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Fighting Terror and Defending Freedom: The Role of Cost-Benefit Analysis

Daniel J. Mitchell

Fighting Terror and Defending Freedom: The Role of Cost-Benefit Analysis

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The attacks on September 11, 2001, convinced policy makers that the government needed additional tools to both deter and punish terrorists. The USA PATRIOT Act[2] (Patriot Act) was the most visible manifestation of this new strategy – and, other than the decision to depose Saddam Hussein in Iraq, also perhaps the most controversial. Supporters argue that the Patriot Act was a long-overdue modernization of the law, while critics contend that it upset the balance between government power and individual rights. This debate is important, but it usually overshadows the equally critical issue of how law enforcement resources should best be allocated.

Notwithstanding all the bickering, there appears – at least to the outside observer – to be a wide swath of agreement in the legal profession. Legal scholars all seem to agree that government has the right to investigate and prosecute individuals, but that there should be legislative and judicial oversight to ensure the protection of civil liberties. The left and right argue over the precise boundaries of these principles, to be sure, which is why certain aspects of the Patriot Act have aroused so much debate.

Not enough attention is given, however, to the effective use of law enforcement resources. Many of the legal reforms in the Patriot Act ostensibly were enacted to make America safer by increasing the government's ability to catch terrorists, ideally before they strike. But there is more than one way to increase the government's ability to win the war against terrorism. Tilting the balance between government power and individual rights is one option, but similar results can be achieved if the government can more effectively deploy existing resources.

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1. Any views or opinions presented in this article are solely those of Daniel J. Mitchell, Ph.D. and do not necessarily represent those of The Heritage Foundation.

2. United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

Cost-Benefit Analysis

Law enforcement policy should include cost-benefit analysis so that resources are best allocated to protect life, liberty, and property. This should not be a controversial proposition. Cost-benefit analysis may not be a conscious decision, but it already is part of the public policy process. For instance, few people would think it is acceptable for a city of ten million to have just one police officer. Yet it is also true that few would want that city to have five million police officers. In other words, there is a point where additional law enforcement expenditures – both public and private – exceed the likely benefits. Every government makes such decisions.

Cost-benefit analysis applies to aggregate resource allocation choices, such as how many police officers to employ in a city, but also to how a given level of resources is utilized. In other words, since there are not unlimited resources, it makes sense to allocate those resources in ways that yield the greatest benefit. On a practical level, city officials must decide how many officers to put on each shift, how many officers to assign to different neighborhoods, and how many officers to allocate to each type of crime. The same issues apply in the war against terrorism. Officials must decide not only on the level of resources devoted to fighting terrorism, but they also must make allocation decisions between, say, human intelligence and electronic surveillance.

Assessing the Patriot Act

Cost-benefit analysis is not the only tool to judge law enforcement policy. Nor should it necessarily rank above other concerns. To cite an absurd example, imagine that there was solid evidence that arbitrarily detaining all left-handed people would reduce crime rates and increase national economic output. A strict utilitarian approach using cost-benefit analysis might justify that decision, but it would clearly violate other principles – not to mention conflict with numerous provisions of the Constitution.

Even with this caveat, applying cost-benefit analysis to the Patriot Act is a complicated exercise. How does one quantify the benefits of a free society? How does one measure the costs and benefits of legal reforms? What is a benchmark of success in the battle against terrorism? This paper is not going to even try and answer these difficult questions. Instead, it will focus on the more narrow issues of whether, based on cost-benefit analysis, the Patriot Act moves policy in the right direction.

The role of international charities will provide a specific case study.

Despite the controversy, it is not clear that the Patriot Act gives the government vast new powers. Much of the law is designed to modernize existing laws to reflect both changes in technology and the existence of new threats. For instance:

- The law extends the use of surveillance to additional terrorist offenses.[3]
- The law allows "roving wiretaps" to target the communications of an individual rather than just the communications of that individual on a particular telephone.[4]
- The law allows law enforcement to obtain cross-jurisdictional search warrants.[5]
- The law allows investigators to access business records to investigate terrorism-related offenses.[6]

The government argues that these provisions, and others like them, do not change the fundamental relationship between individuals and government.[7] Some private-sector experts support this position.[8] Simply stated, it is difficult to argue that Americans are losing important freedoms if an existing tool is being extended so that it covers a new technology or a new crime. And if the modernization of the law makes it more likely that law enforcement will catch or deter terrorists, then these provisions of the Patriot Act make sense from a cost-benefit perspective.

On the "cost" side, these laws presumably do not increase the cost of investigating and prosecuting terrorists. Indeed, it is likely that law enforcement costs will be marginally reduced since many of the reforms in the Patriot Act, such as the roving wiretap and cross-jurisdictional search warrant, will reduce time spent on bureaucratic procedures.

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3. United States Department of Justice, *The USA PATRIOT Act: Preserving Life and Liberty*, *available at* http://www.lifeandliberty.gov/ (last visited Feb. 13, 2005).

4. *Id.*

5. *Id.*

6. *Id.*

7. United States Department of Justice, *Dispelling the Myths*, *available at* http://www.lifeandliberty.gov/subs/u_myths.htm (last visited Feb. 13, 2005).

8. Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 DUQ. L. REV., 663 (2004).

On the "benefit" side, the government claims that the law has helped fight the battle against terrorism.[9] In the absence of peer-reviewed academic research, it is difficult to determine whether these claims are accurate. Nor does the Department of Justice draw a clear link between its stated achievements and the reforms in the Patriot Act – though another publication does list investigations that have been facilitated by the new law.[10] Cynics may plausibly argue that the government is exaggerating the benefits of the Patriot Act, but it is not unreasonable to think that the provisions in the bill will marginally boost the success of law enforcement.

Anti-Money Laundering Laws

Extending existing law enforcement tools may not alter the relationship between individuals and the state, but this does not necessarily mean that resources are being effectively deployed. Anti-money laundering laws are a good example. Critics have long argued that these laws impose heavy costs and generate few benefits. The Bush White House agreed and proposals to ease the regulatory burden were being reviewed during the Administration's first year.[11] But in the aftermath of September 11, 2001, policy makers were interested only in policies that theoretically might enhance the war against terror. As a result, anti-money laundering laws were expanded as part of the Patriot Act.

But while anti-money laundering laws theoretically help the war against terror, this does not mean that they necessarily are justified by cost-benefit analysis. A relatively new book from the Institute for International Economics, *Chasing Dirty Money: The Fight Against Money Laundering*, strongly supports anti-money laundering laws and advocates their expansion. But the authors admit that these laws imposed costs of $7 billion in 2003, yet they admitted that

> [w]hile the number of suspicious activity reports filed has risen rapidly in recent years. . .total seizures and forfeitures amount to an extremely small

9. United States Department of Justice, *Waging the War on Terror*, *available at* http://www.lifeandliberty.gov/subs/a_terr.htm (last visited Feb. 13, 2005).

10. United States Department of Justice, *Report from the Field: The USA PATRIOT Act at Work*, *available at* http://www.lifeandliberty.gov/docs/071304 report_from_the_field.pdf.

11. Adam Wasch, *Administration Cautions Senators On Risks of Banning Certain Accounts*, Bureau of National Affairs, March 7, 2001, *available at* http://www.freedomandprosperity.org/Articles/bna03-07-01/bna03-07-01.shtml

> sum (approximately $700 million annually in the United States) when compared with the crude estimates of the total amounts laundered. Moreover, there has not been an increase in the number of federal convictions for money laundering.[12]

The private sector bears most of the cost of anti-money laundering laws, but the authors also note that, "Budgetary costs for AML laws have tripled in the last 20 years for prevention and quadrupled for enforcement."[13]

The key question, of course, is whether these costs are matched by concomitant benefits. The answer almost certainly is no. As indicated in the preceding paragraph, the government seizes very little dirty money. There are only about 2,000 convictions for federal money laundering offenses each year, and that number falls by more than 50 percent not counting cases where money laundering was an add-on charge to another offense.[14]

Other nations also seem to have trouble making effective use of anti-money laundering laws. An article in *Dissent* contains the following grim statistics:

> Attempts to find laundered funds are usually dismal failures. According to Interpol, $3 billion in dirty money has been seized in twenty years of struggle against money laundering-about the amount laundered in three days. U.S. Treasury officials say 99.9 percent of the foreign criminal and terrorist money presented for deposit in the United States gets into secure accounts. That means anti-money-laundering efforts fail 99.9 percent of the time.[15]

The problem, at least in part, is that the current system relies on indiscriminate data collection. This collects a haystack of data, so it should come as no surprise that law enforcement squanders considerable resources searching for the needle of criminal activity. A former member of the European Parliament explains that war against crime and terror would be more effective if law enforcement could focus on criminal activity:

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12. Peter Reuter & Edwin M. Truman, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING, INSTITUTE FOR INTERNATIONAL ECONOMICS (2004), *available at* http://www.iie.com/publications/chapters_preview/381/ 1iie3705.pdf (last visited Mar. 31, 2005).

13. *Id.*

14. *Id.*

15. Lucy Komisar, *Offshore Banking: The Secret Threat to America*, DISSENT (Spring 2003), *available at* http://www.dissentmagazine.org/menutest/articles/sp03/komisar.htm.

> There are two quite distinct approaches to this task. One starts at the other end of the chain – the generality of citizens - and seeks to sift through the events of daily life to identify criminal activity. Another focuses on terrorists, criminals or suspected terrorists or criminals themselves, and attempts to identify, pursue and prosecute them: the 'interdiction' approach. The first approach is obviously less focused, more labour intensive and more likely to raise problems of invasion of privacy, clogging of systems and interference with the lives of honest citizens.[16]

An article in the *Journal of Financial Crime* reached a similar conclusion, noting that anti-money laundering laws "often focus on process rather than results [and that there] is very little cost-benefit analysis and very little discussion of whether law enforcement resources are being effectively utilized."[17] A column in the London *Times* noted that the current system "makes the obligation of public authorities passive: in this model they await reports from bank managers, accountants, lawyers and other professionals, rather than taking active steps to deploy crime-fighters to identify, pursue and indict criminals."[18]

A Dismal Record

Statistics only tell part of the story. Even more damning is the first-hand testimony of those who are familiar with the system. An article in *Reason* has a less than flattering appraisal of anti-money laundering laws from a former law enforcement official:

> "I consider all these measures to be highly counterproductive," says John Yoder, director of the Justice Department's Asset Forfeiture Office in the Reagan administration. "It costs more to enforce and regulate them than the benefits that are received. You're getting so much data on people who are absolutely legitimate and who are doing nothing wrong. There's just so much paperwork out there that it's really not a targeted effort. You have investigators running around chasing innocent people, trying to find something that they're doing wrong, rather than targeting real criminals."[19]

The same article also cited a former agent with the Federal Bureau

16. Graham Mather, *Policing of Financial Transactions*, European Policy Forum, Dec. 22, 2003.

17. Daniel Mitchell, *US Government Agencies Confirm that Low-Tax Jurisdictions are not Money Laundering Centers*, *available at* http://www.freedomandprosperity.org/Papers/blacklist/blacklist.shtml (Jan. 2002).

18. Graham Mather, *Money-Laundering Fight Could Hit the Wrong Targets*, TIMES (UK), Oct. 2, 2001.

19. John Berlau, *Show Us Your Money*, REASON, Nov. 2003.

of Investigation:

> Oliver "Buck" Revell, a highly decorated 30-year veteran of the FBI who supervised the bureau's counterterrorism division in the 1980s and '90s, agrees that the sheer volume of data generated by these measures can overwhelm law enforcement efforts. "You can be buried in an avalanche of information," Revell says. "The total volume of activity makes it very difficult to track and trace any type of specific information.[20]

These sentiments are echoed by one of America's top financial consultants. In an article about the Patriot Act, anti-money laundering laws, and the fight against terrorism, Bert Ely wrote:

> The legislation's premise is false, on two grounds. First, the authorities have consistently failed to use existing laws effectively to detect criminal behavior before-the-fact. Second, even with this additional police power, the authorities will still not be able to identify terrorists before they strike nor shut off their funding. In fact, the new law and its accompanying regulations will provide future terrorists with a highly detailed road map of how to avoid detection.[21]

Other experts – even those who are ideologically sympathetic to anti-money laundering laws – reach the same conclusion. A recent *Washington Post* story explained:

> Charles Intriago, a former prosecutor who publishes Miami-based Money Laundering Alert puts it bluntly: "Bottom line: It's a piece of cake [for a terrorist or other criminal] to move $10 million into this country." . . .But even final rules won't provide a "how-to" manual on what to look for, critics say. "There's no meaningful guidance from government for the financial industry on how to detect and report terrorist financing," said Joseph M. Myers, a lawyer who in January stepped down as a career staffer on the White House's National Security Council, where he was the day-to-day coordinator among various federal agencies on the terrorism financing issue.[22]

Not surprisingly, the financial services industry does not relish being deputies for the government. This is not only because they bear the lion's share of the cost for anti-money laundering laws, but also because it forces banks and other financial institutions to adopt an adversary

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20. *Id.*

21. Bert Ely, *Money Laundering Laws Won't Stop International Terrorism*, *in* THE PRIVACY PAPERS, May 29, 2002, *available at* http://www.freecongress.org/commentaries/2002/020529be.asp (last visited May 18, 2005).

22. Kathleen Day & Terrence O'Hara, *Obstacles Block Tracking of Terror Funding*, WASH. POST, July 14, 2004, at E-01.

relationship with customers.[23] But while bankers find anti-money laundering laws bad for business and ineffective, they are reluctant to publicly resist. As noted by the *Economist*:

> No banker present challenged Mr Aufhauser, although some balked at the notion of treating all customers as potential criminals. Most banks these days do not voice such views openly for fear of being accused of not doing their bit to cut off al-Qaeda's sources of money. In private, however, bankers with long experience of financial crime say that many of the rules introduced since September 11th to keep terrorists out of the mainstream financial system will not achieve their aim. And in the end, customers will pay more for banking, because of the high cost of making detailed checks. The heart of the problem, from the banks' point of view, is that the vast majority of financial transactions look (and are) so routine and prosaic. America's Federal Bureau of Investigation recently tried to design a profile of how terrorists might use a bank. It failed to come up with any more unusual activity than placing a big deposit and then withdrawing cash in a series of small amounts. That profile, the anti-money-laundering boss at a big American bank points out, fits a quarter of banks' customers.[24]

Anti-money laundering laws present enough of a challenge when dealing with criminals who are trying to turn "dirty" money into "clean" money. Bankers have an even bigger problem when dealing with terrorists, who usually start with "clean" money and have evil plans. A Reuters dispatch outlines the problem:

> U.S. banks struggling with tough new laws to spot terrorist financing say they will be groping around in the dark until government officials provide more intelligence to narrow the search. Bankers, experts and industry advocates say that unlike money laundering—which dominated dirty money searches before the Sept. 11 attacks—terrorist cash flow has no unique characteristics that would help banks spot, track or avoid it. . . .One government official said on condition of anonymity: "You're looking for a needle in a haystack. Unless you already know who the terrorists are, it's hard to figure out what would be a distinguishing birthmark. There aren't any. . . .In all seriousness, I haven't seen any typology that says: this is a red flag for terrorism," said one senior official at a large U.S. bank. "The only way so far that we can think of to identify terrorist financing is for the government to identify who the terrorists are."[25]

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23. Bob Barr, *Unfriendly Bankers*, UNITED PRESS INT'L, Oct. 16, 2003.

24. *The Needle in the Haystack*, ECONOMIST, Dec. 12, 2002. *available at* http://www.economist.com/displayStory.cfm?Story_ID=1492146.

25. Caroline Drees, *US banks struggle to spot 'terrorist financing,'* REUTERS, Mar. 9, 2004, *available at* http://www.forbes.com/business/newswire/2004/03/09/rtr1291602.

All of these examples indicate that anti-money laundering laws may be inherently dysfunctional. Simply stated, it does not make sense to superficially spy on all financial transactions. Instead, law enforcement would be more successful if government – and its unofficial deputies in the private sector – focused on likely wrongdoers. But this choice also would require cost-benefit analysis. As this Associated Press story indicates, it is unclear that government makes very wise decisions even when resources are targeted against illegal activity:

> The Treasury Department agency entrusted with blocking the financial resources of terrorists has assigned five times as many agents to investigate Cuban embargo violations as it has to track Osama bin Laden's and Saddam Hussein's money, documents show. In addition, the Office of Foreign Assets Control said that between 1990 and 2003 it opened just 93 enforcement investigations related to terrorism. Since 1994 it has collected just $9,425 in fines for terrorism financing violations. In contrast, OFAC opened 10,683 enforcement investigations since 1990 for possible violations of the long-standing economic embargo against Fidel Castro's regime, and collected more than $8 million in fines since 1994, mostly from people who sent money to, did business with or traveled to Cuba without permission.[26]

By themselves, the aforementioned anecdotes might not be terribly damning, but they are worrisome when there is scant evidence that anti-money laundering laws fail to deter or hinder crime. This does not mean that there is no benefit or that the laws do not raise the cost of laundering funds – thus presumably deterring some criminal activity. But it does suggest that the current system is not an effective use of resources.

A Positive Reform

Anti-money laundering laws generally are not very effective, but there has been at least one encouraging development. As part of the Patriot Act, Section 314(a) creates a targeted information request. This feature, sometimes known as the "pointer program," allows government to make requests seeking information about specific individuals suspected of terrorism and money laundering.[27] According to a

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26. John Solomon, *More Agents Track Castro than Bin Laden*, ASSOC. PRESS, Apr. 30, 2004.

27. Stuart A. Levey, Under Secretary, Terrorism and Financial Intelligence, U.S. Department of the Treasury, Testimony, Senate Committee on Banking and Urban Affairs, Sept. 29, 2004, *available at* http://www.treas.gov/press/releases/

description from the Financial Crimes Enforcement Network (FinCEN):

> [T]he rule establishes a mechanism for law enforcement to provide financial institutions with the names of specific suspects, something that would not have likely have occurred on the same magnitude without such a mechanism. Because financial institutions will be required to report back to FinCEN any matches based on such suspect information, law enforcement will have an added incentive to share information with the financial community.[28]

The law has earned positive comments from law enforcement officials.[29] A 2003 report from the FinCEN includes the following favorable comments:

- An ICE Officer wrote, "314(a) information provided by the FI was pivotal to the investigation."[30]
- An IRS Special Agent said, "314(a) information helped the case tremendously. Accounts not previously known were identified and points of contact at the bank were established."[31]
- Another IRS Agent said, "314(a) process is great and valuable. The information request identified domestic account activity previously unknown." The agent said he would definitely use the process again.[32]
- An FBI agent said, "I think the system is fantastic. In all my government years, I really haven't seen a system work this efficiently. I was able to identify over 40 accounts for my subject. I don't think I would have been able to identify some of these accounts without this mechanism."[33]

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js1965.htm?IMAGE.X=31\&IMAGE.Y=15.

28. Department of the Treasury, *Special Information Sharing Procedures To Deter Money Laundering and Terrorist Activity*, Final Rule 31 C.F.R. Part 103, RIN 1506-AA27, *available at* http://www.treas.gov/press/releases/docs/314finalrule.pdf?IMAGE.X=31\&IMAGE.Y=15.

29. Stuart A. Levey, Under Secretary, Terrorism and Financial Intelligence, U.S. Department of the Treasury, Testimony, Senate Committee on Banking, and Urban Affairs, Sept. 29, 2004, *available at* http://www.treas.gov/press/releases/js1965.htm?IMAGE.X=31\&IMAGE.Y=15.

30. Bank Secrecy Act Advisory Group US Department of the Treasury, *SAR Activity Review 6*, Nov. 2003, *available at* http://www.fincen.gov/sarreviewissue6.pdf.

31. *Id.*

32. *Id.*

33. *Id.*

These reports, to be sure, should be taken with a grain of salt. After all, FinCEN is in charge of the program and clearly has an interest in publicizing favorable information. Nonetheless, it is worth noting that it is difficult to find similarly favorable remarks about the value of data collected by traditional anti-money laundering rules. Currency transaction reports (CTRs), which mandate automatic filings for transactions of $10,000 and above, and suspicious activity reports (SARs), which require discretionary filings for unusual transactions, have a less-than-stellar track record.[34]

Interestingly, the Pointer Program matches very closely with the recommendations of the Task Force on Information Exchange and Financial Privacy. Chaired by former Senator Mack Mattingly and advised by former Attorney General Ed Meese, the Task Force of lawyers, economists, and former law enforcement officials was quite critical of conventional anti-money laundering regulations. But the Task Force also endorsed a more targeted approach:

> The last thing that would be constructive in the effort to apprehend terrorists and criminals would be to generate even more untargeted reports by, as has been proposed, reducing the reporting threshold or broadening the reporting network. To rationalize the effort to apprehend terrorists and criminals, the current CTR and SAR system should be replaced. Instead, the authorities should generate a confidential "watch list" consisting of individuals and organizations (and their known aliases, identifying numbers and addresses) about which there is reasonable and significant suspicion of involvement in terrorism, other threats to national security or serious crimes.[35]

The Pointer Program, to be sure, does not replace other anti-money laundering rules and regulations. Nonetheless, at least 314(a) targets those who may be involved in criminal activity. And law enforcement plays an active rather than passive role. Last but not least, it seems to yield results. According to a government report, 270 requests have helped identify 1,508 unknown accounts. That's the good news. The bad news is that the government also admits that this process generated only 9 arrests and 2 indictments.[36]

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34. Task Force on Information Exchange and Financial Privacy, *Report on Financial Privacy, Law Enforcement, and Terrorism*, Mar. 25, 2002, *available at* http://www.freedomandprosperity.org/task-force-report.pdf.

35. *Id.*

36. Financial Crimes Enforcement Network, *FinCEN's 314(a) Fact Sheet*, Jan. 26, 2005, *available at* http://www.fincen.gov/314afactsheet012605.pdf.

It also is worth noting that the Pointer program has generated criticism from some quarters. The financial services industry certainly does not appreciate the imposition of new costs – particularly since 314(a) requests are in addition to other regulatory burdens. And some civil liberties organizations are uncomfortable with the government's ability to focus on particular individuals. But the Pointer program approach at least is based on a common sense approach that it is better to focus a lot on the few people who are sinister rather than spying a little bit on everybody.

International Charities

As part of its anti-terrorist financing guidelines, the government has suggested a "voluntary" set of guidelines for charities.[37] These unofficial regulations impose a number of reporting and bookkeeping requirements on charities, ostensibly to ensure that they do not become – even unwittingly – conduits for contributions to terrorist organizations. This is part of a broader effort by the government to monitor the actions of Muslim-oriented nonprofit organizations.[38]

Not surprisingly, these new guidelines and scrutiny have attracted criticism from the Muslim community, as have some enforcement actions against Islamic charities.[39] The Administration denies targeting Muslim charities, asserting that its efforts "are not in any way intended to impede, restrict or scrutinize legitimate charitable giving. Indeed, the promotion of both faith-based and secular charitable giving is a central goal of this Administration."[40]

Cost-benefit analysis is the missing part of this debate. Ideally, the federal government should demonstrate that these supposedly voluntary

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37. Department of Treasury, *U.S. Department Of Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices For U.S.-Based Charities*, *available at* http://www.treas.gov/press/releases/reports/po36072.pdf (last visited Feb. 15, 2005).

38. Juan Carlos Zarate, Assistant Secretary, *Terrorist Financing and Financial Crimes*, U.S. Department of the Treasury, Testimony to the House Financial Services Committee Subcommittee on Oversight and Investigations, *available at* http://www.treas.gov/press/releases/js2256.htm (last visited Feb. 16, 2005).

39. Council on American-Islamic Relations, *Freeze on Group's Assets Questioned by U.S. Muslims*, Dec. 4, 2001, *available at* http://www.cair-net.org/default.asp?Page=articleView&id=531&theType=NR.

40. Department of Treasury, *Response to Inquiries from Arab American and American Muslim Communities for Guidance on Charitable Best Practices*, Nov. 7, 2002., *available at* http://www.treas.gov/press/releases/po3607.htm.

guidelines will yield benefits that exceed the combined costs to taxpayers and the nonprofit sector. The anti-terrorist financing guidelines will mean more regulation and bureaucracy. The costs to taxpayers may not be large, but it will impose a burden on charities.

To be sure, the guidelines do not impose onerous requirements. Indeed, many of the recordkeeping and reporting requirements should present very little problem for well-run charitable organizations. But on the other hand, it is also appropriate to ask whether there is any reason to think these guidelines will hinder charities that want to aid terrorists?

A comparison of the Pointer Program and other anti-money laundering policies should be a road map. Guidelines, reporting requirements, and other obligations imposed on large populations are unlikely to be effective. As discussed above, collecting too much information means looking for a needle in a haystack. Making the haystack bigger may complicate the job of law enforcement in addition to raising privacy concerns.

This does not mean that Islamic charities should not play a role in the battle against terrorism. While charities do not exist to act as deputies of law enforcement, there is an obligation to fight evil. This means avoiding contact with or assistance to designated individuals and entities. It also means a moral obligation to cooperate with investigations and prosecutions.

Finally, there is the issue of profiling. While beyond the scope of this paper, cost-benefit analysis presumably would justify the targeting of law enforcement resources against a subset of the population that – empirically speaking – shares certain characteristics with 100 percent of the terrorists that attacked America. The key question, of course, is where to draw the line. Clearly it would be impermissible to travel down the path of Rooseveltian detention camps, not to mention grossly unfair to the vast majority of American Muslims that have no sympathy for terrorism. But would it also be impermissible for the Federal Bureau of Investigation to spend more time investigating – based on their shares of the U.S. population – Muslims compared to Jews? As one author argued:

> One unchallengeable fact of the war on terrorism is that the enemy consists overwhelmingly of radical Muslims. To defeat al Qaeda inside the United States, domestic terrorist fighters must find the Muslim terrorist cells, penetrate them, and then destroy them. Fishing through financial records will not flag those cells, particularly as future terrorists become more effective in covering their financial tracks. Instead, the search for the terrorists' cells must start where they incubate—in the minority of Muslim

mosques, cultural centers, and similar gathering spots where hatred of America is fomented.[41]

Conclusion

The issues raised in this paper show that there is no substitute for traditional methods of investigation. Anti-terrorist activities are more likely to be effective when targeted against those who have come to the attention of authorities for various reasons, including bribery and surveillance. Whether focused on banks or charities, indiscriminate information-collecting exercises should play a secondary role. John Berlau's *Reason* article provides a useful summary:

> Have we gotten more security during the last 30 years in exchange for the privacy we've sacrificed? Looking specifically at the BSA and other bank surveillance measures, prominent experts in law enforcement, national security, and technology say the answer is no. The record of FinCEN, the agency that was charged with tracking terrorist financing prior to 9/11, seems to vindicate their arguments. The lack of success with the financial information that the government has long been collecting does not bode well for more-ambitious data dredging plans. Indeed, experience suggests that piling up more data could make it *harder* to zero in on terrorists.[42]

In a 1974 dissent in *California Bankers Association v. Schultz*, Justice Douglas argued that the Fourth Amendment should protect financial records.[43] He was unsuccessful, but he accurately warned that this created the proverbial slippery slope: "It would be highly useful to government espionage to have reports from all our bookstores, all our hardware and retail stores, all our drugstores . . .What one buys at the hardware and retail stores may furnish clues to potential uses of wires, soap powders, and the like used by criminals."[44]

41. Ely, *supra* note 21.
42. Berlau, *supra* note 19.
43. 416 U.S. 21 (1974).
44. *Id.* at 84-85.