



## **SPECIAL ADVISORY**

# **MANAGING KIDNAPPING CASES UNDER NEW U.S. HOSTAGE POLICY**

**January 14, 2016**

### **BACKGROUND**

Over a period of 30 years of assisting mission agencies managing kidnappings, CCI has experienced the widest possible range of support and interaction with the United States government (USG). In some cases, support and assistance has been top notch; but in other cases trying to get the simplest things from the USG seemed to require superhuman effort. And in a few cases the problem wasn't a failure to help, but rather opposition and interference.

In 2014, a number of public events that included the beheadings of American hostages by ISIS revealed significant shortcomings in how the USG handled cases of American hostages. These shortcomings were particularly acute in the area of information sharing with families of hostages. The president ordered a complete review of how the USG responds to kidnapping and hostage-taking of Americans overseas.

The results of that review were published in June 2015. There are two major changes in USG policy that will have a significant impact on the response of mission agencies when their staff is kidnapped:

1. The USG will now be a proactive "first responder" in all cases where an American citizen is kidnapped or taken hostage overseas. The USG will take steps and actions on its own initiative.
2. The USG will now work much more closely with the families of American hostages. The family will be the primary point of contact with the USG and will be the recipient of information and intelligence the USG develops. And, the family will be the source of decisions (or at least input) on issues such as what concessions might be made or whether or not a military rescue should be attempted.

### **ASSESSMENT: USG as a First Responder**

At first glance, greater USG involvement in hostage cases seems like a good thing, and in many cases it will be. However, it is critical that we remember and understand that the worldview and "big picture" objectives of the USG (or any government) will always

be different than those of faith-based sending organizations. The risk tolerance of the government, and its perceived risk tolerance for private citizens (such as missionaries) will always be different than that of faith-based sending organizations. And government will never understand factors that faith-based agencies must consider in these cases, such as continuation of ministry and the complex relationships between missionary hostages and the local church, new believers and other ministry stakeholders. It has been CCI's frequent and ongoing experience that government officials and agents dealing with these hostage cases must be briefed in depth on the distinctives of faith-based organizations and their personnel. Even then, there is a significant potential for governments to act in their own best interest or by substituting its values for those of the hostage(s) (and sending organization) when making decisions.

In CCI's experience, the divergence in USG values and approaches with those of faith-based sending organizations has manifested itself in two cases where hostage-takers were offered the removal of missionaries from a large area in exchange for the release of hostages. In another case, for political reasons the government pressured the family and sending organization into approving a military rescue mission where one was not yet needed (resulting in unnecessary deaths). And in a recent case, the initiation of a military rescue when negotiations had reached a breakthrough and imminent release of a missionary hostage – but the hostage was killed during the rescue attempt.

In none of these cases do we feel malice or anti-missions sentiment was involved. But in every one, government officials acted on their own initiative and based on the values and world-view of the government, not those of the hostages or their sending organizations.

### **ASSESSMENT: Families as Primary Point of Contact with USG**

In several recent high-profile cases, family members have been extremely critical of the role the USG played. Criticism ranged from no information being provided to the families all the way to the USG threatening to prosecute family members who paid ransoms. The hostage policy review concluded in June 2015 essentially validated the concerns and claims of many hostage families (including the fact that at least two families were threatened by a State Department official with prosecution if they paid a ransom – a claim denied by the Secretary of State but later found to be true). The experiences and concerns of hostage families received a great deal of attention during the policy review, and the outcomes of the review reflect that. However, CCI believes that the new policies reflect a response to the experiences of primarily a small group: families and hostages where there was no traditional employer involved. Many of the most vocal families lost hostages who were independent contractors or free-lance journalists. In those cases there was no employer involved, and therefore nobody to assist and support the families during their ordeal and in their interactions with the USG.

Probably as a consequence of dealing with so many vocal families who essentially had to “go it alone”, the new USG policy gives a considerable role and influence to families. And although much correction in this area was needed, in this process the policy review failed to address the role of employers (or in our context, sending agencies). Although

CCI has received assurances from numbers of government officials that sending agencies will be welcomed into the USG process, it is always with the caveat that “if the family approves”. At least as the current USG hostage policy is constructed, next-of-kin family member(s) would be able not only to override any action the sending organization might deem necessary and appropriate, but they would also be able to stop the flow of all information from the USG to the sending agency.

Since just like governments, families are diverse and opinionated and have very different worldviews; placing this much authority in the hands of families (rather than with sending agencies) has the very real potential to result in consequences of dire concern to the agencies. For example, a family that doesn’t support missions generally could agree to a recommendation by the USG that a negotiation offer of the withdrawal of all missionaries from a region or country be made in exchange for the release of a hostage. Although the family doesn’t have the authority to make this happen, the USG could work in concert with the host government to have visas withdrawn and this outcome then becomes possible.

It is not difficult to foresee a range of other possible scenarios in which “solutions” agreed to by families and the USG are counter to the objectives and mission of the sending organization – and, would be counter to the wishes of the missionary hostage.

### **ASSESSMENT: Paying Ransom Under the New Policy**

Because some families had been threatened with prosecution if they paid ransom for hostages held by ISIS, the USG policy review did speak to this issue. There are two US statutes that deal with this issue: Title 18, U.S. Code 2339B – Providing material support or resources to designated foreign terrorist organizations; and Title 15, U.S. Code 78dd-1, et seq, the Foreign Corrupt Practices Act of 1977. The first is of most concern in hostage cases. It has been interpreted from time to time by the USG as prohibiting the payment of ransom to an individual or entity that is a “designated foreign terrorist organization”. Although CCI cannot render legal opinions or advice, in every case where we have asked an attorney to review this statute in light of a potential negotiated payment to a kidnapper from a “designated foreign terrorist organization” we have been told that there would in fact be a technical violation of this statute.

In fact, that was the USG’s ultimate explanation for telling families that they could be prosecuted. After initially denying it had ever happened, the USG corrected its explanation and said that it was just trying to provide families with all the information possible.

During the rollout and presentation of the new policy to the stakeholders who participate in the review, this issue was addressed. Families (and the other stakeholders) were assured that the USG had no intention of prosecuting families trying to recover their loved ones from kidnappers. We believe it is of note that all other components of the new policy are memorialized in the Directives and Findings issued by the President. However, the only documentation of the USG policy on ransom payments was contained in PowerPoint slides which said:

*The Department of Justice **does not intend** to add to families' pain in such cases by suggesting that they could face criminal prosecution" and "Perhaps the best indicator of how DOJ will exercise **its prosecutorial discretion** in enforcing the material statute is DOJ's past record of prosecuting such cases under the statute (:). The Department of Justice has never used the material support statute to prosecute a family for paying a ransom for the safe return of their loved one. (Emphasis added)*

It is important to understand that under US law, there remains the potential for employers and/or families and/or response consultants to be prosecuted for paying a ransom in some cases. "Prosecutorial discretion" is nothing approaching a guarantee or promise; and CCI finds it of note that the USG chose *not* to address this issue in the Presidential Directives or the Findings.

### **RECOMMENDATIONS: USG as a First Responder**

Sending organizations should realize that if a kidnapping occurs, they will have to work closely with the USG to be a meaningful partner (and to influence the outcome). It will not be possible to simply leave the USG on the sidelines (a place it wanted to be in most of these cases over the years) and it will not be possible to just ignore them and hope they go away. Representatives of the sending organization are encouraged to reach out early and proactively to the USG, primarily the FBI, when one of these events occurs. CCI also believes that dealing with USG law enforcement, military and intelligence agencies is complex, multi-faceted and calls for support from individuals experienced in doing so. In other words, this is a time to reach out for help and for both experience and expertise that likely isn't available in-house.

### **RECOMMENDATIONS: Families as Primary Point-of-Contact with USG**

In almost all cases, the desires, objectives and priorities of a missionary who is taken hostage will align closely with those of his or her sending organization. There may or may not be overlap between those and the desires, objectives and priorities of the missionary hostage's family. But under this new USG policy, the family's voice will be the one heard unless the sending agency takes proactive steps to position itself as the primary point-of-contact with the USG.

Based on multiple discussions with officials throughout the USG, CCI believes that the best way for a sending agency to assert its status as the primary point-of-contact requires a written legally binding instrument from the hostage giving such authority to the sending agency. Since this document cannot be obtained after a kidnapping occurs, it must be taken care of before an event. This means that a sending agency, in order to preserve its role with the USG in a kidnapping, has to obtain appropriate documentation from all of its personnel before an event happens. We recognize that this is no small undertaking, but simply see no other viable course of action.

The documentation needed must have a certain legal standing, and as we've said, CCI cannot give legal advice. We have consulted with attorneys and others on this matter,

however, and we can share the options for consideration that we believe every sending agency should discuss with their own attorneys:

1. The instrument in question will be most effective if it is a legal power of attorney executed in accordance with the laws and rules of the appropriate state (probably the state of residence or the state of incorporation of the sending agency – but check with your attorney).
2. The instrument should specifically state that the person signing recognizes that his or her family and his or her government may have opinions, desires and recommendations for action that differ from those of the sending agency; but, that the person signing specifically desires and chooses that the sending agency make all of the decisions needed on his or her behalf.
3. The authority for decision-making should be clear that the signer intends that his or her sending agency be the decision-maker to the exclusion of any other person, entity or government.
4. The instrument should cover any situation that meets the definition of a kidnapping or hostage taking under any United States Code or other statute of the USG; and/or any situation in which it is reasonably foreseeable that such a kidnapping has occurred.
5. The instrument should describe the types of decisions as broadly as possible, including (but not limited to): Whether or not negotiations will occur; who will conduct negotiations; what limitations or boundaries affect potential offers or resolutions; the timing and pace of negotiations; the role and involvement of any government; whether or not a hostage rescue should be attempted; what information and statements (if any) will be made to the public and/or the news media.
6. The instrument may also address issues such as care of minor children, management of financial matters, and other personal issues. If these are not covered in this instrument, they should be addressed in a formal manner in some other way.

### **RECOMMENDATIONS: Paying Ransom Under the New Policy**

At least at this point in time, a family or sending organization that decides to pay a ransom to a kidnapper who is identified as a terrorist pursuant to Title 18, U.S. Code 2339B is at potential risk of prosecution. The many public statements of USG officials that there is “no intention” to prosecute families in these circumstances are helpful but not binding. At the end of the day, a decision to pay a ransom in these cases necessarily carries some degree of risk of prosecution. We assess that risk as very small in the present context. But, we recognize that context changes and so that risk could change as well.

One way to help in these situations is to involve as many USG officials as possible in the process. It is unlikely any USG official will tell you that you “should” pay a ransom to a designated terrorist organization. But every time you ask and they don’t tell you that you should not do so is an opportunity for you to document the conversation as an indication that you are relying on the representations of the USG made when this new policy was introduced.

CCI stands ready to support Christian agencies in the response to these situations.

Contact us:

Crisis Consulting International  
9452 Telephone Rd., No. 223  
Ventura, CA 93004 U.S.A.  
Tel (+) 1.805.642.2549  
Email: [info@cricon.org](mailto:info@cricon.org)  
[www.cricon.org](http://www.cricon.org)