

Foundations and Their Role in Antiterrorism Enforcement: Findings from a Recent Study and Implications for the Future

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International Grantmaking III, released last Fall by the Foundation Center and Council on Foundations, documents a five-fold increase in international giving (of all types) in the last decade. But direct U.S. grantmaking overseas is now declining, with a trend toward funding through intermediaries. According to the report, 78 percent of the international funders surveyed believe a “Stricter Regulatory Environment and the ‘War on Terrorism’ Have Increased Difficulties of International Grantmaking.” Foundations of all types and sizes concurred with this opinion. Funders that make grants overseas are increasingly using U.S.-based intermediaries in the performance of due diligence and compliance with regulatory concerns arising from the 2001 Executive Order 13224, the USA Patriot Act, and most particularly the Department of Treasury’s voluntary “Anti-Terrorist Financing Guidelines.”

In independent research conducted while I was appointed at the Georgetown Public Policy Institute’s Center for Public and Nonprofit Leadership, I found that most large international funders believe they have been forced into an inappropriate policing situation. Although not legally required, through the practice of certification and the checking of watch lists, many grantmakers are pursuing a strategy of sharing potential liability with their grantees in order to protect their own assets.

Executive Order 13224, made effective by President Bush immediately following the 9/11 attacks, a month before the Patriot Act passed, and therefore without the check of Congressional deliberation, broadly prohibits “transactions with persons who commit, threaten to commit, or support terrorism.” The authority for this Executive Order comes from the International Emergency Economic Powers Act (IEEPA). “The term ‘person’ means an individual or an entity”... an association, corporation, organization, group or subgroup.” This includes nonprofits and non-governmental organizations. “[T]he term ‘terrorism’ means an activity that... involves a violent act,” or “appears to be intended” among other things “to influence the policy of a government by intimidation or coercion.” I worry about this language because dissent and pressure by advocacy groups to influence policy might be construed as illegal.¹

¹ This is also a point made by Anthony Romero of the ACLU, in a front page story from October 19, 2004: “What do they mean by terrorism? What constitutes support for terrorism? We need to know precisely what those words mean. It is certainly appropriate for Ford and Rockefeller to require grantees to comply with existing federal law, but in a climate of fear and intimidation, vague language that goes beyond the legal requirements is regrettable and ill advised (Strom, Stephanie, “ACLU rejects foundation grants over terror language,” *The New York Times*, October 19, 2004).”

The Executive Order introduces a blacklist of individuals and organizations suspected of terrorism, materially aiding terrorism, or associating with terrorists. IEEPA, by the way, permits humanitarian assistance, including food, clothing and medicine, but this is also outlawed under the Executive Order. Even the children of suspected terrorists are not entitled to assistance under 13224. (This puts the Executive Order, by the way, in contradiction with international law.) 13224 was actually released with the first “list” of only 27 names. When I checked last month, it had grown to some 202 pages (more the doubling since the Fall of 2004). There is also some question as to the political motivations behind additions to the lists, as there have been allegations of foreign governments requesting the designation of opposition groups and insurgents.

List checking by foundations, nonprofit organizations, or other groups, is not legally required by the Executive Order. With the lists attached, however, it is implied. The Treasury Guidelines specifically advise international funders to gather information on potential grantee groups, their employees, subcontracting organizations, and vendors, as well as to check the lists. In several references, the Guidelines suggest that: “The charity should run the names through public databases...” They presume that charitable organizations are primarily laundering money, and demonstrate little understanding of charitable intent, mission or grantmaking practices.

A similar approach is central to Operation Green Quest, an effort involving many federal agencies, to follow the money trail between American organizations and terrorists abroad. In a brochure designed to encourage banks and other financial institutions to report suspicious activity, the government urges them to watch out for charity or relief organizations that could be channeling funds to terrorists and notes that an indication of potential trouble could be transfers between bank accounts of related entities or charities. Many nonprofit groups that have nothing to do with terrorists make such transactions as a regular part of doing their work, and they should not have to worry that they will be investigated for doing so.

All of this furor is also based on questionable ‘evidence’ that charities are a *significant* source of funding for terrorist activities. Yet, Kenneth Dam, Deputy Secretary at Treasury claimed, speaking before the Senate Committee on Banking, Housing and Urban Affairs, Subcommittee on International Trade and Finance, that “Our fight against financing of terror has expanded to the abuse of charities.”²

Some of the nation’s largest Islamic public charities immediately came under suspicion following 9/11. The Holy Land Foundation was the first listed on December, 2001, and its assets were frozen. Holy Land was indicted in July 2004. Notice the lapse of years and due process. The Global Relief Foundation, added to the list October, 2002, and the Benevolence International Foundation, on November, 2002. The assets of the last two groups were frozen in December, 2001, months before they were officially put on the terrorist list. An estimated \$15 million in assets of Islamic charities have been frozen. Since then, according to the 9/11 Commission’s Monograph on Terrorist Financing and OMB-Watch, “the government has neither proven either group was guilty

² Transcript available online at <http://japan.usembassy.gov/e/p/tp-se1560.html>

of any terrorism-related crimes³, nor convicted anyone involved.” Both charities were permanently closed down. The co-founder of Global Relief was deported.

This Fall, the government froze the assets of the Islamic African Relief Agency, with offices in Missouri and Connecticut, although no charges have been announced. Early this year, the *Dallas Morning News* reported that KinderUSA, “[a]n international Islamic charity based in Dallas has suspended operations.” A Kinder employee was approached by the FBI and bribed for information. The organization’s email was being monitored and they suspected their offices had been raided. The board decided not to risk raising money from donors when assets might be frozen at any time. Faithful Muslims must tithe to the poor, and these are the kinds of charities that dispense those gifts, especially during Ramadan. With no charges and a lack of substantial evidence, the charities have no recourse to defend themselves. The contributions made by thousands of Americans will never go toward the charitable purposes that they intended.

Throughout the country, giving to international projects has been stymied by the federal government’s overzealous efforts to ensure that nonprofit groups do not aid terrorists. If I had time today, I’d want to explore the connections between the outpouring of Tsunami relief, the PR campaign of the U.S. Presidents Bush, Clinton and Carter, the Treasury Guidelines, and the difficulty of getting the money to those in greatest need.

Many of the new security rules have impinged not just on the civil rights and liberties of Muslims and Islamic organizations, but also on nonprofit advocacy groups critical of the Bush administration. The damage that has been done to nonprofit groups that could be at the forefront of promoting peace cannot be overestimated. Changes in foundation practices are only a preview of what may come.

In November, 2002, with the Executive Order and the Patriot Act as the (presumed) legal basis, new government oversight of charities came in the form of the Treasury Department’s “Anti-Terrorist Financing Guidelines: *Voluntary* Best Practices for US-Based Charities.” Ironically, Arab-American and Muslim-American organizations had asked Treasury for “guidance on how to avoid legal penalties.”⁴

The confusing Guidelines, in conjunction with the Executive Order, directly affect corporate grantmaking and matching gift programs, foundation funding (especially abroad), and international charitable organizations. In the opinion of many, they place the onus of ferreting out terrorists and terrorist activities on grantmakers and nonprofit groups, rather than the US government.

According to Jon Small, Executive Director of the Nonprofit Coordinating Committee of New York, “If the government believes an organization is supporting

³ The leader of BIF was convicted on non-terrorism-related charges. The 9/11 Commission Report’s Monograph on Terrorist Financing, pg. 11.

⁴ Baron, Barnett, “Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy,” *The International Journal for Not-for-Profit Law*, Volume Six, Issue Two, January 2004

terrorist activities, it has extensive powers to investigate and prosecute those organizations. It should use those powers and not a blacklist that convicts people without due process.”⁵

Over the last eight months, along with GPPI graduate student and research assistant Amanda Horwitz, I initiated a study on when and why foundations accepted these ‘voluntary’ measures and started list checking and certification, and to what extent the Executive Order and Treasury Guidelines have inhibited or altered the nature of international charitable giving. In addition to a focus group with 20 participants at the Grantmakers without Borders conference, we contacted the CEOs of 20 of the largest international funders in the US (based on Foundation Center information on the Top 50 US Foundations Awarding Grants Outside the US, and the Top 50 US Foundations Awarding Grants for International Affairs, both circa 2002).

We conducted interviews with ten representatives of these foundations, and we received materials detailing the compliance strategies of four others. The bulk of the interviews were with the Corporate Secretaries or General Counsels, many at the Vice Presidential level. One President participated under the condition that the interview was confidential. A few other interviews were also conducted in confidence, so all the material from interviews presented here is treated confidentially. The remaining six funders did not respond to our queries, in spite of repeated telephone follow-up. In fact, some of those we did interview were also resistant to speaking openly about the confusion and uncertainty facing foundations in their quest to be ‘in compliance’ with the post-9/11 anti-terrorist financing regulations.

Our conversations with different foundation administrators were remarkably similar. The Vice President of a large grantmaking institution told us:

We were probably aware of the Executive Order in a reasonable timeframe after it was issued, but we didn’t start making any changes until the Guidelines were issued. We thought that our processes were pretty good to begin with in terms of due diligence and didn’t have any concerns that we would be funding any terrorist activities... Let me put this in perspective. The Executive Order and the Guidelines go hand in hand. You could say the foundations were responding to the Executive Order, but the Guidelines often brought it to our attention. What we’re concerned about is the legality, which is of critical importance. There is the fact that standards of conduct get measured. And, then there’s the fact that you don’t want to be seen as not doing battle against terrorism. Whether or not checking lists is an effective component of that is another question... I doubt that checking lists does much to stop terrorism.

As Barnett Baron of the Asia Foundation has pointed out, the guidelines erroneously assume that comprehensive and detailed information about prospective grantees is available and can be readily collected in the developing world, takes a one-size-fits-all approach, and ultimately puts charities in the untenable role of criminal

⁵ Woverton, Brad, “Federal Campaign Flap,” *The Chronicle of Philanthropy*, August 19, 2004

investigators and enforcers of US law⁶. These “intrusive and unnecessary due diligence requirements could destroy the trust necessary for good partnerships between US organizations and their overseas partners,” he warns.⁷

The overly broad language used in the document also has troubling implications. “As currently written, the Guidelines contain many undefined terms that leave grant-makers vulnerable to criminal and civil risk.” Funders are warned not to make grants to those who “deal with” or are “otherwise associated with” terrorists, or are “implicated in any questionable activity,” or appear on “any other official list available to the charity”. They are to conduct a “reasonable search” and take “reasonable steps” to ensure that charitable grants are not diverted to terrorist organizations. None of these terms are defined, leaving grant-makers open to potential legal risk and, in turn, potentially frightening them away from international grant-making,” writes Baron.⁸

The Guidelines have been called unrealistic, impractical, costly and potentially dangerous. I’m told that Treasury issued them because of pressure from President Bush. No one is arguing that terrorism is not a real and dangerous threat. But, by enforcing elaborate, draconian rules, Washington is doing mightily what it claims to be against: harming charities and the people they serve while doing little to stem terrorism.

We observed a kind of cognitive dissonance among foundations concerning the Treasury Guidelines. Grantmakers are eager to point out that their giving priorities and processes have not changed as a result of new security legislation. To quote one Corporate Secretary, whose comments were similar to many others, “We didn’t change anything in our grantmaking policies or procedures.” Yet in the same breath those interviewed mention discussions with legal counsel and rattle off the lists they check and other ways they have adapted to this new environment. In fact, all of the foundations we contacted check lists. Some do it daily, others weekly or monthly. In implementing the new list checking systems, the price tag varies from being negligible for some grantmakers to as high as \$500,000 for one or two other notable foundations.

The Vice President of a major foundation described its comprehensive list checking procedures. When a conversation starts between a program manager and a potential grantee, the appropriate program director is told, and members of the organization are checked against the lists. Then when the grant is made, the organization is checked again, and at the fund disbursement step, the organization and principals checked yet a third time. Additionally, all active grantees are checked every day.

At least one foundation uses a form of profiling in their list checking.

⁶ Baron, Barnett. “Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy,” *The International Journal of Not-for-Profit Law*, Volume Six, Issue Two - January 2004

⁷ IBID

⁸ IBID

We have a Fellowship Program for people who study Islam. The recipients have to be US citizens or have green cards. I will check the 8 to 10 finalists. I'm assuming I won't find any matches. If so, I would talk to the President of [the Foundation] and then try to contact the person or organization. We'd put a permanent record in the grant file.

When we think of lists and list checking, we almost immediately think of the communist blacklists of McCarthyism. There are other clear parallels ...related to the politics of fear and the ideas suggested in the Operation Green Quest brochure of becoming informants and weeding out a threat from within. And, of course, no funder wants to be seen as standing in the way of the fight against terrorism. This raises the unavoidable question as to whether the hunt for terrorists has a political leaning the way McCarthyism did. Are progressive philanthropies or advocacy groups under more scrutiny?⁹

It is perhaps ironic that suspicion in the 1940s and 50s centered on artists/intellectuals. Now the targets are nonprofit groups and philanthropists. However, the movie industry in Hollywood of the 1940s was not asked by the government to enforce the black lists. Yet the Executive Order, the Treasury Guidelines, statements of government officials and advice of lawyers has taken America's foundations dangerously close to acting as the enforcement or police arm of the lists and even more troubling, passing it on to their grantees.

The actual lists have been proliferating since enactment of the Executive Order. According to a *Wall Street Journal* article there are at least a dozen different watch lists currently in use by federal agencies. "The inspector general of the Homeland Security Department, in a sometimes scathing report, cites poor cooperation among many agencies and says his own agency failed "to play a lead role" in oversight. Almost four years later, there is no single, consolidated watch list."¹⁰

Furthermore, the lists are inaccurate. There may be many false positive names. No one knows how to remove a name once it is incorrectly added. The most famous cases include Senator Ted Kenney and singer Cat Stevens, who are both on one or another list, as well as an Anthonio Romero, listed five times, who might the Anthony Romero of the ACLU?

The Corporate Secretary at a large grantmaking institution told us:

⁹ For further reading on this subject I recommend the July 2003 OMB Watch report: An attack on Nonprofit Speech: Death by a Thousand Cuts, and the follow-up report, Continuing Attacks on Nonprofit Speech: Death by a Thousand Cuts II.

¹⁰ Block, Robert and Gary Fields, "Effort to create terror watch list is falling behind, report finds," The Wall Street Journal, October 1, 2004

Anytime a name gets entered into our database... it gets checked. Our IT department integrated it [the Specially Designated Individuals list] with our database... You put in almost any name and come up with a partial match. When this happens, the program staff checks to verify that the person is not the same as the one listed... Every six months a staff member, particularly if they're new, asks us a question about a name on a list and we investigate further... The system ranks the likelihood of a match by the last name and location. -----, who was on our board at one time, is on the list, but we know he's not a terrorist... We're not funding in the Middle East, so it's not really a problem.

In the vacuum of government guidance and inaction, commercial groups have stepped in to help charities with list checking. These businesses include Bridger Systems, ChoicePoint (which has acquired Bridger), CreateHope, InformationAgeAssociates and the Oasis Group. (I trust, as my remarks continue, that you'll notice how deceiving the names of these companies are and even strangely like *Brave New World*.) One of CreateHope's corporate clients enthusiastically told me that the firm checks the lists, runs background checks on employees and vendors of nonprofit groups that might receive funding, and monitors the press for any stories critical of the charity.

Universities are also getting into the game. In recent weeks, the government has released the prototype for new search technology "to sniff out terrorists." Agencies including the Federal Aviation Administration are investing in a new search engine, or "text analysis system," being developed at the University of Buffalo to "mine a corpus of documents for associated ideas or connections – connections between two unrelated concepts, for example, that would otherwise go unseen or would take countless hours of investigative work to discover." It's a kind of government google, specifically funded for anti-terrorism efforts and initially used for searching over data within the 9/11 Commission report and related public Web pages.¹¹ But I stray from the main topic --

The Treasury Guidelines were released without any dialogue or input. They actually muddle the normal regulatory schema for the third sector as the Internal Revenue Service is the government agency charged with oversight of 501(c)(3) organizations. A whole body of mandatory law already governs nonprofit organizations (although the extent of oversight or regulation is open to question and would need to be the topic of another speech.) Some items in the Guidelines are incongruous with existing law.

Major nonprofit organizations and trade associations coalesced in protest against them. Funders told us, "Everyone agrees that the voluntary Guidelines are impossible to deal with... It would be difficult to make any grants if we followed the Guidelines," and "Some aspects of the voluntary Guidelines are ludicrous, would turn us into police, not grantors."

Treasury received a flurry of letters. Although many organizations have been involved in the formulation of a strategic response to Treasury, the Council on

¹¹ Deck-Miller, Annie, "UB system aids counterterrorism." *Business First*, American City Business Journals, Inc., 2005 and <http://www.zdnetindia.com/news/features/stories/122918.html>.

Foundations took a lead role. As you probably know, the Council is the largest trade association representing grantmakers and the coordinator of what became the Treasury Guidelines Working Group.

The Working Group is comprised of some 30 to 40 loosely organized and participating nonprofits, many umbrella groups representing civil liberties advocates, corporate giving programs, foundations, and international relief organizations. The Working Group has formulated “Principals of International Grantmaking,” which they recently released in the hopes that the Guidelines will be reconsidered or even withdrawn. In response to Working Group negotiations, the Treasury Department has announced that they are re-drafting the guidelines, but timing and content are unspecified. New guidelines may be released next week or next year. They may be clearer or vaguer.

The Council on Foundations initially issued a response to Treasury urging a better balance between the need for government oversight and the need to support grantmakers and avoid untenable burdens. But the Council’s comments in this and other documents on their website calls for a risk-based approach that helps grantmakers identify grants that ‘present a greater risk for diversion’ to terrorists. Unfortunately, indicators of higher risk include groups that are not already well-known to the foundation, start up efforts, smaller organizations and the like. Such risk assessments could have a disproportionate effect on small or grassroots advocacy groups, especially those outside the US.

I’ve now seen a few different matrices suggesting that big grants are less risky than small grants or project specific grants are less risky than general operating grants. All this flies in the face of what many in the field have been advocating for at least 30 years.

CreateHope, which I mentioned earlier, provides risk assessments of potential grantees. Risk assessment and risk management tools are not new to nonprofit groups, although the approach is clearly more corporate. Yet much of the literature on the nonprofit sector, and the role of philanthropy in particular, urges taking risks, experimenting, being innovative, holding government accountable, and even testing solutions to problems for which government might take ultimate responsibility.

The Manager of Grants Administration for a large international funder explained:

The Foundation responded on the advice of legal counsel by looking at a risk assessment: size of grant, type of grant, general purpose or not, mostly because of the Executive Order. We did an internal risk assessment and legal counsel provided an opinion.

Is a risk-based approach the principled response, or is it rather more utilitarian? Is this ‘grant profiling’? Might it potentially change the character of the nonprofit sector?¹²

¹² A *Handbook on Counter-Terrorism Measures: What US Nonprofits and Grantmakers Need to Know* was recently published by the Independent Sector (a coalition of approximately 600 national organizations, foundations, and corporate philanthropy programs), InterAction (an alliance of 160 US-based international development and humanitarian nongovernmental organizations),

Most foundations have changed the language in the letters they send out to grantees, and require organizations to sign a document ‘certifying’ that they will not “knowingly permit any portion of the grant to go to terrorism or violence.” Subtle differences in language are used by various foundations, but many employ language that has been all but codified.

Nonprofit groups, and especially grantmaking intermediaries, report that foundations are increasingly requiring certification from the groups they fund. The directors of two international grantmaking intermediaries report that at least three of its funders to date are requiring certification. One of them has had several unpleasant interactions with a funder: the first around the mere reference in a narrative report about indigenous movements to groups that had once advocated violence and again with regard to a funding recommendation for a group in Bolivia. The grantmaker in question thought there *might* be the possibility that *at some time in the future* groups in Bolivia would use violent methods that *could* be labeled terrorist.

Many compliance officers at foundations scoff at the practice. “What does certification do? Wouldn’t a terrorist just sign the letter?” One Program Officer shared with us her frustration, noting that certification language is “useless and embarrassing.” Yet a majority of the grant letters we have looked at now require anti-terrorism certification.

Two out of fourteen major funders in our study were exceptions and had not modified their grant letter.

We have not modified our grant letters, partially because it just doesn’t make sense to do it. We sought advice of our outside counsel. Our view is that the grant letter already prohibits diversion of funds. There are many, many things that people cannot do with our money. A grant has to be used for specific charitable purposes. If we put all of them in [the grant letter], we’d have an opus. That’s the positions we’ve taken and we’re sticking to it... A lot of the letters [that other funders are using] are replete with ambiguities. I don’t know what they mean. If I don’t, how would a grantee?

All the funders we spoke with mentioned seeking and acting on the advice of legal counsel. In fact, one sent us directly to their outside counsel. This legal influence on the foundation sector, while not a new development, seems to be growing.

Most corporate funders, major foundations, international relief organizations and large nonprofits have paid serious attention to the Executive Order and Voluntary Guidelines. The threat of liability, the penalty of frozen assets, and the advice of attorneys has lead many grantmakers to try to comply. In fact, in an informational session

Day, Berry & Howard (basically a law firm), and the Council on Foundations (with 2000 members). This document is a summary of the law and the voluntary ‘requirements’. In conversation, one representative of the Council noted, “It is not an advocacy statement. It is written in neutral, lay language.” But does this give the measures de facto legitimacy by operationalizing policies?

for new funders at the Fall conference of Grantmakers without Borders, a speaker recommended that funders demonstrate “a culture of compliance.”

List checking and certification have emerged as the primary tools in the “culture of compliance.” This seems at odds with the potentially independent, idealistic, progressive nature of much international funding. What changes are we unwittingly making when we start talking about weighing the risks of charity rather than the benefits? ‘Compliance’ with new regulations has come to mean a tacit agreement among grantmakers and grantees to ignore the inane and untenable and adopt only those regulations that are seen as most vital in protecting organizations against legal and political liability.

Smaller funders and nonprofit organizations are less willing to be compliant. According to the Executive Director of a human rights grantmaker:

My board was infuriated...Our first and foremost responsibility is the protection of our grantees, especially those who live and work in conflict areas...We are quite concerned about the depth of reach of the guidelines and we will not become a law enforcement agency... It’s our responsibility to find ways to protect our grantees from these infringements.”

In August, two years ago, Stephanie Strom of the *New York Times* wrote an article: “Threats and Responses: Philanthropy; Small Charities Abroad Feel Pinch of US War on Terror.”¹³ Since then, in my own and other’s investigations, we have heard of groups, particularly in the global south, that have been defunded, or believe they are about to be, or fear such action by refusing certification. These groups will not go on the record with us because they are justifiably concerned that once identified this way, they might lose even more grant money. Compliance with new regulations has come to mean a tacit agreement among grantmakers and their grantees who must ignore the inane and untenable.

In addition, the voluntary policies are creating conflict within funding organizations, particularly between program staff (whose jobs involve building trust with the groups they may fund) and grants administrators trying to comply with the guidelines. I know of disagreements occurring in the offices of both the large and small foundations. Boards are also pressuring staffs who are not comfortable with the practice to look into software for list checking.

I’ve been referring to voluntary measures. But related developments are not always meaningfully voluntary. US AID also now requires certification from all grantees. Most of us are probably aware of last year’s government regulation requiring the more than 10,000 nonprofit members of the Combined Federal Campaign (CFC) - the government’s workplace giving program - to certify that they are not employing people whose names appear on three terrorist watch lists, or giving money to any groups on those lists. Following the filing of a lawsuit by the ACLU and several other groups

¹³ Strom, Stephanie, “Threats and Responses: Philanthropy; Small Charities Abroad Feel Pinch of US War on Terror,” *The New York Times*, August 5, 2003

opposing employee list checking, the government appears to be backing down on this requirement. But, in a The Office of Personnel Management's motion to dismiss the lawsuit the government cites the Treasury Guidelines as authority, and as further justification cites the new grant agreement beings used by the Ford, Rockefeller and Mott Foundations.

The inconsistency of foundations' and nonprofits' responses shows a general confusion about how to interpret current law and guidelines. The ACLU has led the way in refusing to comply. The ACLU has rejected \$1.15 million from the Ford and Rockefeller Foundations over new language used in grant contracts.¹⁴ Both of these foundations have incorporated the new guidelines into their application and grantmaking procedures.

While foundations could be exercising leadership, our conversations with their representatives revealed a rich story of confusion, fear, and compliance. Our mission to capture these changes in numbers and figures failed. This failure demonstrates both the challenges of research into nonprofits, and a crippling lack of courage and transparency within the foundation world.

¹⁴ Strom, Stephanie, "ACLU rejects foundation grants over terror language," *The New York Times*, October 19, 2004