Benevolent Blood Money: Terrorist Exploitation of Zakat and Its Complications in the War on Terror

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BENEVOLENT BLOOD MONEY: TERRORIST EXPLOITATION OF ZAKAT AND ITS COMPLICATIONS IN THE WAR ON TERROR

"Righteousness is not merely that you turn your faces to the East and the West, but righteous is he who believeth in Allah and the Last Day and the angels and the Scripture and the Prophets; and gives his wealth, for love of Him, to kinsfolk and to orphan and the needy and the wayfarer and to those who ask, and to set slaves free; and says Salah and gives Zakat; and those who keep their treaty when they make one, and the patient in tribulation and adversity and time of stress. Such are they who are sincere, Such are the God-fearing."

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1 J.D., The University of North Carolina School of Law, 2009. The author wishes to thank Baba Ji for his strength and guidance, Rita and Roshan for their love and support throughout law school, and his Articles Editor, Katherine Dunn, and the North Carolina Journal of International Law and Commercial Regulation board and staff for their tireless effort during the editing process. The author reserves his deepest gratitude, however, for his mother, Lata, whose sacrifice and compassion have instilled in him the ability to overcome any obstacles placed before him. Any errors and omissions are the author’s.

1 Holy Qur’an 2:177 (emphasis added).
Zakat, meaning “purify,” is the Islamic concept of alms or charity. The obligatory nature of Zakat is firmly established in the Qur’an and the Hadith. Zakat stands as an obligation upon Muslims to pay two and one-half percent of their wealth if and when it exceeds a minimum level, or nisab. To link this devotional pillar of Islam to ties of terrorism and bloodshed creates a conundrum of misplaced rights and confusion. Unlike the American notion of separating church and state, Muslims obligated to perform Zakat make no distinction as to how

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2 See ENCYCLOPEDIA BRITANNICA (15th ed. 2007).
4 See ENCYCLOPAEDIA BRITANNICA (15th ed. 2007). Hadith, Arabic for ‘news’ or ‘story’ serves as a record of “the spoken traditions attributed to the Prophet Muhammad, which are revered and received in Islam as a major source of religious law and moral guidance,” second only to the authority of the Qur’an or scripture of Islam. Hadith also emphasizes Sadaqah, or voluntary almsgiving, which, like Zakat, is intended for the needy. Id.
charitable donations are to be employed. This generous, un-exacting benevolence opens its doors to deception and criminalization, two practices one would hope would never be connected to charity.

This Comment seeks to unravel this complex facet in the “War on Terror.” Part one provides a brief background on terrorist funding including its relevance to the September 11, 2001, terrorist attacks against the United States (“9/11”). Part two explores the reasons why terrorists choose this stealth-like avenue to fund their activities. Recognizing that this type of funding, if not halted, could cripple the War on Terror and fund another 9/11, the U.S. government has implemented several legislative acts with the goal of eradicating this financier of terrorism. Part three explains these acts, and how many of these measures have been accompanied by the deprivation of civil liberties and due process considerations. Part IV examines four cases demonstrating the United States’ process to label these charitable entities as “designated terrorist organizations.” These cases query whether the U.S. government has taken legislation too far or whether its actions are necessary to cut terrorism funding at its roots and prevent another devastating attack on the United States. One must evaluate the effectiveness of the post-9/11 anti-terrorist legislation to determine whether the lack of a subsequent attack can be attributed to the legislation or to other factors. The pride of America rests on the former. With this realization, should the American population be ready to forego civil rights for the good of the nation? The final sections of this Comment seek to evaluate this inquiry, as well as delve into the effects of legislation on Muslim society within the United States. These final sections will examine what the rest of the world is doing to assist the U.S. government in eradicating this form of terrorist financing.

This Comment does not stand as an attack, seeking to silently display ill will towards the Patriot Act and its provisions. Rather, its purpose is to bring forth issues that many citizens of this nation have become so enamored with since 9/11, and to provide a new

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and thought-provoking perspective. This Comment is written with the opinion that government actions taken after 9/11 were necessary for national security purposes, and in that sense, have had a positive impact. However, these security measures have not come without sacrifice. This Comment identifies a subset of the sacrifices that have been made in the name of national security, but with the recognition that with these costs come benefits. We must be cognizant that democracy flourishes when a nation's citizenry is heard. At the same time, we must be aware that the government must step forward to reconcile the broad gap that exists between necessary actions for national security and the unjust deficit of civil rights. This Comment seeks to encourage thoughtful analysis and insightful debate on the current tug-of-war between national security and civil rights present in the War on Terror.

I. Background on Terrorist Funding

A. 9/11 and the Financial War on Terror

The United States' current War on Terror differs from twentieth century physical engagements between militarized nations aggressively fighting for territory and political influence. The new enemies are elusive, fearless, and strike using stealth-like methods. These novel, yet radical fighters utilize fear and terror to spawn social and political agendas. Plagued by such extreme enemies, the United States stands no chance fighting the war using traditional combative methods. Finances and the risk of military casualties stand as barriers to extricating the forces that use religion and pride as the basis for implicating terror.

Terrorists are funding their objectives through charitable sources that undeniably involve religious rights. The U.S. government passed legislation after 9/11 in response to the terrorist threat within our nation. Only recently has the U.S. government received information implicating the importance of charity and Zakat in funding al-Qaeda and other terrorist

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9 Id.
10 Id. at 206.
11 Id. at 213.
regimes.\textsuperscript{12} Even though the U.S. government has become aware of financial support for certain terrorist regimes through charitable networks, this form of fundraising, operating under the pretense of humanitarianism and religion, is difficult for the U.S. government to identify and destroy.\textsuperscript{13}

\textbf{B. Terrorist Funding – More than Bin Laden}

Al-Qaeda expended a mere $400,000 to $500,000 to carry out the devastating attacks on the United States on September 11, 2001.\textsuperscript{14} Evidence indicates that the nineteen hijackers collectively received a monetary reward of $300,000 from al-Qaeda through wire transfers, physical transportation of cash, and use of debit or credit cards to access funds from foreign financial institutions.\textsuperscript{15} According to plot leader Khalid Sheikh Muhammad, the Hamburg cell members\textsuperscript{16} each received $5,000 to pay for their return from Afghanistan to Germany in late 1999 or early 2000.\textsuperscript{17} Once the non-pilot hijackers received their training, each received $10,000 to fund travel to the United States.\textsuperscript{18} The hijackers' primary expenditures included flight school, living expenses, and travel. All hijackers utilized the U.S. banking regime to store their funds and facilitate transactions.\textsuperscript{19} The plotters moved, stored, and spent their money in the most ordinary ways, making detection of criminal behavior difficult while easily bypassing the detection mechanisms in place prior to 9/11.\textsuperscript{20}

In addition to the rather modest funds needed to conduct colossal attacks such as 9/11, al-Qaeda and other terrorist organizations must locate finances to fund their overall

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 206.
\item \textsuperscript{13} \textit{Id.} at 207.
\item \textsuperscript{14} \textit{National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report} 169 (W.W. Norton & Company 2004) [hereinafter \textit{The 9/11 Commission Report}].
\item \textsuperscript{15} \textit{Id.} at 172.
\item \textsuperscript{16} The Hamburg cell members consisted of the four German jihadists, Mohamed Atta, Ramzi Binalshibh, Marwan al Shehhi, and Ziad Jarrah, all of whom played a significant role in the 9/11 attacks. See \textit{id.} at 160-63.
\item \textsuperscript{17} See \textit{id.} at 172.
\item \textsuperscript{18} See \textit{id.} at 169-70.
\item \textsuperscript{19} See \textit{The 9/11 Commission Report}, supra note 14.
\item \textsuperscript{20} \textit{Id.}
\end{itemize}
Funding for terrorist training camps, travel expenses, payment of operatives, weapons, technologies, and housing is allegedly funded by a combination of Osama bin Laden’s purported inheritance, individual contributions, and, as is the focus of this Comment, charitable contributions from various benevolent organizations. Prior evidence shows al-Qaeda had funding of approximately $30 million per year by diversions of money from Islamic charities and other financial facilitators gathering money from individual generous donors. Individual donors may have known the ultimate destination of their donations; others may have failed to discover the truth, believing their charitable donations would go to benevolent causes.

21 See id. at 169-70. In November 2008, over 170 individuals - both foreign and domestic - were attacked and killed in downtown Mumbai, India. The Mumbai attacks displayed a high level of planning and sophistication as the terrorists, intent on targeting Americans, British, Israelis, and Indians, used small boats to arrive by sea from the Pakistani megacity port of Karachi. Eight of the attacks occurred in South Mumbai, the longest and most deadly being at the Taj Mahal Palace and Tower Hotel. Nearly sixty hours and 170 deaths later, the attacks ceased, leaving the Indian population baffled and angry. See Bruce Riedel, Terrorism in India and Global Jihad, THE BROOKINGS INSTITUTION, Nov. 30, 2008, http://www.brookings.edu/articles/2008/1130_india_terrorism_riedel.aspx (last visited Jan. 20, 2009). The terrorist group Lashkar-e-Taiba (LeT) has claimed responsibility for the Mumbai attacks. Ajmal Amir Kasab, the only Mumbai terrorist captured by Indian police, admitted his ten-man team trained for the attacks in Lashkar camps within Pakistan with the support of the Inter-Service Intelligence Agency and launched their attack from Pakistan. The Indian government insists that Pakistan had its hand in the funding of this terrorist attack, or in turn, turned its cheek to the terrorist training within their nation. This raises the query of how state funding outside the realm of charity, or individual contributions, can be stopped. See Bill Roggio, Lashkar-e-Taiba Operatives Directly Linked to Mumbai, THE LONG WAR JOURNAL, Dec. 31, 2008, http://www.longwarjournal.org/archives/2008/12/lashkaretai ba_operat_1.php (last visited Jan. 20, 2009); see also Somini Sengupta, India, Giving Pakistan Dossier on Mumbai Siege, Seeks Extradition, N.Y. TIMES, Jan. 6, 2009, at A6. Jamaa-ud-Dawa, a Pakistani-based charity, is accused of being a public front for LeT militants. The United States accused the charity of recruiting and funding for LeT, who in turn are attempting to reverse the U.S. strategy of improving Indian-Pakistani relations. See Anthony Loyd, The “Charity” that Plotted the Mumbai Attacks, THE TIMES, Dec. 8, 2008, http://www.timesonline.co.uk/tol/comment/columnists/guest CONTRIBUTORS/article5303725.ece (last visited Jan. 20, 2009) (stating that Pakistan’s commitment to the War on Terror is being questioned, since Pakistan is allowing such “charity” based funding for terrorism to occur within their borders.).
Currently, al-Qaeda continues to take advantage of Islam’s call for Zakat. By mixing religious beliefs with financial purposes, al-Qaeda twists legal almsgiving, which is conceived as a way for purification by the Prophet, into a financial apparatus used to fund terrorism. In Saudi Arabia alone, al-Qaeda has illegally received between $300 million and $500 million over the last ten years from wealthy businessmen and bankers representing about twenty percent of Saudi gross national product. This transfer of money has occurred through a web of charities and companies acting as fronts with the notable use of Islamic banking institutions.

Al-Qaeda takes two approaches to using charities for fundraising. The first is to rely on al-Qaeda sympathizers in foreign branch offices of large, international charities. Here, employees secretly siphon money from charitable funds to al-Qaeda. Al-Qaeda also collects money through charity by convincing entire charitable organizations to willingly participate in funneling money to al-Qaeda. An article appearing shortly after 9/11 quoted a Pakistani “cleric” who claimed that al-Qaeda had “hundreds of well-to-do people almost everywhere in the world” eager to financially contribute to the cause. Many of these well-to-do individuals utilize Islamic charities to quench this desire to support al-Qaeda. Evidence shows that al-Qaeda has also collected money from employees of corrupt charities. Although terrorist organizations such as al-Qaeda seem to have mechanisms abroad to retain charitable contributions to support their activities, questions still arise as to why terrorists seem to focus on benevolence.

27 Id. at 11.
28 Id. at 21.
30 Id. at 170.
31 Id. at 170.
32 Id. at 170-71.
33 See Burr, supra note 6, at 8.
II. Terrorist Funding

A. Why Terrorists Exploit Benevolence

Islamic charities seek to provide basic goods and services to communities, both local and abroad, in a manner consistent with the values and teachings of Islam.\(^{35}\) The U.S. government is not easily able to discern whether Islamic charities that collect funds for a particular humanitarian cause are actually being utilized for that purpose, or, as many government agents fear, for monetary support of terrorism.\(^{36}\) Described as "reverse money laundering," charity-based financing of terrorism is concerned with using legal assets for an illegal activity, namely terrorist attacks.\(^{37}\) Charitable organizations are also attractive targets for terrorist entities because of the reluctance of many outside nations to rigorously monitor and scrutinize their activities.\(^{38}\) Especially prevalent in Muslim nations, authorities are faced with discerning between legitimate charities and those that are unknowingly or knowingly being used to divert funds to terrorists, who in turn may be fighting for an illegitimate cause.\(^{39}\) Since Zakat and Sadaqah are viewed as religious responsibilities, governments are reluctant to scrutinize their usage.\(^{40}\) For example, both companies and individuals in Saudi Arabia have a legal and religious obligation to pay Zakat.\(^{41}\) Their contribution is calculated on earnings, profits, capital and all other property and monetary acquisitions.\(^{42}\) Saudi

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\(^{36}\) Id.

\(^{37}\) See id. (explaining money laundering, which is concerned with laundering assets of illegal origin and bringing them back into legal economic circulation).

\(^{38}\) Id.

\(^{39}\) See id.

\(^{40}\) Id. (defining “sadaqah” as supporting charitable works through voluntary contributions).

\(^{41}\) See John D.G. Waszak, *The Obstacles to Suppressing Radical Islamic Terrorist Financing*, 36 CASE W. RES. J. INT’L L. 673, 697 (2004). See also Saudi Arabia Basic Law (1992), ch.1 art. 21 ("Alms tax is to be levied and paid to legitimate recipients."). Saudi Arabia’s "Basic Law" states that the Holy Qur’an and the Sunna of His Prophet are Saudi Arabia's constitution. Id.

\(^{42}\) See Waszak, supra note 41, at 698.
banks pay Zakat on financial transaction fees. These voluntary transactions and contributions leave no paper trail, providing little opportunity for government oversight. Zakat contributed by companies is controlled by the Department of Zakat and Income of the Saudi Ministry of Finance and National Economy, which has developed guidelines on who shall pay Zakat and how these funds shall be received. The government also has stern guidelines on how to transfer these funds to charities.

The United Arab Emirates (U.A.E.) is another territory that serves as a breeding ground for terrorist fundraising, placing a hardship on the United States’ ability to strengthen regulation. The U.A.E breeds various “free trade zones” giving foreigners unfettered access and control over commercial activities. These commercial activities may include legitimate goods or illegal merchandise. Additionally, over eighty hawala operators operate in the U.A.E. A hawala is an informal fund transfer system, used by migrants to send money back to their home country. Since this money transferring system lacks formal record keeping, it can serve as a delivery system for terrorist financing. The transferring of money goes through money changers (hawaladars) receiving cash in one nation with no questions asked. Correspondent hawaladars in another country dispense an identical amount to a recipient or, less often, to a bank account. Hundis, which act as negotiable promissory notes, are emailed between

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43 Id.
44 "When a man gives Zakah to the poor he cannot stipulate the conditions on how the poor man should spend the money. If he spends on some evil acts is not the responsibility of the donor." Prince Salman bin Abd al-Aziz, Governor of Riyadh Region. See BURR, supra note 6, at 26 (citing "Prince Salman bin Abdul Aziz: Rejects Charges against Saudi Charitable Societies," Ayn Al Yaqeen, Saudi Arabia (November 8, 2002)).
45 See Waszak, supra note 41.
46 Id.
47 Id.
48 Id.
49 Id. at 702 & n.182.
50 Id. at 702-03.
51 See Waszak, supra note 41, at 702-03.
52 Id.
53 Id.
hawaladars in differing nations. The sender will provide the recipient with code words or agreed signals like handshakes to retrieve money. Understandably, such systems have almost no chance of being detected due to lack of paperwork and the ancient and ethnic cultural relationship based on trust. The hawaladars are left to police themselves and are reluctant to disrupt the ancient practice.

The United States has and will continue to encounter obstacles when attempting to force other nations to alter their economic surroundings under U.S. based guidelines. Governments within numerous Middle Eastern nations appear to have an interest in preventing terrorist financing, but such efforts could cause social upheaval and threaten to further radicalize the Middle East. Nations such as Saudi Arabia find themselves in this situation. With lucrative oil revenues and self-survival at odds, how can a nation risk upheaval from its citizens on the basis of strictly adhering to U.S.-based policies that will place a strong hold on Muslim charities and benevolent individuals? This political reality causes the Saudi Arabian government to take a nearly bi-polar position: it is forced to appear to be confronting terrorism and terrorist financing by writing laws, but must turn its cheek if these laws are broken in order to appease radical clerics, its citizenry, and al-Qaeda. The politics seen in Saudi Arabia are echoed throughout the entire Middle East, as well as in other Muslim nations throughout the world. The thin line between regulating religion and avoiding social upheaval forces the government to loosen their grasp on those exploiting Zakat for terror.

54 Id. at 702.
55 Id.
56 Id. at 703.
57 See Waszak, supra note 41, at 703.
59 See Waszak, supra note 41, at 705.
60 Id. at 706.
B. Exploiting Benevolence in the United States

Charities have a substantial impact on the U.S. economy. With nearly $2 trillion in assets stemming from some 800,000 charities, of which 350,000 are religiously affiliated, one can foresee the concerns that would arise if corruption were to infiltrate American charitable organizations. Former Secretary of Treasury Paul O’Neill has noted that the abuse of charities corrupts the spirit of charitable giving and betrays the trust and goodwill of donors. This betrayal allows terrorists to obtain funds in the form of charity while profiting from tax benefits, the ability to divert funds overseas, and the religious sympathies of donors.

Under Internal Revenue Code (IRC) section 501(c)(3), for a charitable organization to be exempt from taxes it must operate so that “none of the earnings of the organization... inure to any private shareholder or individual.” The organization must also refrain from attempting to influence legislation as a substantial part of its activities. The Internal Revenue Service (IRS) has defined the term charitable to include “relief of the poor, the distressed, or the underprivileged; advancement of religion, advancement of education... and combating community deterioration and juvenile delinquency.” The Qur’an’s categories stating eligibility for Zakat seem to parallel the IRS’s defined terms for benevolence. The “poor, converts, wayfarers, those in bondage or in debt” may all fall under the general terms

62 See id.
63 Id.
64 Id. at 123-24.
67 Id.
69 BURR, supra note 6, at 12.
of charity defined under the I.R.C. section 501(c)(3). The Qur'an's other stated categories include those committed to Allah for the spread and triumph of Islam, newcomers whose faith is weak, and new converts to Islam "whose hearts have been [recently] reconciled [to truth]" — all seemingly fall within the "advancement of religion." Other reasons exist for a terrorist organization to operate as a charity that are not readily apparent. Structural weaknesses in charitable giving enable funds to be more easily diverted. As stated previously, the existence of physical access to channel funds overseas, especially into nations that have more relaxed financial oversight measures, lays a foundation that allows terrorists to subvert many existing measures to prohibit money laundering or control overseas banking. The ability to exploit the emotion and sympathy of donors is an added reason to operate under the guise of a charitable organization. Using benevolence also confuses the federal government's ability to closely scrutinize charitable activities without a perceived backlash from both charitable and religious communities.

III. Measures Taken by the U.S. Government to Halt the War on Terror

A. Freezing Assets and Other Economic Sanctions Used in the U.S. Government's Financial War on Terrorism

A necessary weapon in the U.S. government's war on terror, especially in halting the financial backing of terrorism, is the use of economic sanctions against terrorist groups, individual terrorists, and those that sponsor terrorist activities. Discretionary power to impose economic sanctions has increased with heightened threats to the United States. Nonetheless, the power to impose economic sanctions during war or a national emergency

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70 See id.
71 Id. at 8.
72 See id. at 123.
73 See id.
has long resided within the office of President of the United States.\textsuperscript{75}

The U.S government began imposing sanctions on enemies as early as colonial times.\textsuperscript{76} Sanctions were utilized under the Trading With the Enemy Act (TWEA)\textsuperscript{77} that made it illegal for U.S. nationals to engage in trade and commerce with declared enemies of the United States.\textsuperscript{78} The TWEA gave the President broad discretionary powers in times of war, allowing him to restrict or prohibit certain transactions deemed threatening to the United States.\textsuperscript{79} Pursuant to section 5(b) of the TWEA, the President had authority during times of war to regulate property ownership "between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one foreign nation, by any person within the United States."\textsuperscript{80}

Although the TWEA is a powerful tool used by the President to exercise vast power during a time of war, this power is limited during peacetime.\textsuperscript{81}

In 1977, Congress expanded the President's statutory authority to allow imposition of sanctions to deal with an "extraordinary threat, which has its source in whole or substantial part outside of the United States, to the national security, foreign policy, or economy of the United States if the president declares a national emergency with respect to such threat."\textsuperscript{82} The International Emergency and Economic Powers Act (IEEPA) originally limited the President's power to actions strictly relating to national emergency.\textsuperscript{83} However, this power was further expanded by the USA Patriot Act, which passed as a result of the 9/11 terrorist attacks.\textsuperscript{84} IEEPA's authority now gives the President heightened authority to confiscate property and block assets during pending

\begin{footnotes}
\footnotetext[75]{Id. at 1354.}
\footnotetext[76]{Id. at 1355.}
\footnotetext[77]{Trading With the Enemy Act of 1917 (TWEA), 50 App. U.S.C.A. § 5; see also Crimm, supra note 74, at 1355-59.}
\footnotetext[78]{TWEA 50 App. U.S.C.A. § 5(b)(1).}
\footnotetext[79]{Id.}
\footnotetext[80]{Id.}
\footnotetext[81]{See id.}
\footnotetext[82]{50 U.S.C. § 1701(a)(2003) (emphasis added).}
\footnotetext[83]{See Crimm, supra note 74, at 1357.}
\footnotetext[84]{USA PATRIOT Act, Pub. L. No. 107-56 § 106.}
\end{footnotes}
The new language added by the Patriot Act also "broadens the government's authority to investigate, regulate, and freeze any property . . . subject to the jurisdiction of the United States."\(^{85}\) Section 1702(c) allows the President to act when the United States is engaged in unconventional war.\(^{86}\) This section also specifically grants the President the authority to confiscate and dispose of any property or interest . . . within the jurisdiction of the United States and that belongs to any foreign individual, foreign entity, or foreign country determined to have "planned, authorized, aided or engaged" in the 9/11 attacks or any other attack against the United States. Under 3 U.S.C. § 301, the President can entrust authority stemming from 5 U.S.C. § 1702 to "the head of any department or agency in the executive branch . . . [and] to perform without approval, ratification, or other action by the President... any function which is vested in the President by law . . . ."\(^{88}\) The ability to delegate power enabled President William Jefferson Clinton to issue Executive Order 12,947 (E.O. 12,947).\(^{89}\) Pursuant to this Order, President Clinton blocked all transfers and interests in property of twelve designated foreign terrorist organizations.\(^{90}\) These organizations, both foreign and domestic, designated under E.O. 12,947, were labeled Specially Designated Terrorists Entities.\(^{91}\) The E.O. also prohibits U.S. citizens, resident aliens, and domestic entities from engaging in any transaction with any designated organization or individual.\(^{92}\) President Clinton deemed that terrorists disrupting the Middle East peace process were an unusual and extraordinary threat to national security and the economy of the United States.\(^{93}\) E.O. 12,947 delegated to the Secretary of Treasury and the Attorney General authority granted to the President under the IEEPA to carry out any duties pursuant

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\(^{86}\) Crimm, \textit{supra} note 74, at 1359.
\(^{88}\) 3 U.S.C. § 301 (2000); see also Crimm, \textit{supra} note 74, at 1358-60.
\(^{90}\) \textit{Id.}
\(^{91}\) Crimm, \textit{supra} note 74, at 1362.
\(^{93}\) \textit{Id.}
to this Order.\textsuperscript{94}

\textbf{B. Executive Order 13,224 (2001)}

On September 19, 2001, President George W. Bush declared that the War on Terror would shift its focus to "NGOs, nongovernmental organizations, [which] serve as fronts, as a funding mechanism for terrorist organizations."\textsuperscript{95} In furtherance of this statement, President Bush issued E.O. 13,224 on September 23, 2001, just thirteen days after 9/11.\textsuperscript{96} Executive Order 13,224 was filed pursuant to the authorities of the IEEPA,\textsuperscript{97} the National Emergencies Act,\textsuperscript{98} section 5 of the United Nations Participation Act of 1945,\textsuperscript{99} and 3 U.S.C. § 301.\textsuperscript{100}

Declar ing a national emergency to deal with the extraordinary and unexpected threat to national security, foreign policy, and the economy of the United States, President Bush insisted that sanctions would be utilized to halt monetary transactions that support foreign terrorists.\textsuperscript{101} Pursuant to E.O. 13,224, the property

\begin{itemize}
  \item \textsuperscript{94} 3 U.S.C. § 301 (2000).
  \item \textsuperscript{95} George W. Bush, U.S. President, Remarks at a Photo Opportunity (Sept. 19, 2001), \textit{available at} http://transcripts.cnn.com/TRANSCRIPTS/0109/19/se.13.html.
  \item \textsuperscript{96} Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Jan. 23, 1995).
  \item \textsuperscript{97} See 50 U.S.C. § 1701 (2003).
  \item \textsuperscript{98} See 50 U.S.C. § 1621 (2002).
  \item \textsuperscript{100} See 3 U.S.C. § 301 (2000).
  \item \textsuperscript{101} Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Jan. 23, 1995). The text of President Bush's findings pursuant to Executive Order 13,224 states:

  "I, GEORGE W. BUSH, President of the United States of America, find that grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001, acts recognized and condemned in UNSCR 1368 of September 12, 2001, and UNSCR 1269 of October 19, 1999, and the continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and in furtherance of my proclamation of September 14, 2001, Declaration of National Emergency by Reason of Certain Terrorist Attacks, hereby declare a national emergency to deal with that threat. I also find that because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists. I also find that a need exists for further consultation and cooperation with, and sharing of information by, United States and foreign financial institutions as an additional tool to enable the United States to combat the financing of terrorism."\" 
\end{itemize}
of twenty-seven designated foreign persons was seized. 102 E.O. 13,224 now prohibits U.S. individuals and entities from engaging in economic transactions, including services, for the benefit of designated persons subject to the Order. 103 Persons violating E.O. 13,224 are subject to criminal prosecution. 104 The E.O also authorizes the Secretary of Treasury to freeze the assets of additional persons who, after investigation, are determined to be associated with terrorism. 105 President Bush made a subtle, yet important conclusion when he stated that “[p]rior notice... taken pursuant to this order would render these measures ineffectual.” 106 As stated by the President’s orders, notice is not necessary prior to designation pursuant to E.O. 13,224. 107

Relating to charitable contributions, E.O. 13,224 is limited by section 1702(b) of the IEEPA, which precludes the President from regulating or prohibiting donations made with the intent to relieve human suffering. 108 However, an exception exists to section 1702(b). Under the IEEPA, humanitarian donations may be regulated if the President determines that such donations would “seriously impair his ability to deal with” a national emergency. 109

The U.S. government has deemed E.O. 13,224 to be one of the best-suited tools to disable terrorist groups and funding. 110 Soon after President Bush implemented E.O. 13,224, the government added multiple terrorist organizations, that were previously under U.S. investigation, to the list of specifically designated terrorist

102 Id.; see also http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf for a current list of terrorists, and groups identified under E.O. 13,224.
104 Crimm, supra note 74, at 1367.
107 Crimm, supra note 74, at 1368.
110 Id. at 456.
entities.\footnote{111} The Revolutionary Armed Forces of Columbia (FARC) and the Real Irish Republican Army (RIRA) were among the designated entities.\footnote{112} These non-Muslim designations purportedly refute many Muslim activists' claims that the Specially Designated Global Terrorist (SDGT) process singles out Islamic or Middle Eastern terrorist groups.\footnote{113}

The Office of Foreign Assets Control (OFAC)\footnote{114} maintains the Specially Designated Nationals and Blocks Persons (SDN) list, a comprehensive roster of several blacklists.\footnote{115} OFAC was formally created in December of 1950 when President Harry Truman, pursuant to the Korean War, declared a national emergency and froze all Chinese and North Korean assets.\footnote{116} Now acting as a subset of the Department of Treasury,\footnote{117} this quiet, rather unnoticeable agency yields enormous power and influence on the global financial markets. OFAC has the power to “administer and enforce economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction.”\footnote{118} OFAC’s role in regulating terrorist funding is unmatched; it has the ability to place an entity on the SDN list and have its assets blocked pursuant to an investigation without giving the entity a formal terrorist designation.\footnote{119} Pursuant to an amendment of the IEEPA,\footnote{120} the government is now able to

\footnote{111} Id.
\footnote{112} Id.
\footnote{113} Id. at 457-58.
\footnote{114} OFAC is the successor of the Office of Foreign Funds Control (FFC), which was established at the advent of World War II. The FFC’s initial purpose was to prevent Nazi use of the occupied nations holdings of foreign exchange and securities and prevent forced repatriation of funds belonging to nationals of those countries. See Dep’t of The Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, http://www.treasury.gov/offices/enforcement/ofac/faq/answer.shtml#2, (last visited Feb. 18, 2008).
\footnote{115} Ruff, supra note 108, at 458.
\footnote{116} Dep’t of The Treasury, supra note 114.
\footnote{117} Id.
\footnote{118} Id.
\footnote{119} Id.
\footnote{120} USA PATRIOT Act, Pub. L. No. 107-56 § 106. (Section 106 of the USA
investigate transactions, which may elevate any threat to national security during a declared national emergency, as well as "block [transactions] during pendent investigations."\textsuperscript{121} Along with maintaining the lists encompassing all designated terrorist organizations and individuals under the SDT and SDGT, OFAC holds the power to freeze assets for other reasons including narcotics trafficking and money laundering.\textsuperscript{122}

The Foreign Terrorist Asset Tracking Center (FTATC) is utilized within the spectrum of OFAC to assist in the identification of foreign terrorist groups and those who support them.\textsuperscript{123} The FTATC’s goal is to disrupt and intercept terrorist funding.\textsuperscript{124} Working with the Department of State and the Attorney General, the FTATC has acted pursuant to E.O 13,224 to uncover, designate, and direct action against charitable organizations and institutions found to be linked with the financing of terrorist groups and individuals.\textsuperscript{125}

The FTATC was originally comprised of the same number of agencies as Operation Green Quest, a multi-agency, financial enforcement initiative that the Department of the Treasury announced on October 25, 2001, to identify and dismantle terrorist networks and their funding.\textsuperscript{126} In November 2002, the Bush Administration transferred FTATC from the Treasury Department’s OFAC to the CIA, housing the FTATC in the Director of Intelligence’s counterterrorism center.\textsuperscript{127} The FTATC, Federal Bureau of Investigations (FBI), and local law enforcement now seek out Islamic institutions and charities operating sophisticated schemes to and from the United States.\textsuperscript{128} Assistant

\textsuperscript{121} Id.
\textsuperscript{122} Ruff, \textit{supra} note 108, at 458.
\textsuperscript{124} \textit{BURR, supra} note 6.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 15.
\textsuperscript{128} Id.
Secretary of Treasury Kenneth Dam addressed the issue with Muslim charities, threatening that FTATC stood ready to act even if it had yet to acquire all necessary evidence to determine which charities were using funds for uncharitable purposes. Dam stated that the current challenge “is to prevent terrorists from using charities as a cover for supporting terrorism while ensuring that charitable giving and charitable works continue.” This challenge has been accelerated by language barriers and cultural mores. Now faced with the reality that benevolence is a facet of terrorist funding, the United States struggles to find a balance between the designating and freezing of blood money, and the allegedly unconstitutional process used to reach this end.

C. Office of Foreign Assets Control Designation Process

The U.S. Treasury Department’s terrorist designation process has incited controversy between those in the legal field representing Islamic charities, and government officials who believe that the designation process is being carefully managed and reflects post 9/11 realities. To instigate OFAC’s designation process, “a number of U.S. agencies, including the Departments of Treasury, State, Justice, as well as the Federal Bureau of Investigation and the intelligence community, review open source and confidential information, including tips and leads, about persons and entities who commit, threaten to commit, or support terrorism.” A “subset of the agencies” then develop a background file, which is reviewed to determine if there is adequate evidence to begin the designation process. Deputy heads will meet to make a recommendation to the Secretary of Treasury after the file is forwarded to the National Security Council. In cooperation with the Secretary of State and the Attorney General, the Secretary of the Treasury will then issue a

129 BURR, supra note 6, at 9-10.
130 Id. at 9.
133 Id.
134 Id.
final designation and blocking order.\textsuperscript{135} This blocking order is implemented by OFAC.\textsuperscript{136}

Pursuant to E.O. 13,224 and the OFAC blocking order, no notice is given to the entity prior to the freezing of its assets.\textsuperscript{137} Upon issuance of the final blocking order, the entity is told that its assets have been frozen.\textsuperscript{138} The entity’s name is then published in the Federal Register and disseminated to financial institutions.\textsuperscript{139}

If a blocked entity wishes to challenge its designation as an SDGT and request removal from the list on grounds of mistaken identity or pure error, the entity must follow OFAC’s assigned process for seeking removal.\textsuperscript{140} The entity must first submit its request in writing to OFAC, which includes the reason the entity believes its funds were blocked in error.\textsuperscript{141} The request for submission will be reviewed by OFAC, with additional information from the petitioner usually requested.\textsuperscript{142} At no point does the petitioner have an opportunity to review any classified evidence that the “subset of agencies” compiled against it.\textsuperscript{143} Removals from the SDGT list, which are not frequent, have always been in cases in which the petitioner is able to establish that he is no longer engaging in any activities that qualify him for designation.\textsuperscript{144}

Entities seeking a meaningful opportunity to defend themselves lack due process protections.\textsuperscript{145} They are given an ex

\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{139} Id.
\textsuperscript{142} Id.
\textsuperscript{143} See Nicole Nice-Peterson, Justice for the Designated: The Process That is Due to Alleged U.S. Financiers of Terrorism, 93 GEO. L.J. 1387, 1390-95 (2005).
\textsuperscript{144} Id. at 1405-19.
\textsuperscript{145} See generally id. (discussing what minimum procedures are required to allow U.S. entities accused of terrorist connections a meaningful opportunity to defend themselves).
parte, in-camera review. Courts reviewing IEEPA designations pursuant to the administrative record compiled by the Secretary of State and OFAC have not been flexible regarding challenges to accuracy and completeness of the administrative record. One must remember that challenges are enabled under the IEEPA as previously explained; however, they usually occur only after the detrimental effects of designation and frozen funds that stand to destruct the appellant’s organization or charity have taken place. Multiple members of the United Nations have expressed their disagreement with the process the United States employs in the freezing of assets. It is argued that the United States should disclose more of the evidence it uses to designate an entity as a terrorist front.

As we delve into prior case law surrounding the struggle between U.S. security and civil rights, the question again must be raised whether the brawny measures taken by the U.S. government have prevented another attack on U.S. soil, or whether the lack of another attack post-9/11 is attributable to other factors. Patriotic notions disallow the latter, insisting that the former, including E.O 13,244, has halted terrorist funding, deterred terrorist sentiment, and decreased terrorist muscle.

IV. Challenging the ‘SDGT’ Designation: U.S.-Based Muslim Charities

The Bush administration’s belief that terrorists “often-times use nice-sounding, non-governmental organizations as fronts for their activities,” ensured that international and domestic charities were on its radar. In December 2001, under the Bush
administration, four of the largest Muslim charities within the United States had their assets blocked and were placed on the SDGT.\textsuperscript{153} All of these charities appealed their designation; none of them succeeded.\textsuperscript{154}

\textbf{A. Holy Land Foundation}

The Holy Land Foundation for Relief and Development (HLF) was the first charity to be designated as an SDGT by the Bush Administration pursuant to E.O. 13,224.\textsuperscript{155} Described as America’s most perfectly disguised Islamic “charity,” the foundation’s stated purpose was to assist “victims of [] Palestinian upbringing.”\textsuperscript{156} HLF was a 501(c)(3) nonprofit charitable organization. Opened under the moniker Occupied Land Fund, HLF was found to have obtained funding from various individuals closely linked to Hamas.\textsuperscript{157} Pursuant to President Clinton’s Executive Order on January 23, 1995, Hamas was a designated terrorist entity.\textsuperscript{158} Evidence against HLF existed, but no action was taken within the United States.\textsuperscript{159} Israeli forces, however, raided the HLF office in Jerusalem in 1997 and purportedly found several documents that directly contradicted HLF’s claims that funds were collected strictly for humanitarian purposes.\textsuperscript{160}

HLF quietly continued to expand. It raised more than $5 million in 1998, $6 million in 1999, and $13 million in 2000.\textsuperscript{161} On December 4, 2001, HFL was labeled as an SDGT acting on behalf of Hamas.\textsuperscript{162} Pursuant to a blocking notice issued by

\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 1396.
\textsuperscript{156} See BURR, \textit{supra} note 6, at 271 (the Holy Land Foundation website has since been removed, but it has been archived by the Library of Congress, \textit{available at} http://memory.loc.gov/91i/catalog/0961.html (last visited Sept. 1, 2008)).
\textsuperscript{157} Id. The Occupied Land Fund received its first substantial donation from Musa Abu Marzouk who was found to be the head of the Hamas political bureau. \textit{Id.}
\textsuperscript{158} Id. at 273.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
OFAC, all of HLF’s funds, accounts, and real property were frozen. The blocking notice did not contain evidence setting forth specific IEEPA violations by HLF. The same day the blocking order was issued, government agents entered HLF offices in Texas, Illinois, New Jersey, and California, seizing and removing all contents. No warrant was issued prior to the raids. Pursuant to the order, HLF was no longer able to involve itself in transactions without specific authorization from OFAC.

HLF moved for a preliminary injunction in the U.S. District Court for the District of Columbia challenging the SDGT designation and the freezing of its assets. HLF argued that OFAC’s actions were in violation of the Due Process Clause of the U.S. Constitution and arbitrarily took place in violation of the Administrative Procedure Act (APA). The government argued that it had substantial evidence that millions of dollars in HLF charitable funds were distributed to Hamas. Additionally, it moved to dismiss the due process claims, arguing that pre-deprivation notice and hearing are unreasonable in exigent circumstances, and that actions were taken pursuant to OFAC’s designated review procedures. The government further argued that HLF had “ample opportunity” to contest its designation as an SDGT. HLF petitioned the court to admit various exhibits to supports its defense including sworn affidavits from its CEO.

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163 Id.
164 See Nice-Peterson, supra note 143, at 1396.
165 Id.
166 See Holy Land, 219 F. Supp. 2d at 64.
167 Id.
168 See Nice-Peterson, supra note 143, at 1397.
170 Id. at 70.
171 Id. at 62.
172 Nice-Peterson, supra note 143, at 1397; see also Holy Land, 219 F. Supp. 2d at 76. One can see the previously discussed tension between interests of national security and civil liberties in this case. Under due process considerations, HLF argued that they were unable to obtain a fair trial before their assets were frozen and their offices raided. HLF also argued that OFAC’s actions were in violation of First and Fourth Amendment rights granted by the U.S. Constitution. See id. However, the government may have felt that the threat in giving the court confidential information on how these charities have been “caught” would hinder their ability to prosecute these corrupt entities and give terrorists a way to work around the government’s evidence gathering. See id.
denying that HLF provided support to Hamas\textsuperscript{173} and evidence that the U.S. government had provided aid to the same Hamas-affiliated hospitals to which HLF is alleged to have contributed.\textsuperscript{174} HLF accused OFAC of avoiding and excluding evidence submitted by HLF that was contrary to OFAC's position, in turn, making the record incomplete and detrimentally inaccurate.\textsuperscript{175} Unable to obtain evidence in a timely manner to refute OFAC's allegations before it planned to redesignate HLF as an SDGT in May 2002, the district court rejected HLF's review under the APA and strictly applied the established rule, which limited the scope of review under the APA to the "[o]riginal administrative record."\textsuperscript{176}

The administrative record included numerous hearsay materials that would not ordinarily be considered under a summary judgment proceeding, including classified material that HLF was not allowed to review or refute.\textsuperscript{177} No extra-record evidence was admitted.\textsuperscript{178} The court reasoned that since OFAC provides designated entities post-deprivation rights to present counter-evidence, the administrative record becomes binding as the court's scope of review.\textsuperscript{179} The court reviewed OFAC's designation of HLF as an SDGT under the arbitrary and capricious standard.\textsuperscript{180} It held that OFAC's decision met "certain minimal standards of rationality"\textsuperscript{181} in that the administrative record contained "ample evidence" that:

(1) HLF has had financial connections to Hamas since its creation in 1989; (2) HLF leaders have been actively involved in various meeting with Hamas leaders; (3) HLF funds Hamas-controlled charitable organizations; (4) HLF provides financial support to orphans and

\textsuperscript{173} Nice-Peterson, supra note 143, at 1398.
\textsuperscript{174} Id.
\textsuperscript{175} Holy Land, 219 F. Supp. 2d at 65.
\textsuperscript{176} Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004).
\textsuperscript{177} See Nice-Peterson, supra note 143 (citing Holy Land, 219 F. Supp. 2d at 85). The administrative record, as explained previously, did not contain any refutations on the part of Holy Land. Id.
\textsuperscript{178} Id.
\textsuperscript{179} Holy Land, 219 F. Supp. 2d at 66.
\textsuperscript{180} Id. at 74.
\textsuperscript{181} Id. at 67.
families of Hamas martyrs and prisoners; (5) HLF’s Jerusalem office acted on behalf of Hamas; and (6) FBI informants reliably reported that HLF funds Hamas.\footnote{Id. at 69.}

On due process grounds, HFL challenged OFAC’s designation pursuant to the lack of pre-designation notice or a hearing to offer counter-evidence to enable inclusion in the administrative record.\footnote{Id. at 76.} The court found that a failure of notice and hearing occurred; however, it determined that this failure did not amount to a due process violation.\footnote{Id. at 76.} The court deemed that the President’s declaration of a national emergency under the IEEPA constituted an extraordinary situation whereby notice and hearing after seizure did not amount to a denial of due process.\footnote{Holy Land, 219 F.Supp.2d at 76 (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)).} The reviewing court also found that the U.S. government had satisfied all requirements: (1) the deprivation served an important government interest, in this case combating terrorism; (2) prompt action was necessary to prevent the transfer of assets prior to the blocking order; and (3) government officials blocked the assets pursuant to the IEEPA.\footnote{Id. at 76-77; see also Sahar Aziz, supra note 147, at 65.} The court also dismissed HLF’s constitutional claim under the First Amendment of right to association, deeming that the blocking order did not “[p]rohibit membership in Hamas or endorsement of its views, and therefore [did] not implicate HLF’s associational rights.”\footnote{Holy Land, 219 F. Supp. 2d at 81.} Further, the court held that freedom of association had not been violated because designation and blocking of funds promote substantial governmental interests in combating terrorism by undermining its financial base, and that “there is no other, narrower means of ensuring that charitable contributions to a terrorist organization are for a legitimate purpose.”\footnote{See id. at 81-82.} On appeal, the D.C. Circuit Court affirmed the lower court’s decision and upheld OFAC’s designation of HLF as an SDGT.\footnote{Id. at 81.} Pointing to national security interests, the court upheld the government’s reliance on hearsay
throughout the record, as well as its consideration of strictly classified evidence. The court also determined that HLF’s due process rights were not violated because it was shown that “notification would impinge upon security or other foreign policy goals of the United States,” and that HLF obtained a written opportunity to be heard post-deprivation when it submitted materials to OFAC for its consideration. Thus, pre-seizure notice of the blocking order was not necessary. In 2004, HLF was denied certiorari by the U.S. Supreme Court.

B. Global Relief Foundation

Global Relief Foundation (GRF) began operating in 1992 as a domestic non-profit organization headquartered in Illinois. In its complaint, GRF claimed to be a charitable organization that funds humanitarian relief programs around the world. Global Relief Foundation characterizes itself as the largest U.S.-based Islamic organization “with respect to the geographic scope of its relief programs.” In 2000, Global Relief reported nearly $3.7 million in charitable funding. Its distribution of aid reached China, Pakistan, Iraq, and various other nations. Although many of its funds came from the United States, nearly ninety percent of its donations were sent abroad.

On December 14, 2001, the FBI searched the headquarters of GRF and the home of its executive director. Materials ranging from credit cards to computers were seized for analysis by the FBI; on the same day, pursuant to IEEPA and E.O. 13,224, OFAC issued a blocking notice and requirement to furnish information.

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190 Id.
191 Holy Land, 333 F.3d at 163.
192 Id.
193 Id.
196 Id.
197 Id.
198 Id.
199 Id.
200 Id.
201 Global Relief Found., 207 F. Supp. 2d at 786.
The blocking order froze all of GRF's assets until further notice. The government's blocking order minimally acknowledged that it "had reason to believe [GRF] may be engaged in activities that violate the [IEEPA]." No specific grounds were stated before or after the freeze of GRF's assets. Contesting the blocking order would only be possible through the designated administrative procedures determined by OFAC. However, GRF was unable to produce a defense because it could not obtain the secret evidence that OFAC was using to validate the freezing of its assets.

Global Relief Foundation sought an injunction and declaratory judgment in federal district court to release the seized materials and unfreeze its funds while investigations were ongoing. GRF argued that the blocking of its assets and seizure of records was both unlawful and unconstitutional. The district court denied its motions, finding that GRF was unlikely to succeed on the merits. GRF claimed that the IEEPA's humanitarian exception did not preclude an organization from the right to provide humanitarian aid to any possible recipient, even those closely associated with terrorism. The court disagreed. It claimed that the President had the power to block any humanitarian aid as long as he first declared a national emergency and showed that this particular aid impaired his ability to deal with an emergency. The district court also rejected GRF's claim that E.O. 13,224 was unconstitutionally vague for its failure to define the phrase "associated with a person determined to be a terrorist." The court deemed that the vagueness issue was not ripe for review because, as stated previously, GRF had not been labeled an SDGT and the U.S. Treasury Department was blocking its assets while

\[202\] Id. at 792.


\[204\] Global Relief Found., 207 F. Supp. 2d at 787; see also Nice–Peterson, supra note 143, at 1390.

\[205\] Global Relief Found., 207 F. Supp. 2d at 787; see also Ruff, supra note 108, at 459.

\[206\] Id. at 794.

\[207\] Id. at 795.

\[208\] Id. at 802.
investigating the possible links to terrorist financing.\textsuperscript{209} In dealing with lack of pre-deprivation notice the court stated:

Due to exigencies of national security and foreign policy considerations, the Executive branch historically has not provided pre-deprivation notice in sanction programs under the IEEPA. The actions taken by the Executive branch pursuant to these statutes are procedurally and substantively different from other types of governmental conduct in that they first require a declaration of war or national emergency arising, at least in part, outside the United States.\textsuperscript{210}

On October 18, 2002, OFAC designated GRF as an SDGT.\textsuperscript{211} The Treasury Department's statement regarding the designation of GRF explained that GRF "[h]as connections to, has provided support for, and has provided assistance to Usama bin Ladin, the al-Qaida Network, and other known terrorists groups."\textsuperscript{212} The press release stated that one of the founders of GRF was a member of Makhtab Al-Dhidamat, the precursor organization to al-Qaeda.\textsuperscript{213} GRF officials were found to be closely connected to Osama bin Laden and the Taliban after it was subjected to international sanctions.\textsuperscript{214} The evidence of links against the foundation seemed quite intricate and substantive. Evidence shows that GRF published various newsletters requesting donations for God's cause— they [the Zakat funds] are disbursed for equipping the raiders, for the purchase of ammunition and food, and for their [the

\textsuperscript{209} Id. at 803; see also Ruff, supra note 108, at 462.

\textsuperscript{210} Global Relief Found., Inc. v. O'Neill, 207 F. Supp. 2d 779, 803 (2002); see also Palestine Information Office v. Schultz, 853 F.2d 932, 942-43 (D.C. Cir. 1988) (standing for the proposition that no governmental interest is more important than the security of the nation).


\textsuperscript{213} Id.

\textsuperscript{214} Id.
Mujahideen's] transportation so that they can raise God the Almighty's word... it is likely that the most important of disbursement of Zakat in our times is on the jihad for God's cause....

C. Benevolence International Foundation

Benevolence International Foundation (BIF) is an Illinois-based charitable nonprofit corporation administering humanitarian aid to individuals afflicted by war, natural disaster, and extreme poverty. As with GRF and HLF, the U.S. government acted upon suspicions that BIF had ties to terrorism. Due to suspicions regarding BIF's actions possibly violating the IEEPA, on December 14, 2001, OFAC issued a notice to BIF stating that the U.S. government had reason to believe that BIF may be engaged in activities that violate the IEEPA. The letter was accompanied with blocking of all BIF funds, accounts, and business records in accordance with the IEEPA. The government demanded the immediate production and surrender of all records, including computer files. Chicago offices of BIF and the home of BIF's Chief Executive Officer Enaam Arnaout were subsequently raided, and mass financial records were seized. As with the previous two charities, BIF was never given specific evidence leading to the governments blocking order. BIF filed suit in the United States District Court for the Northern District of Illinois, challenging the blocking order on grounds similar to GIF, claiming that the blocking order violated statutory and constitutional rights. Due to the fact that BIF was unable to financially support the continuance of the case, the case was voluntarily dismissed.

215 Id.
217 Id.
220 Id.
221 Id. at 937.
222 Id. at 941; see also Ruff, supra note 108, at 462.
223 Nice-Peterson, supra note 143, at 1402.
On November 19, 2002, BIF was designated as an SDGT.\footnote{224 Id.} The Department of Treasury deemed that BIF had provided support for and had been linked to al-Qaeda and its operatives.\footnote{225 Id.} BIF was also linked to both Mamdouh Mahumud Salim, a lieutenant present at the founding of al-Qaeda, as well as Mahamed Loay Bayazid, who was implicated in several U.S. embassy bombings.\footnote{226 Id.} Enaam Arnaout was later convicted in the United States for operating BIF as a racketeering enterprise.\footnote{227 Id.}

D. Islamic American Relief Association - USA

Islamic American Relief Association - USA (IARA) was the United States branch of the Islamic African Relief Agency, an international charity found to be linked to terrorism. In Islamic American Relief Agency v. Gonzales,\footnote{228 Islamic American Relief Agency v. Gonzales, 477 F.3d 728, (D.C. Cir. 2007).} the court held that the U.S. government did not exceed its statutory authority under the IEEPA when it blocked assets of the relief organization. Since IARA was found to be a branch of an organization placed on the SDGT list, it was deemed to have terrorist ties.\footnote{229 Id.} “[B]ased on the September 11th terrorist attacks... and the state of national emergency” the court held that a sufficient basis existed for the government’s conclusion that the agency and its branch subsidiary posed an unusual and extraordinary threat to the United States.\footnote{230 Id. at 728-30.}

On October 13, 2004, OFAC designated IARA as an SDGT.\footnote{231 Id.} OFAC concluded that IARA provided “financial support or other services to persons who commit, threaten to commit, or support terrorism.”\footnote{232 Id.} This designation meant that none of IARA’s assets, including the U.S. subsidiary IARA-USA, could be “transferred, withdrawn, exported, paid, or otherwise dealt in without prior

\begin{itemize}
\item \footnote{224 Id.}
\item \footnote{225 Id.}
\item \footnote{226 Id.}
\item \footnote{227 Id.}
\item \footnote{228 Islamic American Relief Agency v. Gonzales, 477 F.3d 728, (D.C. Cir. 2007).}
\item \footnote{229 Id.}
\item \footnote{230 Id. at 728-30.}
\item \footnote{231 For the government’s actions against IARA, see Office of Public Affairs, U.S. Dep’t of Treasury, Department of Treasury Designates Global Network, Senior Officials of IARA for Supporting bin Laden, Others (Oct. 12, 2004), http://www.ustreas.gov/press/releases/js2025.htm (last visited Sept. 1, 2008).}
\item \footnote{232 Id.}
\end{itemize}
authorization from OFAC.” IARA-USA was no longer able to use its offices or remove any items of corporate property. Unofficially, IARA-USA was extinguished.

IARA-USA soon filed suit refuting the OFAC designation, naming the Attorney General, the Secretary of Treasury, and other unidentified FBI agents and Department of Treasury personnel as defendants. IARA-USA claimed the blocking of its assets was unsupported by the record. The court of appeals reviewed the designation under the APA, and thus the APA’s highly deferential standard of review applied. Under this standard, the court would only set aside OFAC’s action if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The designation was upheld in federal court. The government produced evidence in support of a determination that IARA-USA was the U.S. branch of an international charity linked to terrorism.

IARA-USA was shut down in 2004. In January 2008, a federal grand jury indicted the IARA and several of its former officers with eight new counts of engaging in illegal financial transactions for the benefit of US-designated terrorist Gulbuddin Hekmatyar. These superceding indictments added to the original charges stemming from its 2004 placement on the Specially Designated Global Terrorist List, and in March 6, 2007, five officers where charged for violating federal sanctions by

233 Id.
234 Id.
235 Id.
236 See Islamic American Relief Agency, 447 F.3d at 732-33.
237 Id.
238 Id.
239 Id. at 732.
240 Id.
243 Id.
misusing IARA’s charitable status to raise funds for an unlawful purpose. It is important to note that both indictments failed to charge IARA or its chief officers with material support of terrorism, and did not allege that IARA knowingly financed terrorism. The indictments alleged that the defendants engaged in financial transactions in violation of the IEEPA, and these transactions benefited property controlled by a U.S.-designated terrorist organization.

IARA-USA garnered much attention because it was discovered that a mosque established and funded by retired NBA basketball star Hakeem “The Dream” Olajuwon gave more than $80,000 to the Islamic African Relief Agency. Olajuwon, like much of the American Muslim community, claims to have had no knowledge of the links to terrorism, believing that the Islamic African Relief Agency was a legitimate organization dedicated to helping the needy in Africa. The Islamic African Relief Agency was later found to have supported Hamas and offered financial support to Al-Ittihad al-Islamiya (AIAI), another organization listed as an SDGT pursuant to E.O. 13,224.

As seen in the previous four cases, USA Patriot Act Title I, section 106 has elicited various challenges and complaints of due process deprivation. By increasing the President’s power over property, assets of organizations, or foreign persons by permitting the submission of evidence in support of government action on an ex-parte, in camera basis, the government may subvert multiple due process considerations. This amendment to the International Emergency Powers Act specifically states:

244 Id.
245 Id.
247 Id.
250 See USA PATRIOT Act § 106(c), 50 U.S.C. § 1702(c) (2003).
In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Act) such information may be submitted to the reviewing court ex parte and in camera. This subsection does not confer or imply any right to judicial review.\textsuperscript{251}

As explained by the Attorney General, the need for this provision materializes in the government’s ability to identify and neutralize terrorist networks.\textsuperscript{252} Should national security measures such as section 106 preempt constitutional due process concerns? Utilizing this provision allows the U.S. government to do more than freeze bank accounts; it allows the seizure of assets related to groups identified as allegedly associated or providing material support to any alleged terrorist organizations.\textsuperscript{253}

The Patriot Act does not deny the accused judicial review in the absolute. In fact, judicial review is pronounced in section 316(a) of the Patriot Act.\textsuperscript{254} This provision permits owners of confiscated property to file federal lawsuits challenging OFAC’s determination that the property was utilized in furtherance of terrorism.\textsuperscript{255} However, this judicial review could be rendered meaningless since evidence may be suspended if the court deems that compliance with the Federal Rules of Evidence could implicate national security interests.\textsuperscript{256} With balance understandably tipping in the government’s favor, the court must weigh the need to protect the sanctity of confidential information, which could leak information allowing terrorists to subvert government investigation, with the potential that the right to a fair

\textsuperscript{251} USA PATRIOT Act § 106(c), 50 U.S.C. § 1702(c) (2003); see also Classified Information Procedures Act, 18 U.S.C. Appx. § 1(a)(2003). Section 1(a) defines classified information as “[a]ny information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security . . . .”; see also O’Sullivan-Butler, supra note 249, at 14.

\textsuperscript{252} O’Sullivan-Butler, supra note 249, at 4414.

\textsuperscript{253} 18 U.S.C. § 2339(a) (stating that the term “material support or resources means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities . . . .”).

\textsuperscript{254} USA PATRIOT Act, Pub. L. No. 107-56, § 316.

\textsuperscript{255} Id.

\textsuperscript{256} O’Sullivan-Butler, supra note 249, at 415.
trials will be violated. In the cases previously discussed, the court was required to determine which interest should prevail. In evaluating the procedures used in these cases the courts considered the following:

1. the interest at stake for the charitable organizations;
2. the risk of an erroneous deprivation through the procedures used;
3. the probable value of additional or different safeguards;
4. and the interest of the government in utilizing ex-parte, in camera, due process-lacking procedures rather than those which coincide with constitutional principles.

In each instance, national security was determined to be more vital.

We now turn to the due process deprivations that resonate throughout the previous cases, once again emphasizing the necessity for the reader to question whether the government must use these policies to avoid another 9/11 or whether the lines of the Constitution have blurred so as to render the Constitution meaningless.

V. Skimming the Line of Due Process: A Critique of the Terrorist Designation Process

The Fifth Amendment Due Process Clause prohibits the government from depriving any person of life, liberty, or property without due process of law. The present due process regime requires that each side be permitted to rebut the adversary’s evidence by fostering evidence to the contrary. Under new anti-terrorism legislation, the government’s eradication of due process protection affords the defendant no ability to confront any classified evidence used to designate a charitable entity as funding terrorism. Moreover, the new legislation allows blocking of assets pending investigation. The threat posed, therefore, is the

257 Id.


259 U.S. CONST. amend. XIV, § 1 (“Nor shall any State deprive any person of life, liberty, or property . . . .”).

260 O'Sullivan-Butler, supra note 250, at 414.

261 Selden, supra note 138, at 538.

262 Id.
blocking of assets based on scarce or irrelevant evidence.\textsuperscript{263} In cases where the government does have sufficient evidence to designate an entity, risk of error still pervades the procedures provided to these charitable organizations.\textsuperscript{264}

Many designated charitable organizations claim that they are being deprived of their property, which includes financial as well as physical assets, without due process.\textsuperscript{265} An organization designated as a terrorist organization under the IEEPA remains ignorant of the designation until it realizes that its assets are frozen, which can be triggered by a mere investigation into its activities.\textsuperscript{266} One civil liberties organization claims "once a charitable organi[z]ation is so designated . . . the charity is unable to see the government’s evidence and thus understand the basis for the charges. Since its assets are frozen it lacks resources to mount a defens[e]."\textsuperscript{267} These classified ex-parte, in camera evidence proceedings have been the basis of the majority of erroneous deprivation claims.\textsuperscript{268} Using secret evidence to justify deprivation gives these charities no meaningful opportunity to test the authenticity of information being used to deprive its assets.\textsuperscript{269} "[N]o better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it."\textsuperscript{270}

The final procedural deficiency stems from the lack of review given to blocking orders. The only evidence reviewable by a court once an OFAC designation occurs is the administrative record compiled by the agency.\textsuperscript{271} The charitable entity is not allowed to submit additional evidence.\textsuperscript{272} Since the IEEPA contains no provision for judicial review, review is conducted under APA

\textsuperscript{263} Id.
\textsuperscript{264} Id.
\textsuperscript{265} See Sahar Aziz, supra note 147, at 65.
\textsuperscript{266} See Global Relief Found., 207 F.Supp.2d at 779.
\textsuperscript{268} Nice-Peterson, supra note 143, at 1407.
\textsuperscript{269} Id.
\textsuperscript{270} Id. (citing Fuentes v. Shevin, 407 U.S. 67, 81 (1972)).
\textsuperscript{271} Nice-Peterson, supra note 143, at 1407.
\textsuperscript{272} Id.
guidelines.\textsuperscript{273} Under the APA, the review is conducted under the "arbitrary and capricious" standard giving an almost definite victory to the government.\textsuperscript{274} Under this standard, an action by the government is only held invalid if it is deemed to be arbitrary, capricious, or an abuse of discretion.\textsuperscript{275} This strong deference seemingly leads to affirmation of all OFAC designations.\textsuperscript{276} In combination with this deference, OFAC decisions disrupt the balance of national security and civil rights. The government reviews these designations on an ex-parte, in camera evidence proceeding using "unprecedented freedom from judicial or congressional oversight." \textsuperscript{277} National security, arguably rightly so, seems to overwhelm the assertion of procedural due process rights in every case.\textsuperscript{278}

Because identifying terrorist ties is a difficult task, the room for error is large.\textsuperscript{279} OFAC's freezing of assets deals with individuals and entities from around the world and difficult-to-identify sources from certain target nations.\textsuperscript{280} It should not be overlooked that due process of law is not for the sole benefit of the charities in this instance. It is in the best interest of the government to protect itself against mishaps that leave lasting stains on our system of justice, which are bound to occur in ex-parte evidentiary and review proceedings.\textsuperscript{281}

In considering these due process deficiencies resulting from deference to national security, we must remember that the government was forced to act swiftly before more targets could

\begin{footnotesize}
\begin{enumerate}
\item Administrative Procedure Act, § 5 U.S.C. 555 (2000); see also Nice-Peterson, \textit{supra} note 143, at 1407.
\item Nice-Peterson, \textit{supra} note 143, at 1407.
\item Id. at 1408 (quoting Peter L. Fitzgerald, "If Property Rights Were Treated Like Human Rights, They Could Never Get Away With This": Blacklisting and Due Process in U.S. Economic Sanctions Programs, 51 HASTINGS L.J. 73, 136 (1999)).
\item See id. ("Decisions made by OFAC receive even greater deference because they involve matters of national security or foreign policy" (citations omitted)).
\item Selden, \textit{supra} note 138, at 554.
\item Id.
\item See, e.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317 (1950) (holding the U.S. could exclude the alien wife of a citizen who had served in the armed forces of the United States during World War II without hearing).
\item Selden, \textit{supra} note 138, at 553.
\end{enumerate}
\end{footnotesize}
react and subvert previous U.S. restrictions.\textsuperscript{282} Moreover, in dealing with charities, precautions needed to be taken before these organizations were able to move assets or money elsewhere.\textsuperscript{283} As previously stated, these limitations on due process do not occur spontaneously; they occur only after the charity is given a terrorist designation by the President, the Secretary of State, the Secretary of the Treasury, and the Attorney General.\textsuperscript{284} After 9/11, President Bush declared, “money is the lifeblood of terrorism.”\textsuperscript{285} Recognizing that this “lifeblood” was being supplied by charities, the government understood that necessary means needed to be taken.\textsuperscript{286}

It is important to bear in mind that both the IEEPA provisions for the discretionary use of evidence, and the use of ex-parte, in camera review have been deemed constitutional.\textsuperscript{287} Although charities make valid arguments about the difficulties that arise in these procedures, the government’s notion of national security seems to trump all interests. While the government has a compelling argument for nondisclosure and secret evidence, the judiciary must make sure that the national security argument pervading throughout the designation of these entities is not being abused. However, since precedent has established the national security argument extremely successfully, the ability to exploit its use becomes even more omnipresent.

\section*{VI. First Amendment Claims of Charities}

“\textit{Woe to the idolaters, who do not pay the Zakat, and who deny the Hereafter.}”\textsuperscript{288}

As stated within the Qur’an, charitable giving is a necessary

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  \item \textsuperscript{282} Id. at 502.
  \item \textsuperscript{283} \textit{See id.} (noting that some charitable organizations divert donations to finance suicide bombs and other attacks).
  \item \textsuperscript{284} Id. at 497.
  \item \textsuperscript{285} Peter Brookes, \textit{A Devil’s Triangle: Terrorism, Weapons of Mass Destruction, and Rogue States} 52 (2005).
  \item \textsuperscript{286} Selden, \textit{supra} note 138, at 502 (noting that some terrorist entities, including al Qaeda, raise money by convincing donors that their donations will go to orphans and widows, when in actuality the donations are sent to suicide bombers).
  \item \textsuperscript{288} Holy Qur’an 41:6-7.
\end{itemize}
aspect of the Muslim faith. However, this faith-based claim seems to have no reversible effect on OFAC designations. The courts have consistently found that terrorist designations and blocking orders do not violate a charity’s right to speech, association, or free exercise of religion. In multiple instances, First Amendment freedom of religion claims were considered moot because the charitable organizations had failed to hold themselves out as religious-based organizations. HLF claimed that the blocking order imposed by the government pursuant to designation as an SDGT violated its First Amendment right to free exercise of religion and the free exercise rights of its donors. Within its petition, HLF alleged that OFAC violated the Religious Freedoms Restoration Act. The D.C. District Court split HLF’s claims into two parts: (1) HLF’s claim of substantial burden on its free exercise of religion, and (2) its claims of substantial burden brought on behalf of its Muslim employees and donors. HLF argued that its charitable work fulfilled its religious obligation of Zakat and that following this pillar of Islam was an exercise of religious rights. The court worked its way around this defense by reasoning that HLF had failed to prove that it was a religious organization per se. Thereby, HLF failed to establish that the organization was exercising religious beliefs. HLF had defined itself to the court as a “nonprofit charitable corporation” without reference to religious character. Regarding its claim on behalf

291 Id. at 82.
292 Id. at 83.
293 Id.; see also Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2002) (declaring that the government may substantially burden a person’s exercise of religion only if the burden is (1) in furtherance of a compelling government interest and (2) is the least restrictive means of furthering that compelling government interest).
294 Holy Land, 219 F. Supp. 2d at 83.
295 Id.
296 Id.
297 See id. (“Although charitable activities may constitute religious exercise if performed by religious believers for religious reasons, HLF has not established that, as an organization, it made these contributions as an exercise of its own religious beliefs.”).
298 Id.
of employees and donors, the court concluded that HLF did not have associational standing to raise these claims, finding that claims surrounding free exercise of religion required individual participation to prove the extent of burden the government had placed on religious practices.\textsuperscript{299} On appeal the Court of Appeals for the District Columbia revisited the issue of whether the Religious Freedoms Restorations Act (RFRA) could be implicated in this situation.\textsuperscript{300} The circuit court affirmed on grounds that the Constitution gives \textit{"[n]o free exercise right to fund terrorists."}\textsuperscript{301} The court went on to state that \textit{"preventing such a corporation from aiding terrorists did not violate any right contemplated in the Constitution or the RFRA."}\textsuperscript{302}

Recently, Emadaddin Z. Muntasser, a Muslim, was accused of misleading the government about the nature of Care International Inc. ("Care"), a charity the government claims supported the jihadist and mujahedin; he argued that funding jihad is a religious right.\textsuperscript{303} His attorney, Susan Estrich, argued that the right to solicit or promote religious efforts, which includes funding jihad, is protected by the Constitution.\textsuperscript{304} Her memorandum in support of her motion to dismiss the indictment on the basis of unconstitutional treatment of the laws contends that "Care was set up to advance religious goals; jihad is a religious concept; \textit{[Z]akat} is a religious obligation; support for the \textit{[mujahedin]} is, according to certain interpretations of the \textit{[Qur'an]}, a religious command."\textsuperscript{305} She further argues that \textit{"[i]t is absolutely clear that the government is not free to prefer one religion over another: if Jews and Catholics are free to raise money and support their chosen causes domestically and internationally, no different rules may be applied . . . ."}\textsuperscript{306}

\textsuperscript{299} \textit{Id.}

\textsuperscript{300} \textit{Holy Land}, 219 F. Supp. 2d at 84.

\textsuperscript{301} \textit{Holy Land Found. for Relief & Dev. v. Ashcroft}, 333 F.3d 156, 166-167 (D.C. Cir. 2003).

\textsuperscript{302} \textit{Id.} at 167.

\textsuperscript{303} United States v. Mubayyid, 476 F. Supp. 2d 46, 47 (D. Mass. 2007) (defining "jihad" as "Islamic holy war" and "mujahideen" as "holy warriors").

\textsuperscript{304} \textit{Id.} at 51.

\textsuperscript{305} Defendants' Motion to Dismiss and Incorporated Memorandum at 38, U.S. v. Mubayyid, No. 05-40026, 2005 WL 5660269 (D. Mass. 2005).

\textsuperscript{306} \textit{Id.} at 36.
Muntasser had been charged with scheming to conceal the fact that Care was an outgrowth of the Al-Kigah Refugee Center, an organization that was linked to the bombing of the World Trade Center in New York in 1993.\textsuperscript{307} The government contended that had the IRS known that Care was raising monetary funds for jihad, it would not have been granted 501(c)(3) nonprofit status.\textsuperscript{308} Although Estrich’s argument could be labeled radical, it is backed by beliefs found within the Muslim population. As seen in section 205(c)(3) of the I.R.C., a not-for-profit organization utilizing funds for the advancement of religion is entitled to a tax exemption.\textsuperscript{309} Arguably, when Care was using Zakat towards funding jihad or mujahedin, it was advancing the Muslim religion. The U.S. government denied First Amendment rights in this situation, acknowledging that national security interests preempt any organization’s First Amendment religious rights.

\textbf{VII. Wins for Civil Rights or Wins for Terrorists?}

Two recent cases have rendered verdicts that take a turn towards expanding civil rights. An argument can be made that the circumstances surrounding these two cases suggest triumphs for those who seek to support terrorism through financial means.\textsuperscript{310} The first of these holdings seems to limit penalties for supporting terrorism to criminal proceedings.\textsuperscript{311} The second case directly asserts that parts of the Patriot Act are unconstitutionally vague.\textsuperscript{312}

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\textsuperscript{307} \textit{Mubayyid}, 476 F. Supp. 2d at 48.
\textsuperscript{308} \textit{ld}. at 52.
\textsuperscript{309} See I.R.C. § 501(c)(3) (2000) (noting “corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious purposes” are entitled to tax exemption).
\textsuperscript{310} See, \textit{e.g.}, Posting of Andrew Cochran to Counterterrorism Blog, http://www.counterterrorismblog.org/ (Dec. 29, 2007, 2:12 EST) (“[Requiring] a more direct causal link . . . between the defendants and the murders . . . make[s] it extremely difficult, if not impossible, for terrorism victims to receive compensation from those whose funds made a particular attack possible.”).
\textsuperscript{312} See Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1134-35 (9th Cir. 2007).
\end{flushleft}
A. Boim v. Quranic Literacy Institute: The Civil Case

The 1991 Anti-Terrorism Act (ATA) allows recourse for U.S. citizens who have sustained injuries as a result of activities of foreign terrorist organizations in that it allows injured persons, their estates, survivors, or heirs to recover threefold the damages sustained, as well as the cost of bringing suit, including attorney fees. However, the ATA does not allow the U.S., foreign states or government officials to be named as defendants, and it excludes suits resulting from "an act of war." In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA), allowing federal courts jurisdiction over claims by U.S. citizens alleging injury at the hands of state-sponsored terrorism. Acting as an effective amendment to the Foreign Sovereign Immunities Act (FSIA), the AEDPA mandates that the defendant be identified as a state-sponsor of terrorism by the U.S. State Department to maintain the lawsuit.

Although infrequent, suits have been brought utilizing the AEDPA and the ATA. In one case that is illustrative of the successful utilization of the ATA against several charitable organizations is Boim v. Quranic Literacy Institute. In Boim, the plaintiffs were the parents of David Boim, who was shot and killed by Islamic Terrorists on Israel's West Bank in 1996. They named as defendants Amjad Hinawi and Khalil Tawfiq Al-Sharif, two individuals directly involved in the murder of their son, along with several U.S. individuals and U.S.-based charitable

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313 Boim, 291 F.3d 1000.
317 Id. at 355.
320 Id.
organizations that allegedly supported Hamas. Pursuant to summary judgment against several defendants, including HLF, OFAC stepped in to seize and freeze multiple assets.

Issues surrounding liability of and damages against the Quranic Literacy Institute (QLI) went to trial. To prevail on their claim against QLI, the Boims had to prove that QLI “provided material support” to Hamas. The trial court held that the evidence presented by the Boims was sufficient to prove that their son was murdered by Hamas terrorists, and that defendants had knowingly provided material support to Hamas. On December 8, 2004, the three Islamic charities named as defendants were ordered to pay $156 million to the parents of David Boim. However, on December 28, 2007, a federal appeals court overturned the $156 million award.

The appeals court ruled that the Boims failed to show a link between the contributions from the American Islamic charities’ contributions to the militant organization Hamas and to David Boim’s shooting death. The Boim’s theory was that in promoting, raising money, and otherwise working with and on the behalf of Hamas or its affiliates, the defendants, including HLF, helped to fund, train, and arm the terrorists that killed their son. William Neal, a juror in the case, told the media that the government’s evidence “was pieced together over the course of a decade – a phone call this year, a message another year.” Instead of trying to prove that the defendants knew they were supporting terrorists, Neal stated that the prosecutors “danced around the wire transfers by showing us videos of little kids in

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321 Id.
322 Id. at 893.
323 Id. at 931.
324 Id. at 891 (quoting Boim, 291 F. 3d at 1016).
325 Boim, supra note 319, at 899.
327 Id.
328 Id.
329 Id. at 709-10.
bomb belts and people singing about Hamas, things that didn’t directly relate to the case.”

John Beal, lawyer for QLI, went on to say that “[t]hese cases are about a Middle Eastern political dispute that does not belong in an American Courtroom.”

“This case was a paradigmatic example of the laws being thrown out the window because of the pain and fear and anger that all of us felt after Sept[ember] 11,” said attorney Matthew Piers. “If we break our laws in moments like this, the bad guys win.”

The Council on American-Islamic Relations (CAIR) stated, “This landmark ruling is a strong rejection of the recent disturbing trend of political lawsuits against American Muslims who have committed no crime other than providing humanitarian aid to Palestinians.”

The court in the Boim case admitted evidence to refute claims made by the decedent’s parents. While this was a civil case, with the ramifications of the decision not affecting national security, the decision nonetheless illustrates the effectiveness of allowing evidence in rebuttal of terrorist claims—the individuals labeled as supporting terrorists and ultimately blamed for the death of a soldier were able to defeat this branding through a fair judicial process. The mere fact that the “terrorist supporters” in this instance did not have to pay for David Boim’s death may be labeled by some as a victory for terrorists and their financial supporters, as well as a legal defeat for the Bush, and now Obama, administration’s ongoing “War on Terror.”

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331 Id.
334 Id.
336 Id.
B. Patriot Act Definition of ‘Support for Terrorism’ Partially Held Unconstitutional

On December 10, 2007, the Court of Appeals for the Ninth Circuit affirmed the district court’s finding that the AEDPA’s prohibition of providing “material support or resources” to designated terrorist organizations was unconstitutionally vague in *Humanitarian Law Project v. Mukasey*. The definition of “material support or resources” included, *inter alia*, the terms “service,” “training” and “expert advice and assistance.” The court explained that “vague statutes are invalid for three reasons: 1) to avoid punishing people for behavior they could not have known was illegal; 2) to avoid arbitrary and discriminatory enforcement by government officers; and 3) to avoid any chilling effect on the exercise of First Amendment freedoms.”

The provisions made it a crime to support “foreign terrorist organizations” be it training, expert advice, assistance, or personnel. These actions were taken pursuant to a 2005 ruling by Judge Audrey B. Collins of the U.S. District Court, Central Court of California, who deemed two provisions of E.O. 13,224 impermissibly vague because they allowed the President to unilaterally designate organizations as terrorist groups and broadly prohibit association with such groups. In their original complaint, Humanitarian Law Project asserted that the law compels a “guilt by association standard” under which innocent individuals could be punished for supporting good works of an organization engaged in illicit activities.

This seems to be a win for both charities and individual donors that fear prosecution for providing benign assistance to foreign groups that subsequently have been added to OFAC’s SDT or SDGT list. “The court’s decision confirms that even in fighting

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338 *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122, 1139 (9th Cir. 2007).
339 *Id.* at 1128.
340 *Id.* at 1133.
341 *Id.* at 1136.
343 *Id.*
terror, unchecked executive authority and trampling on fundamental freedoms is not a permissible option." However, fear of prosecution for donating to a hidden terrorist charity still pervades the Muslim American community.

VIII. U.S. Muslims Fear Donating to Charities

If you have any involvement in the financing of the al Qaida organization, you have two choices: cooperate in this fight, or we will freeze your U.S. assets; we will punish you for providing the resources that make these evil acts possible. We will succeed in starving the terrorists of funding and shutting down the institutions that support or facilitate terrorism.

Triggered by fear that their charitable donations could bring unwanted attention from the U.S. government, and perhaps link them to terrorism, many Muslim Americans are backing away from Muslim-based charities. This fear often leads to a moral dilemma for Muslim Americans. They may either follow the pillars of Islam, which include Zakat, or forget about their religion and needy Muslims around the world for fear of government intrusion. Najah Bazzy established Zaman International in order to provide for needy Muslim communities around the world. Her inability to obtain charity funds stems from the fear resonating in the Muslim community. The largest donations she receives come in the form of anonymous wads of $100 bills stuffed into envelopes. No one wants his or her name traced to the donation. Much of the fear comes from brawny U.S. government action that the Muslim American community views as unnecessarily invasive.

344 See id. (citing David Cole, a Georgetown University law professor who helped to represent the plaintiff).

345 U.S. Dep't Treasury, Contributions by the Department of the Treasury to the Financial War on Terrorism: Fact Sheet, Sept. 2002 (citing Treasury Secretary Paul O'Neill, Sept. 24, 2001).


347 Id.

348 Id.

349 Id.
Prior to 9/11, utilization of IRC section 501(1)(c)(3) and other statutory frameworks allowing examination of the records of religious charities were seldom, if ever, invoked. Applying such statutes to scrutinize the finances of a religious organization was virtually unheard of. The U.S. government was hesitant to investigate any link between questionable donations and Islamic charities existing within the sovereign. Factors stemming from Muslim voter sentiment and questionable civil rights infractions led to over-wariness in order to avoid disenfranchising minorities. With more than 1,200 mosques and 426 Muslim associations in the United States, and with most of those institutions collecting Zakat and Sadaqah, the complications not only existed in substance, but in magnitude.

In 1999, the Muslim community presented the Clinton Administration with guidelines acceptable to Islamic charities. These guidelines sought to strengthen mainstream Muslims against the increasing attacks upon them by fundamentalists. Those in the Muslim community were willing to “adopt a policy of complete transparency,” and they appeared “eager to show the government where the money comes from what they use it for.” The U.S. government failed to respond. When the Muslim community again came forward after 9/11 seeking “federally sanctioned guidelines” in order to “conduct a thorough legal and financial audit, one that will provide a clean bill of health,” the U.S. government was again unresponsive. The U.S. government’s post-9/11 attack and its efforts to shut down many charities, combined with the fact that charity is one of the basic tenets of Islam, dispersed a false impression that all Muslim charities were supporting terrorism. In line with this fear, the

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351 See BURR, supra note 6, at 265.
352 Id.
353 Id.
354 Id. at 266.
355 Id. at 265.
356 Id. at 266.
357 See BURR, supra note 6, at 266.
358 Id. (citing Salam Al-Marayati, Indict Individuals, Not Charities, N.Y. TIMES, Oct. 11, 2002, at A33).
359 Id.
Muslim community feels that its charitable organizations were being targeted because they were providing assistance in high-risk areas throughout the Middle East, Africa, and Asia.\textsuperscript{360} Multiple non-Muslim charitable organizations send monetary aid to these areas, yet a nominal amount of these non-Muslim organizations have been designated as supporting terrorism. As a result of these inequities, the Muslim community within the United States feels as though they are being singled out on the basis of religion.\textsuperscript{361} While the U.S. government may have legitimate reasons for freezing assets and blocking funds, the perception still exists that the U.S. government has attacked the Muslim community on the basis of religion.\textsuperscript{362}

\textbf{IX. The Treasury Department and the Muslim Community in America}

Commencing Ramadan in 2004, the Secretary of Treasury issued a statement cautioning Muslims against giving charitable contributions to questionable groups: "[w]hen you open your hearts to charity during Ramadan, we encourage you to educate yourself in the activities of the charities in which you donate, to help ensure that your generosity is not exploited for nefarious purposes."\textsuperscript{363} Within the statement was a list of groups that had been previously designated as supporting terrorists and that had been blacklisted.\textsuperscript{364} The statement also served as a reminder that it was a crime to support any of these groups or terrorist-ridden organizations in any fashion.\textsuperscript{365} Laila Al-Marayati argues that suspicion linked to Muslim charities denotes an assumption by the U.S. government that every instance of a Muslim giving overseas should be examined.\textsuperscript{366} The U.S. Department of Treasury continues to closely examine the Muslim community since the


\textsuperscript{361} See id.

\textsuperscript{362} \textit{Id. at} 335-37.

\textsuperscript{363} Al-Marayati, \textit{supra} note 360, at 336.

\textsuperscript{364} \textit{Id}.

\textsuperscript{365} \textit{Id}.

\textsuperscript{366} \textit{Id}.
passing of E.O. 13,224 in order to catch funds directed at terrorist entities. In 2002, the U.S. Department of Treasury issued Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities. These guidelines were introduced as a response to demands from the Muslim American community. In 2005, the guidelines were revised to take into account comments obtained from the charitable community, notably the Arab-American and Islamic-American communities, on how to best safeguard charitable giving from misuse by terrorists and increase awareness of the very real threat terrorist groups pose. The revised guidelines were released for public comment in 2005. These recommendations provided guidelines to assist charities that attempt in good faith “to protect themselves from terrorist abuse.” The guidelines were also used to provide due diligence to the pillar of Zakat. Charities were advised to apply a “risk-based” approach, especially when granting funds to those organizations abroad due to the increased risk associated with overseas charitable activity. Charities were expected to collect basic information about the grantee, including the grantee’s projects and goals. In order to properly check backgrounds, charities were to check OFAC’s SDN List, as well as the Terrorist Exclusion List (TEL). Both of these lists are made available to the public.

On September 29, 2006, the Treasury Department released its third version of the Anti-Terrorist Financing Guidelines. In the

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367 Id.
369 Al-Marayati, supra note 360.
370 Anti-Terrorist Financing Guidelines, supra note 368, at 8.
371 Id.
372 Id. at 9.
373 Id.
374 Id. at 2.
375 Id. at 14.
377 Anti-Terrorist Financing Guidelines, supra note 368.
annex to this version, the Treasury Department sought to inform the Muslim population of terrorists' abuse of the charitable sector. It explains that terrorist organizations utilize benevolence in order to radicalize vulnerable populations and cultivate support for their cause.\(^{378}\) Recent developments, such as the exploitation of Lashkar-e Tayyiba and false charitable fronts used after the 2005 earthquake in South Asia, display such abuse of charitable services.\(^{379}\) Hamas associated charities were used for support in the Palestinian territories, while Hezbollah had control of the charitable distribution in Lebanon.\(^{380}\) These examples demonstrate the continued ability of terrorist entities to effectively exploit and obtain funds from charitable organizations and relief efforts.

The Treasury Department, in combination with other departments of the U.S. government, continues to combat terrorist abuse of the charitable sector by:

1. sanctioning terrorist related charities and officials through terrorist financing designations;
2. contributing financial information and investigative resources and expertise to advance criminal investigations and prosecutions of charities and charitable officials providing material support for designated terrorist organization or activities; (3) facilitating international action to address these abuses; and (4) conducting comprehensive outreach to the charitable sector to raise awareness of terrorist exploitation and the steps that charities can take to protect themselves from such abuse.\(^{381}\)

In addition to these ongoing efforts by the U.S. government, other nations around the world have recognized the problem of terrorist exploitation of benevolence and assisted to curb this abuse.\(^{382}\) The Financial Action Task Force (FATF), the largest inter-governmental organization responsible for developing and promoting global policies to combat money laundering and

\(^{378}\) Id.
\(^{379}\) Id.
\(^{380}\) Id.
\(^{381}\) Id.
\(^{382}\) Id.
terrorist financing, has published various guidelines for strengthening the international standard for combating abuse of non-profit and charitable organizations.\textsuperscript{383} Regional bodies, stemming from the FATF, including the Asia Pacific Group, Eurasian Group, and the Middle East and North African Financial Action Task Force, have all developed typologies on the active threat of terrorist financing and support through charities that operate within their regions.\textsuperscript{384} These organizations are implementing measures, leading to the ultimate goal of dismantling charities that fund terrorism.\textsuperscript{385}

X. Halting the Terrorist Exploitation of Charities Abroad: U.N. Assistance

The United States' efforts to curb the financing of terror will be futile if other nations allow charitable networks, especially those charities that exploit Zakat and other benevolent purposes, to escape investigation and regulation. The United Nations has recognized this problem.\textsuperscript{386} Several resolutions have been passed compelling member states to act to freeze terrorist financing.\textsuperscript{387}

On September 28, 2001, the United Nations Security Council adopted Resolution 1373 forcing its member states to prevent and suppress the financing of terrorist attacks.\textsuperscript{388} Resolution 1373 forces nations to "[p]rohibit nationals or any persons and entities within their territories from making any funds, financial assets, or economic resources... for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist attacks...."\textsuperscript{389} The resolution necessitates freezing of assets and economic resources of those individuals who facilitate the commission of terrorist acts.\textsuperscript{390} Uncertainty remains as to the binding legal effect of the resolution, which includes four

\begin{itemize}
\item \textsuperscript{383} Anti-Terrorist Financing Guidelines, \textit{supra} note 368, at 14.
\item \textsuperscript{384} \textit{Id.} at 15.
\item \textsuperscript{385} \textit{Id.}
\item \textsuperscript{386} \textit{See} United Nations Model Terrorist Financing Bill (2003), \textit{available at} http://www.imolin.org/imolin/model.html (last visited Sept. 15, 2008).
\item \textsuperscript{387} \textit{See} United Nations Treaty Collection, Conventions on Terrorism, \textit{available at} http://untreaty.un.org/English/Terrorism.asp, (last visited Sept. 15, 2008).
\item \textsuperscript{389} \textit{Id.} ¶ 4.
\item \textsuperscript{390} \textit{Id.}
\end{itemize}
requirements in order for states to be legally conforming.  

In 2004, the Security Council adopted Resolution 1535, which called for the creation of a Counter Terrorism Committee Executive Directorate (CTED) to monitor the implementation of Resolution 1373 and to facilitate its implementation in member states. Resolution 1540 was also added in 2004. Backed by the 1540 committee, its task was to monitor member states’ compliance with previous resolutions, calling on states to prevent non-state actors (including terrorist groups) from accessing weapons of mass destruction. On September 14, 2005, in conjunction with the World Summit, the Security Council held a high-level meeting during which Resolution 1624 was adopted. Resolution 1624 condemned all acts of terrorism, irrespective of their motivation, as well as the incitement of these acts. Secretary General Kofi Annan launched a new proposal during this September 2005 summit. Using a five-pillar approach, Annan sought to: “dissuade groups from resorting to terrorism; deny terrorist the means to carry out an attack; deter states from supporting terrorist groups; develop state capacity to prevent terrorism; and defend human rights in the context of terrorism and

391 Id. (The four requirements of Resolution 1373 are to: [1] prevent and suppress the financing of terrorist attacks; [2] criminalize the willful provision or collection, by any means directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used in order to carry out terrorist acts; [3] freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities; and [4] prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit of facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.).


394 Id.

395 Id.
On May 2, 2006, Annan released his report titled *Uniting Against Terrorism: Recommendations Used for a Global Counter-Terrorism Strategy.* These recommendations further developed and refined the pillars previously stated. The report also identified practical means for the United Nations to strengthen individual and collective capacity to fight terrorism. On September 8, 2006 Annan’s global counter terrorism strategy was adopted by the General Assembly.

As of January 2006, thirty-four United Nation member states had combined to freeze over $93 million in terrorist assets under the al-Qaeda and Taliban regime. The United Nations Security Council has also imposed various travel bans and financial sanctions against al-Qaeda and associated entities. In conjunction with the International Monetary Fund, forty nations have been assessed on anti-money-laundering and terrorism financing capacity. The World Bank has also assessed measures of compliance with counter terrorism financing standards and delivered technical assistance to all developing regions.

Understanding that the ultimate success in the fight against those who commit terrorist acts requires global support, the United States must be the leader in both pushing for U.N. policies surrounding sanctioning, and setting an example by implementing and abiding by these policies. The task at hand is too enormous for the United States to accomplish by itself. It will take the cooperation of each individual state and the cooperation of nations in tune with their neighbors to correctly execute each U.N. resolution. As a result, trials and tribulations are sure to arise when a nation must balance between threats of social upheaval, anti-U.S. sentiment, and conforming to U.N. resolutions.

396 *Id.*
398 UN Action to Counter Terrorism, *supra* note 392.
400 *Id.*
401 *Id.*
402 *Id.* at 28.
403 *Id.*
XI. Conclusion

To succeed in the War on Terror, the U.S. government must not turn its cheek to what Jihadist and Muslim fundamentalists are fighting for: that is, their religious ideological roots. The U.S. government must accept the fact that for the first time since the Crusades, Western civilization finds itself immersed within a religious war. The fight against these elusive individuals must include a religious-ideological dimension. Bombs, sanctions, and the freezing of assets will not curtail these roots. However, the goals reached by stunting the financial backing of terrorist networks are effective in the short term. Though our nation has been involved in war for the last eight years, no terrorist attacks have touched our soil during this period. Throughout this comment, the reader was faced with the dilemma of deciding whether brawny measures taken by the U.S. government after 9/11 have protected this nation from further attacks, or whether these allegedly over-intrusive actions were taken in vain. In conjunction with this query comes another, that is, whether these stringent national security measures should come at the expense of displacing and eradicating fundamental due process rights. Judge Richard Posner explains this current tension between anti-terrorism measures and personal and civil rights.

Labeled as "reality probabilism," Posner claims that people have a difficulty understanding the tradeoffs between false positives and false negatives, because it is difficult to think in probabilistic terms.

"The more rights that criminal defendants enjoy, the more guilty people who are exonerated; the fewer rights that criminal defendants enjoy, the more innocent people are convicted."

Weighing probabilities against consequences, suicidal terrorism and those who assist in its implementation can lead to colossal damage. Does the assumption of equal and opposite probabilities deem that defendants within terrorist cases should have fewer rights than normal criminal cases? One could believe so.

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406 Id.
407 Id. at 177.
As previously acknowledged, OFAC is able to designate entities as SDGTs under the auspices of a relaxed requirement of proof beyond a reasonable doubt.\(^{408}\) Giving terrorists the public foray of a trial on the merits could potentially incur grave consequences to U.S. security.\(^{409}\) Furthermore, the long, drawn-out litigation process may allow for quick movement of "blood money." The public trial may also give defendants a platform for propaganda and recruitment.\(^{410}\) Lastly, a trial on the merits may clue terrorists in on methods that the U.S. government may use to investigate terrorist activity.\(^{411}\) The threat of revealing such classified information is enormous. However, public sentiment suggests, and our Constitution insists, that before the freezing and the practical taking of property from these charitable organizations, due process is given in the form of adequate notification of the charges and the opportunity to be heard at these proceedings.\(^{412}\) In a nation founded upon individual rights, the U.S. government must struggle with its own citizens designating it the "bad guy" for implementing legislation to fight against those that have attacked this nation and threaten to do so in the future.

With no end in sight for the War on Terror, we must become accustomed to the battle between protection and privacy—a battle that is taking place among the citizenry of the United States in the legal combat zone.

SUMERET H. CHUGANI

\(^{408}\) Id.

\(^{409}\) Id. at 177-79.

\(^{410}\) Id.

\(^{411}\) See Posner, supra note 405, at 177.