproductive Health Response in Conflict Consortium, press release, “Reproductive Health for Refugees Consortium ... Regrets Loss of State Department Support for Its HIV/AIDS/Refugee Youth Programs,” Sept. 18, 2003. International Women’s Health Coalition, Fact Sheet: “Bush’s Other War: The Assault on Women’s Sexual and Reproductive Health and Rights,” www.iwhc.org//index.cfm?fuseaction=page&pageID=468, based on Letter from eight organizations to Secretary of State Colin L. Powell – March 10, 2003; Letter from the Women’s Commission for Refugee Women and Children – June 2003; Letter from the Reproductive Health for Refugees Consortium – August 11, 2003; “U.S. Cuts Off Financing for AIDS Program, Provoking Furor,” The New York Times, August 27, 2003.

⁵⁶ Telephone conversation Carmen Barroso with author, Sept. 14, 2004.

A ‘Back Door’ Domestic Gag Rule

Although the global gag rule does not apply to domestic programs, the administration has initiated action in HIV/AIDS prevention programs that indicate the concept is being brought in through the back door by way of regulatory changes and use of audit powers.

Proposed Regulations Would Censor Privately Funded Communications

Organizations doing AIDS and HIV prevention may also have to contend with censorious CDC guidelines on HIV prevention grant funds that were proposed in June.⁵⁷ The proposed regulations include new censorship provisions for the content of all their materials – even those privately funded – in order to be eligible for federal grants. The CDC is the principal federal funder of prevention education about HIV and AIDS. A host of nonprofits have submitted comments opposing the rule, and no final rule has been published.

According to Doug Ireland in the *LA Weekly*, “It’s all couched in arcane bureaucratese, but this is the Bush administration’s Big Stick – do exactly as we say, or lose your federal funding.”⁵⁸ Nearly all of the some 3,800 AIDS service organizations that do the bulk of HIV-prevention education receive at least part of their budget from federal dollars, writes Ireland, and without that money, they will have to slash programs or even close their doors.

The new regulations require the censoring of any “content” - including pamphlets, brochures, fliers, curricula, audiovisual materials and pictorials (for example, posters and similar

educational materials using photographs, slides, drawings or paintings), as well as advertising and web-based information. They require all such content to eliminate anything even vaguely “sexually suggestive” or “obscene” – like teaching how to use a condom correctly. And they demand that all such materials include information on the “lack of effectiveness of condom use” in preventing the spread of HIV and other sexually transmitted diseases.

The STOP AIDS Project

In 2003, the Centers for Disease Control and Prevention (CDC) investigated the STOP AIDS Project, a San Francisco based group, whose mission is to prevent HIV transmission among all gay and bisexual men in San Francisco, through multicultural, community based organizing. The issue focused on promotional materials for STOP AIDS federally funded activities, even though they had been properly reviewed and approved by the CDC mandated local review board.

But the CDC was also interested in STOP AIDS Project’s activity in non-federally funded workshops. CDC “suggested” that the use of the private funds should contain the same restrictions as the federal funds. STOP AIDS Project correctly maintained that the CDC suggestion was inappropriate and continued to offer special workshops using money from the City of San Francisco. These funds were not subject to federal standards because they were not a match for the federal funds.

STOP AIDS was denied \$225,000 this year under the new CDC guidelines for HIV prevention funding, according to Darlene Weide, executive director of STOP AIDS. This was important money in what was a \$1.8 million total budget last year. Weide finds the funding rejection hard to take after her organization passed a federal audit last year “with flying colors.” She finds the rejection “especially galling” because the new focus of the CDC Advancing HIV

⁵⁷ Proposed Revision of Interim HIV Content Guidelines for AIDS-Related Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, Marketing, Advertising and Web site Materials, and Educational Sessions in CDC Regional, State, Territorial, Local, and Community Assistance Programs; Notice Vol. 69 Fed. Reg. Pages 33824-33828, June 16, 2004

⁵⁸ Doug Ireland, “Condom Wars: New guidelines gut HIV prevention -- and endanger young people’s lives,” *LA Weekly*, June 25, 2004.

Prevention funds is on connecting with individuals who are HIV positive, and, she says, the STOP AIDS Project developed the model considered to be “the gold standard ... across the country.” She believes that their program is “one reason why new infections in San Francisco are on the decrease.”

Weide says, “It is a fairly held belief among AIDS service organizations that the new CDC ... guidelines were constructed to prevent innovation and local control to avoid political fallout from the republican right.” She adds, that it “is shortsighted” to shift “to a medical model of public health away from a proven effective approach to prevention [that includes outreach to] high risk HIV negative individuals.”

Dictating Policy

A new development in the administration’s emphasis on control of nonprofit speech is the new policy concerning prostitution and sex trafficking instituted by USAID in February 2004, to implement a provision of the 2003 Global HIV/AIDS bill. In order to receive any money to combat HIV/AIDS, USAID now requires applicants to certify that they have explicit policies opposing prostitution and sex trafficking before they may be eligible for grants or contracts.

While such policies sound laudable, the concept behind them is dangerous. It raises questions about the degree to which government can or should control the policies of nonprofits. Does this mean the government can require specific language? If there are policy differences, can the government require a nonprofit to adopt language applies beyond the scope of its federal funding?

Some explicit policy language may cause practical problems for grantees. For example, Senator Patrick Leahy (D-VT) says, “It is no secret that commercial sex workers and sex trafficking are a major cause of HIV transmission in Asia and in parts of Africa. We all want to see these practices end. But the reality is that they exist ... Any effective strategy to combat HIV/AIDS must include programs to

reduce its spread through prostitution and sex trafficking ... There are organizations who work directly with commercial sex workers and women who have been the victims of trafficking, to educate them about HIV/AIDS, to counsel them to get tested, to help them escape if they are being held against their will, and to provide them with condoms to protect themselves from infection. This work is not easy. It can also be dangerous ... I am concerned that [this new policy], which requires such organizations to explicitly oppose prostitution and sex trafficking, could impede their effectiveness.”⁵⁹

Proponents of this approach, including Rep. W. Todd Akin (R-MO), want to extend the policy beyond the Global HIV/AIDS bill. Rep. Akin said, “When the United States sends tax dollars to treat and prevent AIDS in Africa, we are telling women that we are interested in their well-being, and we must never confuse that message by financially supporting organizations that actually promote prostitution and sex trafficking.”⁶⁰

Policy certification is a dangerous government intrusion into the internal policy setting function of nonprofits. It should be dropped.

⁵⁹ Sen. Patrick Leahy (D-VT), “Limitation Provision, Jobs and Growth Tax Relief Reconciliation Act of 2003,” *Congressional Record*, S6457, May 15, 2003.

⁶⁰ Rep. W. Todd Akin (R-MO), “Amendment No. 20 to Title VIII-Additional General Provisions, Sec. 801, H5348-04,” *Congressional Record*, July 8, 2004.

Part III

Selective Enforcement: Speech Police?

Retaliatory action is not limited to government grantees. Rather than engage in debate on the merits, the administration and its conservative allies punish nonprofits that are vocal in their opposition to a variety of policy proposals. Some active nonprofits have found themselves subject to investigations, criminal prosecution and government audits after vocally engaging in policy debates that oppose the administration's ideology. Others have found themselves segregated into protest zones where their public demonstrations are isolated from view.

Nonprofits Threatened with Criminal Prosecution

Project On Government Oversight

In the spring of 2004 the Nuclear Regulatory Commission "threatened staff members at a watchdog group, the Project on Government Oversight (POGO), with criminal prosecution because they published their own detailed critique of security at Entergy Nuclear's two reactors at Indian Point in New York," according to the *Washington Post*.⁶¹ The critique was of a mock attack to test security at the reactors.

POGO claimed that the plant's security was too loose. They said the mock attack involved too few attackers, assumed the attackers did not have access to commercially available weapons, and that the attacks were all in the daytime, rather than nighttime.⁶² In an October letter from the Director of the Office of Nuclear Security and Incident Response, the commission claimed they could not respond in detail to the critique without compromising

⁶¹ R. Jeffrey Smith, "Nuclear Security Decisions Are Shrouded in Secrecy," the *Washington Post*, March 28, 2004.

⁶² Matthew L. Wald, *New York Times*, "Group Says Test of Nuclear Plant's Security Was Too Easy," Sept. 6, 2003.

security and asked POGO to "not publicly disclose the content of [its] letter [to the commission] and ... permanently remove from [its] website the entire letter ..."⁶³ The same letter threatened POGO and individuals associated with it with criminal and/or civil penalties for any "unauthorized disclosure".

POGO agreed to delete information from its letter if the Commission could substantiate that the information was sensitive. The commission would not specify what should be deleted, citing security reasons. POGO's attorney, David C. Vladek, said the commission "was trying to 'silence' the group."⁶⁴ Ultimately, the commission backed down and allowed POGO to publish its letter with slight modifications.⁶⁵

Justice Department Prosecutes Greenpeace

An unusual federal prosecution of the organization Greenpeace last fall posed a direct threat to first amendment rights. Two Greenpeace activists climbed aboard a ship carrying Amazon rainforest mahogany wood into the Port of Miami, FL, and posted a banner that said, "President Bush: Stop Illegal Logging." They were arrested and charged with misdemeanors. Greenpeace was subsequently indicted for violating an obscure 19th century law meant to keep boarding house owners from boarding

⁶³ Roy P. Zimmerman, director, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, letter to Danielle Brian, executive director, POGO, Oct. 8, 2003.

⁶⁴ Smith, op. cit.

⁶⁵ Email from Beth Daley, director of communication, POGO, to author, Aug. 16, 2004.

arriving ships to recruit sailors. If convicted, Greenpeace could have been fined up to \$10,000, placed on probation and required to report to the government on its activities. It could also have lost its tax-exempt status. A federal court judge, however, dismissed the case.

Greenpeace lawyers say this is the first time an organization has been prosecuted for the actions of its members. Legal experts point out that southern prosecutors harassed the National Association for the Advancement of Colored People (NAACP) in the 1950's and 1960's, but note that this case was especially unusual and questionable. Bruce S. Ledewitz, a law professor at Duquense University who has studied the history of dissent in America, told the *New York Times*, "there is not only the suspicion but also perhaps the reality that the purpose of the prosecution [was] to inhibit First Amendment activities."

The ship that was boarded by the two activists was illegally importing mahogany wood from Brazil. Greenpeace was working with the Brazilian government against the trade because the tree is an endangered species and its logging results in widespread deforestation on indigenous land. In October, Greenpeace's ship, *Esperanza*, was denied access to the Port of Miami on the grounds that it was a security risk.⁶⁶

A federal court judge, however, dismissed the case.⁶⁷ Greenpeace attorney Tom Wetterer says that the Justice Department has not since bothered the organization.

Policy-Active Nonprofits Targeted for Audits

The Land Stewardship Project

The Land Stewardship Project (LSP) in Minnesota was audited by the IRS last year,

⁶⁶ OMB Watch, "Greenpeace under Ashcroft Attack," 11/17/2003.

⁶⁷ OMB Watch, "Judge Acquits Greenpeace in Victory for Free Speech," 6/1/2004.

and Dana Jackson, associate director, and Mark Schultz, director of the policy office in Minneapolis, both suspect it was because of their policy work on the "pork checkoff" issue.

The pork checkoff is a major issue for family farmers. The National Pork Producers Council, with backing from the current administration, wanted to continue the mandatory tax on hogs sold. Proceeds from the tax are being used, according to the Campaign for Family Farms, for programs that support "corporate concentration, industrialization and the factory farm system of livestock production, which drives family farmers out of business."⁶⁸ The Land Stewardship Project, a founding member of the Campaign for Family Farms, says, "The National Pork Producers Council (NPPC) ... gets nearly all the funds (more than \$500,000,000 or half a billion dollars since it started) and uses it to build a media machine with our money."⁶⁹ According to LSP, the money collected from this program was originally intended to benefit hog farmers through promotional efforts, yet it has been used to push the family farmer out of business and promote factory farms and the corporate takeover of the hog industry.⁷⁰

To correct the problem LSP and others pushed for a national referendum of farmers on the pork checkoff. It took a while, but the U.S. Department of Agriculture agreed to hold it. USDA's final rules for the referendum indicated that "To be eligible to vote, a producer must have sold at least one hog that they own between August 18, 1999 and August 17, 2000."

⁶⁸ Land Stewardship Project, press release, "Court Rules Pork Checkoff Unconstitutional; Checkoff's Days are Numbered," Oct. 22, 2003.

⁶⁹ Land Stewardship Project, press release, "Referendum to End the Mandatory Pork Checkoff: The Real Story: Producers Win Right to Vote Fair and Square," June 1, 2000.

⁷⁰ Land Stewardship Project, press release, "Hog Farmers Want Fair and Democratic Vote to End the Mandatory Pork Checkoff," June 22, 2000.

When Iowa hog farmer Larry Ginter saw the NPPC's press release on the upcoming mandatory pork checkoff referendum, he laughed. Ginter, a Campaign for Family Farms spokesperson and a member of Iowa Citizens for Community Improvement, says, "It says right here that the NPPC thinks the pork checkoff has been a phenomenal success at what it was designed to do. What a crock The mandatory pork checkoff has taxed us out of a half a billion dollars, brought us the lowest prices of the century, and two out of every three hog farmers – 250,000 total – have gone out of business since it started. If it was designed to hand the industry over to factory farms, then it's a success."⁷¹

Hog farmer members of the Campaign for Family Farms (CFF), the coalition of state based farm groups who led the three and a half year effort to end the mandatory pork checkoff, ... [celebrated] their huge victory over the National Pork Producers Council (NPPC) as Secretary of Agriculture Glickman announced on Jan. 11, 2001 that hog producers voted to end the mandatory pork checkoff. Hog farmers had plenty to celebrate as they beat the NPPC, which spent upwards of \$4 million in an attempt to win the referendum. There were a total of 30,347 votes cast in the referendum. Of those votes, 15,951 producers (53 percent) voted to end the mandatory pork checkoff, and only 14,396 (47 percent) voted to continue the tax.⁷²

Yet, in a backroom deal announced Feb. 28, 2001, the USDA agreed *not* to terminate the mandatory pork checkoff. According to LSP, USDA's agreement was made with the National Pork Producers Council (NPPC), and was meant to overturn the democratic vote of hog

⁷¹ Land Stewardship Project, press release, "USDA publishes final rules for mandatory pork checkoff referendum Hog farmers in Minnesota and nationwide ready to vote pork checkoff down," July 12, 2000.

⁷² Land Stewardship Project, press release, "Hog Farmers End Mandatory Pork Checkoff, Independent producers vote down pork tax, Campaign for Family Farms prepares for next corporate target," Jan. 11, 2001.

farmers who voted to end the pork tax in the nationwide referendum held in 2001.⁷³

Hog farmers [quickly filed] a federal lawsuit against the USDA to end the mandatory pork checkoff.⁷⁴ Federal District Court Judge Richard Enslen ruled in October 2002 that the pork checkoff forces hog farmers to pay into a program that they believe is contrary to their interests because it supports factory-style hog production and corporate control of the industry. The checkoff, therefore, is "unconstitutional and rotten," the judge ruled. The Sixth Circuit Court of Appeals upheld the ruling in October 2003, saying the pork checkoff was unconstitutional and finding it "compels [hog farmers] to express a message with which they do not agree," and struck down the entire Pork Act.⁷⁵

"We do think it is very unfortunate that the Bush Administration specifically asked the Court not to hear the pork checkoff case, and that the Court concurred," said Ginter, a named party in the pork case. "But we are confident that justice will prevail and ... the ... pork checkoff [program] will be terminated" ... Hog farmers have paid more than \$170 million into the pork checkoff since the Clinton administration conducted the 2001 national referendum.⁷⁶

National Education Association

The IRS is auditing the National Education Association (NEA), the nation's largest

⁷³ Land Stewardship Project, press release, "USDA strikes deal with NPPC to overturn results of national referendum Hog farmers blast Bush Administration decision to save the mandatory pork checkoff tax," Feb. 28, 2001.

⁷⁴ Land Stewardship Project, press release, "Hog Farmers Launch Lawsuit Against USDA Pork Producers Rally Against Agriculture Secretary Today in Iowa," May 14, 2001.

⁷⁵ Land Stewardship Project, press release, "Supreme Court Decides To Hear Arguments on Mandatory Beef Checkoff Program," May 24, 2004.

⁷⁶ Ibid.

teachers union, based upon the recommendation and documentation of the conservative law firm, Landmark Legal Foundation. CBSNews.com reported last Nov. 25 that “the Associated Press ... has reviewed the NEA’s filings [with the IRS] from years 1993 through 1999 and hundreds of pages of internal NEA documents. The records showed the 2.7 million-member union spent millions of dollars to help elect pro-education candidates [for political office], produce political training guides and gather teachers’ voting records ... The documents were gathered by Landmark Legal Foundation, [which] has filed complaints with the IRS seeking an audit and a criminal investigation of whether the NEA evaded taxes.”⁷⁷

However, the NEA is a union, not a charity, and tax law permits it to engage in political activities paid for from a segregated fund. These expenditures are reported to the IRS. In addition, Reg Weaver, president of the NEA, said, “These ‘unearthed’ documents are NEA’s detailed budget reports that we distribute annually to more than 20,000 NEA members, leaders, and staff.”⁷⁸

Mark Levin, president of Landmark, maintains that if the union were to report political expenditures, the IRS would collect taxes on money used for any direct or indirect political expenses.⁷⁹ Says Weaver, “NEA does indeed pursue ‘a robust political agenda,’ but, contrary to Mr. Levin’s assertion, ‘it does so within the rules that govern tax-exempt organizations.’ That has been the conclusion reached by the Department of Labor, the Internal Revenue Service, and the Federal Elections Commission in previous investigations, and we are confident that it will be the conclusion reached by the Department of Labor and the Internal Revenue Service when their current investigations are

completed.”⁸⁰ Weaver adds that the NEA will “vigorously defend our constitutional right to speak to our members about the role of politics in public education.”⁸¹

According to CBSNews.com “the ... NEA is loathed by conservatives who see it as the guardian of an entrenched educational establishment that has resisted efforts to make teachers more accountable for their students’ performance. The Bush administration has been accused of ordering politically motivated audits before.”⁸²

Subsequently, Landmark prevailed upon the Labor Department also to undertake an audit of the NEA.⁸³ NEA reports no final audit reports have emerged as yet from either IRS or Labor.⁸⁴

Protest Zones

Protest zones have become a favorite way for the Secret Service to stifle free speech of individuals and nonprofit organizations of a different policy or political persuasion from the administration. Protest zones often are fenced-in zones remote from the public officials who are targets of the protests. Demonstrators friendly with the administration tend to receive better treatment, often being allowed up close to the public officials. Protest zones, ironically are called “free speech zones” by public officials.

Demonstrations are usually organized and sponsored by nonprofit organizations to express an opinion about a policy or event. To protect this tradition the ACLU has sued on behalf of four national advocacy groups that engage in frequent demonstrations

⁷⁷ CBSNews.com, “Teacher’s Union Faces Audit,” Washington, Nov. 25, 2003.

⁷⁸ Email from Michael Pons, NEA media department, to author, Sept. 20, 2004.

⁷⁹ CBSNews.com, “NEA Lobbyist’s Remark Troubles Conservative Legal Group,” March 25, 2004.

⁸⁰ Email from Michael Pons, op. cit.

⁸¹ Quoted in CBSNews.com, Nov. 25, 2003, op. cit.

⁸² CBSNews.com, Nov. 25, 2003, op. cit.

⁸³ CBSNews.com, March 25, 2004, op. cit.

⁸⁴ Email from Michael Pons, NEA media office, to author, Sept. 9, 2004.

around the country. The suit alleges that there have been “a significant spike in such incidents under the Bush Administration”. It charges officials “with a ‘pattern and practice’ of discrimination against those who disagree with government policies.” The groups are: Association of Community Organizations for Reform Now (ACORN), United for Peace and Justice, USAction and National Organization for Women (NOW).⁸⁵

According to ACLU legal papers, local police, acting at the direction of the Secret Service, violated the rights of protesters in two ways: people expressing views critical of the government were moved further away from public officials while those with pro-government views were allowed to remain closer. Security is not the issue, because anyone intent on harming officials would simply carry a sign with a supportive message or no sign at all. More than a dozen examples of police censorship at events around the country were identified.⁸⁶

“Unfortunately,” says Anthony Romero, executive director of the ACLU, “the case was dismissed because we were deemed to lack standing, but, while disputing that they committed the actions we accused them of, the Secret Service agreed that were they to commit them they would be illegal.”⁸⁷

Nevertheless, the practice continued throughout the following year, in presidential visits to South Carolina, Atlanta and Oak Ridge, TN. Katuah EarthFirst a local environmental group in Tennessee, was involved in the latter. Chris Irwin, a law student at the University of Tennessee, spoke for the group saying that the protest zone policy is “doing exactly what it’s supposed to do – it’s scaring Americans away from exercising their First Amendment rights ... It’s ironic that we have a president claiming to be pushing democracy in Iraq while here in

⁸⁵ ACLU, press release, Sept. 23, 2003, “Secret Service Ordered Local Police to Restrict Anti-Bush Protesters at Rallies, ACLU Charges in Unprecedented Nationwide Lawsuit.”

⁸⁶ Ibid.

⁸⁷ E-mail from Romero to author, Aug. 19, 2004.

Tennessee the First Amendment only applies to a few hundred square feet.”⁸⁸

The recent political conventions brought protest zones to the media’s front pages. The Democratic convention in Boston was the warm-up for both protesters and police. The Republican convention in New York City became the main event. Between conventions, *New York Times*’ guest columnist, Dahlia Lithwick, a senior editor at Slate, wrote, “You are at liberty to exercise your First Amendment right to assemble and to protest, so long as you do so from behind chain-link fences and razor wire, or miles from the audience you seek to address ... It’s easy to forget that as passionate and violent as opposition to the Iraq war may be, it pales in comparison with the often bloody dissent of the Vietnam era Enormous national events will inevitably be terror targets. So will the president. But before we single out the anarchists and the environmentalists and the puppet-guys for diminished constitutional protections - before we herd them into what are speech-free zones - we might question whether they represent the real danger. If we don’t recognize the distinction between passionate political speech and terrorism now, it may be too late to protest later.”⁸⁹

At the Republican convention in New York City, “the protests were believed to be the largest ever at a U.S. political convention,” reported *USA Today*, noting that there were “half-million or so people who protested during the ... week ... More than 1,800 people were arrested during [the] protests.”⁹⁰ *The Washington Post* reported that this was “the largest number of arrests associated with any American major-party convention. At the Democratic convention in

⁸⁸ Associated Press, “Protest zones deter some during Bush’s Tennessee stop,” 7/13/2004.

⁸⁹ Dahlia Lithwick, *New York Times*, “Tyranny in the Name of Freedom,” Aug. 12, 2004.

⁹⁰ Martha T. Moore and Charisse Jones, “Protest Groups ‘Empowered’ by Large Turnout,” *USA Today*, Sept. 3, 2004.

Chicago in 1968 ... cops made fewer than 700 arrests.”⁹¹

United for Peace and Justice organized the huge protest march Sunday, before the convention started, that came off rather peacefully. Although, as reported by TomDispatch.com, “With hovering helicopters, serried ranks of police, and visible police dogs (which ... brought to mind Abu Ghraib), not to speak of that Fuji blimp shadowing the march from beginning to end, you could sense how blurred the distinction between dissent and terror was becoming.”⁹²

The next night, on the convention’s opening, the Poor People’s Economic Human Rights Project (a coalition of 50 organizations) led marchers to Madison Square Garden where “they were confronted by police tactics that altered the peaceful climate. Police erected pens that divided the crowd in half, leaving those within the barricades feeling panicked and fearful, and those left behind feeling frustrated,” according to the New York Civil Liberties Union. The NYCLU had challenged the use of pens during peaceful protests in its federal lawsuit earlier this summer that detailed how their use typically results in unfortunate situations that can inflame the crowd.⁹³

The War Resisters League, a decades-old pacifist group, planned a peaceful march from 9/11 Ground Zero to Madison Square Garden, the convention site, where it intended to conduct a civil disobedience action. Within a block or two of its start, however, according to the *Washington Post*, a “video [from the New York Civil Liberties Union] shows marchers lined up on the sidewalk, far from an intersection, as a police officer announces on a bullhorn: ‘You’re under arrest.’ ‘They came with batons, bicycles,

they came with netting,’ said the Rev. G. Simon Harak, a Jesuit priest. ‘The kind of forces you expect to be turned on terrorists was unleashed on us.’ Police arrested 200 people, saying they had blocked the sidewalk.”⁹⁴

Sensitivity to national television audiences no doubt mitigated the responses of the Secret Service and local police to protesters in Boston and New York. However, protest zone restrictions on individuals’ and nonprofits’ free speech at presidential venues seem here to stay. Nevertheless, vigilant and public action by nonprofit organizations challenging the zones also appears to reduce the scope of the zones.

⁹¹ Michael Powell and Michelle Garcia, “Arrests at GOP Convention Are Criticized,” *The Washington Post*, Sept. 20, 2004.

⁹² Tom Engelhardt, “Voices from the March to Nowhere,” TomDispatch.com (a project of the Nation Institute), Aug. 30, 2004.

⁹³ ACLU, press release, “NYCLU Concerned about Change in Police Tactics During Peaceful Protests,” Aug. 31, 2004.

⁹⁴ Powell and Garcia, op. cit.

Part IV

Overbroad Implementation of Homeland Security Policy Creates Chilling Effect

Since 2001 the secretive approach the administration has taken on homeland security issues has created huge potential risks for nonprofits that speak out on issues. If the government is willing to take retaliatory action against grantees and other nonprofits that disagree on policy, what is to stop it from using homeland security powers to shut down nonprofits that vocally disagree with it?

Security related laws, including the USA PATRIOT Act, provide the federal government with the power to freeze and seize nonprofit assets based on secret evidence, with no process of appeal for the group. Although such a scenario may seem unlikely, a nonprofit that was targeted with such action would have virtually no redress or legal protection. The chilling effect, the potential for abuse, or misapplication of homeland security powers is already having an impact on nonprofits.

After 9/11, White House press secretary Ari Fleischer admonished the country that Americans should “watch what they say, watch what they do.” The statement has become the mantra for this administration. Attorney General John Ashcroft has been very clear: dissent equals disloyalty. As he told the Senate Judiciary Committee on December 6, 2001, “To those who scare peace-loving people with phantoms of lost liberty, my message is this. Your tactics only aid terrorists for they erode our national unity and diminish our resolve.”

Three central questions must be asked: What dangers do charities actually represent as agents of terrorism? Has government action toward charities been proportionate to the real dangers represented, considering other activities that aid and abet terrorism? What impact has misdirected homeland security policy had on charities and other nonprofits?

Background

The legal framework surrounding homeland security policy is set by the PATRIOT Act and Executive Orders issued under the International Emergency Economic Powers Act. Congress rushed the PATRIOT Act through during the last week of October 2001, in a closed process that took place while congressional offices were shut down for anthrax testing. The result is an ill-conceived and over-reaching law and set of administrative mechanisms that have caused anxiety and trepidation in legitimate charities about speaking out and representing Middle Eastern, Muslim and immigrant populations, and about challenging the government’s war on terrorism policies and activities.

The act creates a new crime, “domestic terrorism”, with a vague definition that would have criminalized civil rights marches in the 1960s. In addition, greatly expanded search and surveillance powers raise concern for nonprofits about the privacy of our staffs, members and the people we serve.

For example, the government can search the records of an organization for activity by a third party and bar the organization from notifying anyone about that search. Although the law says such a search cannot be “conducted *solely* upon the basis of activities protected by the first amendment of the Constitution” (emphasis added), speech could be a factor as long as any other reason was given. The government can freeze bank accounts and seize property and records, such as computers and telephone logs, without notice. The only basis for this draconian action is an allegation to a court of “reasonable necessity for the seizure.” The nonprofit has

no right to appeal or even to learn of the evidence used against it.

Last year OMB Watch published a report, “The USA PATRIOT Act and its Impact on Nonprofit Organizations.”⁹⁵ We described how several Muslim-based organizations were shut down by the administration, although no criminal charges were proven against them. The report also revealed other problems, such as the revelation that local police in Colorado were developing “spy files” on local activists in more than 200 organizations.

The courts are being asked by individuals and nonprofit organizations to provide relief from the heavy-handed administration of the PATRIOT Act, with mixed results. As Congress has been debating PATRIOT Act II, a U.S. District Court judge struck down a key provision of the 2001 PATRIOT Act as unconstitutional. Judge Victor Marrero said that the provision that “allows the FBI to demand information from Internet service providers without judicial oversight or public review ... effectively bars or substantially deters any judicial challenge,” and violates free speech rights by imposing permanent silence on targeted companies. Writing that “democracy abhors undue secrecy,” Marrero ruled that “an unlimited government warrant to conceal ... has no place in our open society.”⁹⁶

What Dangers Do Charities Actually Pose as Agents of Terrorism?

Over the past year it has become clear that the government focus on charities in the war on terror is vastly disproportionate to the dangers presented. Limited government resources need to be prioritized and used where the potential for

⁹⁵ OMB Watch, Executive Report, “The USA PATRIOT Act and its Impact on Nonprofit Organizations,” September 2003, <http://www.ombwatch.org/article/articleview/1803/>

⁹⁶ Quoted in Christy Harvey, Judd Legum and Jonathan Baskin, “The Progress Report: Under the Radar: Civil Liberties – PATRIOT Act Dealt Blow,” Sept. 30, 2004, American Progress Action Fund, progress@americanprogressaction.org. Julia Preston, “Judge Stikes Down Section of PATRIOT Act,” *New York Times*, Sept. 30, 2004.

harm is greatest. It is becoming increasingly clear that the heavy focus on charities is not justified. To make matters worse, misdirected homeland security action is making it more difficult for charities, especially international groups, to carry out their missions. This can hurt efforts to end terrorism by cutting back on the kind of humanitarian work that makes people less desperate and susceptible to recruitment by terrorist organizations.

GAO Report on Terrorist Financing

In November, 2003, the Government Accountability Office (GAO) released its report on “Terrorist Financing: U.S. Agencies Should Systematically Assess Terrorists’ Use of Alternative Financing Mechanisms.”⁹⁷ The report found that terrorists earn “assets by selling contraband cigarettes and illicit drugs ... and by other means ... They move funds by concealing their assets through ... informal banking systems, and commodities such as precious stones and metals.”⁹⁸ It also found that terrorists earn assets by misusing charitable organizations that collect donations, making some charities a direct source of funds.⁹⁹ Thus, “Terrorists or their supporters may ... infiltrate legitimate charitable organizations and divert funds to directly or indirectly support terrorist organizations. In both cases, the charitable organizations may collect donations from both witting and unwitting donors.”¹⁰⁰

The GAO report makes it clear that the government needs to learn more about the level of threat posed by different money laundering mechanisms, saying, “The extent of terrorists’ use of alternative financing

⁹⁷ www.gao.gov/atext/d04163.txt

⁹⁸ Ibid. “GAO Highlights: Highlights of GAO-04-163, a report to congressional requesters,” November 2003.”

⁹⁹ Ibid. “GAO Highlights...”

¹⁰⁰ www.gao.gov/atext/d04163.txt

mechanisms in unknown ... In monitoring terrorists' use of [these] mechanisms, the U.S. government faces a number of challenges, including ... sharing data on charities with state officials.”¹⁰¹ The report called for the Federal Bureau of Investigation (FBI), Treasury Department and other relevant agencies to collect and analyze information, and for the IRS to establish procedures, in consultation with state charity officials, to share information about charities.¹⁰²

In December 2003 Senate Finance Committee Chairman Charles Grassley (R-IA) and ranking member Max Baucus (D-MT) asked the Internal Revenue Service (IRS) to produce the confidential financial records and tax documents of several Muslim charities and Islamic philanthropic organizations.¹⁰³ The letter observed that “Government officials, investigations by federal agencies and the Congress, and other reports have identified the crucial role that charities and foundation play in terror financing ... Often these groups are nothing more than shell companies for the same small group of people, moving funds from one charity to the next charity to hide the trail.”¹⁰⁴ To date there has been no public action related to this request. However, nonprofit sector organizations have been actively working on guidelines for nonprofits to prevent such abuse. (See below)

Barnett Baron, executive vice president of the Asia Foundation in San Francisco, has observed “The Treasury Department has identified philanthropy as a major source of funding for terrorist activity ... Yet, the results from the first two years of Treasury’s efforts, and those of international bodies, to curtail the flow of funds to terrorist organizations seem rather paltry ... [In fact,] the General Accounting Office ... criticized the Treasury Department’s limited focus on

¹⁰¹ Ibid. “GAO Highlights ... “

¹⁰² Ibid.

¹⁰³ <http://www.ombwatch.org/article/articleview/2008>.

¹⁰⁴ Senators Charles E. Grassley and Max Baucus, U.S. Senate Committee on Finance, December 22, 2003 letter to Hon. Mark Everson, Commissioner of IRS.

organized philanthropy, citing the many other sources of potential funding for terrorist organizations ... several recent studies, including the GAO report mentioned above, demonstrate that terrorist organizations have been very creative - even entrepreneurial - in their use of both legitimate and criminal activities to fund their operations... Documented evidence of charitable giving as a source of funding for terrorist organizations is dwarfed in scale by the likely diversion of funds from other sources, including: Hawala – money transfer without money movement – estimated at up to \$200 billion a year; Remittances, estimated at a minimum of \$150 billion a year by the World Bank; and Unregulated Islamic banking institutions throughout the Middle East, which deal mostly in cash without systematic reporting requirements.”¹⁰⁵

Has Government Action Toward Charities Been Proportionate to the Potential Dangers They May Pose?

The federal government’s attempts to prevent use of charities as fronts for terrorists or mechanisms for laundering funds to them appear to be disproportionate to any threat charities represent. Many of the measures undertaken, from list checking to freezing assets, have been based on flimsy evidence.

Tax-Exempt Status Can Be Suspended Without Due Process

Congress passed the Military Family Tax Relief Act of 2003 (P.L. 108-121) that authorizes the Internal Revenue Service to suspend the tax exemption of any nonprofit that is officially designated as a terrorist organization. Designation usually occurs by Executive Order. Contributions to such groups are not tax deductible. There are no

¹⁰⁵ Barnett F. Baron, “Commentary: Philanthropy and Homeland Security,” *Foundation News and Commentary*, May/June 2004.

due process rights for affected groups, since the act says, “no organization or other person may challenge a suspension in any administrative or judicial proceeding...”¹⁰⁶ The law does allow the Executive Branch to restore exempt-status in the case of erroneous designation.

The IRS has implemented the law, initially revoking the exempt status of groups designated under Executive Order 13224. In June they suspended the tax-exempt status of the Rabbi Meir Kahane Memorial Fund, which is a part of the Kahane movement.¹⁰⁷ Kahane-related groups were designated by the State Department as terrorist organizations in December of 2000. Kahane groups, including the fund, work to promote the views of the Israeli politician, Rabbi Meir Kahane, who believed that Israel is the motherland of the Jews and all hostile Arabs must be removed. Kahane was assassinated in 1990. The group posted its response on its website, www.kahane.org, claiming, “The State Department wishes to silence the last voice of legitimate and legal opposition to the Road Map and the U.S. ‘peace’ initiatives in the Middle East.”

In October 2004 the IRS revoked the exempt status of a related group, the Islamic African Relief Agency because of an alleged tie to terrorism. In Announcement 2004-87 the Internal Revenue Service said the organization was designated October 13 under Executive Order 13224 as supporting or engaging in terrorist activity or supporting terrorism.

Whether or not the IRS has been justified in designating these groups as supporters of terrorism, the fact remains that revocation of tax-exempt status, without any possibility of appeal, is a draconian measure. Most organizations could not function for long without the ability to raise deductible contributions.

Criminal Charges May be Based on Faulty Evidence

In July, the Justice Department indicted the nation’s largest Muslim charity, Holy Land

¹⁰⁶ Section 1(a)(4).

¹⁰⁷ IRS Announcement 2004-56, June 24, 2004.

Foundation for Relief and Development, and its leaders, charging, according to the *Washington Post*, that they funneled “\$12.4 million over six years to individuals and groups associated with the Islamic Resistance Movement, or Hamas, a Palestinian group that the U.S. government says is a terrorist organizationThe charges against the foundation, which funded orphanages and clinics in the Palestinian territories, and other causes, include material support for terrorism, money laundering and income tax offenses.”¹⁰⁸

The Foundation has been dormant since late 2001, when federal agents froze its assets and raided its headquarters in Dallas. Its legal challenge to the 2001 freeze order was unsuccessful. Later the group sent a letter to the Department of Justice Inspector General asking it to investigate the FBI’s handling of the case, alleging “materially misleading” evidence. Later the same day, the Justice Department unsealed the indictment of the charity and seven top officials.

A lawyer for the Foundation said the government relied on secret evidence, including a misleading 54-page FBI memorandum and erroneous translations of Israeli intelligence reports. An independent translating service hired by Holy Land found 67 discrepancies and errors in a four-page FBI document used in that case. The complaint describes several instances of incorrect or misleading information, including mention of Holy Land’s financial support for Al Razi Hospital, claimed to have Hamas affiliations. The FBI memo did not disclose that the U.S. Agency for International Development also funded the hospital.¹⁰⁹ A central issue in the case will be whether

¹⁰⁸ John Mintz, *Washington Post*, “Justice Department Indicts Nation’s Largest Muslim Charity,” July 28, 2004.

¹⁰⁹ OMB Watch, *The Watcher*, “Muslim Charity Says FBI Fabricated Evidence, 8 Indicted,” August 9, 2004.

funding charities or other groups that have ties to terrorist organizations amounts to funding terrorism.

In September, the Justice Department indicted Adham Amin Hassoun, who was charged with issuing “checks from 1994 to late 2001 to unindicted co-conspirators and groups, including the Holy Land Foundation and Global Relief Foundation, to support jihad.”¹¹⁰

9/11 Commission Finds Concerns about Charities’ Shutdown

A report published in the summer of 2004 by the independent commission to investigate the 9/11 attacks raised “substantial civil liberty concerns” regarding the government’s 2001 shutdown of two Chicago-area Islamic charities.¹¹¹

Federal authorities closed the Benevolence International Foundation (BIF) of Palos Hills, IL, and the Global Relief Foundation (GRF) of Bridgeview, IL, before any official finding that they were aiding terrorist organizations. Both had been under FBI scrutiny for years because of apparent ties to foreign terrorist organizations.

The GAO report had discussed BIF as an international charity whose U.S. executive director was indicted for supporting al Qaeda and other terrorist organizations. According to the Department of Justice, the “Foundation moved charitable contributions fraudulently solicited from donors in the United States to locations abroad to support terrorist activities ... And the Director of the Pakistan office of the ... Foundation avoided a Pakistani intelligence investigation by moving to Afghanistan with the foundation’s money and documents.”¹¹²

The GAO report also reviewed treatment of GRF, which was said to send “more than 90 percent of

its donations abroad, and, according to [Dept. of Justice], the Foundation [had] connections to and [had] provided support and assistance to individuals associated with Osama bin Laden, the al Qaeda network, and other known terrorist groups. The Global Relief Foundation [had] also been linked to financial transactions with the Holy Land Foundation.”¹¹³

But the staff report of the 9/11 Commission found that, “Despite these troubling links, the investigation of BIF and GRF revealed little compelling evidence that either of these charities actually provided financial support to al Qaeda – at least after al Qaeda was designated a foreign terrorist organization in 1999. Indeed, despite unprecedented access to the U.S. and foreign records of these organizations, one of the world’s most experienced and best terrorist prosecutors has not been able to make any criminal case against GRF and resolved the investigation of BIF without a conviction for support of terrorism.”¹¹⁴

The finding calls into question the government’s claims of success in fighting terrorism and highlights the issue of the continued abuses of civil liberties towards Muslim charities since 9/11. The FBI raids on the foreign, and then the Illinois offices of both charities, were authorized under the PATRIOT Act, and required the approval of only one Treasury Department official.

The charities’ assets were frozen for about 10 months before the Treasury Department officially deemed them supporters of terrorism. As a result, both charities closed their doors permanently – leaving over a million dollars intended for humanitarian relief suspended indefinitely. The government did not prove that either group was guilty of any terrorism-related crimes. The director of Benevolence International pled guilty to diverting money to Islamic fighters in Bosnia and Chechnya but

¹¹⁰ Neil A. Lewis, “Two Men Indicted in Fund-Raising for Terrorists,” *New York Times*, Sept. 17, 2004.

¹¹¹ John Roth, Douglas Greenberg and Serena Wille, Staff Report to the Commission: “Monograph on Terrorist Financing,” National Commission on Terrorist Attacks upon the United States, Washington, DC, 2004.

¹¹² www.gao.gov/atext/d04163.txt

¹¹³ Ibid.

¹¹⁴ Roth, Greenberg and Wille, op. cit.

prosecutors later dropped charges that he aided terrorists. A co-founder of Global Relief was deported after an immigration judge deemed him a security risk.

The staff report to the 9/11 Commission concludes that these cases demonstrate the government's dramatic shift from pre-9/11 investigating and monitoring terrorist financing to actively disrupting suspect entities by freezing their assets. It also found that many suspects are denied due process and organizations have been closed without formal evidence that they actually funded al Qaeda or other terrorist groups. The question becomes, what is the threshold of information for the government to take disruptive action against suspect charities?¹¹⁵ What rights should charities have to challenge such allegations and appeal official actions?

These findings are symptomatic of a wider failure to focus the war on terror effectively. "On Sept. 2, a federal judge in Detroit threw out the only jury conviction the Justice Department has obtained on a terrorism charge since 9/11." When the men were initially arrested, "Attorney General John Ashcroft heralded the case in a national press conference ... But Ashcroft held no news conference in September when this case was dismissed, nor did he offer any apologies to the defendants who had spent nearly three years in jail ... Here, as in Iraq, Bush's war [on terrorism] is not going as well as he pretends ...

"Until that reversal, the Detroit case had marked the only terrorist conviction obtained from the Justice Department's detention of more than 5,000 foreign nationals in antiterrorism sweeps since 9/11. So Ashcroft's record is 0 for 5,000 ... [The Justice Department has been guilty] of prosecutorial abuse in the interest of obtaining a 'win' in the war on terrorism."¹¹⁶

Treasury Department Guidelines to Prevent Terrorist Financing Miss the Mark

¹¹⁵ OMB Watch, "Commission Finds Muslim Charities Shutdown Without Cause, 9/7/2004.

¹¹⁶ David Cole, "Taking Liberties," *The Nation*, Oct. 4, 2004.

In May 2003, the IRS asked for public comment on "Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities," a document released by the Treasury Department's Office of Foreign Assets Control (OFAC) in November 2002. The Guidelines cover governance, disclosure, transparency and financial practices. They also include procedures for groups that distribute funds to foreign organizations. Although the Guidelines focus on grantmaking organizations, they apply to all charities in the United States.

Although these best practices are labeled "voluntary" the Treasury Department has authority under the PATRIOT Act to freeze or seize assets of charities. Moreover, it is likely that Treasury Department "best practices" will impose a standard for due diligence that U.S. charities must follow. A number of nonprofit leaders called for the Guidelines to be withdrawn, in part because they were much broader than necessary to prevent diversion of assets to terrorists, and in part because they had not been subject to public comment prior to their release.

The Guidelines address areas generally regulated by the states or Internal Revenue Service. For example, Guideline I(B)(1) requires a board to meet at least three times a year with the majority attending in person. This would preclude the possibility of meeting via teleconference, webcasting or other alternatives used by organizations whose directors might be geographically distant.

In the summer of 2003, the IRS, another agency within the Treasury Department, asked for comments on "how new guidance might reduce the possibility of diversion of assets for non-charitable purposes while preserving the important role of charitable organizations world-wide." More than two dozen nonprofits commented on the guidelines. In April the Treasury Department invited commenters to a meeting to discuss ways the guidelines could be revised to better achieve their goals. A working group

of nonprofit sector organizations then drafted an alternative that is currently circulating for comment within the sector. Later this year the working group will meet with Treasury to discuss specific revisions, using the alternative as the model.

Barnett Baron of the Asia Foundation expressed concern “about the virtual impossibility of full compliance with [the Treasury] Guidelines ... Even if a foundation complies with the Guidelines to the best of its ability, the language is so vague and so sweeping that there is no guarantee its assets will not be frozen or other criminal sanctions will not be applied by the government. In lawyer’s terms, compliance with the Guidelines does not provide a ‘safe harbor’ against possible legal action.” Baron raises several critical issues, one being “the likelihood that other, uninvestigated sources of terrorist financing are significantly more important than the relatively small amounts that may be diverted from the organized and regulated U.S. philanthropic sector.”¹¹⁷

What about regulation of religious congregations to prevent terrorist financing? Baron raises “the likelihood that a significant source of funding for terrorist activities does not come from the regulated philanthropic sector, but from an entirely unregulated source – cash transfers from religious congregations.” He observes that, “Religious congregations in the United States have historically played a substantial role in channeling cash contributions to extremist and terrorist organizations, including the Irish Republican Army, Kosovo Liberation Army, extremists in Chechnya, Sikh extremists in India, Jewish extremists in Israel and Palestinian extremists, among others.” Yet they are exempt from filing IRS Form 1023, the Application for Recognition of Exemption under Section 501(c)(3) and IRS Form 990, the Return of Organizations Exempt from Income Tax. Thus, religious bodies and their grant making are “effectively excluded from government oversight.”¹¹⁸

¹¹⁷ Barnett F. Baron, “Commentary: Philanthropy and Homeland Security,” *Foundation News and Commentary*, May/June 2004.

¹¹⁸ Baron, op. cit.

What Impact Has Misdirected Homeland Security Policy Had on Charities and Other Nonprofits?

Chilling Impact on Groups and Their Members

In November 2003, the Senate Judiciary Committee held a hearing focused on the PATRIOT Act and other post 9/11 policy impacts on civil liberties. Witnesses from opposite ends of the political spectrum criticized the Act, including the American Civil Liberties Union, and former Rep. Bob Barr, who voted in favor of the Act while a member of Congress. Barr told the Committee, “Little did I, or many of my colleagues, know the act would shortly be used in contexts other than terrorism, and in conjunction with a wide array of other, privacy-invasive programs and activities.”¹¹⁹

Nadine Strossen, president of the ACLU, testified that “even the threat of some powers has plainly had a chilling effect on the exercise of constitutional rights – including the freedom to speak, read and associate in ways that challenge government policy ... [Section 215,] whether or not used, has already been harmful to the Arab American community and others who have come under suspicion since September 11.”¹²⁰

She described two Muslim and Arab community and civil rights organizations – the Muslim Community Association of Ann Arbor, MI, and the Islamic Society of Portland, OR – which had reported decreases in membership activity, fundraising, and attendance at prayers and community events because of fear that the government could get the organizations’ records and target their members for investigation, using the PATRIOT Act.

¹¹⁹ Senate Judiciary Committee Holds Hearing on PATRIOT Act, OMB Watcher, December 2, 2003

¹²⁰ Nadine Strossen and Timothy H. Edgar, ACLU, Testimony, U.S. Senate Committee on the Judiciary, “America after 9/11: Freedom Preserved or Freedom Lost?” November 18, 2003.

These organizations had direct experiences with the harm unjustified investigations can do.

Muslim Community Association of Ann Arbor

The Muslim Community Association of Ann Arbor offers religious observances and education, children's programs, and volunteer opportunities for the local Muslim community. It also raises funds for humanitarian relief in Iraq and Palestine.

In July 2003, the group became a plaintiff in a lawsuit against the Justice Department, challenging the search and seizure provisions in Section 215 of the PATRIOT Act. The ACLU is representing the plaintiffs in the suit.

In a statement, President Nazih Hassan said, "The mosque leadership has been quite vocal in its criticism of the wide net that has been cast over the Muslim community. Obviously, we and the government do not always share the same perspective. We are very concerned that our political activities are likely to result in MCA members becoming the focus of additional investigations when we have done nothing wrong and have merely spoken out when we have disagreed with government actions."

Hassan went on to describe MCA members' experience in forming the Free Rabih Haddad committee, saying "Rabih Haddad is a 41-year-old native of Lebanon who came legally to the United States and lived until recently in Ann Arbor with his wife and four children. He was an active member of MCA and a volunteer teacher at MCA's Michigan Islamic Academy. In December 2001, Mr. Haddad was arrested on immigration charges. Though never accused of threatening or harming anyone, Mr. Haddad was denied bond and held in solitary confinement for months with almost no access to his family or the outside world. Mr. Haddad was ultimately imprisoned for approximately 19 months and deported to Lebanon in July 2003. He was never charged with any crime."¹²¹

¹²¹ ACLU Press Release July 30, 2003, at <http://www.aclu.org/news/NewsPrint.cfm?ID=13253&c=206>

Bridge Refugee and Sponsorship Services

A Tennessee-based refugee and immigrant service organization, Bridge Refugee and Sponsorship Services, also joined the lawsuit challenging the PATRIOT Act. The group is an affiliate of the Church World Service, Episcopal Migration Ministries and the Tennessee Department of Human Services. In its 20 years of operation, it has resettled more than 1,500 families from Bosnia, Burundi, Congo, Kosovo, Iran, Iraq, Poland, Romania, Sudan, Ukraine, Vietnam and many other countries. The organization's clients are victims of torture, persecution and domestic violence. They help families find living quarters, health care and jobs and provide information to help them make cultural adjustment.

After 9/11 the FBI approached Bridge seeking information about Iraqi refugees. Mary Lieberman, the executive director and a long-time advocate for refugees, refused to provide the information. The FBI then returned with subpoenas for all records relating to Bridge's Iraqi clients.

Lieberman said, "When I received this document, I experienced a flood of emotions. This subpoena upended all of my assumptions about what our government stands for. I was heartbroken that my government would indiscriminately invade the privacy of people who were not suspected of any crime. I was also heartbroken for our Iraqi clients, many of whom had attained refugee status because they had risked their lives to help the American military during Desert Storm and were then persecuted by Saddam Hussein. I knew that they did not deserve this treatment from our government."¹²²

¹²² ACLU press release, July 30, 2003, "ACLU Files First-Ever Challenge to USA PATRIOT Act, Citing Radical Expansion of FBI Powers" at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13249&c=262>

Bridge filed a motion to quash the subpoena, and the issue was temporarily settled when they provided limited information that duplicated data already on hand at the Immigration and Naturalization Service. However, fearing further subpoenas invoking PATRIOT Act powers, Bridge has moved to protect its clients by altering its record keeping practices and eliminating some sensitive information that clients do not want released. This interferes with Bridge's ability to serve its clients.

The following month, the ACLU presented arguments in federal court in the first case to review the constitutionality of Section 215, making this the first time the Justice Department has had to defend the law in court. The lawsuit "was filed on behalf of six nonprofit organizations that provide a wide range of religious, medical, social and educational services to communities across the country." Friends-of-the-court briefs were filed by the NAACP, American Booksellers Foundation, Americans for free Expression, American Friends Service Committee, Japanese American Citizens League, and Episcopal Migration Ministries.¹²³

House Bill Would Have Limited Open Discussion in Academia

In October 2003, the House of Representatives "voted unanimously...to establish an advisory board to monitor how effectively campus international studies centers serve 'national needs related to homeland security' and to assess whether they provide sufficient air time to champions of American foreign policy."¹²⁴ Amy Newhall, executive director of the Middle East Studies Association, observed that the advisory board oversight would be "counterproductive [as] fewer and fewer students [would study] Arabic, Pashtu, Turkish, Urdu."¹²⁵ Newhall reports that

¹²³ ACLU, press release, Dec. 3, 2003, "Federal Court in Detroit Hears Arguments Today in ACLU Challenge to PATRIOT Act."

¹²⁴ Alisa Solomon, *The Village Voice*, "The Ideology Police: Targeting Middle East studies, zealots' 'homeland security' creates campus insecurity," Feb. 25-March 2, 2004, www.villagevoice.com/print/issues/0408/solomon.php.

¹²⁵ Ibid.

the advisory board provision died in the Senate in June.¹²⁶

The proposal raised substantial concerns about free speech and open debate. "Though it's just a few paragraphs in an arcane piece of routine legislation reauthorizing a relatively small amount of money to what's called 'area studies,' the advisory board provision represents an ominous offensive against academic freedom and oppositional views," according to *The Village Voice*. "The very idea of ideological feds inspecting campus lecture halls takes the culture wars to a perilous new level. The seven-member advisory board ... would oversee the country's 118 international studies centers. This year, they shared about \$95 million under Title VI of the Higher Education Act."¹²⁷

Certification and List Checking Divert Attention from Real Dangers

Foundations Pushed to be Government's Enforcers

On Sept. 6 a *Detroit Free Press* news article reported that "Increasingly, private and corporate philanthropic foundations are checking charities and the people who run them against government watch lists before handing out a dollar ... 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."¹²⁸

This trend has caused considerable controversy about both the appropriate role of foundations in the war on terror and the utility of list checking in fighting terrorism. Should foundations take on tasks that would

¹²⁶ Telephone conversation with author, August 11, 2004.

¹²⁷ Solomon, op. cit.

¹²⁸ Tamara Audi, "Charities do detective work in war on terror," *Detroit Free Press*, Sept. 6, 2004.

be better left to law enforcement? How do the harms and costs of list checking and certification weigh against any benefits in prevention of terrorism? These questions need thorough and thoughtful discussion, since the impact of policing by foundations on the sector can be very negative.

For example, the ACLU recently announced that it turned down \$1.5 million in grants from the Ford and Rockefeller foundations because the proposed grant agreement required certification regarding terrorism that the ACLU felt was vague and overbroad. The language says, "By signing this grant letter, you agree that your organization will not promote or engage in violence, terrorism, bigotry or the destruction of any state, nor will it make subgrants to any entity that engages in these activities."¹²⁹

This type of certification is likely fallout from the Treasury Guidelines discussed above. To assist foundations with avoiding problems with anti-terrorist government efforts, the Council on Foundations (COF) has published a *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know*. COF does not counsel abject compliance with the Treasury Guidelines. "Funders that are new to this issue should not be intimidated," writes the COF's General Counsel. "Rather, they should assess the risk that their grant dollars might be diverted to the support of terrorism, assess whether they need to make changes to their existing due diligence steps, and document their decisions. Above all, funders should not let fear of the new rules discourage them from international grantmaking."¹³⁰

Combined Federal Campaign Becomes a Homeland Security Battleground

¹²⁹ New York Times, October 19, 2004

¹³⁰ Janne G. Gallagher, Vice President and General Counsel, Council on Foundations, "Legal Dimensions of International Grantmaking: Grantmaking in an Age of Terrorism: Some Thoughts about Compliance Strategies," *International Dateline*, Council on Foundations, Issue 70, Second Quarter 2004.

Thousands of domestic charities could be impacted by the homeland security policies involving the federal government's Combined Federal Campaign (CFC), which collects \$250 million from federal employees and military personnel for distribution to many thousands of charities across the country. In October 2003, the CFC began requiring all charities seeking eligibility to sign a certification that they would not knowingly employ people whose names appear on several government terrorism watch lists.¹³¹ Apparently, charities routinely signed off on this certification. Some groups understood it to mean charities would be barred from hiring persons they knew to be on a government terrorist watch list, but did require active list checking.

However, on July 31 a *New York Times* article quoted the head of the CFC, Mara Paternoster, saying that each of the thousands of nonprofits participating in the CFC has an affirmative obligation to check such government lists. "To just sign a certification without corroboration would be false certification," she said. In an August 6 statement on the issue, OMB Watch said, "This affirmative obligation to check every current and prospective employee and every organization we contribute to, against a variety of blacklists is not what we understood we had agreed to. Early reactions to CFC's new interpretation indicate most other participants probably share our understanding."¹³²

The ACLU decided to "reject \$500,000 in CFC contributions rather than submit to a government 'blacklist' policy." In a letter to Paternoster, Anthony D. Romero, executive director of the ACLU, wrote, "By requiring non-profit charities to check their employees against a 'black list' in order to receive

¹³¹ ACLU, press release, July 31, 2004, "Citing Government 'Blacklist' Policy, ACLU Rejects \$500,000 from Funding Program."

¹³²

<http://www.ombwatch.org/article/articleview/2316/1/49?TopicID=1>

donations from the CFC, you are furthering a climate of fear and intimidation that undermines the health and well-being of this nation.”¹³³

Romero further wrote that “the lists are notoriously riddled with error and do not provide individuals with a means to correct false information.” Paternoster replied, citing authority from Executive Order 13224 of Sept. 23, 2001, saying, “We expect the charities will take affirmative action to make sure they are not supporting terrorist activities.”¹³⁴

Taking action to challenge the watch list policy of the CFC, the ACLU announced in August the formation of a coalition involving 15 other organizations. The ACLU said “it is continuing to reach out to the [many] charities that receive funding through the CFC not only to inform them of this extreme policy but also to invite them to participate in this [coalition] effort.” Coalition members include Amnesty International, Lawyers Committee for Civil Rights Under Law, NAACP Legal Defense and Education Fund, National Women’s Law Center, Sierra Club and OMB Watch.¹³⁵

Earlier in the year, the *Washington Times* reported that a master terror watch list had been created by the government in December to be used by the Transportation Safety Agency as a “no-fly” list. Michael McMahon, a federal employee whose name matched one on the list, was detained for 45 minutes at Dulles International Airport and questioned about alleged ties to the Irish Republican Army. A *Washington Times* search found more than 20 people with the same name in Virginia and Maryland.¹³⁶

¹³³ ACLU, press release, July 31, 2004, “Citing Government ‘Blacklist’ Policy, ACLU Rejects \$500,000 from Funding Program.”

¹³⁴ Quoted in Adam Liptak, *New York Times*, “A.C.L.U. to Withdraw from Charity Drive,” August 1, 2004.

¹³⁵ ACLU, press release, August 12, 2004, “ACLU Announces Diverse Nonprofit Coalition Opposing Restrictions on Recipients of the Combined Federal Campaign.”

¹³⁶ OMB Watch, *The Watcher*, Nonprofit Issues, “Terror Prevention and Nonprofits: CFC Policy Raises Concerns about Chilling Impact,” Aug. 9, 2004.

The controversy over list checking by nonprofits has become a diversion from meaningful focus on prevention of terrorist financing. For some it has become a litmus test for patriotism and nonprofit sector opposition to terrorism. For example, Leslie Lenkowsky, a professor of public affairs and philanthropic studies at Indiana University, and former director of the federal Corporation for National and Community Service, writes that the ACLU’s and coalition’s opposition to “the well-intentioned [anti-terrorist] efforts of the federal charity drive ... reinforces the already widespread belief that the nonprofit world is incapable of policing itself.”¹³⁷

Lenkowsky, while raising an important issue, is mistaking “well-intentioned” anti-terrorist efforts for effective ones, and ignoring the potential for harm that list checking can do in the nonprofit sector and society. While groups such as Independent Sector, Council on Foundations, National Council of Nonprofit Associations, OMB Watch and other nonprofit organizations have publicly supported increased accountability for the nonprofit sector, blind compliance with flawed homeland security policy ill serves the higher responsibilities of charities and nonprofit organizations to be the conscience and heart of this country.

US AID Certification Expands List Checking to Those Receiving Training and Advice

The United States Agency for International Development requires its grantees to sign a “World Wide Anti-Terrorism Certification” that was first issued in December 2001

¹³⁷ Leslie Lenkowsky, “Protesting Antiterrorism Rules Could Backfire on Nonprofit Groups,” *Chronicle of Philanthropy*, Sept. 2, 2004. A committee of the Council of Foreign Relations and the National Commission on Terrorist Attacks (the 9/11 Commission) are the two bodies having conducted the investigations.

under authority of Executive Order 13224. Some nongovernmental organizations raised concerns about the vagueness of the language, prompting USAID to revise it in March of this year.

The new certification, meant to prevent grantees from providing material support for terrorism, required extensive verification before assistance can be provided to any individual or organization. It requires grantees to certify that they will:

- Verify that the individual or entity does not appear on the list of Specially Designated Nationals and Blocked Persons kept by the U.S. Treasury's Office of Foreign Assets Control.
- Verify that the individual or entity does not appear on any other list USAID might provide.
- Verify that the individual or entity has not been identified by the UN Security Council's sanction's committee established under Resolution 1267 (1999).
- Consider "all public information about that individual or entity of which it is aware or that is available to the public." This is to include information in the news media, in other published forms, or that "from the totality of the facts and circumstances surrounding the person's interactions with the recipient organization or related to the person's reputation in the community" should make the organization aware of the person's terrorist ties.
- Implement reasonable monitoring and oversight procedures to ensure that the assistance provided does not ultimately support terrorist activity, either directly or indirectly.¹³⁸

Depending on the purpose, scope and structure of a program operated by a USAID grantee, compliance with these requirements may run the gamut from difficult to impossible. For example, this could require checking all attendees at meetings and conferences. The type of inquiry

necessary to fully comply could be extremely costly, invade the privacy of program participants or require information that is not available.

138

Conclusion

A disturbing pattern of federal government action against nonprofits that advocate public policies contrary to the administration's agenda has emerged. In our second year of monitoring and reporting these incidents we found that the administration and its conservative allies continue to selectively use government powers to suppress the voice of these nonprofits. They have not proposed legislation or broad regulatory changes that would be subjected to open discussion and debate. Instead they have taken retaliatory action or selectively enforced laws and rules in ways that are outright punitive.

This trend has had a chilling impact on nonprofits. Groups that depend on federal grants risk losing their funding if they oppose administration rules or policies, even if they do so outside the context of their federally funded work. Overbroad and draconian homeland security policies have reinforced this chill on speech, since nonprofits have witnessed government use its powers to freeze and seize nonprofit assets and leave the groups without any legal recourse, even the opportunity to learn the evidence against it.

The nonprofit sector has shown its resilience during this difficult time by not bowing to pressure and intimidation. Many of the groups described in this report have defended their rights through litigation, advocacy and determination to stick to their principles and plans of action. Sometimes this has resulted in loss of funds and a drain on scarce resources – the cost of defending free speech rights.

Nonprofit advocacy is essential to the democratic process. Charities, foundations and other groups should not be discouraged from speaking out on issues. These groups are invaluable resources that play a unique role in policy debates. Nonprofits have unique experience and information that must be taken into account in public decision-making. The sector is devoted exclusively to the public interest, providing citizens with a collective voice. The federal government, including the administration and Congress, should encourage wide nonprofit participation and open debate on issues.

Unfortunately, just the opposite has occurred. It raises the question: If the government is willing to take retaliatory and selective enforcement action against grantees and other nonprofits that disagree on policy, what would stop it from using homeland security powers to shut down nonprofits that vocally disagree with it? The lack of due process rights in homeland security law leaves the door wide open for politically inspired abuse of these broad anti-terrorism powers.

This report cites a number of examples that indicate a deliberate attempt to limit the voice of opposition on policy debates. But numbers alone are not a proper measure of the seriousness of the problem. Fundamental constitutional rights and the health of the democratic process are threatened.

The pattern of retaliation that emerges from the experiences of these groups raises serious questions, for example:

- The Head Start program and its 2,700 local operations has consistently won plaudits for accomplishing its objective of better preparing poor children for school. Of all the programs surviving from the 1960s War on Poverty why has the administration taken on this venerable program? Is it because the leaders of the National Head Start Association had the temerity to oppose the Bush administration's plans to turn the program over to the states, thereby diminishing, if not ultimately eliminating, the national standards, which have stood the test of time?
- Why did it threaten the Project on Governmental Oversight (POGO) with criminal prosecution when the organization was trying to improve our nuclear security? Is it because POGO has consistently been a thorn in this administration's side by siding with and

reporting on whistleblowers on all manner of government foibles and wrongdoing?

- Why has the government audited Advocates for Youth, the National Education Association (NEA), California Rural Legal Assistance (CRLA) and Land Stewardship Project in Minnesota? Is it because each has been guilty of forceful policy activism on behalf of its constituents?
- Why did it use the Secret Service, in collaboration with local police departments, to create protest zones to keep some demonstrators far away from the president, often behind razor-wire-topped fences? Is it because these demonstrators had policy

differences with the administration?

Friendly demonstrators were allowed in much closer to the action.

The retaliatory government tactics described in this report must end. Public discussion of issues should be based on the merits and include all those that want to be heard, without fear of retribution. To address this, America needs an aggressive, sustained public debate on all issues of public policy by an unbowed and engaged nonprofit sector.