May 6, 2024

Re: S. 4136/H.R. 6408, a bill to amend the Internal Revenue Code of 1986 to terminate the tax-exempt status of terrorist supporting organizations

Dear Senator,

The American Civil Liberties Union (ACLU) urges you to oppose S. 4136/H.R. 6408, legislation that would authorize the Secretary of the Treasury to unilaterally designate U.S. nonprofits as "terrorist supporting organizations," strip them of their tax-exempt status, and effectively shut them down.[1] The prohibitions instituted by S. 4136/H.R. 6408 are already illegal under current law, the legislation raises serious constitutional concerns, and because S. 4136/H.R. 6408 vests vast discretion in the Secretary of the Treasury, it creates a high risk of politicized and discriminatory enforcement. The ACLU has deep concerns with this legislation and urges that you oppose any attempt to add S. 4136/H.R. 6408 to a must pass vehicle or otherwise allow the Senate to fast track its enactment.

Under both federal criminal laws and sanctions regimes, U.S. nonprofits organizations are already prohibited from providing broadly-defined "material support" to foreign terrorist organizations and terrorist activity, with severe criminal and civil penalties—and immigration consequences for non-citizens—for violations.[2] Thus, the executive branch already has extensive authority to prohibit transactions with individuals and entities it deems connected to terrorism—including in ways that have raised serious constitutional concerns in the last two decades—and new legislation is unnecessary.

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[1] Under S. 4136, the Secretary of the Treasury may designate a U.S. nonprofit as a "terrorist supporting organization" if the Secretary determines that the nonprofit has provided "material support" to a "terrorist organization." "Terrorist organization" is defined in 26 U.S.C. § 501(p)(2); Section 501(p) already allows the IRS to suspend the tax-exempt status of organizations deemed a "terrorist organization or foreign terrorist organization" under federal law.

[2] *See, e.g.,* 18 U.S.C. § 2339A; 18 U.S.C. § 2339B; Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. § 1189; Immigration and Naturalization Act, 8 U.S.C. § 1182; Exec. Order No. 13, 224 (2001). For example, under 18 U.S.C. § 2339B providing material support to a foreign terrorist organization is a federal crime. Violations are punishable by up to 20 years in prison and severe fines, and nonprofits based in the US or with are subject to this law. Under the Global Terrorism Sanctions Regulations, the Secretary of the Treasury (together with the Secretary of State) has the authority to label a broad range of individuals and entities—both foreign and domestic—as "Specially Designated Global Terrorists." It is illegal for anyone in the United States, including a nonprofit, to engage in a transaction with a Specially Designated Global Terrorist—even when the transaction does not rise to the level of "material support." Any violation is subject to civil penalties of hundreds of thousands of dollars. The Treasury Department's Office of Foreign Assets Control (OFAC) identifies prohibited transactions and imposes civil penalties.

Without any evidence of the need for new legislation, this bill authorizes broad and easily abused new powers for the executive branch. It grants the Secretary of the Treasury virtually unfettered discretion to designate a U.S. nonprofit as a "terrorist supporting organization" and to strip it of its tax-exempt status if the Secretary finds that the nonprofit has provided material support to a terrorist group, even if the "support" is not intentional or connected to actual violence.

The legislation raises significant constitutional concerns, starting with fundamental due process: the Secretary of Treasury could strip U.S. nonprofits of their tax-exempt status based on secret evidence without providing nonprofits a meaningful opportunity to defend themselves before a neutral decisionmaker. In effect, it switches the burden of proof about whether a nonprofit provides material support from the government to the nonprofit. While the bill purports to require "notice," it does not require disclosure of all the reasons for designation or the evidence relied upon to support it—or evidence in the government's possession that might undermine the designation. Instead, the legislation explicitly allows the Secretary to limit notice of the reasons and evidence only "to the extent consistent with national security and law enforcement interests."

As a result, nonprofits can be left in the dark about what conduct the government believes constitutes material support, making it nearly impossible for a nonprofit to clear its name before it is effectively shut down. The bill's creation of an after-the-fact administrative or judicial appeals process not only comes too late, but it is also unlikely to remedy these fundamental deficiencies. Even the legislation's judicial review provision allows the government to submit classified information to federal courts behind closed doors and without making it available to the nonprofit or its lawyer.

The addition of this authority to the tax code would allow the IRS to explicitly target domestic nonprofits using its investigative authority. In practice the executive branch could abuse the authority of the IRS against nonprofits using the tools granted to it by this legislation. This could provide the executive branch with an additional avenue to harass and target politically disfavored groups.

S.4136/H.R. 6408 unjustifiably and unfairly places American nonprofits in the IRS's crosshairs, undermining critically important goals and values. For example:

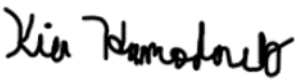
- U.S. nonprofits navigate providing medical, food, and other life-saving humanitarian aid to civilians in multiple parts of the world where both federally designated terrorist groups and rights-violating governments operate.
- U.S.-based human rights groups similarly navigate difficult and dangerous conditions in documenting rights abuses by all parties to conflicts—in areas controlled by terrorist groups and repressive regimes alike—to protect civilians and uphold the international legal regime the U.S. itself invokes and relies upon.

In conducting their life-saving work, these groups, which are already subject to stringent federal material support law and penalties, should also not have to navigate the new threat of being investigated and shut down wrongly and unfairly.

Moreover, the executive branch could interpret the definition of material support broadly to apply to these and other American nonprofits' political advocacy and other activities protected by the First Amendment. Regardless of whether such an effort ultimately holds up in court, the fear of reputational harm and financial risk from designation could curtail constitutionally protected activities.

There has been no evidence presented as to the necessity of this legislation, and the lack of guardrails creates the potential for a future administration to weaponize this legislation to further its own political motives to target U.S. nonprofits, exposing them to stigmatizing and financially devastating punishments. The ACLU urges you to oppose S. 4136/H.R. 6408. If you have questions, please contact Senior Policy Counsel Kia Hamadanchy at khamadanchy@aclu.org or (734)-649-2929.

Sincerely,



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