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## High Alert: The Government's War on the Financing of Terrorism and Its Implication for Donors, Domestic Charitable Organizations, and Global Philanthropy

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# HIGH ALERT: THE GOVERNMENT'S WAR ON THE FINANCING OF TERRORISM AND ITS IMPLICATIONS FOR DONORS, DOMESTIC CHARITABLE ORGANIZATIONS, AND GLOBAL PHILANTHROPY

NINA J. CRIMM\*

## ABSTRACT

Within days after the September 11 terrorist attacks, the U.S. government extended its already existing commitment to combat terrorism. President Bush declared a financial war on terrorism, with the aim of depriving terrorists of their necessary financial support. He issued Executive Order 13,224, which ordered the blocking of assets of specially designated global terrorists.<sup>1</sup> Congress enacted legislation that not only fortified previously existing criminal and civil laws, but also added new ones for use in combating terrorists and terrorism. The Bush Administration dedicated resources to existing and newly created governmental structures that would be responsible for enforcing these laws and for waging the financial war on terrorism. This enhanced legal and structural arsenal contains multiple means by which the U.S. government, as well as citizens injured by activities of foreign terrorists, can pursue economic or criminal sanctions against terrorists and their private sponsors, including individuals, as well as foreign nongovernmental organizations, domestic charitable organizations, and their governing bodies.

Awareness of this greatly expanded potential exposure to liability, and even criminal sanctions, has already engendered unforeseen side effects. Some well-intentioned donors reportedly now are

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1. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

reticent to make charitable contributions to domestic charitable organizations. Law-abiding Muslim charities have documented a decline in contributions received, and charitable organizations are struggling to maintain their pre-September 11 levels of commitment to global philanthropy. As the financial war on terrorism evolves and the arsenal of weapons is strengthened, the government's successes not only may starve terrorists financially, but also may have the unfortunate and unintentional consequence of significantly reducing resources committed to legitimate global philanthropy. Such a result, ironically, would contribute to fundamentalists' and radical terrorists' goal of disrupting globalism, which, if otherwise uninterrupted, could help to foster civil liberties and to achieve social and economic security and prosperity abroad that might diminish the intrinsic potency of terrorist groups and could lessen much of their appeal to outsiders.

Preventive measures thus are essential to minimize the potential negative consequences of the government's financial war on terrorism. To guard against exposure to liability, donors and leaders of domestic charitable organizations must undertake adequate due diligence. Moreover, the government must take great care to protect against overzealous legislation and enforcement actions. Absent sufficient safeguards, the government's actions may exacerbate, rather than diminish, the ultimate effects sought by terrorists.

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*[F]ew actions are more reprehensible than diverting money intended for charity and using it to support hatred and cruelty. Such abuse corrupts the sanctity of charitable giving, diverts funds and resources from those in need, betrays the trust and goodwill of donors, and is a danger to us all.<sup>2</sup>*

\* \* \* \* \*

*The most serious threat to our well being was now clean money intended to kill, not dirty money seeking to be rinsed in a place of hiding.<sup>3</sup>*

## INTRODUCTION

On May 20, 2003, the nation once again was jolted into high alert after terrorist bombings in Saudi Arabia and Morocco.<sup>4</sup> In the wake of the terror attacks of September 11, 2001, anxiety has been building about terrorists' worldwide activities, and for good cause. With increasing regularity, terrorist acts have devastated human lives, destroyed property, and thrown countries' economies into decline. It is clear that the terrorists' deadly goals—on September 11, 2001, and during the two and one-half subsequent years—could not have been achieved without adequate financing.<sup>5</sup> Terrorist financing reportedly has involved not only classic money laundering, where the proceeds of illicit activities are washed or layered in order to conceal their origin,<sup>6</sup> but also the diversion or skimming of funds

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2. See *Testimony of Kenneth W. Dam, Deputy Secretary of the Dep't of the Treasury, Before the Senate Comm. on Banking, Housing, and Urban Affairs Subcomm. on Int'l Trade and Fin.*, Aug. 1, 2002 (attributing statement to former Secretary of the Treasury Paul O'Neill), available at <http://www.treas.gov/press/releases/po3315.htm> (last visited Mar. 16, 2004).

3. U.S. SENATE SELECT COMM. ON INTELLIGENCE AND U.S. PERMANENT SELECT COMM. ON INTELLIGENCE, *JOINT INQUIRY INTO INTELLIGENCE COMMUNITY ACTIVITIES BEFORE AND AFTER THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001*, S. REP. NO. 107-351, at 117 (2002).

4. See Philip Shenon, *U.S. Raises Terror Alert to Next to Highest Level: Orange*, N.Y. TIMES, May 21, 2003, at A19.

5. Experts repeatedly have stated that Osama bin Laden and al Qaeda could not have succeeded in their September 11 attacks without their financial strength. See, e.g., Matthew Levitt, *Iraq, U.S. and the War on Terror: Stemming the Flow of Terrorist Financing: Practical and Conceptual Challenges*, 27 FLETCHER F. WORLD AFF. 59, 60 (2003).

6. See *NBC Evening News*, (NBC television broadcast, Dec. 20, 2003) (reporting illegal drug trade and sidewalk vendor sales of illegal merchandise, such as knock-off purses); see

from such legitimate sources as profits from small storefront businesses and charitable donations to domestic § 501(c)(3) organizations and large international nongovernmental organizations.<sup>7</sup>

The terrorists' heinous acts and their perverse use of funds donated by well-intentioned contributors to domestic § 501(c)(3) organizations generated outrage across the civilized world and incensed the U.S. government. In response, the U.S. government

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*also Testimony of Juan C. Zarate, Deputy Assistant Secretary, U.S. Dep't of the Treasury, Terrorism and Violent Crime Division, in TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 197, 204 (Yonah Alexander & Donald J. Musch eds., 2002) [hereinafter TERRORISM: DOCUMENTS]; Peter J. Kacarab, An In-depth Analysis of the New Money Laundering Statutes, 8 AKRON TAX J. 1, 2 (1991).*

7. *See Testimony of Under Secretary Jimmy Gurulé, Before the House Comm. on Fin. Servs., Oct. 3, 2001, available at <http://www.treas.gov/press/releases/po650.htm> (last visited Mar. 16, 2004).* Under Secretary Gurulé stated:

Unfortunately, available information indicates that some Islamic charitable organizations have been penetrated, exploited and are now controlled by terrorists involved with Al-Qaida.... Islamic charitable organizations serving as cover for terrorist groups adopt innocuous names and co-opt legitimate causes. Often, well-intentioned individuals seeking to make contributions to provide relief for refugees from disaster are defrauded—and their funds end up diverted to finance terrorism.

*Id.*; *see also Prepared Testimony of David D. Aufhauser, General Counsel, Dep't of the Treasury, Before the Senate Judiciary Comm., Subcomm. on Terrorism, Technology and Homeland Security, June 28, 2003, available at <http://www.treas.gov/press/releases/js507.pdf> (last visited Mar. 16, 2004); Dennis M. Lormel, Chief, Financial Crimes Section, Federal Bureau of Investigation, Statement for the Record, in TERRORISM: DOCUMENTS, *supra* note 6, at 227, 236; Testimony of Juan C. Zarate, *supra* note 6, at 204. Tracking the financial sources of the terrorists' funding often is impossible due to the sophistication of the methods utilized by individuals attempting to hide their activities. Not only were substantial funds transferred through many countries, numerous banks and bank accounts, and through the use of credit cards, but funds were also transferred through the underground "hawala system." Dennis M. Lormel, Statement for the Record, *supra* at 237; Testimony of Juan C. Zarate, *supra* note 6, at 203. The hawala system is an informal, paperless transfer system ("hawala" means "trust") that Muslims use throughout the world, including in the United States. Alan Lambert, *Underground Banking and Financing of Terrorism: Organized Crime, Terrorism, and Money Laundering in the Americas*, 15 FLA. J. INT'L. L. 3, 9, 14-15 (2002). Thus, no official bank records are maintained, and governmental authorities cannot track the funds. *Id.* In 1993, Congress passed a law requiring U.S. hawaladars (hawala agents) to be registered with the government and to file suspicious activity reports similar to those filed by established financial institutions. *See id.* at 18. The USA Patriot Act further strengthened provisions against these transfer systems, subjecting them to existing money laundering and terrorist financing regulations, including customer identification, recordkeeping, and suspicious transaction reporting requirements. As of June 26, 2003, over 14,000 money service businesses have registered with the federal government and are now required to report suspicious activities. *See Prepared Testimony of David D. Aufhauser, supra.**

extended its already existing commitment to combat terrorism in the Middle East to target threats from wherever they might emanate, whether from other regions of the world or from within domestic borders. Within weeks of September 11, this commitment was strongly manifested militarily, as well as nonmilitarily. On the nonmilitary front, Congress enacted the USA Patriot Act and President Bush initiated a financial war on terrorism. Not only did the USA Patriot Act fortify the previously existing criminal and civil laws that can be used to combat terrorists and terrorism, but it also added new ones to the arsenal. Moreover, the Bush administration dedicated resources to existing and newly created governmental structures that would be responsible for enforcing these laws and for waging the financial war on terrorism.

The enhanced legal and structural arsenal produced by these swift reactions contains multiple means by which the U.S. government, as well as citizens injured by activities of foreign terrorists, can pursue economic or criminal sanctions against terrorists and their private sponsors, including individuals, foreign nongovernmental organizations, and domestic charitable organizations and their governing bodies. For example, the available arsenal enables the U.S. government to freeze assets in order to “starve” terrorists of their financial “life-blood.”<sup>8</sup> The government can bring a criminal action against persons who knowingly provide “material support or resources” to a terrorist or a foreign terrorist organization,<sup>9</sup> or who intentionally or knowingly collect or provide funds for use in carrying out terrorist activities.<sup>10</sup> Moreover, the government has authority in connection with an individual’s violation of either of these criminal offenses to impose a civil penalty on a domestic entity, including a § 501(c)(3) organization, if the perpetrator was responsible for the management or control of that entity and

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8. See President’s Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1142 (Sept. 20, 2001); *Bush Calls on World to Freeze Terrorist Assets*, AGENCE FRANCE-PRESSE, Sept. 24, 2001; Press Release, Office of the Press Secretary, Fact Sheet on Terrorist Financing Executive Order (Sept. 24, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010924-2.html> (last visited Mar. 16, 2004). Employing a complex web of statutory and other authority, President Bush has directed the Department of the Treasury to freeze assets of terrorists and their sponsors. See *infra* note 68 and accompanying text.

9. 18 U.S.C. §§ 2339A, 2339B (2003) (discussed *infra* Part II.C).

10. 18 U.S.C. § 2339C (2003) (discussed *infra* Part II.D).



committed the offense in that capacity.<sup>11</sup> The government also can bring charges pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO) based on predicate crimes that include the offenses of providing material support or resources to a foreign terrorist organization, or intentionally or knowingly collecting or providing funds for use in carrying out terrorist activities, as well as money laundering.<sup>12</sup> Congress recently proposed legislation to permit the Internal Revenue Service (IRS) to suspend the tax-exempt status under Internal Revenue Code (I.R.C.) § 501(a) of an organization that is identified or designated as a terrorist organization.<sup>13</sup>

Although the arsenal mainly contains weapons available for governmental use, there exist federal statutes that give individuals the means of redressing certain injuries caused by terrorism. Most relevant for purposes of this Article is 18 U.S.C. § 2333, enacted as part of the Antiterrorism Act of 1992.<sup>14</sup> Pursuant to this statute, the courts have permitted U.S. nationals injured by an act of international terrorism, and their estates, survivors, and heirs, to bring civil actions for damages against domestic § 501(c)(3) organizations that have channeled funds to terrorist groups.<sup>15</sup>

This is not an exhaustive list of weapons that can be used to fight the nonmilitary war on terrorism. Nonetheless, this sampling clearly indicates that the U.S. government (and its citizens) potentially can bring legal actions that reach donors, domestic §

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11. 18 U.S.C. § 2339C(f) (2003) (discussed *infra* note 374 and accompanying text).

12. 18 U.S.C. §§ 1961-1968 (2003). For further discussion of the charges that can be brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), see *infra* notes 248-50 and accompanying text.

13. H.R. 7, 108th Cong. § 201 (2003); S. 256, 108th Cong. § 208 (2003). For further discussion, see *infra* Part III.

14. Antiterrorism Act of 1992, Pub. L. No. 102-572, 106 Stat. 4522 (1992), amended by Pub. L. No. 103-429, 108 Stat. 4377 (1994).

15. See *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) (discussed *infra* Part IV). Additionally, relying on the Foreign Sovereign Immunities Act, U.S. citizens have brought lawsuits for monetary damages against state sponsors of terrorism. See, e.g., *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140 (D.D.C. 2002); *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13 (D.D.C. 2002); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128 (D.D.C. 2001). For a brief discussion on the statutory history underlying such lawsuits, see Rudolph Lehrer, Comment, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333, 355-57 (2002).

501(c)(3) organizations, and the organizations' officers, directors, and trustees.

Awareness of this potential exposure to liability, and even to criminal sanctions, has already engendered unforeseen side effects. The media have reported that well-intentioned, law-abiding U.S. Muslims have been reticent to contribute their dutiful "zakat" (2.5% of a Muslim's annual income), even to reputable Muslim charities, for fear that the funds might be routed ultimately to terrorists and that they, as contributors, might be subject to prosecution.<sup>16</sup> Leaders

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16. See, e.g., Riad Z. Abdelkarim, *After a Year of Uncertainty, American Muslim Charitable Donations Rebound*, ETHNIC NEWS, Jan.-Feb. 2004, at 62-63 (reporting Muslims' fear that compliance with their required zakat contribution, particularly when donated to charities for disbursement abroad, would result in harassment, arrest, or possibly even deportation); Alan Cooperman, *Stung by Accusations, America's Muslims Alter Giving*, CHI. TRIB., Dec. 11, 2002, at 37 (reporting that Muslims are concerned about "zakat" going to "bad organizations" and that donations to mosques fell an average of 20% in 2002); Laurie Goodstein, *Muslims Hesitating on Gifts as U.S. Scrutinizes Charities*, N.Y. TIMES, Apr. 17, 2003, at B1 (reporting Muslims' anxiety, distrust, and bewilderment regarding Muslim charities); Pedro Ruz Gutierrez & Jim Leusner, *Donors Fret at Potential Terror Links; Floridians Have Given Generously to Three Charities that Ostensibly Do Good Works Overseas*, ORLANDO SENTINEL, Dec. 28, 2001, at A1 (reporting donors' concerns about being prosecuted for unwittingly contributing money to groups linked to terrorists); Madhu Krishnamurthy, *Fears About Charities Force Muslims to Change How They Give*, CHI. DAILY HERALD, Nov. 11, 2003, at A11 (discussing Muslims' fear that fulfilling their religious obligations may lead either to charities' unwise use of their donations or to government scrutiny, and commenting on the resulting consequence of Muslims' changed giving practices to donate to schools and mosques for local use rather than to Muslim charities for international disbursement); Richard L. Moyers, *A Shocking Silence on Muslim Charities*, CHRON. PHILANTHROPY, Oct. 17, 2002, at 31 (suggesting that because no list of "clean" charitable organizations has been compiled by the U.S. government, there is a chilling effect on donations to Muslim organizations, particularly those that work abroad); Jeff Shields et al., *Islamic Charities Feeling the Pinch; Allegations of Terrorist Links, Frozen Assets Dry Up Contributions*, S. FLA. SUN-SENTINEL, June 19, 2002, at 1A (stating that the U.S. government's scrutiny of charities caused well-intentioned Muslims concern about prosecution for unwittingly giving funds to terrorists); Greg Allen, *Muslim Charities and Donors Attempt to Adapt to New Level of Scrutiny Since 9/11*, (NPR radio broadcast, May 12, 2003), available at <http://discover.npr.org> (reporting that the Islamic monthly, *The Minaret*, survey indicated donations to mosques and charities across the country are down 20-30%); Holly Kernan, *Donations to Muslim Charities Down Due to Increased Government Scrutiny* (NPR radio broadcast, Dec. 1, 2001), available at <http://discover.npr.org/features/feature.jhtml?wfld=1134141> (reporting that donors are concerned that they may be prosecuted and deported for giving money to organizations linked to terrorists even if the charity is not suspect when the donation is given); see also Eric Lichtblau with William Glaberson, *Millions Raised for Qaeda in Brooklyn, U.S. Says*, N.Y. TIMES, Mar. 5, 2003, at A1 (reporting Yemini Islamic cleric boasted raising \$20 million in donations at mosques that funded al Qaeda); Andy Newman, *Brooklyn Muslims Disputing Any Ties to Terror*, N.Y. TIMES, Mar. 5, 2003, at A13 (reporting that Brooklyn's Al Farooq

of domestic Muslim charitable organizations, who publicly have expressed vehement consternation at this chilling effect on a fundamental religious obligation, have documented a substantial decline in contributions received by their charities and have struggled to maintain their charities' levels of commitment to global philanthropy.<sup>17</sup> Although Muslims and Muslim charities have voiced most of the public expressions of concern in the United States,<sup>18</sup>

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Mosque has a history of raising money for Osama bin Laden); Andy Newman & Daryl Khan, *Brooklyn Mosque Becomes Terror Icon, but Federal Case Is Unclear*, N.Y. TIMES, Mar. 9, 2003, at A29 (describing links between clerics collecting funds for the jihad from potentially unsuspecting donors at mosques).

Driven by their fears, to avoid potential identification, and thus to maintain anonymity as contributors of zakat, some Muslims have donated cash or money orders. See Abdelkarim, *supra*.

Recognition of Muslims' reticence to donate internationally has resulted in domestic private foundations contributing to domestic Muslim charities more than previously. See Michael Anift, *Assisting Terrorism's Other Victims*, CHRON. OF PHILANTHROPY, Sept. 4, 2003, at 8.

17. See, e.g., Cooperman, *supra* note 16 (reporting that Muslim charities, fearful of recrimination from the U.S. government, sought guidelines from the Department of the Treasury for steps they should take before giving funds to groups abroad); Ian Wilhelm, *Muslim Charities Accuse Government of Harming Their Fund Raising*, CHRON. PHILANTHROPY, Jan. 9, 2003, at 25 (reporting that donations to domestic Muslim charities have fallen by 20% since the government began pursuing Muslim nonprofit groups for material support of terrorists); Allen, *supra* note 16; Sara Harris, *U.S. Government Action to Seize Funds Allegedly Tied to Terrorists Has Also Affected Some American Muslim Charities* (Minnesota Public Radio broadcast, Dec. 26, 2001) (reporting Muslim charities expect lower donations). Government officials have taken the position that the government's actions in its financial war on terrorism should engender donor confidence rather than fear. See *Prepared Testimony of David D. Aufhauser*, *supra* note 7.

18. In Canada, the International Civil Liberties Monitoring Group (CLMG), a coalition of approximately twenty labor, humanitarian, and religious organizations, has expressed concern that some charities may lose their charitable status. See Marianne Meed Ward, *Are Churches Helping Terrorists? The Government's New Anti-terrorism Bill Requires Charities to Know Exactly What Their Money Is Being Used for, or They Jeopardize Their Tax-Free Status*, PRESBYTERIAN REC., Oct. 2002, at 9. The CLMG has stated that under proposed Canadian federal antiterrorism statutes (somewhat similar to U.S. statutes) the term "terrorism," defined as any act or omission, in Canada or abroad, that is committed "for a political, religious or ideological purpose," is overly broad. *Id.* Because any group considered to be engaging in or supporting terrorism, knowingly or not, could lose its charitable status, CLMG considers the potential for loss of charitable status as significant for relief, humanitarian, and religious organizations if the bill's language is not modified. *Id.*

As an interesting aside, several Virginia politicians who have received political campaign contributions from persons tied to Muslim § 501(c)(3) organizations that are alleged to have illegally provided material support to terrorists and foreign terrorist organizations have expressed concern. See Lisa Rein, *Va. Muslim Groups in Terrorism Probe Funded GOP Races*, WASH. POST, Jan. 22, 2003, at B5 (naming delegates Richard H. Black (Loudoun), Ken Cuccinelli (Fairfax), and Thomas Davis Rust (Fairfax) as having received campaign

there is likely a broader, albeit less vocal, hesitation to engage in global philanthropy.<sup>19</sup>

As the U.S. government's financial war on terrorism evolves and its arsenal of weapons is strengthened, a widespread reluctance of individuals and institutions to participate fully and actively in global philanthropic endeavors is understandable. Nevertheless, these conditions may pose a monumental dilemma. The government's success in its proclaimed war may starve the terrorists financially. That success, however, may also have the unfortunate and unintentional double-edged effects of significantly reducing legitimate global philanthropy while at the same time contributing to fundamentalists' and radical terrorists' goal of disrupting globalism.<sup>20</sup> The former—the widespread withdrawal of financial support for humanitarian aid, the promotion of health, the enhancement of education and other charitable causes, the facilitation of economic development, the building of social capital, and the strengthening of social stability—would be particularly lamentable

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contributions from M. Yaqub Mirza, "president of the now-defunct SAAR Foundation and vice president of the Safa Trust"). For a discussion of the SAAR Foundation's purported connection to terrorist organizations, see *infra* Part II.B.1. On November 1, 2002, the *Washington Post* reported that Virginia Representative James P. Moran "reversed his previous position and returned contributions from three officers of Muslim organizations in Northern Virginia that were raided by federal agents last March in an investigation into terrorist financing." Spencer S. Hsu, *Moran Returns Contributions of Muslim Donors: 3 Tied to Groups Raided in Terror Probe*, WASH. POST, Nov. 1, 2002, at B4. Representative Moran is reported to have stated: "I don't want any contributors to my campaign contributing to any individuals or organizations even inadvertently that might fund terrorism or organizations involved in terrorism." *Id.*

19. See, e.g., Stephanie Strom, *Small Charities Abroad Feel Pinch of U.S. War on Terror*, N.Y. TIMES, Aug. 5, 2003, at A8 (reporting that Environment Tobago, a small indigenous organization that is able to preserve Tobago's endangered wetlands by relying on donations from international sources, nearly failed financially last year as a result of declined support purportedly in response to the U.S. Treasury's issuance of the Voluntary Best Practices Guidelines (see *infra* Part II.C.3.b; notes 470-83 and accompanying text, discussing the Guidelines)).

It is likely that politically sensitive areas will be hit hardest by withdrawal of financial international support. See Kevin Murray, *Administration Is Undermining Democracy*, BOSTON GLOBE, Nov. 30, 2003, at D11 (reporting that donations to Palestine and areas of a similar political nature have declined; that many domestic private foundations are limiting or ceasing their funding programs in the Middle East and instead focusing their international philanthropic efforts in such countries as Brazil or Mexico to avoid the appearance of supporting terrorism).

20. See WALTER LAQUEUR, *NO END TO WAR: TERRORISM IN THE TWENTY-FIRST CENTURY* 212-13 (2003).

at this time of great need worldwide.<sup>21</sup> With respect to the latter—a disruption of globalism—critics have suggested that an interruption of globalism might be beneficial because globalism may not help many poor countries to achieve democracy, to expand educational opportunities, and to enhance social welfare.<sup>22</sup> Antiglobalism, however, also can mean a “rejection of modernity and secularism and the preservation of the status quo.”<sup>23</sup> The rejection of these values may prove detrimental to individuals’ civil liberties and to social and economic stability and prosperity abroad. If the U.S. government’s financial war on terrorism effectively precludes substantial global philanthropic outreach by U.S. donors and §

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21. See Nina J. Crimm, *Through a Post-September 11 Looking Glass: Assessing the Roles of Federal Tax Laws and Tax Policies Applicable to Global Philanthropy by Private Foundations and Their Donors*, 23 VA. TAX REV. 1, 10-13 (2003). The domestic and international needs for financial support of nonmilitary affairs at this time are not and cannot be met by the U.S. government alone. Indeed, U.S. government appropriations over the past forty years for nonmilitary international affairs (foreign aid, State Department, United Nations, information programs, etc.) have sharply dropped in real terms, as a share of our economy and as a share of the federal budget. Robert J. Lieber, *Foreign Policy and American Primacy*, in EAGLE RULES? FOREIGN POLICY AND AMERICAN PRIMACY IN THE TWENTY-FIRST CENTURY 1, 10 (Robert J. Lieber ed., 2002). As of 1997, the United States’ ratio of official development assistance to gross national product was at its lowest level since 1950. Laurie ANN MAZUR & SUSAN E. SECHLER, GLOBAL INTERDEPENDENCE INITIATIVE, ROCKEFELLER BROS. FUND, GLOBAL INTERDEPENDENCE AND THE NEED FOR SOCIAL STEWARDSHIP 10 (1997), available at <http://www.rbf.org/pdf/Global.pdf> (last visited Mar. 16, 2004). Focusing on another measure—gross domestic product—during the administration of President George W. Bush, the government has expended just 0.2% on nonmilitary international affairs, whereas during President John F. Kennedy’s administration, the United States expended 1% of its gross domestic product on nonmilitary international affairs. Lieber, *supra*, at 10. In real terms, outlays for international affairs dropped by 20% between 1986 and 2000. *Id.* U.S. governmental expenditures for international affairs in 1962 was 5.1% of federal spending, and it declined to 1.2% of federal spending by 2000. *Id.* Congressional appropriations to support U.S. bilateral economic, humanitarian, and developmental global programs also have been limited annually to between \$6.8 billion and \$7.2 billion since the late 1990s. See USAID *Country Allocation Summary—Actual Appropriations, Fiscal Year 1999*, available at [http://www.usaid.gov/pubs/cbj2002/cbj2002\\_table02a.html](http://www.usaid.gov/pubs/cbj2002/cbj2002_table02a.html) (last visited Mar. 16, 2004); GAO, GAO-02-471, FOREIGN ASSISTANCE: USAID RELIES HEAVILY ON NONGOVERNMENTAL ORGANIZATIONS, BUT BETTER DATA NEEDED TO EVALUATE APPROACHES 2-4 (Apr. 25, 2002), available at <http://www.gao.gov> (last visited Mar. 16, 2004).

22. LAQUEUR, *supra* note 20, at 213. These critics define “globalism” as being synonymous with the “Americanization” of the world through the imposition of capitalism, market relations, neoliberalism, and corporate power. *Id.*

23. *Id.* at 215.

501(c)(3) organizations, forward momentum for improving peoples' lives and strengthening civil societies may be lost.<sup>24</sup>

This Article provides an analysis of the U.S. government's unfolding financial counterterrorism war and warns donors, as well as officers, directors, and trustees of charitable organizations, that the existing weapons in the government's arsenal may indeed have sobering, if not philanthropically enervating, implications for individuals and entities engaged in global charitable giving. Part I examines the economic sanctions that the U.S. government can impose on terrorists, terrorist groups, and their private sponsors. This Part discusses the statutory and presidential authorities that permit the freezing of assets and the blocking of transactions of designated terrorists and their private sponsors. It explains current outcomes associated with the government's employment of these weapons against terrorism. Part II explains a variety of federal criminal sanctions that the U.S. government can utilize in its financial counterterrorism war. It focuses primarily on federal statutes that proscribe money laundering activities, the provision of material support to terrorists and terrorist organizations, and the unlawful and willful provision or collection of funds to carry out terrorist acts. Part III notes the November 2003 enactment of new IRC § 501(p), which enables the IRS to suspend the § 501(c)(3) status of an alleged terrorist organization, or of one alleged to support terrorism. This statute, passed at the behest of the Department of Treasury, is an additional government weapon to fight individuals and groups who may use domestic § 501(c)(3) organizations reprehensibly to funnel funds to terrorists and terrorist organizations.

Part IV discusses the right of U.S. nationals who are victims of "international terrorism," and their estates, survivors, or heirs to sue for damages under 18 U.S.C. § 2333. Courts have interpreted that statute to extend to claims against domestic § 501(c)(3) organizations alleged to have supported terrorists and terrorist organizations. Part V discusses the imperative that donors and officers, directors, and trustees of § 501(c)(3) organizations undertake appropriate due diligence in an attempt to assure that donated

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24. See Crimm, *supra* note 21, at 20-21.

funds are not misused for unlawful purposes, including the material support or financing of terrorists or terrorist organizations. Questions are raised as to whether the governing bodies of most § 501(c)(3) organizations can undertake sufficient due diligence to protect against criminal and civil liability.

Finally, the Conclusion cautions that the U.S. government must not further tarnish or abuse well-intentioned, law-abiding donors and domestic § 501(c)(3) organizations that terrorists and their supporters may have already misused. The government must be wise in waging its financial war on terrorism. It must guard against overzealous reactions, unjustifiable assertions, and the imposition of unwarranted sanctions against these donors and organizations, and the organizations' officers, directors, and trustees. Failure to heed this caution could result in widespread withdrawal of legitimate global philanthropic support by U.S. donors and charitable institutions. A wholesale blight on financial support for humanitarian aid, the promotion of health, the enhancement of education and other charitable causes, the facilitation of economic development, the building of social capital, and the strengthening of social stability could fuel the destabilization of struggling people abroad. In that event, the government regretfully could permit fundamentalist and radical terrorists to achieve one of their ultimate stated goals—the stifling of progressive forces around the globe.

## I. ECONOMIC SANCTIONS—FREEZING ASSETS AND BLOCKING TRANSACTIONS

### *A. Background*

A powerful weapon in the U.S. government's financial war on terrorism is the use of economic sanctions against terrorists, terrorist groups, and their private sponsors. The discretionary power to impose economic sanctions during war, as well as during times of peace upon the declaration of a national emergency, has long resided with the President of the United States.<sup>25</sup>

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25. See *infra* Part I.A.1. The International Emergency Economic Powers Act (IEEPA) confers broad authority on the President over financial transactions and property in which any foreign country or national has any interest, provided the President first declares a

### 1. Statutory Authority for Economic Sanctions

The use of economic sanctions by the U.S. government dates back to colonial times.<sup>26</sup> Since that period, the form of economic sanctions has varied, depending on the circumstances warranting the sanctions and the laws under which they are imposed.<sup>27</sup> During the twentieth century, although the U.S. government often utilized economic sanctions as a weapon against foreign states and nationals of those states, it has imposed sanctions on international terrorist groups only since 1995.<sup>28</sup>

The early statutory authority for economic sanctions dates to 1917. Six months after the United States entered World War I, Congress enacted the Trading With the Enemy Act (TWEA),<sup>29</sup> intending to provide a codified set of restrictions on commerce to make it illegal for U.S. nationals to engage in commerce with declared enemies of the United States.<sup>30</sup> In addition, TWEA formally

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national emergency. See Michael P. Malloy, *Economic Sanctions and Retention of Counsel*, 9 ADMIN. L.J. AM. U. 515, 518-19 (1995).

26. See Malloy, *supra* note 25, at 518; Stanley J. Marcuss, *Grist for the Litigation Mill in U.S. Economic Sanctions Programs*, 30 LAW & POL'Y INT'L BUS. 501, 501 (1999).

27. See Marcuss, *supra* note 26, at 503-04.

28. See OFFICE OF FOREIGN ASSETS CONTROL, TERRORIST ASSETS REPORT, CALENDAR YEAR 2002, ANNUAL REPORT TO THE CONGRESS ON ASSETS IN THE UNITED STATES OF TERRORIST COUNTRIES AND INTERNATIONAL TERRORISM PROGRAM DESIGNEES (2002).

It has not been unusual for the government to impose economic sanctions that prohibit virtually all transactions with a target country, its entities, and its citizens and residents. See, e.g., Foreign Assets Control Regulations, 31 C.F.R. § 500.201 (1998); Cuban Assets Control Regulations, 31 C.F.R. § 515.201 (1998). It is common also for economic sanctions to encompass entities owned or controlled by entities or nationals of the target country that are located beyond the borders of the target country. See, e.g., Foreign Assets Control Regulations, 31 C.F.R. § 500.302(a)(2) (1998); Cuban Assets Control Regulations, 31 C.F.R. § 515.302(a)(2) (1998). Also typical in recent years are freeze orders on any assets of a target country, its entities and nationals that are located in the United States or in the possession or control of U.S. persons. See, e.g., Iranian Assets Control Regulations, 31 C.F.R. § 535.201 (1998); Iraqi Sanctions Regulations, 31 C.F.R. § 575.201 (1999); Federal Republic of Yugoslavia and Bosnian-Serb Controlled Areas of the Republic of Bosnia and Herzegovina Sanctions Regulations, 31 C.F.R. § 585.201 (1998).

29. Trading With the Enemy Act of 1917 (TWEA), Pub. L. No. 65-91, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-44 (2003)); see also Malloy, *supra* note 25, at 519.

30. See generally HOUSE SUBCOMM. ON INT'L TRADE AND COMMERCE, COMM. ON INT'L RELATIONS, 94TH CONG., TRADING WITH THE ENEMY: LEGISLATIVE AND EXECUTIVE DOCUMENTS CONCERNING REGULATIONS OF INTERNATIONAL TRANSACTIONS IN TIME OF DECLARED NATIONAL



conferred broad discretionary powers on the President in times of war to restrict or prohibit certain transactions considered potentially threatening to the United States. Pursuant to § 5(b) of TWEA, the President had authority during times of war to regulate transactions in foreign exchange, gold or silver, and transfers of credit, evidences of indebtedness, or property ownership "between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries, by any person within the United States."<sup>31</sup>

In March 1933, President Franklin D. Roosevelt exceeded this wartime authority when he invoked TWEA to declare a "Bank Holiday" in response to the economic crisis brought about by the run on bank funds after the Great Depression began.<sup>32</sup> Within five days, Congress responded by amending TWEA to confer on the President the discretionary power to impose economic sanctions during times of peace if the President declared a national emergency.<sup>33</sup> This extended power remained in the statute until December 1977, at which time it was removed,<sup>34</sup> once again limiting the President's economic sanction powers under TWEA to times of war.<sup>35</sup>

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EMERGENCY §§ II-III (Comm. Print 1976) (reproducing documents concerning use of TWEA authority from 1940 to 1976).

31. Trading With the Enemy Act of 1917 (TWEA), Pub. L. No. 65-91, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-44 (2003)).

32. Proclamation No. 2039, 48 Stat. 1691 (1933).

33. Act of March 9, 1933, Pub. L. No. 73-1, ch. 1, § 2, 48 Stat. 1 (1933) (codified as amended at 50 U.S.C. app. §§ 1-44 (2003)). See Malloy, *supra* note 25, at 518-19.

34. Act of December 28, 1977, Pub. L. No. 95-223, § 101(a), 91 Stat. 1625 (1977) (codified at 50 U.S.C. app. § 5(b) (2003)).

35. Trading With the Enemy Act of 1917 (TWEA), Pub. L. No. 65-91, ch. 106, 40 Stat. 411 (1917) (codified at 50 U.S.C. app. § 5(b) (2003)) in part provides:

(1) During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, ...

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, ...

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any ... use, transfer, ... or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States ....

*Id.*

Rather than eliminating presidential power to impose economic sanctions during peacetime upon the declaration of a national emergency, however, Congress merely shifted that statutory authority when it enacted the International Emergency and Economic Powers Act (IEEPA) in 1977.<sup>36</sup> Section 1701(a) of IEEPA allows the President to impose sanctions under § 1702 “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside 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.”<sup>37</sup> The Supreme Court has recognized and validated the President’s broad authority under IEEPA to regulate foreign interests in property.<sup>38</sup>

Although IEEPA, as originally enacted, conferred on the President authority to regulate and impose sanctions with respect to a wide range of transactions, that authority was further expanded by the USA Patriot Act, passed in response to the September 11 terrorist attacks.<sup>39</sup> Subsection (a)(1) of § 1702 currently provides as follows:

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36. Trading With the Enemy Act Amendments, Pub. L. No. 95-223, § 101, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. app. § 5(b)(1) (2003)).

37. 50 U.S.C. § 1701(a) (2003).

38. *Regan v. Wald*, 468 U.S. 222, 232 (1984); *Dames & Moore v. Regan*, 453 U.S. 654, 672 (1981).

39. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, Title I, § 106, 115 Stat. 272 (2001) [hereinafter USA Patriot Act]. The USA Patriot Act also expanded the authorization of courts specifically to provide ex parte and in camera review of classified information in “any judicial review of a determination made under this section ... [that] was based on classified information.” 50 U.S.C. § 1702(c) (2000), *amended by* Pub. L. No. 107-56, § 106(2). The Department of Justice considered, as a principal purpose for the addition of paragraph (c), the authorization for a reviewing court to base a ruling on an examination of the complete administrative record without requiring the U.S. government to compromise security and without forcing the government to “choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nations.” See CHARLES DOYLE, CRS REPORT FOR CONGRESS, THE USA PATRIOT ACT: A LEGAL ANALYSIS, at CRS-41 n.81 (2002) (quoting Department of Justice proposal section 159, dated Sept. 20, 2001, as an appendix in *Administration’s Draft Anti-Terrorism Act of 2001, Hearing Before the House Committee on the Judiciary*, 107th Cong. 54 (2001)).

(1) At the times and to the extent specified in section 1701 of this title, the President may, ...

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities, *by any person, or with respect to any property, subject to the jurisdiction of the United States;*

(B) investigate, *block during the pendency of an investigation*, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest *by any person, or with respect to any property, subject to the jurisdiction of the United States; and*

(C) *when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.*<sup>40</sup>

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40. 50 U.S.C. § 1702(a)(1) (2000), *amended by* Pub. L. No. 107-56, § 106 (emphasis added).

The above-italicized portions of paragraph (a)(1) were added by the USA Patriot Act.<sup>41</sup> A major purpose for the language added in subparagraph (B) was to assist the U.S. government in identifying, investigating, disrupting, and dismantling nontraditional structures, such as domestic § 501(c)(3) organizations and other nongovernmental organizations, used by terrorists' supporters to raise, collect and distribute funds.<sup>42</sup> Furthermore, the new language in subparagraphs (A) and (B) broadens the government's authority to investigate, regulate, and freeze any property or interest in property subject to the jurisdiction of the United States.<sup>43</sup> Congress added subparagraph (C) to indicate clearly that when the United States is engaged in an unconventional war, the President has the authority to confiscate and dispose of any property or interest in property that is 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 an attack on the United States.<sup>44</sup>

Although 50 U.S.C. § 1702(a)(1) vests these authorities in the President, other federal statutes enable the President to delegate the 50 U.S.C. § 1702(a) authorities to other individuals. The umbrella provision of 3 U.S.C. § 301 enables the President to entrust authority to:

the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President ... any function which is vested in the President by law ....<sup>45</sup>

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41. USA Patriot Act, Pub. L. No. 107-56, § 107-56, Title I, § 106, 115 Stat. 272.

42. 50 U.S.C. § 1702(a)(1)(B), *amended by* Pub. L. No. 107-56, § 106(1).

43. 50 U.S.C. § 1702(a)(1)(A), *amended by* Pub. L. No. 107-56, § 106(1).

44. 50 U.S.C. § 1702(a)(1)(C), *amended by* Pub. L. No. 107-56, § 106(1). According to the Department of Justice, § 1702(a)(1)(C) was designed to provide expressly that property seized under IEEPA, as with property seized under TWEA § 5(b), would vest in the United States during times of national emergency involving "unconventional warfare where Congress has not formally declared war against a foreign nation." See DOYLE, *supra* note 39, at CRS-41 n.81 (citing Department of Justice proposal § 159).

45. 3 U.S.C. § 301 (2000). The designation and authorization must be in writing and published in the Federal Register. See *id.*

Among those to whom power may be delegated are the Secretary of the Treasury, the Secretary of State, and the Attorney General. Additionally, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>46</sup> 8 U.S.C. § 1189 specifically permits the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General,<sup>47</sup> to designate an organization meeting stated criteria as a “foreign terrorist organization” after having first notified Congress of his intent to make such a designation.<sup>48</sup> After such notification, the Secretary of the Treasury can require U.S. financial institutions to block all financial transactions of assets they possess or control with respect to the designated terrorist organization.<sup>49</sup>

As will be discussed below in Parts V.B and V.C, these statutes—50 U.S.C. §§ 1701 and 1702(a), 3 U.S.C. § 301, and 8 U.S.C. § 1189—constitute the basic platform from which the current Bush administration launched its financial counterterrorism war, and from which former presidents imposed economic sanctions during peacetime to redress events considered sufficiently threatening to declare a national emergency.

## 2. Seven Decades of Reliance on TWEA and IEEPA Powers

Presidents have utilized their power to impose economic sanctions repeatedly during the past seven decades, notably more often during times of peace than during times of war.<sup>50</sup> Seven years after President Franklin D. Roosevelt first invoked TWEA, although

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46. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1247 (1996).

47. 8 U.S.C. § 1189 (2003); *see also* 18 U.S.C. § 2339(B) (2003).

48. 8 U.S.C. §§ 1189(a)(1)-(2)(A), (4). *See infra* notes 94-99 and accompanying text (discussing “foreign terrorist organization”). One court has held that the designation process under 8 U.S.C. § 1189 is constitutionally flawed, and therefore a designation under that statute is null and cannot be relied upon for prosecution under 18 U.S.C. § 2339B. *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1055-59 (C.D. Cal. 2002). *See infra* note 300 (discussing *United States v. Rahmani*).

49. *See* 8 U.S.C. § 1189(a)(2)(C) (2003). *But see supra* note 48 (noting that one court has held that 8 U.S.C. § 1189 is constitutionally flawed). Moreover, 18 U.S.C. § 2339B(a)(2) requires that financial institutions retain and report to the Secretary of the Treasury that they control or possess funds in which a foreign terrorist organization or its agent has an interest.

50. *See* Malloy, *supra* note 25, at 532.

without textual basis, to declare the "Bank Holiday" of March, 1933,<sup>51</sup> he again relied on TWEA, this time as amended to provide for his declaration of a national emergency during peacetime.<sup>52</sup> On April 10, 1940, responding to the Nazi invasion of Norway and Denmark, President Roosevelt issued an executive order that restricted transfers of property in which either of those two countries or their nationals had an interest, unless the transaction was licensed by the Department of the Treasury.<sup>53</sup> After China entered the Korean War in December 1950, President Harry Truman imposed financial and commercial restrictions against the People's Republic of China, North Korea, and their nationals, which remain today with respect to North Korea and its nationals.<sup>54</sup> President John F. Kennedy established a comprehensive embargo order on trade with Cuba in 1962.<sup>55</sup> President Jimmy Carter blocked Iranian government assets and imposed trade sanctions against Iran in response to the 1979-1981 hostage crisis.<sup>56</sup> President George H.W. Bush imposed numerous economic sanctions on Iraq in response to its 1990 invasion of Kuwait.<sup>57</sup>

The inaugural application of IEEPA economic sanctions to individuals and entities came under President Bill Clinton. In Executive Order 12,947, issued on January 23, 1995, President Clinton declared a national emergency to respond to the "grave acts of violence committed by foreign terrorists [and terrorist organizations] that disrupt the Middle East peace process [and that] constitute an unusual and extraordinary threat to the national

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51. *See supra* note 32.

52. *See supra* note 33 and accompanying text.

53. Exec. Order No. 8389, 5 Fed. Reg. 1400 (Apr. 10, 1940) (declaring a "national emergency" pursuant to TWEA).

54. Proclamation No. 2914, 15 Fed. Reg. 9092 (Dec. 16, 1950) (ordered pursuant to TWEA).

55. Proclamation No. 3447, 27 Fed. Reg. 1085 (Feb. 6, 1962) (ordered pursuant to TWEA). On July 8, 1963, the Office of Foreign Assets Control (OFAC) promulgated regulations to implement the embargo. Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (2003).

56. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979); *see* Iranian Assets Control Regulations, 31 C.F.R. pt. 535 (1981); *see also* Michael P. Malloy, *The Iran Crisis: Law Under Pressure*, 1984 WIS. INT'L. L.J. 15 (analyzing economic sanctions issued in response to the hostage crisis).

57. Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (Aug. 2, 1990). *See* Iraqi Sanctions Regulations, 31 C.F.R. pt. 575 (1990); *see also* Michael P. Malloy, *The Iraqi Sanctions: Something Old, Something New*, 15 S. ILL. U. L.J. 413 (1991) (analyzing the sanctions).

security, foreign policy, and economy of the United States.”<sup>58</sup> Pursuant to the Executive Order, under his IEEPA authority, President Clinton blocked all transfers of property or interests in property of twelve designated foreign terrorist organizations considered a threat to Middle East peace and specifically listed in an annex to the Executive Order;<sup>59</sup> along with

(ii) foreign persons (individuals and organizations) to be designated by the Secretary of State in consultation with the Secretary of the Treasury and the Attorney General if such foreign persons were found:

(A) to have committed, or to pose a significant risk of committing, acts of violence that had the purpose or effect of disrupting the Middle East peace processes or

(B) to be assisting in, sponsoring, or providing financial, material, or technological support for, or services in support of, violence; and

(iii) (foreign or domestic) persons owned or controlled by, or acting on behalf of (i.e. as agent for) any of the designated individuals and entities in the foregoing categories.<sup>60</sup>

Those persons, both foreign and domestic,<sup>61</sup> designated under Executive Order 12,947 were labeled Specially Designated Terrorists (SDTs).<sup>62</sup>

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58. Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

59. *Id.* §1(i). 50 U.S.C. § 1702 does not include detailed criteria that the President must utilize in initially designating these “foreign terrorist organizations”; thereby arguably giving great latitude. See 50 U.S.C. § 1702 (2000 & Supp. 2003). However, 8 U.S.C. § 1189, the statute under which the Secretary of State can designate a “foreign terrorist organization,” provides more detailed guidance. See 8 U.S.C. § 1189 (2000 & Supp. 2003).

60. Exec. Order No. 12,947, § 1(ii)-(iii), 60 Fed. Reg. at 5079. Twelve foreign terrorist organizations were named in the original Annex to the Executive Order, including Abu Nidal Organization (ANO), Democratic Front for the Liberation of Palestine (DFLP), Hizballah, Islamic Gama'at, Islamic Resistance Movement (Hamas), Jihad, Kach, Kahane Chai, Palestinian Islamic Jihad-Shiqaqi faction (PIJ), Palestine Liberation Front-Abu Abbas faction (PLF-Abu Abbas), Popular Front for the Liberation of Palestine (PFL), and Popular Front for the Liberation of Palestine-General Command (PFLP-GC).

61. In 1995, Mohammad Salah became the first American citizen to be listed as a “Specially Designated Terrorist” (SDT). 60 Fed. Reg. 41,152 (Aug. 11, 1995).

62. Terrorism Sanction Regulations; Specially Designated Terrorist, 31 C.F.R. § 595.311 (2003). Not all SDTs are foreign terrorist organizations. See *supra* note 61 (referencing the first American citizen to be listed as an SDT); *infra* notes 94-99 and accompanying text (discussing the term “foreign terrorist organization”).

Executive Order 12,947 further prohibited U.S. citizens, resident aliens, or domestic entities from engaging in any transaction with, or dealing in property or interests in property of, designated persons in the foregoing categories. It also particularly specified that the prohibition included the "making or receiving of any contribution of funds, goods, or services, to or for the benefit of such [designated] persons."<sup>63</sup> The Executive Order delegated to the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, any authority granted to the president by the IEEPA to carry out the Executive Order.<sup>64</sup> That authority included, but was not limited to, the promulgation of regulations and rules, the designation of other persons and organizations, and the re-delegation of such powers to other officers and agencies.<sup>65</sup>

On August 20, 1998, President Clinton issued Executive Order 13,099, updating the list of SDTs annexed to his Executive Order 12,947 to add an individual foreign terrorist, Usama (Osama) bin Muhammad bin Awad bin Ladin, and several terrorist organizations, including the Islamic Army (al Qaeda).<sup>66</sup>

These executive orders, along with earlier presidentially imposed economic sanctions based on TWEA and IEEPA, set the groundwork for President George W. Bush to take the first major step after September 11, 2001 in his declared financial war on terrorism.<sup>67</sup>

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63. Exec. Order No. 12,947, § 1(b), 60 Fed. Reg. at 5079. Additionally, U.S. persons were prohibited from engaging in transactions in attempts to evade, avoid, or violate the blocking order. *Id.* § 1(c), 60 Fed. Reg. at 5079.

64. *Id.* § 4(a), 60 Fed. Reg. at 5080.

65. *Id.*

66. Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (Aug. 20, 1998) (designating also Abu Hafs al-Masri and Rifa'i Ahmad Taha Musa as SDTs).

67. The United Nations Security Council also recognized and condemned the September 11 terrorist attacks, first by U.N. Resolution No. 1368 on September 12, 2001, followed by U.N. Resolution Nos. 1373 and 1390 on September 28, 2001, and January 28, 2002, respectively. Resolution No. 1373, passed and agreed upon by 189 member states of the United Nations, was unequivocally inspired by, but not specifically related to, the September 11 attacks. Nonetheless, the September 11 attacks are mentioned in the preamble to Resolution No. 1373. That Resolution condemns international terrorism and threats to the international community, resolves to take actions against terrorism, establishes binding rules of international law, and creates a mechanism to monitor compliance with those rules. Resolution No. 1373 resolves that all United Nations member states shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful 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



### *B. Executive Order 13,224*

Broadening the scope of President Clinton's Executive Order 12,947, President Bush, on September 23, 2001, issued Executive Order 13,224, in which he stated his findings that:

[G]rave acts of terrorism and threats of terrorism committed by foreign terrorists ... on September 11, 2001, ... 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 .... [I] 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

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order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate 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 and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) 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 or 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.

S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. ¶ 1, U.N. Doc. S/RES 1373 (2001).

Resolution No. 1373 further contained a nonbinding provision that called upon all member States to become parties as soon as possible to the conventions relating to terrorism, particularly the 1999 Convention on the Financing of Terrorism. *Id.* ¶ 3(d). According to one commentator, the reason that Resolution No. 1373 did not make that provision binding may have resulted from political factors, including the reluctance of Security Council member States to become bound. Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 903 (2002). One of those member States purportedly reluctant to be bound was the United States, the original sponsor of Resolution No. 1373. *See id.* at 903 n.22.

U.N. Resolution 1390 resolved specifically with respect to Osama bin Laden, members of al Qaeda, the Taliban, and associated individuals, groups, entities and undertakings, to "[f]reeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities." S.C. Res. 1390, U.N. SCOR, 57th Sess. 4452d mtg. ¶ 2(a), U.N. Doc. S/RES 1390 (2002).

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.<sup>68</sup>

Invoking his powers under § 1702(b), President Bush in § 1 of the Executive Order blocked immediately “all property and interests in property of ... [various] persons that are in the United States or that hereafter come within the United States, or that hereafter come within the possession or control of United States persons.”<sup>69</sup>

This Executive Order authorized seizure of the property of twenty-seven designated foreign persons: twelve individuals and fifteen “foreign terrorist organizations,”<sup>70</sup> including three non-governmental organizations, the names of which were contained in an Annex to the Executive Order.<sup>71</sup> Moreover, pursuant to the

68. Exec. Order No. 13,224, § 1, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

69. *Id.* Pursuant to 18 U.S.C. § 981(b)(1), the Attorney General may seize property, or if involved in an investigation by the Secretary of the Treasury, the Secretary may seize the property. See 18 U.S.C. § 981(b)(1) (2000). For a further discussion of the civil forfeiture provision, see discussion *infra* Part I.D.

70. See *supra* notes 36-45 and accompanying text (commenting on the President's apparent great latitude in designating “foreign terrorist groups”); *infra* Part I.C.2 (setting forth the statutory criteria for the Secretary of State to designate a “foreign terrorist organization” and the OFAC regulatory definition of “foreign terrorist organization”).

71. Exec. Order No. 13,224, Annex, 66 Fed. Reg. 49,083 (Sept. 23, 2001). The Annex designated the following individuals: Abd al-Hadi al-Iraqi, Abu Hafs the Mauritanian, Abu Zubaydah, Tariq Anwar al-Sayyid Ahmad, Sayf al-Adl, Ibn Al-Shaykh al-Libi, Ayman al-Zawahiri, Muhammad Atif, Osama bin Laden, Shaykh Sai'id, Muhammad Salah, and Thirwat Salah Shihata. *Id.*

Twice on September 24, 2001, President Bush underscored his message that nongovernmental organizations could be as insidious as the individual terrorists. First, in remarks in the Rose Garden on September 24, 2001, President Bush commented:

Just to show you how insidious these terrorists are, they oftentimes[sic] use nice-sounding, non-governmental organizations as fronts for their activities. We have targeted three such NGOs. We intend to deal with them .... This executive order means that United States banks that have assets of these groups ... must freeze their accounts. And United States citizens or businesses are prohibited from doing business with them.

Press Release, Office of the Press Secretary, President Freezes Terrorists' Assets (Sept. 24, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010924-4.html> (last visited Mar. 16, 2004). Then, in a message to Congress, he stated with respect to his decision under the Executive Order to suspend humanitarian, medical, and agricultural transfers and donations: “Regrettably, international terrorist networks make frequent use of charitable or

President's delegation authorities under 3 U.S.C. § 301 and 8 U.S.C. § 1189, it authorized seizure of the property of:

(b) foreign persons [individuals and organizations to be] determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States;<sup>72</sup>

(c) persons [foreign or domestic] determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to be owned or controlled by, or to [be] act[ing] for or on behalf of, those persons listed in the Annex to this order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order;<sup>73</sup>

(d) ... persons [foreign or domestic] determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General;

(i) to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism ... or

(ii) to be otherwise associated with [other persons designated pursuant to the order].<sup>74</sup>

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humanitarian organizations to obtain clandestine financial and other support for their activities. If these exemptions were not suspended ... [they] could be used as a loophole through which support could be provided to individuals or groups involved with terrorism ...." *Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism—Message from the President of the United States*, 147 CONG. REC. H5964 (daily ed. Sept. 24, 2001). This sentiment was reflected in the designation of fifteen nongovernmental organizations on the Annex to Executive Order 13,224, which included: Abu Sayyaf Group, Al Qaeda/Islamic Army, Al Rashid Trust, Al-Itihaad Al-Islamiya, Al-Jihad, Armed Islamic Group, Asbat al-Ansar, Harakat ul-Mujahidin, Islamic Army of Aden, Islamic Movement of Uzbekistan, Libyan Islamic Fighting Group, Makhtab Al-Khidamat/Al Kifah, Mamoun Darkazanli Import-Export Company, Salafist Group for Call and Combat, and Wafa Humanitarian Organization. Exec. Order No. 13,224, Annex, 66 Fed. Reg. at 49,083.

72. Exec. Order No. 13,224, § 1(b), 66 Fed. Reg. at 49,079.

73. *Id.* § 1(c), 66 Fed. Reg. at 49,079.

74. *Id.* § 1(d), 66 Fed. Reg. at 49,080. This language reflects the provision of 18 U.S.C. § 2339B, which provides that it is a criminal offense for a person to "knowingly" provide "material support or resources to a foreign terrorist organization." 18 U.S.C. § 2339B(a)(1) (2003).

Those individuals and entities, both foreign and domestic, designated pursuant to Executive Order 13,224 are considered “[s]pecially designated global terrorist[s]” (SDGTs).<sup>75</sup>

Executive Order 13,224 also prohibits U.S. individuals and entities from engaging in economic transactions or dealings with blocked property or interests in property, including the “making or receiving of any contribution of funds, goods, or services to or for the benefit of those [designated] persons listed in the Annex to this order or determined to be subject to this order”;<sup>76</sup> from engaging in transactions that attempt to evade, avoid, or violate the prohibited transactions covered by the order; and from conspiring to violate the order’s prohibitions.<sup>77</sup> Persons who violate these prohibitions are subject to criminal prosecution.<sup>78</sup>

Moreover, President Bush’s Executive Order delegates broad power to the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to make regulations and rules “to employ all powers granted to the President by IEEPA and UNPA [the United Nations Participation Act of 1945],”<sup>79</sup> and to “take such other actions than the complete blocking of property or interests in property ... [that the Secretary deems to be] consistent with the national interests of the United States.”<sup>80</sup> Recognizing the

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75. Global Terrorism Sanctions Regulations, 31 C.F.R. §§ 594.201(a), 594.310 (June 6, 2003). Thus, the SDGT label that attaches to certain designees as a result of Executive Order 13,224 is similar to but slightly broader than the SDT label applied as a result of Executive Order 12,947. *See supra* notes 59-63 and accompanying text (commenting on SDT label that arose from President Clinton’s Executive Order 12,947).

76. Exec. Order No. 13,224, § 2(a), 66 Fed. Reg. at 49,080.

77. *See id.* § 2(c), 66 Fed. Reg. at 49,080.

78. *See infra* Part II (discussing the various federal criminal sanctions).

79. Exec. Order No. 13,224, § 7, 66 Fed. Reg. at 49,081 (referring to the United Nations Participation Act of 1945 (UNPA), as amended, 22 U.S.C. § 287c (2003)). The UNPA provides in subsection (a) that:

[n]otwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided ... are to be employed to give effect to its decisions ... the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations ... any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.  
22 U.S.C. § 287c(a) (2000).

80. Exec. Order No. 13,224, § 5, 66 Fed. Reg. at 49,081.

instant transferability or portability of funds, the President concluded that “[f]or those persons listed in the Annex ... or determined to be subject to this order who might have a constitutional presence in the United States ... prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual.”<sup>81</sup> Accordingly, prior notice of a designation made pursuant to the order is not required.<sup>82</sup>

### C. Outcomes

#### 1. Background

As noted above, economic sanctions have been ordered by U.S. presidents numerous times during the past seven decades,<sup>83</sup> and the resulting administrative tasks—promulgation of rules and regulations, investigations, and other actions—have been delegated to and implemented by federal agencies under 3 U.S.C. § 301 and 8 U.S.C. § 1189.<sup>84</sup> President Roosevelt, pursuant to his April 10, 1940 executive order issued after the Nazi invasion of Norway and Denmark, delegated to the Department of the Treasury the administrative work of effectuating the economic sanctions.<sup>85</sup> To accomplish its tasks, the Department of the Treasury established the Office of Foreign Funds Control (OFFC). Its objective under TWEA was “to prevent Nazi use of occupied countries’ holdings of foreign exchange and to prevent forced repatriation of funds belonging to nationals of those countries.”<sup>86</sup> OFFC was succeeded by the Office of Foreign Assets Control (OFAC), which was created initially to carry out the economic sanctions imposed by President Truman’s proclamation in December 1950 after the entry of China into the Korean War.<sup>87</sup>

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81. *Id.* § 10, 66 Fed. Reg. at 49,081.

82. *Id.*

83. See *supra* Part I.A.2 (providing a brief history of economic sanctions ordered by presidents).

84. See *supra* Part I.A.1 (explaining the statutes).

85. See Office of Foreign Assets Control, U.S. Dep’t of the Treasury, *Frequently Asked Questions*, at <http://www.treas.gov/offices/eotffc/ofac/faq/index.html> (last visited Mar. 16, 2004) [hereinafter OFAC FAQ].

86. *Id.*

87. *Id.*; see *supra* note 54 and accompanying text (noting President Truman’s

OFAC remains in existence and is responsible for administering and enforcing those economic sanction programs that focus primarily on targeted foreign countries and groups of individuals, such as terrorists.<sup>88</sup> It specifically coordinates, administers, and enforces the prohibition on designated economic transactions between targeted foreign countries and U.S. individuals and entities in part by freezing or blocking assets that are subject to U.S. jurisdiction or in the possession or control of U.S. persons.<sup>89</sup> As part of its duties, OFAC regulates the freezing of assets, collects information on "foreign terrorist organizations," and publishes and regularly updates an ongoing list of designated persons.<sup>90</sup>

In administering its responsibilities, OFAC has promulgated numerous regulations governing economic sanction programs.<sup>91</sup> It adopted specific "Terrorism Sanctions Regulations," which include regulations regarding definitions, prohibitions, reporting, interpretations, licensing authority, procedures, and penalties.<sup>92</sup> Among the regulations are those that establish procedures that allow a person to seek the unfreezing of assets believed to be blocked mistakenly and to "seek administrative reconsideration" of a designation.<sup>93</sup>

## 2. Foreign Terrorist Organizations and SDGTs

The terms "foreign terrorist organization" and "SDGT" are not synonymous, but they can overlap. The term "foreign terrorist organization" means an "organization designated or redesignated as

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proclamation).

88. See OFAC FAQ, *supra* note 85. Pursuant to Foreign Terrorist Organizations Sanctions Regulations; Procedures, 31 C.F.R. § 597.802, under current law, the OFAC may take any action delegated to the Secretary of Treasury pursuant to 8 U.S.C. § 1189 and 18 U.S.C. § 2339B. Delegation by the Secretary of the Treasury, 31 C.F.R. § 597.802 (2003).

89. See Lehrer, *supra* note 15, at 336 (citing R. Richard Newcomb, *Office of Foreign Assets Control*, in *COPING WITH U.S. EXPORT CONTROLS* 1998, at 115, 120-21 (PLI Comm. Law & Practice Course, Handbook Series No. A-782, 1998)).

90. See OFAC FAQ, *supra* note 85; see also discussion *infra* Part I.C.2 (discussing the OFAC regulation creating the label "SDGT" and the OFAC regulation defining "foreign terrorist organization").

91. Reporting and Procedures Regulations, 31 C.F.R. § 501 (2003).

92. Terrorism Sanctions Regulations, 31 C.F.R. §§ 595-598 (2003).

93. Procedures Governing Removal of Names from Appendices A, B, and C to this Chapter, 31 C.F.R. § 501.807 (2003); see also Prohibited Transactions Involving Blocked Property, 31 C.F.R. § 595.201(b) (2003); Procedures for Unblocking Funds Believed to Have Been Blocked Due to Mistaken Identity, 31 C.F.R. § 501.806 (2003).

a foreign terrorist organization, [by executive order] or with respect to which the Secretary of State has notified Congress of the intention to designate as a foreign terrorist organization under 8 U.S.C. [§] 1189(a).<sup>94</sup> Pursuant to 8 U.S.C. § 1189(a)(1), the organization must satisfy three statutory criteria: (1) it must be foreign, (2) it must engage in terrorist activity or terrorism, and (3) that activity must threaten the security of U.S. nationals or the national security of the United States.<sup>95</sup> There is no statutory definition of "foreign" in 8 U.S.C. § 1189, and from judicial filings it appears that for purposes of that provision the Secretary of State currently excludes an organization or group formed under the laws of the states or the District of Columbia.<sup>96</sup> Based upon that interpretation, an organization formed under the laws of the District of Columbia or one of the fifty states cannot be a "foreign terrorist organization." The concept of "terrorist activity" as defined in 8 U.S.C. § 1182(a)(3)(B) is broad and encompasses many types of unlawful activity. These activities include committing or inciting another person to commit a terrorist activity, preparing or planning a terrorist activity, gathering "information on potential targets for

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94. Foreign Terrorist Organization, 31 C.F.R. § 597.309 (2003).

95. 8 U.S.C. § 1189(a)(1) (2000 & Supp. 2003).

96. See Joshua A. Ellis, *Designation of Foreign Terrorist Organizations Under the AEDPA: The National Council Court Erred in Requiring Pre-Designation Process*, 2002 BYU L. REV. 675, 679. In the case of *People's Mojahedin Organization of Iran v. Department of State*, 182 F.3d 17 (D.C. Cir. 1999), then-Secretary of State Madeleine Albright had redesignated several organizations, including the People's Mojahedin Organization of Iran (PMOI), as a "foreign terrorist organization" for purposes of 8 U.S.C. § 1189, and the organizations brought petitions for judicial review of the designations based upon claims of the abridgement of their constitutional due process rights. On brief, PMOI raised the issue as to whether the U.S. Office of National Council of Resistance of Iran (USNCRI), a domestic nonprofit organization under the designated group of PMOI aliases, could be a "foreign organization" within the meaning of 8 U.S.C. § 1189. See Ellis, *supra*, at 679. The D.C. Circuit panel expressly declined to address the issue of whether its ruling that "[a] foreign entity ... has no constitutional rights, under the due process clause or otherwise" applies to "those in the United States" who are donors or members of an organization designated by the State Department as a foreign terrorist organization. *People's Mojahedin Org. of Iran*, 182 F.3d at 22 n.6. The Ninth Circuit remanded that question back to the State Department, which ultimately conceded that it would not consider USNCRI a "foreign terrorist organization" for 8 U.S.C. § 1189 designation purposes. See Ellis, *supra*, at 679, 690-91. An entity formed abroad or a foreign "group of two or more individuals, whether organized or not, which engages in [terrorist] activities" is considered a "foreign terrorist group." *Id.* at 680; accord *County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799-800 (D.C. Cir. 2002) (holding that group taking the designation of "Real IRA" does not have constitutional rights because it failed to demonstrate a property interest or a presence in the United States).

terrorist activity,” soliciting funds for a terrorist activity or another terrorist organization, and soliciting an individual to engage in terrorist activity or to become a member of a terrorist organization.<sup>97</sup> Moreover, an organization engages in terrorist activity when it provides material support “for the commission of a terrorist activity,” or “to a terrorist organization.”<sup>98</sup> Finally, the terrorist activities must threaten U.S. nationals or the “national security” of the United States, which “means the national defense, foreign relations, or economic interests of the United States” here or abroad.<sup>99</sup>

By contrast, designation as an SDGT is not limited only to persons designated by the Secretary of State *after* notification to Congress. Instead, Executive Order 13,224 sets forth the circumstances under which the Secretary of the Treasury and/or the Secretary of State, in consultation with others but without notification to Congress, can designate an SDGT.<sup>100</sup> Moreover, unlike a “foreign terrorist organization,” an SDGT need not be foreign. It is clear from § 1 of Executive Order 13,224 that any foreign or U.S. individual, group, or entity can be designated as an SDGT if such person: (1) assists in, sponsors, or provides financial, material, or technological support for, or services in support of, terrorism; is associated with other persons designated pursuant to the order; or (2) is an agent for any designated individuals or entities.<sup>101</sup> Because U.S. individuals and organizations can be designated as SDGTs for providing financial support to terrorists and terrorist groups, well-intentioned individual donors and legitimate domestic § 501(c)(3) organizations that engage in global philanthropy and that do not or cannot track the exact end-users of those donated funds may fear that their assets can be frozen immediately or that they may be subject to criminal sanctions.<sup>102</sup>

The current Bush administration publicly manifested its serious attitude toward compiling a list of SDGTs on September 23, 2001 when, as an Annex to Executive Order 13,244, President Bush listed

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97. 8 U.S.C. § 1182(3)(B)(iv)(I)-(V) (2000 & Supp. 2003).

98. 8 U.S.C. § 1182(3)(B)(iv)(VI) (2000 & Supp. 2003) (referring to the definition in 18 U.S.C. § 2339A of “material support”).

99. 8 U.S.C. § 1189(c)(2) (2000).

100. See Exec. Order No. 13,244, § 1, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

101. See *id.*

102. Whether these concerns are well founded is discussed in Part II, *infra*.



twelve individuals and fifteen nongovernmental organizations as SDGTs, the latter of which are also foreign terrorist organizations.<sup>103</sup> Within a month, President Bush announced a "Ten Most Wanted Terrorist" list of SDGTs.<sup>104</sup> A few days later, the Department of the Treasury's OFAC<sup>105</sup> and the Department of State<sup>106</sup> identified additional SDGTs associated with the al Qaeda attacks. By May 29, 2003, the State Department had added more than 250 individuals and thirty-six entities to its list of designated individuals and entities,<sup>107</sup> and the separate Department of the Treasury list of SDGTs included 264 individuals and entities.<sup>108</sup> By the end of 2003, pursuant to Executive Order 13,224, 315 individuals and

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103. See *supra* note 71 and accompanying text (listing the SDGTs on the Annex to Executive Order 13,224).

104. CNN, *Bush Announces "Most Wanted" Terrorist List*, Oct. 11, 2001, at <http://www.cnn.com/2001/ALLPOLITICS/10/10/inv.most.wanted/index.html> (last visited Mar. 16, 2004).

105. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT OF THE TREASURY, SPECIALLY DESIGNATED NATIONALS (SDN) LIST, available at <http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf> (last visited Feb. 12, 2004) [hereinafter OFAC SDN LIST].

106. OFFICE OF COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT OF STATE TERROR EXCLUSION LIST (Nov. 15, 2003), available at <http://www.state.gov/s/ct/rls/fs/2002/15222pf.htm> (last visited Feb. 12, 2004). Additional lists are maintained by the European Union and the United Nations. See Proposal for a Council Regulation Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Osama bin Laden, The Al-Qaeda Network and the Taliban, and Repealing Council Regulation (EC) No. 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan, available at [http://europa.eu.int/eur-lex/en/com/reg/en\\_register\\_18.html](http://europa.eu.int/eur-lex/en/com/reg/en_register_18.html) (last visited Mar. 16, 2004); UNITED NATIONS, SECURITY COUNCIL, SANCTIONS COMMITTEE, NEW CONSOLIDATED LISTS, available at <http://www.un.org/Docs/sc/committees/1267/pdflist.pdf> (last updated Mar. 12, 2004).

107. See *Testimony of Steven Emerson, Director of the Investigative Project, Before the House Fin. Servs. Subcomm. on Oversight and Investigations, Antiterrorism Financing*, Mar. 11, 2003, LEXIS, Federal Document Clearing House File; Designation of 39 "Terrorist Organizations" Under the "Patriot USA Act," 66 Fed. Reg. 63,620 (Dec. 7, 2001) (reporting a total of thirty-nine terrorist organizations, including some of those designated by President Bush's Executive Order 13,224); *Pakistan Demands Proof to Back U.S. Terror Watch List*, AGENCE FRANCE PRESSE, International News, May 2, 2004, LEXIS (stating that thirty-eight more terrorist organizations are being watched closely).

108. See OFAC SDN LIST, *supra* note 105; see also *Treasury Designates Al-Aqsa International Foundation as Financier of Terror, Charity Linked to Funding of the Hamas Terrorist Organization*, Regulatory Intelligence Data, May 29, 2003, LEXIS, Federal Document Clearing House File. As of June 26, 2003, the Department of the Treasury had designated eighteen nongovernmental organizations. See *Prepared Testimony of David D. Aufhauser*, *supra* note 7.

entities had been designated as SDGTs, of which thirty-six were foreign terrorist organizations.<sup>109</sup>

### 3. Blocked Assets

The concerted counterterrorism efforts of OFAC, the Department of Justice, and cooperating foreign countries and institutions have resulted in the U.S. government's freezing of large amounts of assets.<sup>110</sup> The U.S. government reports that with the cooperation of the international community, \$125 million in terrorist organizations' assets were frozen worldwide between September 11, 2001 and June 5, 2003,<sup>111</sup> including \$36.2 million in the United States.<sup>112</sup> As of September, 2002, the U.S. government had frozen \$6.3 million in charitable funds and other countries had seized \$5.2 million in charitable funds.<sup>113</sup> These concrete results of the financial war on

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109. Bruce Zagaris, *US 2003 Money Laundering Strategy Report Emphasizes International Aspects*, INT'L ENFORCEMENT L. REP. (2004).

110. The authority to freeze and seize funds connected to terrorist groups is a powerful weapon, one over which there is a concern for abuse even within the U.S. government. See Eric Lichtblau, *U.S. Cautiously Begins to Seize Millions in Foreign Banks*, N.Y. TIMES, May 30, 2003, at A16 (reporting concern of U.S. State Department over seizures by the Department of Justice). The Department of Justice has seized through U.S. correspondent bank accounts of foreign banks a significant amount of money believed to have been illegally obtained by terrorist groups. *Id.* Some of these seizures have involved fraud and money laundering investigations unrelated to terrorism. *Id.*

It should be noted that not only can a foreign terrorist organization's funds be blocked pursuant to 18 U.S.C. § 2339B(a)(2)(A) and 50 U.S.C. § 1702(a)(1)(A)(i), but also pursuant to 8 U.S.C. § 1182(a)(3)(B)(i)(IV), a foreign terrorist organization's representatives can be deported.

111. See *Prepared Testimony of John Ashcroft, Attorney General, Before the Committee on the Judiciary, House of Representatives*, June 5, 2003, available at <http://www.house.gov/judiciary/ashcroft060503.htm> (last visited Mar. 16, 2004); Press Release, Testimony of Juan C. Zarate Deputy Assistant Secretary, Executive Office, Terrorist Financing and Financial Crime, Department of the Treasury, Senate Foreign Relations Committee (Mar. 18, 2003) (reporting the freezing of \$125 million in terrorist organizations' assets), available at <http://www.treas.gov/press/releases/fs139.htm> (last visited Mar. 8, 2004); *Testimony of Steven Emerson, supra* note 107 (testifying that the Departments of Justice and Treasury by March 11, 2003, had frozen \$113 million in assets of sixty-two U.S. and foreign organizations supporting terrorism). A recent update reports that as of November 2003, \$136 million had been frozen worldwide. Zagaris, *supra* note 109. As of mid-January 2004, the Treasury Department reported that \$139 million has been blocked. See Edmund L. Andrews, *U.S. and Saudis Act to Freeze Charity's Assets*, N.Y. TIMES, Jan. 23, 2004, at A4.

112. See *Testimony of Steven Emerson, supra* note 107.

113. DEP'T OF THE TREASURY, CONTRIBUTIONS BY THE DEPARTMENT OF THE TREASURY TO THE FINANCIAL WAR ON TERRORISM, FACT SHEET, 12 (2002), available at <http://www.treas.gov/>

terrorism include the highly publicized seizures of assets of several domestic Muslim § 501(c)(3) organizations,<sup>114</sup> which fueled distrust among Muslim donors and precipitated a decline in donations to numerous mosques and other legitimate Muslim charitable organizations.<sup>115</sup>

#### *4. Cases Involving Blocked Assets of Domestic § 501(c)(3) Organizations*

According to one scholar, based on figures produced by the Department of Justice, approximately thirty percent of al Qaeda's financial resources were derived from donations solicited in the United States and abroad.<sup>116</sup> With such a significant portion of al Qaeda's funding attributed to fund raising, it is no wonder that the U.S. government has allocated substantial resources and efforts to blocking assets of domestic § 501(c)(3) organizations utilized in those fund-raising efforts. The affected domestic § 501(c)(3) organizations have brought lawsuits challenging the OFAC temporary blocking orders during an investigation into whether the organization illegally funneled assets to terrorists or terrorist groups. At issue in these cases is whether a preliminary injunction should be issued to lift a temporary blocking order issued under 50 U.S.C. § 1702(a)(1)(B). The courts have not yet fully addressed the

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press/releases/reports/2002910184556291211.pdf (last visited Mar. 8, 2004); see also Bruce Zagaris, *U.S. Senate Finance Hearing Reveals New Initiatives on Counter-Terrorism Financial Enforcement, Counter-Terrorism Financial Enforcement*, 18 INT'L ENFORCEMENT L. REP. 497 (2002).

114. The organizations include the Holy Land Foundation for Relief and Development (Holy Land), Benevolence International Foundation, Inc. (Benevolence International), and Global Relief Foundation, Inc. (Global Relief). Additionally, foreign Muslim charities, such as Al Aksa, have been designated as SDGTs and have had funds seized by the U.S. government. See Timothy L. O'Brien & Heather Timmons, *Muslim Charity Is Tied to Terror Group*, N.Y. TIMES, May 30, 2003, at A16 (reporting that in March 2002, the State Department froze the assets of Al Aksa Martyrs Brigades, a splinter group of Al Aksa, that claimed responsibility for suicide bombings in Israel).

115. See *supra* notes 16-18 and accompanying text (discussing the sentiment of Muslim contributors and the concerns of Muslim charities).

116. See Fletcher N. Baldwin, Jr., *Introduction, Organized Crime, Terrorism, and Money Laundering in the Americas*, 15 FLA. J. INT'L L. 3, 4 (2002) (stating that Department of Justice figures indicate that al Qaeda received approximately 40% of its funds from drugs, 20% from extortion, 10% from kidnapping, and the remainder from fundraising in the United States and abroad).

substantive issue of whether, based on all of the evidence collected by governmental authorities during its investigations, an organization and its managers are guilty of crimes punishable under federal criminal statutes. To date, the courts consistently have confirmed the breadth of authority ascribed to the President and his delegates to issue temporary blocking orders under 50 U.S.C. § 1702(a)(1)(B) and have sanctioned limitations on the constitutional rights of domestic organizations in the discrete timeframe of a declared national emergency when national security and the security of U.S. citizens are considered at stake.

*a. Global Relief Foundation, Inc.*

For many years law enforcement and intelligence authorities investigated and placed under surveillance the Global Relief Foundation, Inc. (Global Relief), a nonprofit organization chartered and incorporated in Illinois, for alleged ties to terrorist groups.<sup>117</sup> On December 14, 2001, pursuant to a warrant and under the authority of the Foreign Intelligence Surveillance Act and the emergency authority of the Acting Attorney General, the FBI conducted a search of Global Relief's headquarters and its executive director's home and seized materials.<sup>118</sup> On the same day, pursuant to § 1702(a)(1)(B), based on previously obtained classified and unclassified information,<sup>119</sup> OFAC determined that Global Relief "had long been sending millions of dollars to regions, including Afghanistan, where [O]sama bin Laden and other Islamic terrorists operate."<sup>120</sup> Based on that determination, the Secretary of the Treasury issued a temporary blocking notice freezing the assets of Global Relief pending the FBI's further investigation of the relationship of Global

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117. Brief for Appellees at 11-12, *Global Relief Found. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002) (No. 02-2536), available at <http://www.ca7.uscourts.gov/briefs.htm>.

118. *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 784 (N.D. Ill. 2002), *aff'd* 315 F.3d 748 (7th Cir. 2002), *cert. denied* 124 S. Ct. 531 (2003). Moreover, on November 24, 2003, the Treasury Department and the IRS announced the suspension of the tax-exempt status of Global Relief because it has been designated as supporting or engaging in terrorist activity. See *infra* note 386 and accompanying text (discussing the ability of the IRS under I.R.C. § 501(p) to suspend the tax-exempt status of such organizations).

119. Brief for Appellees at 9, *Global Relief Found.* (No. 02-2536).

120. *Id.*

Relief, if any, to the September 11 terrorists.<sup>121</sup> The blocking notice was to remain in effect “pending further investigation and resolution of whether GRF [Global Relief] has engaged in activities that violate [IEEPA]”; however, nothing in the order precluded Global Relief from continuing to receive donations into its blocked accounts.<sup>122</sup> The notice advised Global Relief of the administrative means it could employ to challenge the blocking order.<sup>123</sup> Global Relief pursued partial administrative relief.<sup>124</sup> Thereafter, Global Relief filed an action in federal district court on January 28, 2002, seeking declaratory and preliminary injunctive relief and a writ of mandamus.<sup>125</sup> It was not until May 24, 2002 that OFAC first proposed to designate Global Relief as an SDGT.<sup>126</sup> As a result of the administrative appeal procedures, SDGT status was not immediately assigned.<sup>127</sup>

In its lawsuit,<sup>128</sup> Global Relief argued that the IEEPA did not grant the authority to block purely domestic assets, and second, that the interest in assets to be blocked must be an interest held by a foreigner rather than by a U.S. individual or domestic entity.<sup>129</sup> Global Relief also contended that President Bush’s Executive Order

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121. *Id.*; *Global Relief Found.*, 207 F. Supp. 2d at 792.

122. Brief for Appellees at 9, *Global Relief Found.* (No. 02-2536).

123. *Id.* at 11.

124. *Id.*

125. *Id.* at 12.

126. *Id.* at 11.

127. *Id.* On October 14, 2002, OFAC designated Global Relief as an SDGT. *See* OFAC SDN LIST, *supra* note 105.

128. Global Relief first asserted that the warrantless search of its headquarters and of its executive director’s home were ultra vires actions beyond the scope of the powers conferred by Congress on executive agencies. *Global Relief Found.*, 207 F. Supp. 2d at 788. The district court concluded that under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801, there was probable cause to believe that Global Relief and its executive director were agents of a foreign power and that the warrantless search and seizure were appropriate under FISA and not in violation of the First Amendment protected activities of Global Relief and the executive director. *Id.* at 789-90. Furthermore, Global Relief argued that OFAC’s blocking order violated the humanitarian relief exception of the IEEPA. *Id.* at 790. The district court held that the suspected actions of Global Relief did not warrant Global Relief’s access to the IEEPA humanitarian relief exception. *Id.* at 796-97. Global Relief asserted for the first time in its reply brief that 18 U.S.C. § 2339B rather than 50 U.S.C. § 1702(a)(1)(B) was the appropriate statute to subject individuals and entities, including U.S. persons, to a blocking order. *Id.* at 791. The court refused to address the argument because Global Relief had failed to raise the issue in its brief. *Id.*

129. *Id.* at 790.

13,224 legally could not delegate to OFAC authority to block assets “during the pendency of an investigation” because the Executive Order was issued before the enactment of the USA Patriot Act, which added such language to 50 U.S.C. § 1702(a)(1)(B).<sup>130</sup> The district court disagreed with Global Relief as to each contention.<sup>131</sup>

With respect to the assertion that § 1702(a)(1)(B) precluded the freezing of “purely domestic assets,” the court focused on the statutory language, emphasizing that Congress in enacting the provision repeatedly employed the word “any”: once with respect to interest and then again with respect to property.<sup>132</sup> The court stated that had Congress intended the provision to apply to only foreign property, it would have chosen more limiting statutory language.<sup>133</sup> Thus, the court concluded the “plain language” of the statute dictated a broad intent with respect to the government’s ability to block domestic, as well as foreign, assets.

With respect to Global Relief’s contention that interests in assets subject to a blocking order under § 1702(a)(1)(B) must be those of foreign persons, the federal district court first found that the majority of the funds collected and distributed by Global Relief were intended for foreign countries, entities, and nationals.<sup>134</sup> The court also determined that foreign nationals, including Global Relief’s executive director, had a direct interest in the assets collected and distributed by Global Relief.<sup>135</sup> Therefore, the court concluded the blocking order was directed at appropriate interests and assets.<sup>136</sup> It particularly noted that to conclude otherwise would completely undermine the statutory purposes of the act by allowing foreign nationals and entities to create and use U.S. entities to fund terrorism in the United States.<sup>137</sup>

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130. *Id.* at 798.

131. *Id.*

132. *Id.* at 793.

133. *Id.* The court also reviewed and gave deference to OFAC’s regulations, which broadly defined the term “interest.” *Id.* (citing Property; Property Interests, 31 C.F.R. § 535.311 (2002); Interest, 31 C.F.R. § 535.312 (2002); Property; Property Interest, 31 C.F.R. § 595.310 (2002)).

134. *Id.* at 774 (internal citations omitted).

135. *Id.*

136. *Id.*

137. *Id.*

As to Global Relief's position that President Bush legally could not delegate to OFAC authority to block Global Relief's assets during the pendency of an investigation, the federal district court concluded that the blocking order was not an *ultra vires* act by OFAC.<sup>138</sup> The court found that the catchall language of §5 of the Executive Order, which:

authorizes the Secretary of the Treasury (and his designee) to "take such other actions than the complete blocking of property or interest in property as the President is authorized to take under IEEPA ... if the Secretary of the Treasury ... deems such other actions to be consistent with the national interests of the United States,"<sup>139</sup>

was sufficient to cover the temporary blocking of assets pending the outcome of an investigation.

The court then noted that the sequence and timing of events—the issuance of the Executive Order, followed within a month by the passage of the USA Patriot Act amending IEEPA, followed nearly two months later by the OFAC blocking order—supported the conclusion that OFAC properly utilized all IEEPA powers legally delegated, even those associated with the authority to block property during the pendency of an investigation within § 1702(a)(1)(B).<sup>140</sup> The court reasoned that to require the President to republish or amend an Executive Order upon Congress' enactment of amendments to legislation, such as IEEPA, would be inefficient.<sup>141</sup>

Finally, Global Relief argued on constitutional grounds, claiming that the government had violated: (1) the Bill of Attainder Clause, by inflicting punishment (in prohibiting persons from transacting business with Global Relief) before a determination by trial that Global Relief has supported terrorism;<sup>142</sup> (2) the Ex Post Facto Clause, by acting under statutory authority not yet enacted when

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138. Global Relief argued that President Bush legally could not delegate this authority to OFAC, because 50 U.S.C. § 1702(a)(1)(B) was not amended to include such authorization until a month after President Bush issued Executive Order 13,224. *Id.* at 798.

139. *Id.* at 797.

140. *Id.* at 796-97.

141. *Id.* at 797-98.

142. *Id.* at 798-800.

Executive Order 13,224 was issued;<sup>143</sup> (3) the Takings Clause, by unjustly taking private property;<sup>144</sup> (4) the Fifth Amendment's Due Process Clause, by temporarily blocking the assets and business of Global Relief pursuant to OFAC regulations but without judicial oversight;<sup>145</sup> (5) the First Amendment, by the vagueness of Executive Order 13,224 and its improper abridgement of Global Relief's rights of association and of its free speech;<sup>146</sup> (6) the Fourth Amendment, by the FBI's search of Global Relief's offices and seizure of Global Relief's materials;<sup>147</sup> (7) the Fifth and Sixth Amendments, by requiring Global Relief to answer for a capital or infamous crime without presentment or indictment by a Grand Jury and by deprivation of a speedy public trial by jury;<sup>148</sup> and (8) the Eighth Amendment, by the government's imposition of an excessive fine based on Global Relief's civil forfeiture of its interest in property.<sup>149</sup> Global Relief asserted also that the separation of powers embodied in the Constitution prohibited a congressional carte blanche delegation of powers to the president under the IEEPA and that the combination of functions delegated by the President to the Treasury's OFAC was impermissible.<sup>150</sup> The federal district court addressed each argument and in each case found unlikely any constitutional violations.<sup>151</sup> As a result, the court held that Global Relief failed to satisfy the likelihood of success threshold for obtaining preliminary injunctive relief.<sup>152</sup>

On appeal, the Seventh Circuit Court of Appeals affirmed the district court's holdings. The majority opinion, written by Judge Easterbrook, rather summarily disposed of Global Relief's constitutional challenges, including its contention that President Bush had no legal authority when he issued Executive Order 13,224 to

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143. *Id.* at 800-02.

144. *Id.* at 802.

145. *Id.* at 803-05.

146. *Id.* at 805-06. The court in part relied on the Supreme Court's previous determination that "a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 806 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

147. *Id.* at 807.

148. *Id.* at 807-08.

149. *Id.* at 806-07.

150. *Id.* at 807.

151. *Id.* at 798-809.

152. *Id.* at 809.



delegate power to block assets “during the pendency of an investigation.”<sup>153</sup> With respect to the latter challenge, the court held that at the time of its decision the investigation was completed and that the legality of the delegation, therefore, was moot.<sup>154</sup>

Judge Easterbrook, however, focused considerable attention on determining whether 50 U.S.C. § 1702(a)(1)(B) applied to permit any blockage, whether temporary or permanent,<sup>155</sup> of domestic property and funds of a U.S. citizen or a U.S.-chartered entity such as Global Relief in which foreigners have any interest.<sup>156</sup> Basing its determination on Congress’ purpose in enacting IEEPA to regulate assets that can be controlled and used harmfully by foreign enemies, the majority held that the statutory reference to “any interest” is not limited to bare legal ownership, but also includes a beneficial interest.<sup>157</sup> Because Global Relief conducted operations abroad and applied its funds for the benefit of persons who are not U.S. citizens, Global Relief’s assets were not free of foreign nationals’ interests within the meaning of § 1702(a)(1)(B).<sup>158</sup> Although the court did not decide the question of whether Global Relief supports terrorism, it concluded that “the phrase ‘property in which any foreign country or a national thereof has any interest’ in [50 U.S.C.] § 1702(a)(1)(B) does not offer [Global Relief] a silver bullet that will terminate the freeze without regard to the nature of its activities.”<sup>159</sup>

#### b. The Holy Land Foundation for Relief and Development

On December 4, 2001, pursuant to Executive Orders 13,224 and 12,947, OFAC designated The Holy Land Foundation for Relief and Development (Holy Land),<sup>160</sup> self-described as the largest domestic

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153. *Global Relief Found. v. O’Neill*, 315 F.3d 748, 751 (7th Cir. 2002).

154. *Id.*

155. See *infra* notes 221-30 (referencing 18 U.S.C. § 981) (2000); *infra* Part I.D (discussing civil forfeiture).

156. *Global Relief Found.*, 315 F.3d at 752. Relying on the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b)(3) (2000), and *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176 (1982), the Seventh Circuit found Global Relief a citizen of the United States regardless of the fact that two of its three board members were foreign nationals. *Id.*

157. *Id.* at 753.

158. *Id.*

159. *Id.* at 753-54.

160. Holy Land was originally incorporated in California as a nonprofit organization in 1989 as the Occupied Land Fund. In 1991, it changed its corporate name and moved to Texas.

Muslim charity, as an SDGT and an SDT based on Holy Land's alleged "acts for or on behalf of" the terrorist organization Hamas.<sup>161</sup> OFAC blocked all of Holy Land's assets and accounts pursuant to the IEEPA, Executive Order 13,224 (issued by President Bush), and Executive Order 12,947 (issued by President Clinton).<sup>162</sup> In 2002, Holy Land challenged the U.S. government's seizure and blocking of its assets and sought a preliminary injunction in federal district court to enjoin the United States from continuing to interfere with its access to or disposition of its assets.<sup>163</sup> In its lawsuit, Holy Land asserted that the SDGT designation and the blockage of its assets and accounts violated the Administrative Procedures Act (APA) and the Religious Freedom Restoration Act (RFRA), and that those actions of OFAC were unconstitutional.<sup>164</sup>

With respect to Holy Land's assertion that its designation as an SDGT and the resulting blocking of its assets violated the APA, the federal district court first addressed Holy Land's argument that "OFAC exceeded its statutory authority under the IEEPA because Hamas does not have a legally enforceable interest in [Holy Land's] property."<sup>165</sup> The court held that IEEPA does not constrain the term "interest" to a legally enforceable interest.<sup>166</sup> Relying on courts' prior interpretations of the IEEPA,<sup>167</sup> the federal district court concluded that the IEEPA language merely requires that a foreign country or foreign national have "any interest" in property.<sup>168</sup> In response to Holy Land's argument that OFAC's designation of Holy Land as an SDGT was arbitrary and capricious, the court held that the administrative record provided sufficiently "substantial" support for OFAC's determination.<sup>169</sup>

As for Holy Land's contention that its SDGT designation and the blocking of its assets violated the RFRA by impermissibly burdening

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Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 64 (D.D.C. 2002).

161. *Id.* at 64.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 66.

166. *Id.* at 67.

167. *Regan v. Wald*, 468 U.S. 222, 224, 225-26, 233-34 (1984); *Consarc Corp. v. OFAC*, 71 F.3d 909, 913-14 (D.C. Cir. 1995); *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 701-02 (D.C. Cir. 1994).

168. *Holy Land Found.*, 219 F. Supp. 2d at 67-68.

169. *Id.* at 67.

its religious beliefs,<sup>170</sup> the federal district court held that Holy Land's arguments failed as a matter of law.<sup>171</sup> The court found that Holy Land had failed to identify itself as a religious organization and a religious believer, and thus had not shown that an exercise of its own (i.e., a nonprofit corporation's) religious beliefs had been substantially burdened.<sup>172</sup>

Holy Land's constitutional challenges to OFAC's actions were based upon the Fifth Amendment's Due Process Clause and the Takings Clause, the Fourth Amendment, and First Amendment rights of freedom of association and speech.<sup>173</sup> Although the federal district court found that OFAC failed to provide Holy Land with notice or a hearing before taking its actions against Holy Land, it concluded that Holy Land's procedural due process rights had not been violated because under the standards of TWEA or IEEPA, extraordinary circumstances existed that justified reasonable governmental actions to secure promptly an important governmental interest.<sup>174</sup> The federal district court further determined that OFAC had not acted arbitrarily or capriciously and that therefore Holy Land's substantive due process rights were not violated.<sup>175</sup> Based on *Global Relief Foundation* and other cases involving IEEPA and TWEA, the court rejected, without long discussion, Holy Land's contention that the temporary blocking of Holy Land's assets constituted an uncompensated taking in violation of the Fifth Amendment's Takings Clause.<sup>176</sup> The court, however, commented that "it is premature to determine that the temporary deprivation is equivalent to a vesting. It is clear, then, that the current deprivation has not 'go[ne] too far,' so as to constitute a taking, even though ... [Holy Land] may some day have a more viable claim."<sup>177</sup>

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170. *Id.* at 83. Holy Land also argued that the RFRA was violated by an impermissible burdening of the religious beliefs and rights of Holy Land's Muslim donors and employees. The court found that Holy Land did not have "associational standing." *Id.* at 83-84.

171. *Id.* at 83.

172. *Id.* The court accepted Holy Land's assertion that Holy Land's use of donations from Muslim donors and employees for charitable and humanitarian purposes constituted the exercise of religion under RFRA. *Id.*

173. *Id.* at 64.

174. *Id.* at 76-77 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)).

175. *Id.* at 77.

176. *Id.* at 78.

177. *Id.*

The federal district court also rejected Holy Land's First Amendment arguments, one based on freedom of association and the other based on freedom of speech.<sup>178</sup> With respect to Holy Land's freedom of association argument, Holy Land had contended that OFAC's designation and blocking order imposed guilt by association and that OFAC had failed to establish a specific intent by Holy Land to support the illegal activities of Hamas.<sup>179</sup> The court reasoned that OFAC's actions pursuant to IEEPA and the Executive Orders were not taken against Holy Land by reason of association alone, that is, membership in, or endorsement of, Hamas.<sup>180</sup> Quoting the Ninth Circuit in *Humanitarian Law Project v. Reno*,<sup>181</sup> the federal district court stated that "there is no constitutional right to facilitate terrorism,"<sup>182</sup> and it found that designation of Holy Land as an SDGT and the blocking of Holy Land's assets merely prevented Holy Land from financially supporting Hamas' terrorist acts.<sup>183</sup> Moreover, based upon the notion that requiring the government to establish that Holy Land had a "specific intent" to support the illegal conduct of Hamas would undermine the purpose of Congress and the economic sanctions programs, the court held that the First Amendment does not require proof of such "specific intent."<sup>184</sup>

With respect to Holy Land's assertion that the government violated its freedom of speech rights under the First Amendment by blocking its donations for humanitarian purposes, the federal district court analyzed both the speech and nonspeech implications.<sup>185</sup> Relying on the Supreme Court's determination in *United States v. O'Brien* that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms,"<sup>186</sup> the court concluded that in the instant case the Executive Orders and the OFAC blocking order did not violate Holy Land's First Amendment

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178. *Id.* at 80.

179. *Id.*

180. *Id.* at 80-81.

181. 205 F.3d 1130, 1133 (9th Cir. 2000) [hereinafter *Humanitarian Law Project II*].

182. *Holy Land Found.*, 219 F. Supp. 2d at 81.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

rights.<sup>187</sup> The court applied the *O'Brien* four-part intermediate scrutiny test:

[The Government's restriction] passes intermediate scrutiny if (1) [the governmental regulation] is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest—and found that all four parts were satisfied.<sup>188</sup>

Finally, Holy Land asserted that the government violated its Fourth Amendment rights by freezing its bank accounts and conducting an unlawful search of its offices and seizure of its property without a warrant.<sup>189</sup> The federal district court concluded that because courts previously have held that blocking assets pursuant to the IEEPA and Executive Orders does not constitute a seizure, Holy Land failed to state a Fourth Amendment claim with respect to OFAC's freezing of Holy Land's bank accounts.<sup>190</sup> The court, however, did find that Holy Land stated a Fourth Amendment claim with respect to the government's entry onto its corporate premises and removal of its property without a warrant.<sup>191</sup> Because Holy Land's office premises were searched without a warrant, the court agreed with Holy Land that it inexcusably was subjected to a classic unlawful search and seizure.<sup>192</sup>

Holy Land appealed the federal district court's affirmation of OFAC's actions and the dismissal of a substantial portion of Holy Land's complaint. On June 20, 2003, the D.C. Circuit court issued its decision affirming the federal district court's holdings.<sup>193</sup> The circuit court first ruled that, as demonstrated by the administrative record, OFAC had neither exceeded its authority under the APA<sup>194</sup>

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187. *Id.* at 81-82.

188. *Id.* at 81 (citing *O'Brien*, 391 U.S. at 376).

189. *Id.* at 78.

190. *Id.* at 78-79.

191. *Id.* at 78.

192. *Id.* at 79-80.

193. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 1656 (Mar. 1, 2004).

194. *Id.* at 162.

nor violated Holy Land's due process rights in designating Holy Land as an SDGT.<sup>195</sup> It then supported the federal district court's decision rejecting Holy Land's assertion that the IEEPA permits blocking of property only where a "legally enforceable" interest exists.<sup>196</sup> The circuit court stated that the language of 50 U.S.C. § 1702(a)(1)(B) "imposes no limit on the scope of the interest,"<sup>197</sup> that deference must be given to the OFAC regulations, for the issuance of which Congress specifically delegated authority,<sup>198</sup> and that prior case law supported a broad interpretation of the statute's concept of property.<sup>199</sup>

The circuit court, moreover, held that Holy Land's First Amendment rights had not been abridged even if the federal district court erred by considering evidence beyond allegations in Holy Land's original and amended complaints.<sup>200</sup> The court found, based on the entire administrative record presented by Holy Land in its defense, that Holy Land had been given every opportunity to rebut the conclusion that it financially supported Hamas and that it failed to do so. Because there is no First Amendment right or other constitutional right to support terrorists, the constitutional rights of Holy Land had not been abridged.

Finally, the circuit court concluded that the government's designation of Holy Land and its blocking order with respect to Holy Land's assets would support a grant of summary judgment for the

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195. *Id.* at 163 (citing *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003), in which the court expressed "[t]he Due Process Clause requires only that process which is due under the circumstances of the case," which there required only the disclosure of unclassified portions of the administrative record in the designation notice to the organization).

196. *Holy Land Found.*, 333 F.3d at 162 (D.C. Cir. 2003).

197. *Id.*

198. *Id.* at 163.

199. *Id.* (relying on *Global Relief Found. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002), which interpreted property interest to include beneficial interest and not merely a traditional bare legal interest). See *supra* notes 153-59 and accompanying text for a discussion of the Seventh Circuit's decision.

200. *Holy Land Found.*, 333 F.3d at 164-66. The circuit court agreed with Holy Land that under Federal Rule of Civil Procedure 12(b)(6), if matters outside the pleadings are considered, a motion to dismiss is considered to be converted into a motion for summary judgment. *Id.* at 165. Accordingly, all parties must be, but were not here, given an opportunity to present all relevant material. Although the circuit court found the federal district court's failure to comply with Rule 12(b)(6) as an abuse of discretion, it held the error to be harmless and without prejudice to Holy Land. *Id.* at 162.

government without imposing a substantial burden on Holy Land or violating Holy Land's freedom to exercise religion pursuant to the RFRA. The circuit court, agreeing with the federal district court, questioned whether a nonprofit organization, such as Holy Land, is a "person" protected by the RFRA. It concluded that even "accepting the dubious proposition that a charitable corporation not otherwise defined can exercise religion as protected in the First Amendment, preventing such a corporation from aiding terrorists does not violate any right contemplated in the Constitution or the RFRA."<sup>201</sup>

c. Benevolence International Foundation, Inc.

Benevolence International Foundation, Inc. (Benevolence International), incorporated in Illinois and maintaining ten overseas offices, received a blocking notice from OFAC on December 14, 2001, stating that the U.S. government had reasons to believe that Benevolence International might be engaged in activities in violation of IEEPA.<sup>202</sup> The notice blocked all funds, accounts, and business records of Benevolence International pending further investigation and required production and surrender of all of its records and computers.<sup>203</sup> Also on December 14, 2001, the FBI searched the offices of Benevolence International and the home of its chief executive officer, Enaam Arnaout, seizing financial records, personal property, and office equipment.<sup>204</sup> Benevolence International filed an action in federal district court challenging the constitutionality of the FBI's searches and of the OFAC blocking order.<sup>205</sup> Subsequently, Benevolence International filed a motion for preliminary injunction requesting the return of property seized and the removal of the OFAC blocking order.<sup>206</sup> Benevolence International filed numerous affidavits and documents in support of its claim that it had "never provided aid or support to people or organizations known to be engaged in violence, terrorist activities,

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201. *Id.* at 167.

202. *Benevolence Int'l Found. v. Ashcroft*, 200 F. Supp. 2d 935, 936 (N.D. Ill. 2002).

203. *Id.*

204. *Id.* at 937.

205. *Id.*

206. *Id.*

or military operations of any nature."<sup>207</sup> On April 29, 2002, the United States filed criminal charges against Benevolence International and Mr. Arnaout for having "knowingly submitted false material declarations under oath" by affidavit with respect to the pending civil lawsuit.<sup>208</sup>

A day after the government filed the criminal charges, it also filed a memorandum in the civil lawsuit, requesting that discovery in the civil proceeding be stayed due to the concurrent criminal proceeding against Benevolence International and Mr. Arnaout. In making its decision, the district court balanced (1) Benevolence International's rights to proceed expeditiously with the civil litigation and to prepare promptly its civil case, particularly in light of the possible prejudice that its blocked funds would have on its ability to continue to operate and the ability of its grantees to operate, against (2) the public interest in withholding full disclosure of the evidence Benevolence International sought from the civil proceeding.<sup>209</sup> The federal district court concluded that the balance strongly favored a stay of the civil proceeding during pendency of the criminal action, basing this decision on (1) the potential for a long-enduring and voluminous discovery process in the civil lawsuit, (2) the need to eliminate duplication of judicial efforts and to utilize the criminal proceeding as an opportunity to determine the veracity of Mr. Arnaout's sworn affidavit supporting Benevolence International's motion for a preliminary injunction in the civil lawsuit, and (3) the public's interest in law enforcement.<sup>210</sup>

With respect to the criminal proceeding, after grand jury indictments charging Mr. Arnaout with perjury, racketeering conspiracy, providing material support to organizations engaged in violence, money laundering, mail fraud and wire fraud,<sup>211</sup> in February 2003, Mr. Arnaout pleaded guilty to providing financial

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207. *Id.*

208. *Id.* (internal citations omitted).

209. *Id.* at 939.

210. *Id.* at 940-41.

211. See *United States v. Arnaout*, 231 F. Supp. 2d 797 (N.D. Ill. 2002); *United States v. Benevolence Int'l Found.*, Case No. 02 CR 414, 2002 U.S. Dist. LEXIS 17223 (N.D. Ill. Sept. 13, 2002).



support to terrorists.<sup>212</sup> As of this writing, the civil lawsuit had not moved forward.

*d. Summary*

These cases clearly indicate that not only do the President and his delegates have constitutional authority to designate a domestic § 501(c)(3) organization as an SDGT, but that even if not designated as an SDGT, the Department of the Treasury, through OFAC, constitutionally can issue a blocking order under IEEPA against a domestic § 501(c)(3) organization that the government has reasonable grounds to suspect supports terrorism. The courts in the above-discussed cases involving temporary blocking orders issued pursuant to § 1702(a)(1)(B) have repeatedly dismissed as unpersuasive unconstitutionality arguments based on the Bill of Attainder Clause, the Ex Post Facto Clause, the Due Process Clause, and the separation of powers inherent in the Constitution, as well as the First Amendment's rights of free speech and association, the Fifth Amendment's Takings Clause with respect to temporary seizure of interests in property, the Sixth Amendment's right to a speedy jury trial, and the Eighth Amendment's right to avoid excessive penalties.

Should law-abiding domestic § 501(c)(3) organizations be concerned about whether these three cases indicate a wholesale witch-hunt or a new form of McCarthyism?<sup>213</sup> Absolute reassurance cannot

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212. See Eric Lichtblau, *Threats and Responses: The Money Trail; Charity Leader Accepts a Deal in a Terror Case*, N.Y. TIMES, Feb. 11, 2003, at A1. Criminal charges were brought against Mr. Arnaut pursuant to 18 U.S.C. §§ 1962(d), 956(a)(1), and 2339A, which included money laundering, providing material support to terrorist organizations, mail fraud, wire fraud, obstruction of justice, and conspiracy to kill, kidnap, maim, or injure persons in a foreign country. *United States v. Arnaut*, 236 F. Supp. 2d 916, 916-17 (N.D. Ill. 2003).

213. See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 8-10 (2003) (suggesting that the government's application of such antiterrorism statutes as 18 U.S.C. §§ 2339A and 2339B creates an atmosphere of McCarthyism).

Whether the antiterrorism statutes have created an atmosphere of McCarthyism should be of concern. Media reports, such as those in October 2003 by Edwin Black, who, in the past investigated and reported on corporate philanthropic involvement in American and Nazi eugenics, may be indicators. In the October series of articles, Mr. Black reported that grant money from the Ford Foundation, a § 501(c)(3) organization, may have ended up in the hands of Palestinian nonprofit organizations, several of which, including Hamas, are listed by the U.S. State Department as terrorist groups. Edwin Black, *Funding Hate: How Aware is Ford*

be readily given. These cases, however, appear to be instances of effectively shutting down, at least temporarily, the potential means to move tax-exempt funds to foreign terrorists and terrorist groups by organizations that appear to have little, if any, legal purpose. Even if these organizations arguably had some legitimate charitable, religious, and/or political purpose, they should not, and cannot, be disconnected from terrorist activities that they sponsored or financially supported. Under the guise of benevolence, these organizations may have garnered donor support and raised funds needed to sustain terrorist activities.<sup>214</sup> Based on their representations of chaste and unadulterated adherence to charitable missions, the U.S. government granted them what now appear to be unwarranted income tax exemptions.<sup>215</sup> The right of the government to regulate § 501(c)(3) organizations, which benefit from the IRC § 501(a) income tax exemption, is longstanding.<sup>216</sup> Conferral of tax-exempt status on an organization is predicated upon its providing substantial "public benefit." If an organization is wholly or partially organized or operated contrary to public policy<sup>217</sup> or to support or

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*Foundation of Way Its Funds Are Being Used?*, Global News Service of the Jewish People, Oct. 16, 2003, available at <http://www.jta.org> [hereinafter Black, *Funding Hate*]; Edwin Black, *Transparency A Concern As Millions Go to Mideast*, Global News Service of the Jewish People, Oct. 16, 2003, available at <http://www.jta.org>.

214. This sustenance argument goes beyond the argument that money is fungible. See *infra* notes 322-24 and accompanying text (regarding Professor David Cole and the Ninth Circuit decision in Humanitarian Law Project II, 205 F.3d 1130 (9th Cir. 2000)).

215. Whether Georgetown University Law Center Professor David Cole would agree with me is not entirely clear, but I believe that he would. He acknowledges that "[c]utting off material support for terrorist activity is undoubtedly a worthy and appropriate goal." Cole, *supra* note 213, at 13. His article does not suggest (and in fact does not address the issue) of whether a domestic § 501(c)(3) organization deserves tax-exempt status if it funnels money to a foreign terrorist organization.

216. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (permitting revocation of the university's tax-exempt status for its failure to comport with public policy on nondiscrimination); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546-48 (1983) (holding that proscription against substantial lobbying activities imposed on § 501(c)(3) organizations did not violate Fifth Amendment equal protection rights even though § 501(c)(19) organizations are not subject to a substantial lobbying prohibition).

217. See *Bob Jones Univ.*, 461 U.S. at 591-92. The majority opinion, written by Chief Justice Burger, made a sweeping statement:

Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues.... [A]n institution must fall within a category specified in [§ 501(c)(3)] and must demonstrably serve and

engage in illegal activities, the government clearly has the right to deny tax-exempt status and to impose other appropriate sanctions against that organization.

The three cases discussed above, although perhaps extreme examples, hint at the practical and legal obstacles to challenging OFAC's actions. As one scholar has written:

On a practical level, OFAC's historically lackadaisical administrative practices, combined with its broad authority under TWEA and IEEPA and the deference courts show to foreign policy measures, can intimidate those who are subject to OFAC's controls. In order to challenge a particular decision, the stakes would have to be sufficiently large to offset the fear of upsetting future dealings with an agency vested with a tremendous amount of authority and subject to relatively little oversight.<sup>218</sup>

Outcomes of litigation typically do not favor persons who have disputed OFAC's actions. Challenges are sometimes considered as raising "nonjusticiable" political questions, and those challenges determined to raise justiciable questions often fail because the courts give great deference to the Executive and Legislative branches to conduct foreign policy and to safeguard national security.<sup>219</sup> The hurdles imposed for winning constitutional challenges are high.<sup>220</sup>

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be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.

We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.

*Id.* (internal citations omitted). Several years later, the Tax Court ruled that the IRS's revocation of the § 501(c)(3) status of a private school for its failure to present sufficient evidence that it operated in good faith in accordance with a nondiscriminatory policy toward black students was appropriate. *Calhoun Acad. v. Commissioner*, 94 T.C. 284, 305 (1990).

218. 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) (internal citations omitted).

219. *See id.* at 139.

220. *See id.* at 140-60.

#### *D. Permanent Civil Asset Forfeiture*

In addition to blocking assets temporarily, confiscating assets permanently also can be important to the government's financial war on terrorism. Both are clearly contemplated by Executive Order 13,224 and by the federal statutory regime governing civil forfeitures of assets. Under 18 U.S.C. § 981, real or personal property (and proceeds and substituted assets) is subject to forfeiture to the United States if the property is involved in certain types of enumerated transactions or attempted transactions,<sup>221</sup> three of which are of particular relevance to this Article. The first, pursuant to 18 U.S.C. § 981(a)(1)(A), is a transaction or attempted transaction in violation of 18 U.S.C. § 1956 (relating to money laundering of financial instruments),<sup>222</sup> which is briefly discussed below.<sup>223</sup> The second, under 18 U.S.C. § 981(a)(1)(H), involves a violation or attempted violation of 18 U.S.C. § 2339C (relating to prohibitions against terrorist financing),<sup>224</sup> also discussed below.<sup>225</sup> The third, pursuant to 18 U.S.C. § 981(a)(1)(G), relates to planning, perpetrating, supporting, conducting, concealing, or committing an act of domestic or international terrorism against the United States, citizens or residents of the United States, or their property.<sup>226</sup>

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221. 18 U.S.C. § 981(a)(1)(2003); *see* 18 U.S.C. § 2339B(a)(2) (2003) (requiring a "financial institution" to retain control or possession of funds in which a terrorist organization, or its agent, has an interest and to report the existence of the funds to the Secretary of the Treasury); *see also infra* Part II.C (discussing 18 U.S.C. § 2339B (2003)).

222. 18 U.S.C. § 981(a)(1)(A) (2003). That paragraph provides in pertinent part, "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, ... of this title, or any property traceable to such property."

223. *See infra* Part II.B.

224. 18 U.S.C. § 981(a)(1)(H) (2003). That paragraph provides that "[a]ny property, real or personal, involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a violation, of section 2339C of this title." This provision was added by the Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, § 301, 116 Stat. 721, 728 (2002).

225. *See infra* Part II.D.

226. 18 U.S.C. § 981(a)(1)(G) (2003). That paragraph provides:

All assets, foreign or domestic—

(i) of any individual, entity, or organization engaged in planning or perpetrating any act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization;

(ii) acquired or maintained by any person with the intent and for the purpose of

The civil forfeiture statutes permit the seizure of property under IEEPA to be accomplished without notice by the Attorney General, or if the property is seized in a violation investigated by the Secretary of the Treasury (or his delegate, e.g., OFAC), then without notice by the Secretary of the Treasury.<sup>227</sup> Depending on the circumstances, the seizure can take place with or without a warrant.<sup>228</sup>

In recent years, the U.S. government has increasingly utilized civil forfeiture as a sanction to confiscate property based on the greater latitude and likelihood of success it offers in comparison to an action for criminal forfeiture.<sup>229</sup> Civil forfeiture does not require a criminal proceeding, which means that there need be no criminal conviction, and the defendant does not benefit from the constitutional protections available in a criminal proceeding.<sup>230</sup> Because a civil forfeiture is based on in rem rather than in personam jurisdiction,<sup>231</sup> the government need only show probable cause.<sup>232</sup> If, for instance, probable cause is based on the grounds that property was "used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense," the government must show "a substantial connection between the property and the offense."<sup>233</sup> According to one author, probable cause is not much more than a "hunch"<sup>234</sup>—that is, probable cause is

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supporting, planning, conducting, or concealing an act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property; or (iii) derived from, involved in, or used or intended to be used to commit any act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property.

This provision was added by the USA Patriot Act, Pub. L. No. 107-56, § 806, 115 Stat. 272, 378 (2001).

227. 18 U.S.C. §§ 981(b)(1), 983(a)(1) (i)(1), (2)(D) (2003).

228. 18 U.S.C. § 981(b)(1)-(2) (2003). The seizure can be made without a warrant if there is probable cause to believe the property is subject to forfeiture and the seizure is made pursuant to a lawful search or arrest. 18 U.S.C. § 981(b)(2)(B)(i) (2003).

229. Compare 18 U.S.C. § 981 (2003) (civil forfeiture) with 18 U.S.C. § 982 (2003) (criminal forfeiture). See Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 94 (2001).

230. Barnet, *supra* note 229, at 94.

231. See 36 AM. JUR. 2D *Forfeitures and Penalties* § 1 (2001).

232. 18 U.S.C. § 983(c) (2003).

233. 18 U.S.C. § 983(c)(3) (2003).

234. See Barnet, *supra* note 229, at 94 (citing LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 48 (1996)).

demonstrated if circumstances warrant suspicion or the reasonable belief of a connection between the property and a crime.<sup>235</sup> In cases involving the crimes of money laundering, financing of terrorists, or material support of terrorism, this connection apparently can be made rather easily by the government.<sup>236</sup>

Once the government establishes probable cause, the burden of proof shifts to the property owner to prove by a preponderance of the evidence that the property is not related to the crime.<sup>237</sup> As one scholar has stated:

The significance of this burden shift to the rights of property owners cannot be overstated. It places innocent property owners, even those who have been acquitted of criminal charges, and third parties in the position of having to prove a negative. The owner must demonstrate, not that he was innocent or lacked knowledge, but that the property was not involved or connected in any way to the commission of a crime .... It matters not whether the owner of the property was involved in the crime, or even aware that criminal activity was taking place. The owner does not even have to be accused or even suspected of involvement in the criminal activity for his property to be forfeited. If the owner cannot prove the object's innocence, the government has a right to the property that relates back to the time of its illegal use.<sup>238</sup>

Assuming the government prevails in a civil forfeiture proceeding, it gains permanent title to the forfeited property and can dispose of or utilize it for purposes it deems appropriate, including distribution to a victim of the offense that gave rise to the forfeiture.<sup>239</sup>

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235. *Id.*

236. See *supra* Part I.C.4 (regarding the seizure and temporary blocking of assets of Global Relief, Holy Land, and Benevolence International).

237. 18 U.S.C. § 983(d)(1) (2003).

238. See *Barnet*, *supra* note 229, at 94-95 (citation omitted); see also Marc S. Roy, *United States Federal Forfeiture Law: Current Status and Implications of Expansion*, 69 *MISS. L.J.* 373, 383-84 (1999) (suggesting that the property owner may find himself treated "virtually as an interloper" and that the *in rem* characterization further disadvantages the property owner because it enables the government upon a judicially successful claim to assert title retrospectively to the time that the proscribed illegal act occurred).

239. 18 U.S.C. § 981(e)(6) (2003). For a discussion of actions brought by victims of terrorism under 18 U.S.C. § 2333, see *infra* Part IV. Theoretically the government might be able to distribute returned forfeited funds to law-abiding, well-intentioned donors who lost control

It is not surprising then that the government finds the economic sanction of civil forfeiture such an attractive enforcement tool. While 18 U.S.C. § 981 enables the U.S. government to gain permanent title to assets of terrorists, subsections (a)(1)(A), (G), and (H) are so sweeping and the burdens of innocent owners, such as an unsuspecting § 501(c)(3) organization acting as a depository and distributor of donated funds, so high for proving that assets were not used in a crime of money laundering, financing terrorism, or committing terrorism that domestic § 501(c)(3) organizations, which may be unaware that they are being used for illegitimate and illegal purposes, rightfully should be concerned.

## II. FEDERAL CRIMINAL SANCTIONS

### A. Background

During 2001 and 2002, in the aftermath of the September 11 terrorist attacks, Congress reinforced the arsenal of criminal sanctions that the government can utilize in its financial counter-terrorism war. With the October 2001 passage of the USA Patriot Act, various existing statutes were strengthened, predicate offenses under RICO were expanded, and new provisions were added under which criminal sanctions can be imposed against wrongdoers.<sup>240</sup> Eight months later, Congress enacted the Suppression of the Financing of Terrorism Convention Implementation Act of 2002,<sup>241</sup> which implemented a United Nations convention signed by the United States in 2000, criminalized certain financial transactions made in furtherance of various terrorist activities, further expanded predicate offenses under RICO, and fortified the wiretap and money laundering statutes.<sup>242</sup>

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of the funds when they gifted them to the § 501(c)(3) organization for true charitable purposes. Practically, such a distribution to the donors seems unlikely.

240. See *infra* Part II.B-C (discussing provisions added by the USA Patriot Act).

241. Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, 116 Stat. 724 (2002).

242. *Id.* (adding 18 U.S.C. § 2339C and amending 18 U.S.C. §§ 2339A, 2339B, 2332b(g)(5), and 1961(1)(B)); see also MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A LEGISLATIVE PROPOSAL TO IMPLEMENT THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS AND THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM, H.R. Doc. No. 107-139 (2001).

In light of this enhanced statutory authority, well-intentioned U.S. donors and domestic § 501(c)(3) organizations legitimately may be concerned about increased exposure to possible criminal sanctions. It is not inconceivable that the government could overzealously charge, although not necessarily indict or convict, even an innocent donor or charitable organization with one or more criminal offenses<sup>243</sup> if the government found that donations ultimately were collected for and/or were funneled to a terrorist or terrorist organization.<sup>244</sup>

For example, the government can charge terrorists' alleged private supporters (including financial contributors such as donors and § 501(c)(3) organizations) with the illegal provision of material support or resources to terrorists and terrorist organizations under 18 U.S.C. §§ 2339A or 2339B, and/or the provision or collection of funds for use in terrorism under 18 U.S.C. § 2339C. These are

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243. Multiple criminal charges are typical and, if convicted, the perpetrator is subject to multiple criminal penalties. See, e.g., 18 U.S.C. §§ 371, 1341, 1343, 1952, 1961-63, 2339A, 2339B, 2339C (2003); see also, e.g., 18 U.S.C. §§ 956, 1505 (2002). For example, in *United States v. Hammoud*, No. 3:00CR147-MU (W.D.N.C. Mar. 10, 2003), the defendants were convicted by a jury of using proceeds of a cigarette smuggling scheme to fund foreign terrorists. See *Testimony of John Ashcroft Before the Senate Comm. on the Judiciary*, Mar. 4, 2003, LEXIS, Federal Document Clearing House File. The charges included conspiracy to provide material support for foreign terrorist organizations under 18 U.S.C. § 2339B, as well as money laundering, illegal wire transfers, credit card fraud, and other illegal activities. Defendant Mohamad Hammoud was sentenced to a total of 155 years in prison. He has appealed to the Fourth Circuit, claiming his sentence is excessive. See *Convicted Terror Supporter Appeals 155-Year Sentence*, ORLANDO SENTINEL, Mar. 9, 2003, at A22. Another illustrative case is *United States v. Al-Arian*, 267 F. Supp. 2d 1258, 1260 (M.D. Fla. 2003), which charged fifty counts, including conspiracy under 18 U.S.C. § 1962(d) of RICO, conspiracy to provide material support to designated terrorist organizations under 18 U.S.C. § 2339B, and conspiracy to murder, maim, or injure persons at places outside the United States under 18 U.S.C. § 956(a)(1), among others. Some of these charges carry sentences of life imprisonment; others carry shorter sentences; others carry shorter sentences. Similarly, Enaam M. Arnaout, former chief executive officer of Benevolence International Foundation, Inc. (Benevolence International), a domestic Muslim charity, was charged with conducting Benevolence International's affairs through a pattern of racketeering activity under 18 U.S.C. § 1962(d), including mail fraud, wire fraud, obstruction of justice, money laundering, and providing material support to terrorist groups. He also was charged with conspiracy to kill, kidnap, maim, or injure persons in a foreign country in violation of 18 U.S.C. §§ 956(a)(1) and 2339A. *United States v. Arnaout*, 236 F. Supp. 2d 916, 916-17 (N.D. Ill. 2003). In February 2003, Mr. Arnaout pleaded guilty to one count of providing material support to terrorists—for funneling money to pay for boots, uniforms, and other equipment for Islamic fighters in Bosnia-Herzegovina and Chechnya. See Kim Barker & Matt O'Connor, *Last Push Against Charity Leader; U.S. Takes Issue with Guilty Plea*, CHI. TRIB., June 14, 2003, at 14.

244. See *infra* Part II.C-D.



strong charges and powerful statutes, and defendants who have challenged their application have been less than successful.<sup>245</sup> Rejecting these challenges, courts have adhered to the notions that the government can regulate domestic § 501(c)(3) organizations<sup>246</sup> and that it can regulate contributions to such organizations that engage in lawful (but not speech-related), as well as harmful or illegal, activities.<sup>247</sup>

Additionally, the government can bring RICO charges, which must be based on two predicate criminal offenses.<sup>248</sup> These can include the offenses of providing material support or resources to a foreign terrorist organization, or of intentionally or knowingly collecting or providing funds for use in carrying out terrorist activities.<sup>249</sup> The courts have concluded that an economic motive for acts proscribed by the statutes is unnecessary to convict under RICO.<sup>250</sup> The actors of the September 11 attacks purportedly did not have an economic motive. The September 11 attacks, and other acts of terrorism, as well as the material support of terrorists and terrorist groups, nevertheless ostensibly were motivated by a desire to hurt the pocketbooks of Americans and disrupt the U.S. economy,<sup>251</sup> as well as by politics, religious fanaticism, national-ethnic tensions, social problems, or other noneconomic motives.<sup>252</sup>

245. See, e.g., *infra* Part II.C-D.

246. See *supra* notes 215-16 and accompanying text.

247. See, e.g., Humanitarian Law Project II, 205 F.3d 1130 (9th Cir. 2000); *cert. denied* 532 U.S. 904 (2001).

248. 18 U.S.C. §§ 1961-1968 (2003).

249. 18 U.S.C. §§ 2332b(g)(5)(B), 2339A, 2339B, 2339C (2003).

250. *NOW v. Scheidler*, 510 U.S. 249, 260 (1994) (rejecting the notion that the term "enterprise" as used for purposes of the RICO statutes, 18 U.S.C. §§ 1961-1968, encompasses and implies an economic motive requirement and extending these provisions to encompass actions of ideologically motivated abortion protestors). The Supreme Court's decision certainly brings within the realm of RICO persons who are ideologically, politically, socially, or religiously motivated. See, e.g., *Huntingdon Life Scis. v. Rokke*, 986 F. Supp. 982 (E.D. Va. 1997) (using the RICO statutes with respect to animal rights advocates); see also Xavier Beltran, *Applying RICO to Eco-Activism: Fanning the Radical Flames of Eco-Terror*, 29 B.C. ENVTL. AFF. L. REV. 281 (2002).

251. See, e.g., *Remarks by the President to Business, Trade and Agriculture Leaders*, U.S. NEWswire, Oct. 26, 2001, LEXIS, News and Business, News Group File; John Solomon, *FBI Probe Stops Other Terrorism; Arrests Stem from Worldwide Effort*, FLA. TIMES-UNION, Sept. 28, 2001, at A7; *U.S. to Purchase 100 Million Cipro Tablets*, BUS. RECORDER, Oct. 25, 2001, LEXIS, News and Business, News Group File.

252. For a broad view on the roots of terrorism historically, including the September 11 attacks, see LAQUEUR, *supra* note 20, at 11-29. For comments with respect to the September

The U.S. government has broadly and liberally charged alleged terrorists and private supporters of terrorism, such as abortion activities or eco-terrorists, with RICO violations.<sup>253</sup> Now, in its post-September 11 war on terrorism, the government can unleash the strength of RICO against terrorists and their alleged funders and supporters.

Risk aversion suggests that donors and domestic § 501(c)(3) organizations should be adequately apprised of these complex statutes. Donors should seriously undertake due diligence before contributing funds to domestic § 501(c)(3) organizations for global philanthropic purposes. Likewise, leaders of domestic § 501(c)(3) organizations must comply with due diligence standards before collecting and distributing funds. If due diligence is impossible or inadequate, assets should not be transferred or distributed by either donors or § 501(c)(3) organizations. The obvious consequence of such extreme caution, unfortunately, may be a significant reduction in the flow of philanthropic funds, particularly abroad.

### *B. Anti-Money Laundering Initiatives*

The USA Patriot Act both enacted new and fortified existing, anti-money laundering statutes,<sup>254</sup> leading one scholar

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11 attacks, see Richard H. Drummond, *Terrorists Twist Islam Into Something Never Intended*, TEL. HERALD, Oct. 9, 2001, at A4; Peter Ford, *Why Do They Hate Us?*, CHRISTIAN SCI. MONITOR, Sept. 27, 2001, World, at 1. With respect to domestic terrorism by pro-life groups, see Reinhardt Krause, *War Coalition to Fray as Fight Grows, Says Ex-CIA, Defense Chief James Schlesinger on Terror; Cabinet Veteran Discusses Going it Alone, How to Help Moderate Islamic Countries*, INVESTOR'S BUS. DAILY, Oct. 26, 2001, at A3; Abraham McLaughlin & Howard LaFranchi, *Lessons of Past in Stopping Terrorism*, CHRISTIAN SCI. MONITOR, Oct. 31, 2001, USA, at 1; Kathleen Parker, *All is Fair in War, Except Insensitivity*, DENV. POST, Sept. 28, 2001, at B7; Robert Satloff, *Commentary, Israel's Not the Issue; Pass It On*, L.A. TIMES, Oct. 10, 2001, California, pt. 2, at 13; *The U.S. "Has to Bring Moderate Muslims In,"* BUS. WK. ONLINE, OCT. 18, 2001, LEXIS, News and Business, News Group File; Fareed Zakaria, *The Politics of Rage: Why Do They Hate Us?*, NEWSWEEK, Oct. 15, 2001, at 22. With respect to domestic terrorism by pro-life groups, see Editorial, *"Bombing for God" a Contradiction*, OMAHA WORLD HERALD, Feb. 4, 1998, at 8. With respect to eco-terrorism, see Laurent Belsie, *Eco-Vandals Put a Match to 'Progress,'* CHRISTIAN SCI. MONITOR, July 5, 2001, Features, at 11; Scott McInnis, *Terrorism in Any Form Is Intolerable*, DENV. POST, Nov. 25, 2001, at E4; Michael Powell, *Doctor's Killer Called Terrorist, Saint; Motives Debated in Killing of Abortion Provider*, WASH. POST, Mar. 18, 2003, at A3. See also, Crimm, *supra* note 21, at 5-6 & nn.1-2.

253. See *supra* note 243.

254. The anti-money laundering provisions added and expanded by the USA Patriot Act, most of which were enacted in its Title III (International Money Laundering Abatement and

Anti-Terrorist Financing Act of 2001), are too numerous—over 210 potential predicate crimes to money laundering and money spending were added—to explore in this Article. Among the notable provisions is a statute that expanded specific delegations of power to the Secretary of the Treasury to adopt regulations. *See, e.g.*, USA Patriot Act, Pub. L. No. 107-56, § 311, 115 Stat. 272, 298-304 (2001) (conferring on the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional “special measures” and “due diligence” requirements for fighting money laundering); *id.* § 325, 115 Stat. at 317 (empowering the Secretary of the Treasury to promulgate regulations to prevent financial institutions from enabling customers to conceal financial activities by taking advantage of the financial institutions’ concentration account practices); *id.* § 326, 115 Stat. at 317-18 (instructing the Secretary of the Treasury to issue regulations requiring financial institutions to implement minimum new customer identification standards and record keeping). The USA Patriot Act bolstered a number of reporting requirements, but may have overlooked one possible reporting gap—cash donations in excess of \$10,000 to domestic § 501(c)(3) organizations. Currently, under I.R.C. § 6050I any person, including nonfinancial institutions, engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act (BSA)) must file a report with the IRS on the IRS Form 8300 if cash transactions in excess of \$10,000 occur. Form 8300 information is considered tax return information, and is subject to the procedural and recordkeeping requirements of I.R.C. § 6103 that safeguard taxpayers, including restrictions on disclosure to other federal and state authorities. For example, pursuant to current I.R.C. § 6103(i)(7), the Secretary of the Treasury is permitted to disclose return information, including a taxpayer’s name, but excluding other taxpayer return information, to federal law enforcement agencies or federal intelligence agencies only upon written request if the taxpayer is personally and directly involved in an investigation of or response to a terrorist incident, threat, or activity. Subsequent disclosure of the information by the federal law enforcement agencies to state or local law enforcement agencies, where necessary, is permitted. 26 U.S.C. § 6103(i)(7), *amended by* Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 201, 115 Stat. 2427 (2002). Although the dissemination restrictions recently were modified to account for investigations into terrorism, Form 8300 is not as accessible to law enforcement authorities as the various reports mandated by the BSA, which, along with alerts and other money laundering information, are available electronically. To address this inaccessibility to detailed information on Form 8300, those persons that must file Form 8300 now also must file suspicious activities reports (SARs) with the Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN). *See* USA Patriot Act §§ 361, 362, 115 Stat. at 329-33; *see also* H.R. REP. NO. 107-250, at 38-39 (2001). Nonetheless, according to Rev. Rul. 90-61, 1990-2 C.B. 347, cash contributions in excess of \$10,000 received by domestic § 501(c)(3) organizations are not subject to the reporting requirements of I.R.C. § 6050I. Congress did not legislate otherwise in the USA Patriot Act, and unless domestic § 501(c)(3) organizations are considered “financial institutions” within the meaning of 31 U.S.C. § 5312(a)(2), they would not be required to file SARs with FinCEN. For a discussion of whether domestic § 501(c)(3) organizations are considered “financial institutions” within the meaning of 31 U.S.C. § 5312(a)(2)(Z), *see infra* notes 341-50 and accompanying text.

The USA Patriot Act instructed the Administration to take steps to obtain the cooperation of other governments and international financial institutions to collaborate in efforts to ensure that funds are not used to support terrorists. USA Patriot Act §§ 328, 330, 360, 115 Stat. at 319-20, 329; 31 U.S.C. §§ 5311 (2003); 22 U.S.C. §§ 262(p)-(r) (2003). Additionally, it provides long-arm in rem jurisdiction over foreign money launderers’ assets. USA Patriot Act §§ 317-19, 115 Stat. at 310-15. Of particular importance to U.S. donors and charitable

to describe the Act as containing the “most comprehensive anti-money laundering requirements since the Bank Secrecy Act of 1970.”<sup>255</sup> Many of these new or enhanced statutes—too numerous and complex to recount individually in this Article<sup>256</sup>—specifically target not only traditional, but also nontraditional, financial networks that are utilized by terrorists and their organizations.<sup>257</sup>

In conjunction with its anti-money laundering statutory authority, the government has voiced its commitment to identifying, disrupting, and dismantling the financial infrastructures and sources of funding of terrorists and terrorist organizations.<sup>258</sup> As

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organizations who believe assets were wrongly confiscated, § 316 of the USA Patriot Act sets forth the means by which an innocent owner of assets confiscated under “any provision of law relating to the confiscation of assets of suspected international terrorists” may contest the forfeiture. *Id.* § 316, 115 Stat. at 309-10 (amending 18 U.S.C. § 983 (2000)).

Congress focused on not only the use of traditional financial institutions to move money illegally, but also on the transmission of assets and money laundering by hawalas. *Id.* § 373, 115 Stat. at 339-40 (amending 18 U.S.C. § 1960 (1994)). Now, persons involved in unregistered or unlicensed money transmitting businesses, or who are licensed or registered but are connected with the transmission of funds known to have been used to promote or support criminal activity or known to be derived from criminal activity, can be fined or imprisoned, or both. *Id.*

The USA Patriot Act also enhanced the provisions of RICO. For example, the definition of “racketeering activity” was expanded to include 18 U.S.C. § 2339B, so that the provision of material support or resources to terrorist organizations is a predicate offense under RICO. *Id.* § 376, 15 Stat. at 342 (amending 18 U.S.C. § 1956(c)(7)(D) (2000)), which already included as a RICO predicate offense the provision of material support or resources to terrorists within the meaning of 18 U.S.C. § 2339A). Note that 18 U.S.C. § 2339C was added as a RICO predicate offense by the Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, § 301, 116 Stat. 727 (2002). *See infra* Part II.D.

255. George H. Millard, *New and Innovative Rules in the World of Finance: Organized Crime, Terrorism, and Money Laundering in the Americas*, 15 FLA. J. INT’L L. 3, 20 (2002).

256. *See supra* note 254 (listing several anti-money laundering statutes).

257. *See infra* Part II.D (discussing 18 U.S.C. § 2339C).

258. *See, e.g.*, U.S. DEP’T OF TREASURY AND U.S. DEPT OF JUSTICE, NATIONAL MONEY LAUNDERING STRATEGY 23-24 (2002).

It is notable that the goal of the Financial Action Task Force (FATF), an international group of thirty-one nations co-chaired by the United States and Spain, is to combat money laundering. FATF member nations are committed to detecting and freezing funds intended to support terrorism. In October 2001, FATF issued eight standards as baseline recommendations for governments worldwide to combat the financing of terrorism. *See* Press Release, FATF Cracks Down on Terrorist Financing (Oct. 31, 2001), *available at* <http://www.oecd.org/fatf>. The standards seek to deny terrorists and their supporters access to international financing systems. *Id.* On October 11, 2002, FATF issued a set of International Best Practices regarding due diligence practices for nonprofit organizations to combat money laundering. Financial Action Task Force on Money Laundering, Combating the

part of its efforts to achieve those aims, the Department of the Treasury, in October 2001, established Operation Green Quest, a multi-agency terrorist financing task force, formed to identify systems used by terrorist organizations to raise and move funds.<sup>259</sup> Operation Green Quest targets systems, individuals, and organizations for scrutiny and then coordinates investigations of those persons and entities suspected of illegal money laundering activity. To date, such investigations have resulted in the previously discussed blocking orders, have uncovered various money laundering schemes, and have led to criminal prosecutions and criminal forfeitures.<sup>260</sup>

In early March 2003, the Department of the Treasury announced the creation of a new Executive Office for Terrorist Financing and Financial Crimes (EOTF/FC). The EOTF/FC is charged with coordinating and heading the Department of the Treasury's "multi-faceted efforts to combat terrorist financing and other financial crimes, within the United States as well as abroad."<sup>261</sup> Additionally, EOTF/FC is responsible for providing policy guidance to OFAC and to FinCEN.<sup>262</sup> Furthermore, the Department of the Treasury, in cooperation with the Department of State, will award up to \$5 million for information leading to the dismantling of funding mechanisms, such as "underground financial systems, illicit charities, [and] corrupt financial service providers," used to finance a terrorist organization.<sup>263</sup>

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Abuse of Non-Profit Organisations, International Best Practices (Oct. 11, 2002), *available at* [http://www.fatf-gafi.org/TerFinance\\_en.htm](http://www.fatf-gafi.org/TerFinance_en.htm).

259. Press Release, U.S. Customs Service, Fact Sheet on Expansion of Operation Green Quest (Jan. 9, 2003), *available at* [http://www.customs.gov/xp/cgov/newsroom/press\\_releases/012003/01092003.xml](http://www.customs.gov/xp/cgov/newsroom/press_releases/012003/01092003.xml) (last visited Mar. 16, 2004) [hereinafter Operation Green Quest Overview]; Press Release, U.S. Customs Service, Operation Green Quest Overview (Feb. 26, 2002), *available at* [http://www.customs.gov/xp/cgov/newsroom/press\\_releases/22002/02262002.xml](http://www.customs.gov/xp/cgov/newsroom/press_releases/22002/02262002.xml) (last visited Mar. 16, 2004). Operation Green Quest is led by the U.S. Customs Service, and includes agents and analysts from IRS, U.S. Secret Service, ATF, FBI, OFAC, FinCEN, the U.S. Postal Inspection Service, and the Naval Criminal Investigative Service. *Id.*

260. *See* Operation Green Quest Overview, *supra* note 259.

261. Press Release, U.S. Department of the Treasury, U.S. Treasury Department Announces New Executive Office for Terrorist Financing and Financial Crimes (Mar. 3, 2003), *available at* <http://www.treas.gov/press/releases/js77> (last visited Mar. 16, 2004).

262. *Id.*; *see also supra* notes 254, 259 and accompanying text (discussing FinCEN and OFAC).

263. *See* U.S. Dep't of the Treasury, Terrorist Financing Rewards Program, Mission,

The enhanced array of anti-money laundering laws and initiatives (along with other federal criminal statutes)<sup>264</sup> that can be used against terrorist financing, and the governmental commitment to enforce those laws, arose in response to allegations that laundered funds helped terrorists build financial empires that are used destructively worldwide.<sup>265</sup> For example, according to congressional testimony, terrorists' supporters have obtained funds through illegal acts, have washed those monies, along with legally obtained funds, through § 501(c)(3) organizations and their bank accounts in order to acquire the appearance of legitimately obtained income, and have diverted such monies to support terrorist groups.<sup>266</sup> A senior special agent with the U.S. Bureau of Immigration and Customs Enforcement remarked that money is often collected and passed through multiple charities, some of which are "phantom operations," in order to disguise its origin and destination.<sup>267</sup> Two prominent examples illustrate how terrorists allegedly have laundered money to fund their unlawful activities.

### *1. The Virginia-Based SAAR Network*

In 1984, a Pakistani native formed the SAAR Foundation (SAAR), a Virginia nonprofit § 501(c)(3) organization, ostensibly for the purposes of spreading belief in the Islamic religion and doing charitable work.<sup>268</sup> SAAR, along with more than a hundred Muslim

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available at <http://www.treas.gov/rewards/mission.html> (last visited Mar. 16, 2004).

264. See discussion *infra* Part II.C–D.

265. See, e.g., *Testimony of Deputy Assistant Attorney General Alice Fisher Before the Oversight and Investigations Subcomm. of House Fin. Servs.*, Mar. 11, 2003, LEXIS, Federal Document Clearing House File.

266. See, e.g., GAO, GAO-04-163 TERRORIST FINANCING: U.S. AGENCIES SHOULD SYSTEMATICALLY ASSESS TERRORISTS' USE OF ALTERNATIVE FINANCING MECHANISMS (Nov. 2003), at "What GAO Found," available at <http://www.gao.gov>; *Prepared Testimony of David D. Aufhauser*, *supra* note 7; *Testimony of Steven Emerson*, *supra* note 107; *Testimony of Richard Hoglund, Interim Director, Office of Customs Investigations, Before the Oversight and Investigations Subcomm. of House Fin. Servs.*, Mar. 11, 2003, LEXIS, Federal Document Clearing House File.

267. See Amanda Garrett, *Terrorists' Money Takes Convolutd Path in U.S.; Web of Links Leads Investigators to Imam*, CLEV. PLAIN DEALER, Jan. 18, 2004, at A1 (reporting how multiple money laundering by various clergy and "charities" appears to have supported the Hamas and Palestinian Islamic Jihad).

268. Douglas Farah & John Mintz, *U.S. Trails Va. Muslim Money, Ties: Clues Raise Questions About Terror Funding*, WASH. POST, Oct. 7, 2002, at A1.

think tanks, charities, and companies in the SAAR network (SAAR network), was reported to be financed by Sulaiman Abdul Aziz Rajhi, a member of the Saudi Arabian royal family.<sup>269</sup> SAAR shared office space in Virginia with two other organizations, the Safa Trust and the International Institute for Islamic Thought (IIIL).<sup>270</sup> Allegedly, the IIIL had ties to al Qaeda as well as other terrorist organizations.<sup>271</sup>

The government began investigating SAAR in 1995, following a raid of the offices of a Tampa, Florida group of Muslim activists affiliated with the University of South Florida.<sup>272</sup> By late 2001, Operation Green Quest categorized SAAR as a high priority.<sup>273</sup>

The government pursued three areas of investigation: SAAR's alleged funneling of \$20 million through multiple offshore accounts to two bankers designated by the government as terrorist financiers;<sup>274</sup> the purported laundering of \$1.8 billion in charitable donations allegedly received by SAAR in 1998;<sup>275</sup> and allegations that the SAAR network had ties to and financed terrorist organizations such as the Muslim Brotherhood, Hamas, Palestinian Islamic Jihad (PIJ), al Qaeda, and others.<sup>276</sup>

On March 20, 2002, federal agents raided the offices of SAAR, the Safa Trust, the IIIL, and the homes of some of their representatives. The raid, for which twenty-nine search warrants were issued, was based upon the government's belief that these entities provided material support to foreign terrorist organizations through the funneling of funds via charities, businesses, and nongovernmental

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269. *Id.*

270. *Testimony of Matthew A. Levitt Before the Senate Comm. on Banking, Housing and Urb. Aff.*, Aug. 1, 2002, LEXIS, Federal Document Clearing House File.

271. Although SAAR officially dissolved in December 2000, many of its functions were transferred to the Safa Trust. Douglas Farah & John Mintz, *Fighting Terror Funds and Fundamentalism: Funding Inquiry Targets Muslim Groups*, BOSTON GLOBE, Oct. 13, 2002, at A30.

272. Farah & Mintz, *supra* note 268, at A1; *see infra* Part II.B.2.

273. Farah & Mintz, *supra* note 271, at A30.

274. Farah & Mintz, *supra* note 268, at A1.

275. *Id.*; *see also* Farah & Mintz, *supra* note 271, at A30. SAAR representatives explained that the \$1.8 billion reported as charitable contributions on its 1998 federal tax return was a clerical error, and that SAAR did not receive that amount in charitable donations. Farah & Mintz, *supra* note 271, at A30; Farah & Mintz, *supra* note 268, at A1.

276. Farah & Mintz, *supra* note 268, at A1.

organizations.<sup>277</sup> As of April 20, 2003, no arrests or indictments had resulted from these raids.<sup>278</sup> Several bank accounts have been seized, however.

## 2. Sami Amin Al-Arian

In a separate, though connected,<sup>279</sup> instance, the government contends that terrorists and their supporters used wealthy U.S. citizens to launder money.<sup>280</sup> Sami Amin Al-Arian, a professor and religious scholar at the University of South Florida, has been indicted and is alleged to have acted illegally on behalf of the PIJ,<sup>281</sup> a SDGT, through the Islamic Concern Project (ICP). The ICP is a self-described humanitarian group representing itself as a charity for Palestinians.<sup>282</sup> The indictment charges Al-Arian, and others, with (1) misleading or defrauding donors with respect to the use of their contributed funds, (2) passing money through wealthy U.S. citizens to create fraudulent tax deductions, and (3) laundering donations through ICP that ultimately were intended to support PIJ.<sup>283</sup> According to information captured by an FBI wiretap, Al-

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277. See *Testimony of Richard Hoglund*, *supra* note 266. The federal magistrate who signed the search warrants sealed the affidavits that supported the government's raid. See *Testimony of Nihad Awad, Executive Director, Council on American-Islamic Relations, Before the House Int'l Relations Comm., Subcomm. on Int'l Operations*, Oct. 9, 2002, LEXIS, Federal Document Clearing House File; *Testimony of Matthew A. Levitt, Senior Fellow, Washington Institute for Near East Policy, Before the Senate Comm. on Banking, Housing and Urb. Aff.*, Aug. 1, 2002, LEXIS, Federal Document Clearing House File.

278. Tim O'Neil & Andrew Schneider, *Terrorist Link is Denied*, ST. LOUIS POST-DISPATCH, Apr. 20, 2003, at D1.

279. Apparently, the government was led to Sami Amin Al-Arian by its extensive Virginia and Georgia raids of the SAAR network offices. See Mary Jacoby, *Friends in High Places*, ST. PETERSBURG TIMES, Mar. 11, 2003, at 1D; see also *supra* Part II.B.1. The indictment against Al-Arian alleges that the Islamic Academy of Florida (IAF), which was incorporated by two men who served as directors of the IIIL and were suspected of association with foreign terrorist organizations, funded IAF, the World and Islam Studies Enterprise, a think tank once headed by Al-Arian, and the Islamic Committee for Palestine, a charity once headed by Al-Arian. See Mary Jacoby & Graham Brink, *Saudi Form of Islam Wars with Moderates*, ST. PETERSBURG TIMES, Mar. 11, 2003, at 1A; *supra* note 271 and accompanying text.

280. See Glenn R. Simpson, *U.S. Links Scholar to Possible Terror Funding*, WALL ST. J., Mar. 17, 2003, at A4.

281. See *id.*

282. See *Testimony of Steven Emerson*, *supra* note 107. See generally Simpson, *supra* note 280, at A4.

283. See Simpson, *supra* note 280, at A4; see also Criminal Indictment Count One ¶ 62, *United States v. Al-Arian*, 267 F. Supp. 2d 1258 (M.D. Fla. 2003).



Arian raised \$53,000 for ICP, including \$25,000 in cash raised during a trip to Chicago.<sup>284</sup> The Chicago donors claimed charitable contribution deductions for their cash contributions to ICP.<sup>285</sup> Subsequently, Al-Arian allegedly passed the same cash to wealthy individuals in the 40% income tax bracket, who would “re-donate” the cash to ICP and then claim a charitable contribution deduction of 40% on the same money.<sup>286</sup> The idea was not only to increase the overall worth of the donated funds by providing a double charitable contribution deduction, but also to launder funds intended for PIJ, a known terrorist organization.

*C. Prohibition on the Provision of Material Support to Terrorists and Terrorist Organizations Under 18 U.S.C. §§ 2339A and 2339B*

*1. Background*

“Virtually every criminal ‘terrorism’ case that the government has filed since September 11 has included a charge that the defendant provided material support to a terrorist organization.”<sup>287</sup> Indeed, a *New York Times* headline on April 6, 2003, shouted: “1996 Statute Becomes the Justice Department’s Antiterror Weapon of Choice.”<sup>288</sup> These quotations, referring to 18 U.S.C. § 2339B, also could apply easily to 18 U.S.C. § 2339A, and certainly the quotations portray the potential prosecutorial strength of these statutes.<sup>289</sup> The statutes,

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284. See Criminal Indictment Count One ¶ 62, *Al-Arian*, 267 F. Supp. 2d at 1258.

285. *Id.*

286. See *id.*; *Testimony of Steven Emerson*, *supra* note 107.

287. Cole, *supra* note 213, at 9 (referring to charges brought against John Walker Lindh; Lynne F. Stewart, the attorney for Sheikh Omar Abdel Rahman; five men from Lackawanna, New York indicted in *United States v. Goba* and subsequently sentenced to prison pursuant to 18 U.S.C. § 2339B; James Ujaama, a Seattle activist; a group of men from Detroit, indicted in *United States v. Koubriti*; and a Portland, Oregon group). See, e.g., *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003) (dismissing on constitutional grounds the 18 U.S.C. § 2339B charges brought against Lynne F. Stewart); *United States v. Koubriti*, 252 F. Supp. 2d 418, 419 (E.D. Mich. 2003); *United States v. Goba*, 240 F. Supp. 2d 242, 244 (W.D.N.Y. 2002) (finding 18 U.S.C. § 2339B an act of violence for purposes of denying release from detention on bail); *United States v. Lindh*, 212 F. Supp. 2d 541, 547 (E.D. Va. 2002).

288. Eric Lichtblau, *1996 Statute Becomes the Justice Department’s Antiterror Weapon of Choice*, N.Y. TIMES, Apr. 6, 2003, at B15.

289. Bolstered by the media’s publicity, the statutes also might have a preventive effect by increasing a person’s reluctance to engage in proscribed activities.

enacted as part of the Violent Crime Control and Law Enforcement Act of 1994<sup>290</sup> and the AEDPA,<sup>291</sup> respectively, criminalize the provision of material support or resources to terrorists or terrorist organizations. Congress revisited and fortified both statutes after the September 11 attacks. With the enactment of the USA Patriot Act, Congress enhanced 18 U.S.C. § 2339A by extending the maximum sentence that can be imposed for violation of the statute,<sup>292</sup> expanding the definition of “material support or resources,”<sup>293</sup> and adding the covered offense to the list of predicate offenses under RICO.<sup>294</sup> The USA Patriot Act also strengthened 18 U.S.C. § 2339B, as it had § 2339A, by extending the maximum sentence for violation of the statute<sup>295</sup> and adding the covered offense to the list of RICO predicate offenses.<sup>296</sup>

According to the statutory language, 18 U.S.C. § 2339A criminalizes the provision of material support to terrorists:

(a) Offense. Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of ... [multiple listed sections, including §2332b which covers acts of terrorism that transcend national boundaries] ... of this title ... or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life....<sup>297</sup>

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290. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005(a), 108 Stat. 1796, 2022-23 (1994). Before its amendment by the USA Patriot Act, the statute was amended by Section 323 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255 (1996).

291. See AEDPA § 301, 110 Stat. at 1247.

292. See USA Patriot Act, Pub. L. No. 107-56, § 810(c), 115 Stat. 272, 380 (2001).

293. *Id.* § 811(f), 115 Stat. at 381.

294. *Id.* § 805(a), 115 Stat. at 377.

295. *Id.* § 810(d), 115 Stat. at 380.

296. *Id.* § 805(b), 115 Stat. at 377.

297. In addition to the penalties specified in 18 U.S.C. § 2339A(a), violation of § 2339A is grounds for the government to subject assets to civil forfeiture under 18 U.S.C. § 981. See *supra* Part I.D.

(b) Definition. In this section, the term “material support or resources” means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethalsubstances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.<sup>298</sup>

The 18 U.S.C. § 2339A definition applies by cross reference to 18 U.S.C. § 2339B,<sup>299</sup> which imposes criminal sanctions on anyone who “knowingly provides,” or “attempts or conspires” to provide, “material support or resources” to a designated “foreign terrorist organization.”<sup>300</sup> The current requisite statutory intent—knowledge—not only includes actual knowledge but also situations in which a person “should have known,”<sup>301</sup> thereby potentially including

298. 18 U.S.C. § 2339A(a)-(b) (2003).

299. See 18 U.S.C. § 2339B(g)(4) (2003).

300. 18 U.S.C. § 2339B(a)(1) (2003). The term “terrorist organization” is defined as “an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.” *Id.* § 2339B(g)(6) (2003). See *supra* notes 94-99 and *infra* note 386 and accompanying text for a discussion of that term.

One court has determined that even though invalidating 8 U.S.C. § 1189 might have serious negative effects on counterterrorism efforts, the statute is facially unconstitutional because subsections (a)(3)(A) and (b)(2) are contrary to the Due Process Clause. *United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D. Cal. 2002). The court focused on subsections (a)(3)(A) and (b)(2), which provide that in designating an entity as a “terrorist organization” the Secretary of State must create an administrative record reviewable by the court, and that the administrative record including classified materials, can be submitted to the court *ex parte* and for in camera review. *Id.* The court reasoned that there are no circumstances under which the Secretary of State must give a constitutionally protected organization notice or an opportunity to object to information in the administrative record that might contradict the Secretary’s designation. *Id.* Accordingly, the court held that when an organization is designated as a “foreign terrorist organization” pursuant to 8 U.S.C. § 1189, the designation is null and void, and it cannot be relied upon to prosecute under 18 U.S.C. § 2339B. *Id.* at 1059.

The court distinguished *People’s Mojahedin Organization of Iran v. United States Department of State*, 182 F.3d 17 (D.C. Cir. 1999), by noting that the court in that case found that the PMOI was not entitled to U.S. constitutional rights because it was neither present in the United States nor owned property in the United States. See *Rahmani*, 209 F. Supp. 2d at 1056. Finally, the court also dismissed the holding in *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001) as illustrative of a constitutional application of 18 U.S.C. § 1189.

301. In drafting the USA Patriot Act, Representative George W. Gekas (R-Pa.) addressed the level of intent required under 18 U.S.C. § 2339B through questions to Attorney General John Ashcroft. Mr. Ashcroft indicated that “we think the standards should be actual

officers, directors, and trustees of domestic § 501(c)(3) organizations who fail to fulfill their due diligence obligations.<sup>302</sup> According to the government, this level of intent is aimed at protecting innocent and well-intentioned donors to charity,<sup>303</sup> and by extension of principle, it safeguards the interests of beneficiaries whom donors ultimately intend to receive the charitable fruits of their donations. Pursuant to 18 U.S.C. § 2339B, a perpetrator can be fined, imprisoned up to fifteen years, or both, and if any person's death results from acts that violate the statute, a lifetime sentence can be imposed.<sup>304</sup>

## 2. Constitutional Challenges

Litigants and commentators have argued that the definition of "material support" for purposes of 18 U.S.C. §§ 2339A and 2339B is impermissibly vague, too broad, or that it otherwise violates constitutional rights.<sup>305</sup> One such challenge produced mixed results.

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knowledge or should have known, that's a pretty high standard, but we don't want people to be responsible if they appropriately thought they were giving to a charity." *Testimony of John Ashcroft, United States Attorney General, Before the House Comm. on the Judiciary*, Sept. 24, 2001, available at <http://www.house.gov/judiciary>. There has been discussion about possibly lowering the standard to knowing and reckless endangerment. See *Prepared Testimony of David D. Aufhauser*, *supra* note 7.

302. See *infra* Part V.A. It has been reported that the Ford Foundation provided funding to nongovernmental, pro-Palestinian organizations. As a result of pressure by the Treasury Department, the Ford Foundation commissioned an audit by Ernst & Young. The audit revealed numerous ambiguities that prevented auditors from ascertaining how such grants were utilized by the pro-Palestinian organizations. See Black, *Funding Hate*, *supra* note 213.

303. See *Testimony of John Ashcroft*, *supra* note 301.

304. See 18 U.S.C. § 2339B(a)(1) (2003). In addition to the penalties specified in 18 U.S.C. § 2339B(a)(1), violation of § 2339B is grounds for the government to subject assets to civil forfeiture under 18 U.S.C. § 981. See *supra* Part I.D.

305. A well known challenge involved Lynne F. Stewart, an attorney for Sheikh Omar Abdel Rahman. The government indicted Stewart, Mohammed Yousry, Ahmed Abdel Sattar, and others for conspiring to provide material support and resources to a foreign terrorist organization, and with providing and attempting to provide material support and resources to a foreign terrorist organization. *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003). In particular, the indictment alleged that the defendants conspired to provide, and did provide, communications equipment, personnel, transportation, and other support to a foreign terrorist organization, the Islamic Group (IG), in violation of 18 U.S.C. § 2339B. The defendants challenged the charges on grounds of constitutional vagueness. *Id.* at 355.

First, the government asserted that the defendants had provided a communications pipeline by which Sattar transmitted messages from Sheikh Rahman, a prisoner, to IG leaders through the use of telephone conversations and by which Stewart released Sheikh Rahman's statement to the press. *Id.* at 356. The defendants challenged those charges on

grounds that § 2339B was unconstitutionally vague with regard to its prohibition on “providing” material support or resources in the form of “communications equipment.” *Id.* at 360. The defendants asserted that the indictment merely charged them with talking and their usage of communications equipment was not the “provision” of equipment to the IG. *Id.* at 357. They contended that Congress did not intend § 2339B to criminalize the mere use of communications equipment, as opposed to criminalizing the actual provision of the equipment to terrorists and terrorist groups. *Id.* at 356. Relying on legislative history, the U.S. District Court for the Southern District of New York agreed with the defendants and ruled that “by criminalizing the mere use of phones and other means of communication the statute provides neither notice nor standards for its application such that [the statute] is unconstitutionally vague as applied.” *Id.* at 358.

Second, the government indicted the defendants and unknown co-conspirators for providing personnel, including themselves, to assist IG. *Id.* at 359. The defendants argued that the statute fails to provide fair notice of the types of acts statutorily prohibited for the provision of “personnel,” and urged the court to follow the Ninth Circuit’s opinion in *Humanitarian Law Project II*, 205 F.3d 1130 (9th Cir. 2000). *Sattar*, 272 F. Supp. 2d at 358. The court again ruled for the defendants, stating that:

It is not clear from § 2339B what behavior constitutes an impermissible provision of personnel to an FTO [foreign terrorist organization]. Indeed, as the Ninth Circuit Court of Appeals stated in *Humanitarian Law Project*, “Someone who advocates the cause of the [foreign terrorist organization] could be seen as supplying them with personnel.” ... The Government accuses Stewart of providing personnel, including herself, to IG. In so doing, however, the Government fails to explain how a lawyer, acting as an agent of her client, an alleged leader of an foreign terrorist organization, could avoid being subject to criminal prosecution as a “quasi-employee” allegedly covered by the statute. At the argument on the motions, the Government expressed some uncertainty as to whether a lawyer for an FTO would be providing personnel to the FTO before the Government suggested that the answer may depend on whether the lawyer was “house counsel” or an independent counsel—distinctions not found in the statute.... The Government attempts to distinguish the provision of “personnel” by arguing that it applies only to providing “employees” or “quasi-employees” and those acting under the “direction and control” of the FTO. But the terms “quasi-employee” or “employee-like operative” or “acting at the direction and control of the organization” are terms that are nowhere found in the statute or reasonably inferable from it.

Moreover, these terms and concepts applied to the prohibited provision of personnel provide no notice to persons of ordinary intelligence and leave the standards for enforcement to be developed by the Government....

Moreover, the Government continued to provide an evolving definition of “personnel” to the Court following oral argument on this motion. Added now are “those acting as full-time or part-time employees or otherwise taking orders from the entity” who are therefore under the FTO’s “direction or control.”

*Id.* at 359-60 (citations omitted).

As a result of these rulings, the court dismissed the charges against the defendants for conspiring to provide, and providing and attempting to provide, material support and resources to an foreign terrorist organization in violation of § 2339B. *Id.* at 361.

Finally, the defendants argued that § 2339B is unconstitutionally overbroad. *Id.* at 361-62. The court disagreed. It concluded that the statute is content-neutral and that its purpose in

In *Humanitarian Law Project v. Reno* (*Humanitarian Law Project II*), David Cole, of the Institute for Public Representation and a professor at Georgetown University Law Center, who represented the plaintiffs, sought a preliminary injunction to bar the enforcement of 18 U.S.C. § 2339B.<sup>306</sup> The plaintiffs argued that the statute was impermissibly vague and otherwise unconstitutional. Specifically, the plaintiffs argued that the statutory definitions of “foreign terrorist organization” and of “material support” were impermissibly vague.<sup>307</sup> The Ninth Circuit, affirming the federal district court,<sup>308</sup> agreed that the portion of the statutory definition of material support that prohibits the provision of personnel and training to foreign terrorist organizations was impermissibly vague, and must be severed from the statute when it appears to prohibit activity protected by the First Amendment.<sup>309</sup> The court reasoned that the statute does not permit persons of ordinary intelligence to determine the type of training or provision of personnel that is statutorily prohibited.<sup>310</sup> Subsequently, a three-judge panel of the Ninth Circuit ruled, contrary to the government’s assertion, that the vagueness of the statutory provision is not remedied merely because the terms “personnel” and “training” are defined in the United States Attorneys’ Manual.<sup>311</sup> According to that opinion, the definitions in

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detering and punishing the provision of material support or resources to foreign terrorist organizations is a legitimate purpose not aimed at speech but rather at conduct. *Id.* at 362.

306. See 205 F.3d 1130, 1133 (9th Cir. 2000).

307. *Id.* at 1137.

308. See *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1205, 1215 (C.D. Cal. 1998).

309. See *Humanitarian Law Project II*, 205 F.3d at 1137.

310. *Id.* Similarly, in a January 22, 2004 decision, the U.S. District Court for the Central District of California held that the terms “expert advice or assistance” in 18 U.S.C. §§ 2339A and 2339B were unconstitutionally vague. *Humanitarian Law Project v. Ashcroft*, Case No.: CV 03-6107 ABC (MCX), 2004 U.S. Dist. LEXIS 926, at \*43-44 (C.D. Cal. Jan. 22, 2004). However, applying the test of *Virginia v. Hicks*, 539 U.S. 113 (2003), the court found that the plaintiffs had failed their burden of proving that those same terms were substantially overbroad under the First Amendment. *Id.* at \*46-47. Finally, the district court found that the plaintiffs failed to demonstrate that the statutory prohibition on providing “expert advice or assistance” punishes pure speech by penalizing moral innocents for culpable acts of a group. Therefore, the court held that the statutory prohibition does not criminalize associational speech. *Id.* at \*51-53.

311. *Humanitarian Law Project v. United States*, 352 F.3d 382, 403 (9th Cir. 2003) [hereinafter *Humanitarian Law Project III*].

the United States Attorneys' Manual do not constitute adequate notice to the public-at-large.<sup>312</sup>

The plaintiffs then argued in *Humanitarian Law Project II* that the statute violates their First and Fifth Amendment rights by conferring "unfettered discretion" on the Secretary of the Treasury.<sup>313</sup> The court dismissed the plaintiffs' argument, finding that the Secretary's discretion is limited.<sup>314</sup>

Plaintiffs further asserted that 18 U.S.C. § 2339B is unconstitutional because it proscribes a donor's donating funds even if the donor does not have the specific intent to aid in the unlawful purposes of the foreign terrorist organization.<sup>315</sup> The court responded that "[m]aterial support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of donor intent."<sup>316</sup> According to the court's narrow interpretation, "specific intent to aid" a foreign terrorist organization is not required for violation of the statute.<sup>317</sup>

Finally, plaintiffs contended that the statute abridged a donor's First Amendment right to free speech on the ground that monetary donations were a form of protected speech. Further, they asserted that the statute abridged their First Amendment freedom of association with foreign organizations that function as political advocacy groups.<sup>318</sup> In essence, plaintiffs argued that the statute imposes guilt by association or membership.<sup>319</sup> The court disagreed, noting that the government may regulate contributions to organizations that engage in lawful non-speech-related activities.<sup>320</sup> The court stated that the government "may certainly regulate contributions to organizations performing unlawful or harmful activities, even though such contributions may also express the donor's feelings about the recipient."<sup>321</sup> Applying the intermediate scrutiny standard to assess whether the statute was properly tailored to

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312. *Id.* at 404-05.

313. *Humanitarian Law Project II*, 205 F.3d at 1133.

314. *Id.* at 1137.

315. *Id.* at 1133.

316. *Id.*

317. *Id.* at 1134.

318. *Id.*

319. *Id.* at 1133.

320. *Id.* at 1135.

321. *Id.*

achieve the governmental interest of preventing the United States from being used as a place for fundraising for foreign terrorist organizations, the court decided that the statute was properly tailored.<sup>322</sup>

In support of its conclusion, the court relied on its interpretation of congressional intent. The court stated that when Congress “incorporated a finding into the statute that ‘foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct,’” it meant that *all* material support transferred to a foreign terrorist organization aids its unlawful purposes.<sup>323</sup> Because money is fungible, the court maintained that even contributions earmarked by a donor for peaceful goals can be used to carry out terrorist activities by freeing up funds that a terrorist group can dedicate to its unlawful activities.<sup>324</sup>

In a law review article criticizing the Ninth Circuit’s opinion, Professor Cole suggests that the congressional finding on which the court based this final conclusion cannot be based on “a factual ‘finding’” but rather arises as merely “a normative claim.”<sup>325</sup> He states:

Finally, the freeing up argument surely overstates the extent to which donations to a group’s lawful activities are in practice translated into illegal activities. No one would seriously suggest, for example, that the millions of dollars donated to the ANC in the 1980s to support its lawful anti-apartheid work were simply transformed into bombs and weapons for its military wing. Most “terrorist organizations” do not exist for the *purpose* of engaging in terrorism. They generally have a political purpose or goal—for example, ending apartheid in South Africa or obtaining self-determination for Palestinians in the occupied territories—and use a variety of means to attain that end. Some of those means may be terrorist and some may be perfectly lawful. But it simply does not follow that all organizations that use or threaten to use violence will turn any donation that supports their lawful activities into money for terrorism. According to a senior Israeli

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322. *Id.*

323. *Id.*

324. *Id.*

325. See Cole, *supra* note 213, at 12.



military officer, even Hamas, the organization reportedly responsible for an untold number of unspeakable suicide bombings in Israel, spends ninety-five percent of its resources on a broad range of social services.... Yet the material support law presumes that even a donation of crayons to a day-care center affiliated with Hamas will "facilitate" terrorism.<sup>326</sup>

Professor Cole expanded his arguments in litigation on behalf of the eight plaintiffs whom he had represented in *Humanitarian Law Project II*. In *Humanitarian Law Project v. United States* (*Humanitarian Law Project III*), a new claim was raised for the first time on appeal before a three-judge panel of the Ninth Circuit.<sup>327</sup> Plaintiffs asserted that § 2339B violates their Fifth Amendment right to due process of law because the statute fails to require proof that a person charged with violating the statute personally had a guilty intent when supplying "material support" to a designated organization.<sup>328</sup> In contrast to the testimony of Attorney General Ashcroft before the House Judiciary Committee,<sup>329</sup> the government acknowledged at oral argument in the case that "a donor to a proscribed organization could be convicted under the statute even if he or she was entirely unaware that the organization was designated as a terrorist organization."<sup>330</sup> Judge Pregerson, joined by Judge Thomas, was firm in the majority opinion that § 2339B does not impose strict liability on persons who provide "material support" to designated terrorist organizations, but rather that it

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326. *Id.* at 12-13 (internal citations omitted); see also Ian Fisher, *Defining Hamas: Roots in Charity and Branches of Violence*, N.Y. TIMES, June 16, 2003, at A8 (reporting that the pillars of Hamas are "religion, charity and the fight against Israel").

327. 352 F.3d 382 (9th Cir. 2003).

328. Specifically, the plaintiffs feared prosecution under § 2339B. Their asserted interest was to provide pecuniary and nonfinancial support only for the peaceful political and humanitarian activities of two designated organizations, the Kurdistan Workers Party, a.k.a., Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), which engaged not only in humanitarian and peaceful political activities, but also in terrorist activities, meant respectively to assist Turkish Kurds and Tamils in Sri Lanka. *Id.* at 388, 390-92. After designation of PKK and LTTE as foreign terrorist organizations, each plaintiff ceased supporting the organizations. *Id.* at 392. The Court may have been considering organization like Hamas, which is not solely a terrorist organization, although it does sometimes engage in terrorist activity. See Glenn R. Simpson, *Unraveling Terror's Finances*, WALL ST. J., Oct. 24, 2003, at A2.

329. See *supra* note 301 and accompanying text.

330. *Humanitarian Law Project III*, 352 F.3d at 400.

requires the government to prove beyond a reasonable doubt a contributor's "knowledge, either of an organization's designation or of the unlawful activities that caused it to be so designated."<sup>331</sup> The majority focused on five federal cases unrelated to § 2339B as supporting their judgment that the Fifth Amendment right to "personal guilt" applies to § 2339B.<sup>332</sup> The opinion distinguished § 2339B from the "narrow class" of statutes not requiring such personal "evil intent" because the purposes of those laws are to regulate "industries, trades, properties or activities that affect public health, safety or welfare."<sup>333</sup> First, the opinion cited the harshness of the § 2339B criminal sanction—the potential of a maximum life sentence—when compared to cases within the narrow class of statutes not requiring mens rea. Furthermore, the opinion stated that the "conduct regulated by §2339B does not fall into 'public welfare' category of conduct ... excepted from a scienter requirement" because those exceptions apply to situations where the inherent danger of the conduct itself should warn a person of possible legal regulation.<sup>334</sup> The majority opinion considered "[c]haritable contributions made to organizations ... [as] not [as] 'inherently dangerous' as are grenades, firearms and corrosive liquids."<sup>335</sup>

By requiring mens rea for successful prosecution under § 2339B, the majority opinion of the three-judge panel in *Humanitarian Law Project III* attempted to curb prosecutorial power by precluding the potential to convict, and therefore punish, "moral innocents"—donors entirely unaware that an organization is designated by the government as a terrorist organization.<sup>336</sup> Nonetheless, one judge

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331. *Id.* at 403.

332. *Id.* at 395-99 (citing particularly *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964); *Scales v. United States*, 367 U.S. 203 (1961); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Brown v. United States*, 334 F.2d 488 (9th Cir. 1964) (en banc), *aff'd on other grounds*, 381 U.S. 437 (1965); *Hellman v. United States*, 298 F.2d 810 (9th Cir. 1961)).

333. *Id.* at 399 (relying largely on *United States v. Launder*, 743 F.2d 686 (9th Cir. 1984)).

334. *Id.* at 401.

335. *Id.* at 402.

336. *Id.* The majority opinion vividly illustrated "moral innocents" to include "a person who simply sends a check to a school or orphanage in Tamil Eelam run by the LTTE," and "a woman who buys cookies from a bake sale outside of her grocery store to support displaced Kurdish refugees to find new homes." *Id.*

The legislative history of § 2239B might suggest an intention, at least by some in Congress, to require a mens rea requirement for prosecution under the statute. Senator Orrin Hatch expressed his belief that a person must knowingly provide support to the terrorist function

dissented. Judge Rawlinson's dissent was largely based upon his view that the five federal cases relied upon by the majority were inapposite.<sup>337</sup> His dissenting position may signal that in the future other courts might not readily agree with the majority of the three-judge panel in *Humanitarian Law Project III*.

### 3. Implications for Donors and § 501(c)(3) Organizations

As a result of the Ninth Circuit's opinion in *Humanitarian Law Project II*, many individuals could be caught in troublesome positions.<sup>338</sup> Even after the three-judge panel ruling in *Humanitarian Law Project III*, it is not clear whether the full Ninth Circuit or other federal courts might virtually expunge the scienter standard of specific intent from the statute.<sup>339</sup> This could leave officers, directors, and trustees who ultimately are responsible for the use of donations received by their § 501(c)(3) organizations open to liability. Also, well-intentioned donors still may be exposed to liability. On a practical level, it is unlikely that an innocent, reasonable Muslim giving obligatory zakat, for example, or another well-intentioned reasonable donor making a donation to his or her place of worship, to a humanitarian relief organization, or to any other seemingly legitimate charitable organization would consider,

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of a group to be prosecuted under the provision. Nevertheless, when it enacted § 2339B, Congress eliminated any discussion of a mens rea requirement. See James P. Fantetti, Comment, *John Walker Lindh, Terrorist? Or Merely a Citizen Exercising His Constitutional Freedom: The Limits of the Freedom of Association in the Aftermath of September Eleventh*, 71 U. CIN. L. REV. 1373, 1379 (2003). Some argue that Congress' failure to include specifically any mens rea requirement in the language of § 2339B allows prosecutors to obtain a conviction in virtually every case "without proof of individual wrongdoing." See David Cole, *An Ounce of Detention*, AM. PROSPECT, Sept. 2003, at 50. Even if an accused donor could avoid prosecution or conviction because of the lack of the requisite mental state, the burden remains with the donor to prove the lack of knowledge about the use of the contribution for an illegal cause. See R. Robin McDonald, *Patriot Act: Are Abuses Real?*, FULTON COUNTY DAILY REP., Nov. 19, 2003.

337. *Humanitarian Law Project III*, 352 F.3d at 406 (Rawlinson, J., dissenting).

338. The statute and the Ninth Circuit's opinion confer tremendous prosecutorial power on the government. See *Humanitarian Law Project II*, 205 F.3d 1130, 1135 (9th Cir. 2000); see also 18 U.S.C. § 2339B (2003).

339. *Humanitarian Law Project II*, 205 F.3d at 1133-34. The court left in place the "knowledge" requirement. According to the court, specific intent to aid terrorists or a terrorist group is not necessary to violate 18 U.S.C. § 2339B.

first, the notion that money is fungible, and second, the prospect that his or her altruism might assist a foreign terrorist group.<sup>340</sup>

What about the domestic § 501(c)(3) organization itself? Beyond the temporary freezing and/or permanent confiscation of its assets, might it further be exposed and subjected to liability? The current answer is probably “yes,” as the following sections elucidate.

*a. Section 501(c)(3) Organizations as “Financial Institutions” for Purposes of 18 U.S.C. § 2339B—31 U.S.C. § 5312(a)(2)(Z)*

Pursuant to 18 U.S.C. § 2339B(a)(2), “any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization, or its agent, has an interest, shall ... retain possession of, or maintain control over” the monies and must report the holdings to the Secretary of the Treasury.<sup>341</sup> Even if a “financial institution” does not distribute the funds directly to a foreign terrorist organization, sanctions can apply. Knowing failure to comply with the statute’s mandates subjects the financial institution to a civil penalty of the greater of \$50,000 per violation or twice the amount of funds at issue.<sup>342</sup>

For purposes of § 2339B, the definition of “financial institution” is contained in 31 U.S.C. § 5312(a)(2).<sup>343</sup> It includes conventional banking-type institutions (e.g., insured banks, commercial banks, savings and loans, private bankers, credit card companies) and some less traditional, nonbanking businesses (e.g., casinos, card clubs, pawnbrokers, persons involved in real estate closings and settlements, and persons engaged in vehicle sales).<sup>344</sup> Giving the Department of the Treasury latitude to include additional businesses within the § 5312(a)(2) definition of “financial institution,” Congress enacted two catchall definitional paragraphs, one of which is pertinent for this discussion.<sup>345</sup> Subparagraph (Z) of 31 U.S.C.

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340. One author aptly described 18 U.S.C. § 2339B as “essentially a strict liability crime.” George C. Harris, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 36 CORNELL INT’L L.J. 135, 143 (2003) (book review).

341. 18 U.S.C. § 2339B(a)(2) (2003).

342. *Id.* § 2339B(b) (2003).

343. *Id.* § 2339B(g)(2) (2003); 31 U.S.C. § 5312(a)(2)(A)-(Z) (2003).

344. 31 U.S.C. § 5312(a)(2)(A)-(Z).

345. The other expansive definitional phrase is contained in 31 U.S.C. § 5312(a)(2)(Y), which provides “any business or agency which engages in any activity which the Secretary of

§ 5312(a)(2) provides as one definition of “financial institution,” “any other business designated by the Secretary [of the Treasury] whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.”<sup>346</sup> Thus far, Treasury and OFAC regulations that interpret the definition of “financial institution” focus exclusively on the more traditional notions of the term and have not addressed this expansive statutory phraseology. Whether 31 U.S.C. § 5312(a)(2)(Z) might be interpreted to include § 501(c)(3) organizations, in their capacities as collectors and disseminators of cash donations, as businesses “whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters”<sup>347</sup> is currently not clear, but such an interpretation certainly is not out of the realm of possibility.<sup>348</sup>

The Bank Secrecy Act (BSA) includes 31 U.S.C. § 5312 and was enacted to require certain reports or records “where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.”<sup>349</sup> To accomplish that purpose, the

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the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage.” The language “similar to” was added to the statutory phraseology by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6185(a), (g)(1), 102 Stat. 4354, 4355 (1988). This phrase appears to cover such nontraditional financial institutions and networks as unregistered hawalas. Nonetheless, as part of the counterterrorism provisions of the USA Patriot Act, Congress amended the definition in 31 U.S.C. §§ 5312(a)(2)(A) and (R) to clearly cover persons and networks of people who “engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system.” USA Patriot Act, Pub. L. No. 107-56, § 359(a), 15 Stat. 272, 328 (2001). For an explanation of the term “hawala,” see *supra* note 7.

346. 31 U.S.C. § 5312(a)(2)(Z). In contrast, Bank Secrecy Act Treasury regulation 31 C.F.R. § 103.11(n) rather narrowly defines the term “financial institution” to include a bank, broker, money services business, telegraph company, casino, card club, or person subject to a state or federal bank supervisory authority. Definitions, 31 C.F.R. § 103.11 (2002). That regulation defines the term “bank” to include rather traditional concepts of a bank, such as a commercial bank or trust company, a savings and loan association, or a foreign bank. *Id.* § 103.11(c). Similarly, the current OFAC regulations essentially mirror the statutory language that lists the more traditional types of financial institutions, and they do not elucidate what is meant by such other businesses designated by the Secretary of the Treasury. See *id.* § 595.316 (defining “U.S. financial institution”); *id.* § 597.307 (defining “financial institution”).

347. 31 U.S.C. § 5312(a)(2)(Z).

348. During recent hearings before the Senate Judiciary Committee, the Committee was urged to consider whether charities should be treated as “financial institutions” for purposes of the Bank Secrecy Act. *Testimony of Jonathan Winer, Member, Council on Foreign Relations, Before the the Senate Judiciary Comm.*, Nov. 20, 2002, LEXIS, Federal News Service File.

349. Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114, 1115 (1970) (codified as

BSA requires “financial institutions” to report domestic transactions in U.S. currency and to report transactions involving foreign financial agencies.<sup>350</sup> The regulations promulgated after passage of the BSA define a “financial institution” in terms of a “person” and, based on legislative history and congressional intent, the courts have held that individuals, as well as all cognizable entities having legal status, can be “financial institutions.”<sup>351</sup> Recognizing that money launderers attempt to conceal associations with large cash transactions and to evade the BSA’s reporting requirements, in 1987, Congress amended 31 U.S.C. § 5312(a)(2) to expand the definition of “financial institution” beyond businesses that engage in conventional banking services. The legislative history of the BSA indicates that the reporting requirements were designed to provide a strong and sweeping tool for law enforcement agencies to locate and investigate large currency transfers of the proceeds of unlawful acts.<sup>352</sup>

*b. Section 501(c)(3) Organizations as “Financial Institutions” for Purposes of 18 U.S.C. § 2339B—Treasury’s Voluntary Best Practices Guidelines May Portend the Future*

To date, the Secretary of the Treasury has not issued regulations under 31 U.S.C. § 5312(a)(2)(Z) that apply the “high degree of

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amended at 12 U.S.C. §§ 1730d, 1829b, 1951-59 (1982 & Supp. IV 1986) 5312 and 31 U.S.C. §§ 321, 5311-22 (1982 & Supp. III 1985)), amended by 31 U.S.C. §§ 5312(a)(2)(T), (u)(5), 5316(a)(1)-(2), 5316(d), 5317(b)-(c), 5318(a)-(f), 5321(a)(1)-(2), 5321(b)-(d), 5322(a)-(c)).

350. 31 U.S.C. § 5313(a), covering reports on domestic coins and currency transactions, provides:

When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

351. See, e.g., *United States v. Levy*, 969 F.2d 136, 139-40 (5th Cir. 1992); *United States v. Goldberg*, 756 F.2d 949, 955 (2d Cir. 1985).

352. H.R. REP. NO. 91-975, at 11-12 (1970), reprinted in 1970 U.S.C.C.A.N. 4394, 4395-97; 116 CONG. REC. 16951, 16954 (1970) (testimony of Rep. Patman describing the Department of the Treasury’s need for such a tool).

usefulness in criminal, tax, or regulatory matters”<sup>353</sup> language to domestic § 501(c)(3) organizations that collect and disburse donated funds. In November 2002, however, the Department of the Treasury issued Voluntary Best Practices Guidelines that may portend the future issuance of such regulations. The purpose of the Voluntary Best Practices Guidelines is to assist U.S.-based charities in avoiding any ties to terrorist organizations that might lead to further blocking actions.<sup>354</sup> Nonetheless, in these guidelines, the Department of the Treasury specifically warns: “Compliance with these guidelines shall not be construed to preclude any criminal or civil sanctions by the Department of the Treasury or the Department of Justice against persons who provide material, financial, or technological support or resources to, or engage in prohibited transactions with, persons designated pursuant to ... [AEDPA (which encompasses § 2339B) or IEEPA].”<sup>355</sup> It appears that this warning contemplates that the Department of the Treasury at some future date may consider U.S.-based charities and private foundations “financial institutions”<sup>356</sup> for purposes of 18 U.S.C. § 2339B.<sup>357</sup>

In that event, any domestic § 501(c)(3) organization that becomes aware that it possesses or controls funds in which a foreign terrorist organization or its agent has an interest, and knowingly fails to retain possession or control of the funds and to make proper reports to the Secretary of the Treasury, could be fined under 18 U.S.C. § 2339B.<sup>358</sup> The threshold standard of intent required to violate the statute appears to be relatively low. This low threshold, along with the fact that the statute permits the civil sanction to be applied even if a “financial institution” itself does not directly distribute

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353. 31 U.S.C. § 5312(a)(2)(Z) (2003).

354. U.S. DEPT OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2002) [hereinafter VOLUNTARY BEST PRACTICES], available at <http://www.treas.gov/press/releases/docs/tocc.pdf> (last visited Mar. 16, 2004). The guidelines were issued at the request of Muslim-oriented charities, which indicated concern that the government might block their donations in efforts to prevent terrorist funding. See Cooperman, *supra* note 16, at 37.

355. VOLUNTARY BEST PRACTICES, *supra* note 354, at 2.

356. See J. Christine Harris, *New Treasury Guidelines on Terrorist Funding Draw Criticism*, 97 TAX NOTES 1009 (2002); Mark Rambler, *New Developments for International Charitable Giving: The War Against Terrorist Financing*, 39 EXEMPT ORG. TAX REV. 33, 35 (2003).

357. 18 U.S.C. § 2339B(a)(2), (b) (2003).

358. *Id.*

the funds to a foreign terrorist organization or its agent, should heighten concern among domestic § 501(c)(3) organizations and should spur them to undertake significant due diligence precautions.

Even if § 501(c)(3) organizations are not “financial institutions” for purposes of § 2339B, they may not be insulated from liability. As discussed in the next section of this Article, 18 U.S.C. § 2339C confers power on the government to prosecute entities that unlawfully and willfully provide or collect funds to carry out terrorist activities.<sup>359</sup>

#### *D. Unlawful and Willful Provision or Collection of Funds to Carry Out Terrorist Acts*

In June 2002, Congress enacted the Suppression of the Financing of Terrorism Convention Implementation Act of 2002 (Suppression of Financing Act).<sup>360</sup> The Suppression of Financing Act implements the International Convention for the Suppression of Financing of Terrorism (International Convention), which was adopted by the United Nations General Assembly on December 9, 1999,<sup>361</sup> and ratified by the United States on June 26, 2002.<sup>362</sup> The International Convention is aimed at stopping the flow of financial resources that support international terrorism.<sup>363</sup> The International Convention obligates signatory states to criminalize conduct relating to raising money and other assets that support terrorist activities.<sup>364</sup> More specifically, the Preamble to the International Convention

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359. 18 U.S.C. § 2339C (2003).

360. Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, 116 Stat. 727 (2002). Most of 18 U.S.C. § 2339C became effective on June 25, 2002. However, paragraph (b)(1)(D) (concerning jurisdiction over a perpetrator found outside the United States when the offense occurs in the United States) and paragraph (b)(2)(B) (concerning jurisdiction over a perpetrator found in the United States when the offense occurs outside the United States) did not become effective until July 26, 2002. *See id.*

361. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 [hereinafter International Convention].

362. *See* International Convention for the Suppression of Terrorism (Dec. 9, 1999), available at [http://untreaty.un.org/ENGLISH/TreatyEvent2003/treaty\\_11.htm](http://untreaty.un.org/ENGLISH/TreatyEvent2003/treaty_11.htm) (last visited Mar. 16, 2004). The United States signed the International Convention on January 10, 2000. *Id.* As of April 9, 2003, seventy-nine countries had ratified the International Convention. *Id.*

363. *See* S. EXEC. REP. NO. 107-2, at 20 (2001).

364. *Id.*



calls on States to "take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities"<sup>365</sup> and to cooperate with one another in that effort.<sup>366</sup> Thus, the International Convention was intended as a powerful counterterrorism regime.

Consistent with its obligations under the International Convention, Congress, in enacting the Suppression of Financing Act, provided a puissant counterterrorism measure. Among the Suppression of Financing Act's provisions was the addition of § 2339C to

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365. International Convention, *supra* note 361, Preamble, 39 I.L.M. at 270. The International Convention provides that States must exercise criminal jurisdiction over the lawful and willful provision or collection of funds with the intention that they be used or in the knowledge that they are to be used to carry out certain terrorist acts. *Id.* art. 7, 39 I.L.M. at 273; S. EXEC. REP. NO. 107-2, at 20 (2001). States must freeze funds allocated or used for supporting terrorist activities. International Convention, *supra* note 361, at art. 8. The language is similar to the language approved in Security Council Resolution 1373, para. 1(c), *supra* note 67, as well as the language of Executive Order 13,224. *See supra* notes 68-82 and accompanying text. The International Convention further requires States to criminalize under their domestic laws offenses enumerated in the Convention if they have an international nexus, and to provide assistance to other States with investigations and criminal or extradition proceedings regarding the listed offenses. International Convention, *supra* note 361, arts. 2-15, 39 I.L.M. at 271-76.

According to Michael Chertoff, former Assistant Attorney General, Criminal Division of the Department of Justice, International Convention would provide the U.S. law enforcement agencies with a new means of halting the misuse of charitable institutions to finance terrorism. S. EXEC. REP. NO. 107-2, at 30. Mr. Chertoff explained that the United States would no longer be acting alone. The International Convention requires States to have laws that address the financing of terrorist acts, including laws of extradition. As a result, the cooperation of other States would be an "indispensable tool." *Id.* at 30-31. Upon further questioning, however, Mr. Chertoff acknowledged that some countries with large Muslim populations, such as Saudi Arabia, had not signed the International Convention. *Id.* at 38. It should be noted, however, that Saudi Arabia did sign the International Convention two days after the hearings at which Mr. Chertoff testified. *See* International Convention for the Suppression of Terrorism (Dec. 9, 1999), available at [http://untreaty.un.org/ENGLISH/Status/Chapter\\_xviii/treaty11.asp](http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp) (last visited Mar. 9, 2004). As of April 9, 2003, however, Saudi Arabia had not ratified the International Convention, nor had other signing countries with significant Muslim populations such as Egypt, Sudan, Indonesia, and others. *See id.*

366. The International Convention obligates nations either to submit for prosecution or to extradite any person in their jurisdictions who unlawfully and willfully provides or collects funds with the intent that the money be used to carry out terrorist activities. International Convention, *supra* note 361, arts. 9-11, 39 I.L.M. at 274-75. Within stated limits, States are obligated to cooperate with one another in criminal investigations, or criminal or extradition proceedings. *Id.* arts. 12-15, 39 I.L.M. at 275-76.

Title 18 of the United States Code.<sup>367</sup> The language of § 2339C tracks that of certain provisions in the International Convention. In particular, 18 U.S.C. § 2339C targets domestically formed entities, including domestic § 501(c)(3) organizations, entities formed outside the United States but located in the United States, and the individuals who manage or control those entities, who might directly or indirectly fund terrorism. The statute requires some international nexus with respect to the terrorist financing, such as someone operating abroad, or a nexus with interstate or foreign commerce.<sup>368</sup> Subsection (a) of 18 U.S.C. § 2339C makes it a crime to unlawfully<sup>369</sup> and willfully<sup>370</sup> (directly or indirectly) provide or collect funds, or conspire to do so, with the intention that such funds be used in full or in part to carry out a terrorist act in the United States,<sup>371</sup> or to cause death or serious bodily injury when, by the nature or context of the act, its purpose is to intimidate a population or to compel a government or an international organization to undertake or abstain from any action.<sup>372</sup> The provision states unequivocally that “[f]or an act to constitute an offense ... it shall not be necessary that the [provision or collection of the] funds were actually used to carry out a predicate act.”<sup>373</sup>

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367. It bears noting that, as with 18 U.S.C. §§ 2339A and 2339B, the government can easily charge a violation of 18 U.S.C. § 2339C along with other offenses. For example, the Suppression of Financing Act added § 2339C, a federal crime for acts of terrorism that transcend national borders under 18 U.S.C. § 2332(b)(g)(5). Suppression of Financing of Terrorism Convention Implementation Act of 1992, Pub. L. No. 107-197, § 301, 116 Stat. 727 (2002). Accordingly, for example, anyone can be prosecuted for violation of 18 U.S.C. § 2339C in combination with 18 U.S.C. § 2339A, and both of those provisions are predicate offenses under RICO, 18 U.S.C. § 1961. *Id.* The Suppression of Financing Act also made 18 U.S.C. § 2339C a predicate offense under the wiretap statute of 18 U.S.C. § 2516(1)(c). *Id.*

368. 18 U.S.C. § 2339C(b) (2003).

369. The term “unlawfully” “is intended to embody what would be considered under U.S. law as common law defenses.” H. REP. NO. 107-307, at 12 (2001).

370. The term “willfully” means “voluntary or intentional.” *Id.*

371. This predicate act of 18 U.S.C. § 2339C(a)(1)(A) encompasses offenses within listed treaties specified in subsection (e)(7) of the statute.

372. 18 U.S.C. § 2339C(a)(1)-(2). Paragraph (a) of the statute implements International Convention Article 2, paragraphs 1 and 3-5. H. REP. NO. 107-307, at 12. Subsection (b) establishes the jurisdiction of the United States with respect to perpetrators of offenses in subsection (a), whether the perpetrators are located in the United States or abroad. This subsection is consistent with the obligations that the United States has under the International Convention, but in certain instances goes beyond those obligations. *See id.*

373. 18 U.S.C. § 2339C(a)(3) (2003).

The penalties for violation of 18 U.S.C. § 2339C(a) are harsh.<sup>374</sup> First, anyone who violates the provision can be fined, imprisoned for up to twenty years, or both.<sup>375</sup> Second, subsection (f) of the statute creates an additional civil penalty to be imposed on any domestic legal entity or any foreign legal entity located in the United States of at least \$10,000, payable to the U.S. government, if any person responsible for the entity's control or management, while in that representative capacity, "committed any offense" under 18 U.S.C. § 2339C(a).<sup>376</sup> The responsible person, such as an officer or director, need not be convicted of the offense in order for the government to impose the civil penalty against the legal entity.<sup>377</sup>

Subsection (c) makes it a separate offense to conceal or disguise the nature, location, source, ownership, or control of material support, resources, or funds if such acts were taken knowing or intending that the material support, resources, or funds were provided in violation of either 18 U.S.C. § 2339B or § 2339C(a).<sup>378</sup> Subsection (c) applies to any individual or entity in the United States or any U.S. national or domestically formed legal entity, including a § 501(c)(3) organization. An offense under subsection (c) is punishable by fine, imprisonment of up to ten years, or both.<sup>379</sup>

To date, no indictments have been brought under 18 U.S.C. § 2339C against either individuals or organizations. As a result, there are many unknowns. At this juncture, the statute has not been challenged as unconstitutionally vague or otherwise unconstitutional. It cannot be determined now how zealously the government

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374. In addition to the penalties specified in 18 U.S.C. § 2339C(d), violation of § 2339C is grounds for the government to subject assets to civil forfeiture under 18 U.S.C. § 981. See *supra* Part I.D.

375. 18 U.S.C. § 2339C(d)(1) (2003).

376. 18 U.S.C. § 2339C(f) (2003). According to the House Judiciary Committee report, in determining the amount of the penalty, "the court should consider the legal entity's net worth, the volume of business it transacts, its ability to pay, the amount of the transaction involved in the Subsection 2339C(a) offense, and the nature of the predicate act." H. REP. NO. 107-307, at 13. The additional civil penalty of 18 U.S.C. § 2339C(f) implements International Convention Article 5. *Id.*

377. H. REP. NO. 107-307, at 13.

378. According to the House Judiciary Committee report, this provision goes beyond the obligations of the United States under the International Convention. This provision was intended to enhance the means by which law enforcement agencies can combat the financing of terrorists and terrorist organizations. *Id.* at 12.

379. 18 U.S.C. § 2339C(d)(2) (2003).

might attempt to apply the statute, nor how the statute would be interpreted by a federal court. The statutory language is broad, and a domestic § 501(c)(3) organization must be extremely wary of being used unsuspectingly by others as a means of channeling funds to terrorists and terrorist groups. The statute specifically makes it an offense to “willfully,” that is, voluntarily, provide or collect funds with the intent or “knowledge” that they may be used in full or in part for terrorist activities.<sup>380</sup> Whether “willfulness” might be interpreted as the mere affirmative act of accepting offered donations or fundraising cannot now be known. Also currently unknown is whether the government may take the position that the element of “knowledge” incorporates the concept of “should have known” if adequate due diligence were undertaken. If that is the standard, what might constitute adequate due diligence? Must the due diligence be so thorough as to provide information that is beyond the ability of most § 501(c)(3) organizations to collect or determine?

Moreover, whether the statutory caveat—that the offense is committed whether the collected or provided funds are actually used for terrorism<sup>381</sup>—would prevail if challenged is presently unknown. The statute certainly incorporates the notion that money is fungible and that the provision of one dollar to be used for legitimate purposes by a terrorist group frees another dollar from other sources to be used for illegal purposes. This “freeing of assets” theory was found acceptable by the Ninth Circuit in the context of 18 U.S.C. § 2339B.<sup>382</sup> In *Humanitarian Law Project II*, the court focused on the congressional finding that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”<sup>383</sup> The same language was reiterated in congressional hearings discussing the International Convention and the need for its implementation by Congress,<sup>384</sup> which ultimately resulted in enactment of 18 U.S.C.

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380. 18 U.S.C. § 2339C(a)(1) (2003).

381. See *supra* note 373 and accompanying text (discussing 18 U.S.C. § 2339C(a)(3)).

382. *Humanitarian Law Project II*, 205 F.3d 1130, 1133-34 (9th Cir. 2000) (responding to plaintiff's challenge to 18 U.S.C. § 2339B by construing the statute's scienter requirement of knowledge to lack the need to know that a donor's funds were actually used for terrorist activities and applying a “freeing up” of assets theory).

383. *Id.* at 1136.

384. *Prepared Statement of Ambassador Francis X. Taylor Before the Comm. on Foreign*

§ 2339C, including the statutory caveat in subsection (a)(3). Finally, as a general matter, if the statutory caveat were challenged, it is unclear whether such a challenge would prevail. On the one hand, the Ninth Circuit in *Humanitarian Law Project II* and *III* has shown reluctance to give carte blanche to the government's contention that the antiterrorist provisions of 18 U.S.C. § 2339B are constitutional under the First and Fifth Amendments. On the other hand, the federal courts historically have given deference to Congress with respect to matters of foreign policy and national security.<sup>385</sup>

### III. SUSPENSION OF DESIGNATED ORGANIZATION'S TAX-EXEMPT STATUS

Although over the past two and one-half years Congress strengthened numerous statutory provisions available for waging the financial war on terrorism, it was not until November 2003 that it statutorily remedied the former inability of the IRS to suspend the tax-exempt status of a designated SDGT, a designated foreign terrorist organization, or an identified supporter of terrorism.<sup>386</sup> As

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*Relations*, SEN. EXEC. REP. NO. 107-2 (2001), Appendix, at 18.

385. See, e.g., *Haig v. Agee*, 453 U.S. 280, 292 (1981) (giving deference to Congressional interest in protecting foreign policy and national security with respect to the Passport Act); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (deferring to congressional interest in protecting foreign policy and national security with respect to the Alien Registration Act, which permits deportation of certain aliens); *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 787-88 (N.D. Ill.), *aff'd*, 315 F. 3d 748 (7th Cir. 2002); *Palestine Info. Office v. Shultz*, 674 F. Supp. 910, 918 (D.D.C. 1987), *aff'd*, 853 F.2d 932 (D.C. Cir. 1988).

386. Pub. L. No. 108-121, § 108, 117 Stat. 1335, 1339 (2003). Section 108(a), adding I.R.C. § 501(p)(2), describes a terrorist organization that has been designated or otherwise identified as:

**TERRORIST ORGANIZATIONS**-An organization is described in this paragraph if such organization is designated or otherwise individually identified—

(A) under section 212(a)(3)(B)(vi)(II) or 219 of the Immigration and Nationality Act as a terrorist organization or foreign terrorist organization, (B) in or pursuant to an Executive order which is related to terrorism and issued under the authority of the International Emergency Economic Powers Act or section 5 of the United Nations Participation Act of 1945 for the purpose of imposing on such organization an economic or other sanction, or

(C) in or pursuant to an Executive order issued under the authority of any Federal law if—

(i) the organization is designated or otherwise individually identified in or pursuant to such Executive order as supporting or engaging in

enacted, new I.R.C. § 501(p) denies eligibility of any such organization for I.R.C. § 501(a) tax-exempt status and enables the IRS to suspend the existing tax-exempt status of any such organization designated either before or after the provision's November 11, 2003 enactment.<sup>387</sup> Moreover, during the suspension period, not only is the tax-exempt status of the designated organization under I.R.C. § 501(a) removed, but for a donation directly or through a trust to a § 501(c)(3) organization, the new § 501(p) precludes the availability to a donor of a charitable contribution deduction that would be otherwise allowable under I.R.C. §§ 170, 545(b)(2), 556(b)(2), 642(c), 2055, 2106(a)(2), or 2522.<sup>388</sup>

Pursuant to prior law, the IRS could revoke permanently the § 501(c)(3) status of an organization, but only after the IRS conducted an examination of the organization, issued to the organization a letter proposing the revocation, and permitted the organization to exhaust its administrative appeals rights, the outcome of which was then subject to judicial review under I.R.C. § 7428. By contrast, the new § 501(p) permits suspension of an organization's tax-exempt status without an opportunity for prior challenge.<sup>389</sup> A suspension does not preclude the organization from continuing to operate, subject to taxation, during the suspension period. If the IRS determines at a later date that the suspension is erroneous, the statute permits a credit or refund of any taxes overpaid by the organization.<sup>390</sup>

Congress sent a powerful, and needed, message by enacting the new § 501(p). The Department of the Treasury prominently announced the IRS's swift action after enactment of the new § 501(p) to suspend the tax-exempt status of Benevolence

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terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act) or supporting terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989); and

(ii) such Executive order refers to this subsection.

387. *Id.* § 108(a)-(b), 117 Stat. at 1339 (adding I.R.C. § 501(p)(1)). The suspension period begins with the date that an organization is first designated or identified and ends when all designations or identifications of the organization have been rescinded. I.R.C. § 501(p)(3) (2003).

388. I.R.C. § 501(p)(4) (2003).

389. *Id.* § 501(p)(5).

390. *Id.* § 501(p)(6).

International, Global Relief, and Holy Land and, consequently, to disallow donors' charitable contribution deductions for donations to these organizations.<sup>391</sup> These suspensions emphasize the government's serious enforcement attitude toward organizations viewed as supporters of terrorism. Yet, in removing tax enticements and benefits, the new provision may have an unintended effect. Instead of law-abiding donors' redirecting donations solely to trustworthy and highly reputable § 501(c)(3) organizations that can assure the adequacy of their due diligence to identify the funds' ultimate beneficiaries, donors may suspend their charitable contributions altogether or, as in the case of some Muslim donors,<sup>392</sup> send donations abroad through Internet channels, friends, and nontraditional informal networks.

#### IV. PRIVATE CIVIL ACTIONS

In addition to the numerous federal statutes that enable the U.S. government to combat terrorism, Congress in the early 1990s enacted 18 U.S.C. §§ 2331-2338 to provide a private civil cause of action against persons (including individuals, organizations, and entities) other than sovereign states for victims of "international terrorism" not occurring during acts of war.<sup>393</sup> Congress intended to

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391. See *Treasury and IRS Suspend Tax Exempt Status of Three Organizations Identified with Terrorism* Nov. 14, 2003, LEXIS, Federal Document Clearing House File.

392. See, e.g., Greg Allen (reporter) & Robert Siegel (anchor), *Muslim Charities and Donors Attempt to Adapt to New Level of Scrutiny Since 9/11, All Things Considered* (National Public Radio broadcast, May 12, 2003); see also Kevin Murray, *Administration is Undermining Democracy*, BOSTON GLOBE, Nov. 30, 2003, at D11 (stating that the majority of funding for terrorist organizations is from banks, businesses, Internet donations, and individual remittances); *supra* note 16 (citing Muslim fears about giving to § 501(c)(3) organizations, including to mosques).

393. Congress initially enacted the provisions as part of the Antiterrorism Act of 1990, Pub. L. No. 101-519, § 132, 104 Stat. 2250 (1990), but the statutes were repealed because of a technical deficiency. Congress subsequently re-enacted the provisions as part of the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003, 106 Stat. 4506, 4522 (1992). The exclusion of claims brought on account of war was intended to bar actions for injuries resulting "from military action by recognized governments as opposed to terrorists, even though governments also sometimes target civilian populations." S. REP. NO. 102-342, at 46 (2002).

Pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA), a foreign state, its agencies, and its instrumentalities are presumed to be immune to lawsuits unless a specific exception removes that immunity. 28 U.S.C. §§ 1602-1611 (2003). One such exception is 28

give U.S. nationals a remedy for a “wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed.”<sup>394</sup> For injury to the

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U.S.C. § 1605(a)(5), which removes immunity when:

money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment....

As part of AEDPA, Congress amended FSIA in 1996 to particularly include provisions that could be applied to rogue states to hold them accountable for acts of terrorism perpetrated on U.S. citizens. 28 U.S.C. § 1605(a)(7) specifically excepts sovereign states from immunity to lawsuits seeking monetary damages by U.S. nationals, plaintiffs, or victims for “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act....” This statute permits private actions against foreign countries that the Executive branch has designated as a state sponsor of terrorism occurring either in the United States or extraterritorially. These provisions did not address private causes of action against individuals, organizations and entities who engage in terrorist acts.

*Id.* On June 17, 2003, Senator Richard G. Lugar introduced a bill, the Benefits for Victims of International Terrorism Act of 2003 (BVITA), to establish a comprehensive federal program to provide benefits to U.S. victims of international terrorism. S. 1275, 108th Cong. (2003), LEXIS, Congressional Bill File. The bill is intended to be a workable federal program to provide benefits to terrorism victims who are U.S. nationals, including individuals physically injured, killed, or held hostage on account of an act of “international terrorism,” which is determined by the Secretary of State, in consultation with the Attorney General and the Secretaries of Defense, Homeland Security, and the Treasury Department. *Id.* §§ 2-4. For a discussion of the definition of “international terrorism,” see *infra* notes 394-405 and accompanying text. Pursuant to the bill, uniform payments would be made to eligible claimants from a Victims of International Terrorism Benefits Fund to be established by the U.S. government. This fund would include appropriated amounts, contributions from individuals, entities, and foreign governments, and possibly from blocked assets. S. 1275, § 10; *Benefits for Victims of Terrorist Attacks: Hearing on S. 1275 Before the Senate Comm. on Foreign Relations*, 108th Cong. (2003) (testimony of Sen. Richard G. Lugar and Stuart E. Eizenstat, Partner, Covington and Burling), LEXIS, Federal Document Clearing House File. The bill prohibits double recovery with respect to the same act of international terrorism involving a victim’s injury or death, or due to a person’s being held hostage. S. 1275, § 8(a). It further specifies that if a person files a civil action against a foreign state, government, its agencies or instrumentalities, or against the U.S. government, or its agencies or instrumentalities and recovers financial payment through judgment, relief under the BVITA is prohibited. *Id.* § 12(c)(1). The bill, however, does not prohibit recovery under both BVITA and 18 U.S.C. § 2333, if both were to apply with respect to a single act of international terrorism.

394. S. REP. NO. 102-342, at 22 (1992). The term “international terrorism” is defined in 18 U.S.C. § 2331(1) as:

activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of



individual, or his property or business, pursuant to these statutes victims, their estates, survivors, or heirs are entitled to sue in the federal district courts for compensatory and treble damages.<sup>395</sup> The statute allows for "the imposition of liability at any point along the causal chain of terrorism [that] would interrupt, or at least imperil, the flow of money."<sup>396</sup>

The statutes initially arose in response to *Klinghoffer v. Palestine Liberation Organization*.<sup>397</sup> Mr. Klinghoffer was murdered by Palestine Liberation Organization (PLO) terrorists who attacked a cruise ship in the Mediterranean Sea. Mr. Klinghoffer's family, U.S. nationals, sued various commercial entities under state tort laws, general maritime law, and the Death on the High Seas Act (DOHSA).<sup>398</sup> The defendants filed third-party complaints to bring

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the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping;

and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum....

18 U.S.C. § 2331(1) (2003).

395. S. REP. NO. 102-342, at 22 (July 27, 1992).

396. *Id.*; see also 18 U.S.C. § 2333(a) (2003). 18 U.S.C. §§ 2331-2337 have been criticized for not providing sufficiently comprehensive coverage. See, e.g., *Hearing of the Senate Judiciary Comm., Terrorism Financing*, Nov. 20, 2002 (testimony of Nathan Lewin), LEXIS, Federal News Service File (detailing the need to (1) include specifically in 18 U.S.C. § 2333 "aiding and abetting" as a basis for civil liability; (2) statutorily authorize the federal prosecutors to share information relevant to lawsuits brought under 18 U.S.C. § 2333; (3) lengthen the statute of limitations for filing lawsuits under 18 U.S.C. § 2333; and (4) extend 18 U.S.C. § 2333 to financially enable plaintiffs' attorneys to pursue litigation before a final judgment by providing seized funds as payments for attorney fees). On November 28, 2001, Congress enacted legislation that requires the President to propose, by the time of submission for the 2003 fiscal year budget, a legislative proposal to create "a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism (or relatives of deceased United States victims of international terrorism) that occurred or occurs on or after November 1, 1979." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-77, § 626(a), 115 Stat. 748, 803 (2001).

397. 739 F. Supp. 854 (S.D.N.Y. 1990).

398. 46 U.S.C. § 761 (2003).

the PLO into the lawsuit.<sup>399</sup> The district court held that because the death occurred in navigable waters, the Klinghoffer family had cognizable claims against the PLO under federal admiralty jurisdiction and the DOHSA.<sup>400</sup>

Congress created 18 U.S.C. §§ 2331-2338 after the *Klinghoffer* litigation to ensure that torts from terrorist activity occurring outside the boundaries of the United States would be actionable, even if the perpetrator were not subject to federal maritime jurisdiction, as in the *Klinghoffer* case.<sup>401</sup> According to testimony at Senate hearings upon the initial proposal of the statutes in 1990,<sup>402</sup> the "existence of such cause of action [18 U.S.C. § 2333] may deter terrorist groups from maintaining assets in the United States, from benefitting from investments in the United States, and from soliciting funds from within the United States."<sup>403</sup> One skeptic, however, testified: "I don't know whether fundraising for a terrorist is an act of international terrorism.... So if you want to provide an effective remedy, liability has to extend to the organizations that have assets in this country and the substantive liability provision has to be written so that that is clear."<sup>404</sup> She further stated that there is

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399. *Klinghoffer*, 739 F. Supp. at 857. The PLO describes itself as:

the internationally recognized representative of a sovereign people who are seeking to exercise their rights to self-determination, national independence, and territorial integrity. The PLO is the internationally recognized embodiment of the nationhood and sovereignty of the Palestinian people while they await the restoration of their rights through the establishment of a [comprehensive], just and lasting peace in the Middle East.

*Id.*

400. *Id.* at 858-59.

401. *Antiterrorism Act of 1990: Hearing on S. 2465, Before the Senate Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong. 12 (1990) [hereinafter *S. 2465 Hearing*] (testimony of Alan J. Kreczko). Mr Kreczko testified that "[w]hereas that opinion [*Klinghoffer*] rested on the special nature of our admiralty laws, this bill will provide general jurisdiction to our Federal courts and a cause of action for cases in which an American has been injured by an act of terrorism overseas." *Id.*

402. The proposed statute was in the Antiterrorism Act of 1990, which was not enacted. *See supra* note 393.

403. *S. 2465 Hearing*, *supra* note 401, at 12 (testimony of Alan J. Kreczko). According to prepared testimony by Daniel Pipes, the PLO had raised its funds through legal and illegal means. Although most of its money was not maintained in the United States, the PLO had bank accounts in New York at the Arab Bank and at the Chemical Bank. *Id.* at 114-15, 117 (testimony of Daniel Pipes).

404. *Id.* at 119 (testimony of Wendy Collins Perdue).

a realistic likelihood of actually recovering money only from a defendant who has assets which are located in the United States. The individuals who actually carry out terrorist acts are unlikely to fall into this category. It is the organizations, businesses and nations who support, encourage and supply terrorists who are likely to have reachable assets. Would a claim under this statute reach these organizations? The language of the bill is very unclear on this.<sup>405</sup>

This testimony was an accurate prediction.

In a case of first impression, *Boim v. Quranic Literacy Institute*,<sup>406</sup> the parents of a teenage U.S. citizen, who also was a dual citizen of Israel and who was murdered in Israel by Hamas terrorists, sued under 18 U.S.C. § 2333 several individuals, the Quranic Literacy Institute (QLI), and Holy Land for the loss of their son.<sup>407</sup> The Boims sought \$100 million each of compensatory and punitive damages, plus litigation costs and treble damages.<sup>408</sup> The Boims alleged that QLI and Holy Land, ostensibly humanitarian charities recognized in the United States as § 501(c)(3) organizations, provided material support and resources to terrorists and their organization in violation of 18 U.S.C. §§ 2339A and 2339B.<sup>409</sup> They specifically contended that QLI and Holy Land raised funds in the United States, laundered them, and funneled them to Hamas in Gaza and

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405. *Id.* at 126. Ms. Perdue further stated that the litigation that could arise from the proposed statutes would be symbolic acts. *Id.* at 133. But Perdue went on to state that if you want the litigation to have practical implications, not simply a mechanism for symbolic effect, then it has got to be structured so that there is actually money that you can—Mr. Pipes has discussed the assets of the PLO. Well, if you want to get at that, the liability provisions have to be clear so that you can get at that.

*Id.*

406. 291 F.3d 1000 (7th Cir. 2002), *aff'g* 127 F. Supp. 2d 1002 (N.D. Ill. 2001). The suit also named the Holy Land Foundation for Relief and Development as a defendant. *Id.*; see also *supra* Part, I.C.4.b (describing OFAC's blocking of Holy Land's assets and accounts).

407. In a separate proceeding by the United States, the government brought an action to seize funds of the individual *Boim* defendants. *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. Ill. 1999). In that lawsuit, the government contended that the individuals, employees of QLI, used domestic charitable organizations to raise and launder funds in the United States for Hamas. *Id.* at 794-95.

408. *Boim*, 291 F.3d at 1004.

409. *Id.*

the West Bank for use in financing terrorists.<sup>410</sup> The Boims alleged that Hamas depended on these contributions to carry out its terrorist activities.<sup>411</sup> QLI and Holy Land moved to dismiss the complaint, based on the argument that 18 U.S.C. § 2333 does not support a cause of action for aiding and abetting international terrorism.<sup>412</sup> The district court denied the motion.<sup>413</sup> QLI and Holy Land filed an interlocutory appeal requesting that the Seventh Circuit consider the viability of a claim brought under the previously untested statute.<sup>414</sup>

In considering the viability of the plaintiffs' claim, the Seventh Circuit addressed three separate issues. The first issue was whether funding a foreign terrorist organization "involves" an act of international terrorism within the meaning of its definition in 18 U.S.C. § 2331, which applies to 18 U.S.C. § 2333. The court held that it does not.<sup>415</sup> The court reviewed congressional hearings and found that Congress intended the statute to apply expansively and to encompass all American tort law.<sup>416</sup> The court found that the statute clearly was intended "to reach beyond those persons who themselves commit the violent act that directly causes the injury."<sup>417</sup> Nonetheless, the court concluded that tort law requires proximate cause for a person to be "involved" in a proscribed activity and that foreseeability, its linchpin, was absent with respect to the case at hand.<sup>418</sup> Specifically, the court stated:

To say that funding *simpliciter* constitutes an act of terrorism is to give the statute an almost unlimited reach. Any act which turns out to facilitate terrorism, however remote that act may be from actual violence and regardless of the actor's intent, could be construed to "involve" terrorism. Without also requiring the

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410. *Id.*

411. *Id.* at 1003.

412. *Id.* at 1004-05.

413. *Id.* at 1001.

414. *Id.*

415. *Id.*

416. *Id.* at 1010 (citing 137 CONG. REC. S4511-04 (daily ed. Apr. 16, 1991)); see also S. 2465 Hearing, *supra* note 401, at 12 (testimony of Joseph Morris); 136 CONG. REC. S4568-01 (daily ed. Apr. 19, 1990).

417. *Boim*, 291 F.3d at 1011.

418. *Id.* at 1012.

plaintiffs to show knowledge of and intent to further the payee's violent criminal acts, such a broad definition might also lead to constitutional infirmities by punishing mere association with groups that engage in terrorism, as we shall discuss later in addressing the First Amendment concerns raised here....

To hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability. Nothing in the language of the statute or its structure or history supports that formulation. The government, in its amicus brief, maintains that funding may be enough to establish liability if the plaintiff can show that the provider of funds was generally aware of the donee's terrorist activity, and if the provision of funds substantially assisted the terrorist act in question.... We will consider the government's proposed standard separately in our discussion of aiding and abetting liability. For now we note only that the complaint cannot be sustained on the theory that the defendants themselves committed an act of international terrorism when they donated unspecified amounts of money to Hamas, neither knowing nor suspecting that Hamas would in turn financially support the persons who murdered David Boim.<sup>419</sup>

The second issue that the court addressed was whether 18 U.S.C. § 2333 incorporates the definitions of "international terrorism" utilized in 18 U.S.C. §§ 2339A and 2339B, thus giving the Boims a valid claim.<sup>420</sup> The court ruled that it does. After determining that the term "international terrorism" had not been interpreted previously for purposes of 18 U.S.C. § 2333 or for purposes of the Foreign Intelligence Surveillance Act,<sup>421</sup> which contains the same terminology, the court drew upon legislative history and the statutory structure and context of the term.<sup>422</sup> In doing so, the court reviewed the language of 18 U.S.C. §§ 2339A and 2339B and noted that Congress had "undoubtedly intended that the persons providing financial support to terrorists should also be held criminally liable."<sup>423</sup> The court stated that it would be "counterintuitive" to

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419. *Id.* at 1011-12.

420. *Id.* at 1015-16.

421. 50 U.S.C. § 1801(c) (2003).

422. *Boim*, 291 F.3d at 1010.

423. *Id.* at 1014.

conclude that Congress would intend persons to be subject to criminal liability under 18 U.S.C. §§ 2339A and 2339B, but not civil liability under 18 U.S.C. § 2333 as long as “knowledge and intent” are demonstrated.<sup>424</sup> The court added that because Congress intended 18 U.S.C. § 2333 to apply more broadly than 18 U.S.C. §§ 2339A and 2339B, actual proof of a criminal violation under either of the latter statutes is not required to maintain a claim under the former provision.<sup>425</sup> All that is needed for a justiciable claim under 18 U.S.C. § 2333, the court concluded, is a standard showing of causation under tort law.<sup>426</sup>

Finally, the court addressed whether a civil cause of action under 18 U.S.C. §§ 2331 and 2333 can be maintained for aiding and abetting an act of international terrorism.<sup>427</sup> The court concluded in the affirmative. It based its holding on several rationales. First, the court reasoned that even though 18 U.S.C. § 2333 does not incorporate the terminology of “aiding and abetting,” the language, structure, and legislative history of the statute indicated an intention to import general tort law.<sup>428</sup> Second, the court found that the tort concept of “aiding and abetting” includes conduct that gives rise to a violation of 18 U.S.C. §§ 2339A or 2339B, in that it “involve[s]” acts that are violent or dangerous to human life within the definition of “international terrorism.”<sup>429</sup> Third, the court firmly stated that a failure to impose liability on aiders and abettors who knowingly and intentionally fund acts of terrorism would thwart the clear intent of Congress to sever the flow of money to terrorists “at every point along the causal chain of violence.”<sup>430</sup>

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424. *Id.* at 1014-15.

425. *Id.* at 1015.

426. *Id.*

427. *Id.* at 1016-21.

428. *Id.* at 1020. The court distinguished *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), in which it was held that a private plaintiff cannot maintain an aiding and abetting lawsuit under the Securities and Exchange Act of 1934, § 10(b) because it neither provides an express (direct) or implicit (indirect) right of private action. *Boim*, 291 F.3d at 170-78. By contrast, the Seventh Circuit in *Boim* found the legislative history to be clear that 18 U.S.C. § 2333 provides an express right of private action. *Id.* at 1019.

429. *Boim*, 291 F.3d at 1020.

430. *Id.* at 1021.

Contrary to the assertion of QLI and Holy Land, the court specifically held that the defendants' associational rights under the First Amendment were not abridged by its conclusion that a claim can be maintained under 18 U.S.C. § 2333 for a violation of 18 U.S.C. § 2339B.<sup>431</sup> Reviewing relevant case law, the court reiterated that the actual imposition of liability under the statute requires a plaintiff to demonstrate more than a mere association with a group engaged in illegal activity; it requires a showing of specific desire or intent to support or help the group engage in illegal activity.<sup>432</sup> In the instant case, the court determined that the Boims' allegations were sufficient to support their lawsuit.<sup>433</sup> The Boims' allegations were not based on QLI's or Holy Land's mere association with Hamas;<sup>434</sup> rather, the Boims sought to hold the organizations liable for aiding and abetting their son's murder by raising funds that would be laundered and supplied to carry out terrorist operations, to purchase guns that would be used as murder weapons, to train the killers, and to compensate the killers' families.<sup>435</sup> Stating that proof would depend on the facts, the court held that the assertions were sufficient to sustain an action under 18 U.S.C. § 2333 without violating defendants' First Amendment rights of association.<sup>436</sup> Additionally, contrary to the assertions of QLI and Holy Land, the court ruled that a § 2333 claim based solely on conduct that would render the actor criminally liable under 18 U.S.C. § 2339B does not abridge the actor's First Amendment political associational rights.<sup>437</sup> That § 2339B is not narrowly drawn to apply only to persons intending to support illegal goals but also can capture persons who contribute money solely for humanitarian purposes was not fatal.<sup>438</sup> Relying on *Humanitarian Law Project II*, the court indicated that terrorist organizations use funds for illegal activities regardless of

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431. *Id.* at 1025.

432. *Id.* at 1022-25.

433. *Id.* at 1028.

434. *Id.* at 1024.

435. *Id.* at 1023-24.

436. *Id.* at 1028.

437. *Id.*

438. *Id.* at 1027.

a donor's intent and that Congress was compelled statutorily to attach liability to all contributions to such organizations.<sup>439</sup>

The *Boim* decision clearly opened the floodgates.<sup>440</sup> That seminal case arose from actions prior to September 11, 2001. Currently, three multiple-plaintiff civil actions have been filed under 18 U.S.C. § 2333 by families of victims of the heinous attacks of September 11, and more lawsuits may follow.<sup>441</sup> At present, it is an open question as to whether the courts consistently will consider the September 11 terrorist acts to fall within the statute's definition of "international terrorism."<sup>442</sup> In one case of first impression, *Smith v. Islamic Emirate of Afghanistan*, that arose from the events of September 11, the U.S. District Court for the Southern District of New York ruled that those attacks constituted "international terrorism" rather than "domestic terrorism," the latter of which is not covered by 18 U.S.C. § 2333.<sup>443</sup> The court considered the September 11 attacks as having "occur[red] primarily within the territorial jurisdiction of the United States," and thus as satisfying that element of the term "domestic terrorism."<sup>444</sup> Nonetheless, although wary of interpreting the term

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439. *Id.*

440. Another lawsuit, *Estates of Ungar ex rel. Strachman v. Palestinian Authority*, 153 F. Supp. 2d 76, 97-98 (D.R.I. 2001), and 228 F. Supp. 2d 40, 49-50 (D.R.I. 2002), involving 18 U.S.C. § 2333 preceded *Boim*. The administrator of the estates of a husband and wife killed in Israel asserted a claim under 18 U.S.C. § 2333 against the Palestinian Authority and the Palestine Liberation Organization for encouraging terrorist activities, providing a safe haven and base of operations to the terrorists who killed the deceased, and for supporting families of terrorists. The court twice refused to dismiss the lawsuit for failure to state a justiciable claim under 18 U.S.C. § 2333. The court granted the plaintiffs' motion to enter default judgment against the Palestinian defendants. *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 215 F.R.D. 36, 39-40 (D.R.I. 2003).

441. 18 U.S.C. § 2335 provides a four year statute of limitations, which can be tolled for periods when terrorists have concealed their acts, identities, or remain outside of the United States. See 18 U.S.C. § 2335 (2003).

442. See *supra* notes 393-96 and accompanying text (defining the term "international terrorism").

443. 262 F. Supp. 2d 217, 221-22 (S.D.N.Y. 2003). The plaintiffs sued the Islamic Emirate of Afghanistan, the Taliban, al Qaeda, and Osama bin Laden under 18 U.S.C. § 2333, seeking damages for the deaths of family members. *Id.*

444. *Id.* at 221 (citing 18 U.S.C. § 2331(5) (2003)). The statute defines the term "domestic terrorism" to mean activities that:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—
  - (i) to intimidate or coerce a civilian population;



"international terrorism" too expansively, the court determined that, as required by the definition of "international terrorism," the September 11 acts "transcend[ed] national boundaries in terms of the means by which they [were] accomplished ... or the locale in which their perpetrators operate[d]." <sup>445</sup> In support of this conclusion, the court relied on satisfactory evidence that the attacks were carried out by foreign nationals who "apparently received their orders and funding and some training from foreign sources" and that Iraq provided material support to al Qaeda and Osama bin Laden. <sup>446</sup> As a result, the court awarded the plaintiffs economic damages under 18 U.S.C. § 2333. <sup>447</sup>

In another, consolidated case, *Ashton v. Al Qaeda Islamic Army*, filed in the Southern District of New York on behalf of 1400 victims and survivors of the September 11 attacks, plaintiffs seek more than \$1 trillion in damages, in part based on 18 U.S.C. § 2333. <sup>448</sup> Among the defendants are individuals, banks, domestic § 501(c)(3) organizations, <sup>449</sup> foreign terrorist organizations, and corporations alleged to have provided funds and other material support to the terrorists. The complaint filed in *Ashton* follows on the heels of a complaint filed on August 15, 2002, in the District of Columbia, by administrators of the estates of victims and by survivors of the September 11 attacks. In that case, *Burnett v. Al Baraka Investment and Development Corp.*, <sup>450</sup> plaintiffs sought trillions of dollars in damages, over

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping, and

(C) occur primarily within the territorial jurisdiction of the United States.

18 U.S.C. § 2331(5) (2003).

445. *Smith*, 262 F. Supp. 2d at 221.

446. *Id.* at 221, 232.

447. *Id.* at 237. With respect to decedents George Smith and Timothy Soulas, the court awarded the estate funeral service expenses, compensatory damages for lost earnings, pain and suffering, and solatium damages (damages allowed for mental anguish, bereavement and grief as permitted under *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998)) to select family members. *Smith*, 262 F. Supp. 2d at 234-39. The court denied punitive damages because the statute does not provide for such an award. *Id.* at 239-40.

448. Nos. 02-CV-6977, 02-CV-6978, 2002 WL 32152069, at \*38 (S.D.N.Y. filed Sept. 3, 2002).

449. *Id.* at \*10-11. The U.S. domestic § 501(c)(3) organizations include Benevolence International, Global Relief, the International Institute of Islamic Thought, and the SAAR Foundation. *Id.*

450. No. 02-CV-1616 (D.D.C. filed Aug. 15, 2002), available at <http://www.dcd.uscourts.gov/>

\$3 trillion of which is sought pursuant to 18 U.S.C. § 2333, against several individuals alleged to be terrorist financiers, seven international banks, eight Islamic foundations and their subsidiaries (including the SAAR Foundation, the Safa Trust, and Benevolence International), and a private foundation established in Saudi Arabia with a branch created in the United States as a § 501(c)(3) organization.<sup>451</sup> Allegations are based on aiding and abetting terrorists and violations of RICO under 18 U.S.C. § 1962, as well as other federal statutes.<sup>452</sup>

The *Boim* and *Smith* decisions, along with the other lawsuits (*Ashton* and *Burnett*) filed as a result of the September 11 attacks, compound the reasons for officers, directors, and trustees of well-intentioned, legitimate domestic § 501(c)(3) organizations to undertake “appropriate” due diligence before disseminating funds either domestically or abroad for charitable purposes.

## V. DUE DILIGENCE

### *A. Due Diligence by Members of Governing Bodies of § 501(c)(3) Organizations*

For a variety of reasons, most § 501(c)(3) organizations are created as corporations,<sup>453</sup> with the remainder largely formed as trusts. A range of legal obligations is imposed on decision makers (officers, trustees, and directors) of § 501(c)(3) organizations to ensure accountability to beneficiaries and to the public. Common law and state statutory law impose fiduciary duties on each officer, trustee, and director of a domestic § 501(c)(3) organization, whether formed as a corporation or as a trust.<sup>454</sup> The fiduciary standards

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02-1616order.pdf (last visited Mar. 9, 2004).

451. *Id.* The defendant § 501(c)(3) organization is the Al-Haramain Islamic Foundation, Inc. *Id.*

452. *See id.*

453. *See* Nina J. Crimm, *A Case Study of a Private Foundation's Governance and Self-Interested Fiduciaries Calls for Further Regulation*, 50 EMORY L.J. 1093, 1133-35 (2001) (providing statistics with respect to private foundations formed between 1962 and 2000); Note, *Developments in the Law—Nonprofit Corporations*, 105 HARV. L. REV. 1578, 1593 (1992) (stating that virtually all contemporary private foundations were created as corporations).

454. *See, e.g.*, REVISED MODEL NONPROFIT CORP. ACT § 830 (1987); N.Y. NOT-FOR-PROFIT

applicable to trustees can be stricter than those applicable to charitable corporations' directors and officers, and certain governing principles may differ with respect to these two categories. For example, under the common law, trustees of charitable trusts often are not protected from personal tort liability and contract claims that arise out of their actions or those of their subordinates.<sup>455</sup> By contrast, state laws may exempt directors and officers of nonprofit charitable corporations from personal liability for tort or contract claims unless the individual was grossly negligent or intended to cause the resulting harm.<sup>456</sup> Nonetheless, to a large extent, trustees, directors, and officers share similar fiduciary obligations.

Each corporate officer and director has a duty of obedience, a duty of loyalty to the organization, and a duty of care. The common law duty of obedience requires each officer and director to fulfill the particular charitable purposes of the corporation.<sup>457</sup> As a corollary to the duty of obedience, each officer and director must also ensure that the entity conducts its affairs in a lawful manner.<sup>458</sup> The duty of loyalty requires each officer and director to pursue the interests and mission of the nonprofit corporation with undivided allegiance by placing the interests of the entity above private interests.<sup>459</sup> Similarly, trustees have a strict duty of loyalty to administer the trust solely in accordance with trust provisions and in the interests of the charitable beneficiaries.<sup>460</sup> The duty of care requires each

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CORP. LAW §§ 101-1411 (McKinney 1997). If the § 501(c)(3) organization is formed as a trust, the trustees have fiduciary duties under state laws similar to those applicable to directors and officers under nonprofit corporation laws. For a general discussion, see Crimm, *supra* note 453, at 1138-47.

State Attorneys General have statutory jurisdiction over the nonprofit organizations' charitable assets and the fundraising activities of the organizations, and have authority to bring lawsuits for an officer's, director's, or trustee's breach of fiduciary duties. See Crimm, *supra* note 453, at 1184-86; Nina J. Crimm, *Why All Is Not Quiet on the "Home Front" for Charitable Organizations*, 29 N.M. L. REV. 1, 1-4 (1999).

455. See, e.g., *Lynch v. John M. Redfield Found.*, 9 Cal. App. 3d 293, 298 (Ct. App. 1970).

456. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 720-a (McKinney 1997) (providing that, with few statutory exceptions, an uncompensated director, officer, or trustee of a nonprofit corporation described in I.R.C. § 501(c)(3) shall not be liable to any person other than the corporation, unless the conduct was grossly negligent or "intended to cause the resulting harm to the person asserting such liability"); see also *Lynch*, 9 Cal. App. 3d at 298.

457. See, e.g., *Alco Gravure, Inc. v. The Knapp Found.*, 479 N.E.2d 752, 756-57 (N.Y. 1985).

458. See, e.g., *Carter v. United States*, 717 F. Supp. 188, 194-95 (S.D.N.Y. 1989).

459. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 717(a) (McKinney 1997).

460. See RESTATEMENT (SECOND) OF TRUSTS §§ 169, 170 (1959).

corporate officer and director to use reasonable care and act in good faith in discharging their responsibilities.<sup>461</sup> Likewise, trustees have a duty of care to administer the charitable trust prudently and to exercise all granted powers reasonably, in good faith, and with due regard for the interests of the beneficiaries.<sup>462</sup>

Breach of any fiduciary duty may result in the filing of a misconduct action against the wrongdoer,<sup>463</sup> a lawsuit to remove or suspend the offender,<sup>464</sup> and in cases involving particularly egregious conduct or a specific statutory violation, a criminal proceeding against the perpetrator.<sup>465</sup> Because the nonprofit corporate veil can be pierced or a trust's cloak set aside so as to impose civil and criminal penalties on wrongdoing officers, directors, and trustees,<sup>466</sup> those individuals have a strong incentive to shield organizational funds from misuse or diversion for inappropriate or unlawful purposes.<sup>467</sup> Guarding against such misappropriation requires due diligence compliance.

Additionally, in order to preserve the income tax exemption of a § 501(c)(3) organization, particularly one making grants to foreign persons or organizations, appropriate due diligence must be undertaken. The nature of the due diligence required in part will depend on whether the organization is a public charity or a private

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461. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 717(a).

462. See RESTATEMENT (SECOND) OF TRUSTS §§ 172-82 (1959) (explaining various duties of trustees).

463. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW §§ 623(a), 717, 720 (McKinney 1997) (permitting the Attorney General, an officer or director of the nonprofit organization, a member of the nonprofit organization by use of a derivative action, and others to bring misconduct actions against officers and directors).

464. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW §§ 706(d), 714(c) (McKinney 1997) (permitting the Attorney General or ten percent of the members of the nonprofit organization to bring an action to remove a director); S.H. & Helen R. Scheuer Family Found., Inc. v. 61 Assocs., 582 N.Y.S.2d 662, 664 (App. Div. 1992) (permitting a member of the nonprofit organization and board of directors to bring a claim for the removal of board members).

465. The Attorney General or other law enforcement agencies can bring criminal proceedings against officers and directors of nonprofit organizations. See, e.g., NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 n.22 (1984); People v. Pymm, 563 N.E.2d 1, 8 (N.Y. 1991); Heidi Evans & Dave Saltonstall, *Indictments in Hale Scandal: Ex-Chief, Hubby Charged with Theft, Forgery*, N.Y. DAILY NEWS, Feb. 6, 2002, at 2; *Shelter Founder's Daughter Sentenced*, CHI. TRIB., Oct. 25, 2002, at 14.

466. See Matthew D. Caudill, *Piercing the Corporate Veil of A New York Not-for-Profit Corporation*, 8 FORDHAM J. CORP. & FIN. L. 449, 462-64 (2003).

467. See *supra* Part II.C (discussing 18 U.S.C. §§ 2339B and 2339C).

foundation.<sup>468</sup> While this Article is unable to address these due diligence requirements in detail, the due diligence required also will vary by the grant size and nature, by the capacity of the grant-making organization, and by the recipient's country, depending on the local infrastructure and on the presence or absence of information sought. At a basic level, if funds are to be granted to nonexempt organizations, the grant-making organization's decision makers must demonstrate that the grantor retains control and discretion over the use of the distributed funds, the use of the funds furthers the grantor's exempt purpose, and records are maintained to establish the use of the funds.<sup>469</sup>

As previously discussed in Part II.C.3.b,<sup>470</sup> the Voluntary Best Practices Guidelines (Guidelines) issued by the Department of the Treasury last year are essentially costly, voluntary due diligence recommendations (not mandates) for grant-making U.S.-based charities and private foundations. They are broad in scope and lacking in detailed specifics. According to the Department of the Treasury, compliance with the Guidelines does not provide a safe haven that will protect a U.S.-based charity or private foundation from either criminal or civil liability.<sup>471</sup> One can infer from the Treasury's assertion regarding the Guidelines' lack of protection against potential liability that the Guidelines represent the Treasury's perception of some "minimal reasonable" due diligence standards.<sup>472</sup> Based upon that reasoning, governmental authorities

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468. Private foundations are subject to special rules under I.R.C. §§ 4942 and 4945, to which public charities are not subject. For further discussion of these provisions, see Crimm, *supra* note 21, at 72-89.

469. See Rev. Rul. 68-489, 1968-2 C.B. 210 (1968); see also Treas. Reg. §§ 53.4942-6 (2003) and 53.4945-5 (2003) (involving foreign grants by domestic private foundations). For further discussion of these provisions, see Crimm, *supra* note 21, at 72-89. Moreover, if funds are distributed to a foreign individual, Revenue Ruling 56-304 requires the domestic charitable organization to make the distribution on a charitable basis, maintain adequate records as to the recipient, the amount and the purpose, the selection process, and the relationship of the recipient to the organization's trustees, officers, substantial contributors, and related entities. Rev. Rul. 56-304, 1956-2 C.B. 306 (1956).

470. See *supra* note 354 and accompanying text.

471. See *supra* note 354 and accompanying text.

472. According to the prepared testimony of David D. Aufhauser, General Counsel for the Department of Treasury, the Voluntary Best Practices Guidelines are important because they "offer a means by which charities can protect themselves against terrorist abuse and are consistent with the principles espoused in both the private and international public sectors."

might view the failure of trustees, officers, and directors of U.S.-based charities and private foundations to comply fully with the Guidelines, or even to go beyond the Guidelines, as a breach of one or more of their fiduciary duties. If that is true, what might it take to insulate officers, trustees, and directors from liability under state statutes, common law, and federal law?<sup>473</sup> Further, is it reasonably possible to undertake sufficient due diligence to achieve such protection? Answering these questions requires a review of the Guidelines.

Among the listed voluntary best practices are recommendations under four broad categories: (1) the development of the U.S.-based charity's or private foundation's own "adequate governing structure";<sup>474</sup> (2) the disclosure and transparency of the organization's governing structure, finances, and fundraising goals;<sup>475</sup> (3) the creation and implementation of adequate financial and accountability procedures;<sup>476</sup> and (4) the establishment and execution of procedures enabling evaluation and review of "foreign recipient organizations" and such organizations' financial operations,<sup>477</sup> including basic vetting of foreign grantee organizations.<sup>478</sup>

The adequate governing structure recommendations are straightforward and include common sense suggestions, although not all organizations currently satisfy the recommendations, particularly the first two. The recommendations are that (1) the board of directors should be an active and independent governing body composed of at least three members who meet at least three times annually; (2) the board should maintain public records of its decisions; and (3) the board should operate in accordance with its governing instruments.<sup>479</sup>

The disclosure and transparency guidelines include: (1) making publicly available a list of board members and the five highest-

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*Prepared Testimony of David D. Aufhauser, supra note 7.*

473. *See supra* notes 301-02 and accompanying text (discussing persons who "should have known" about the provision of material support to terrorists and terrorist organizations).

474. *See VOLUNTARY BEST PRACTICES, supra* note 354, at 2.

475. *See id.* at 3.

476. *See id.* at 4.

477. *See id.* at 5.

478. *See id.*

479. *Id.* at 2-3.

ranking key employees, and their salaries; (2) identifying subsidiaries and other affiliates that receive funds from the charity; (3) providing on request an annual report that describes the charity's finances, purposes, programs, activities, tax-exempt status, and the structure of its board and its members' responsibilities; (4) making financial statements available; (5) soliciting funds in a manner that informs donors how and where donations will be expended; (6) stating clearly the charity's goals and purposes so that persons examining the disbursements can determine whether the charity adheres to those goals; and (7) substantiating on request the veracity of solicitation and informational materials.<sup>480</sup>

The financial practice and accountability provisions recommend: (1) an annual budget adopted and overseen by the charity's board; (2) the appointment of a financial/accounting officer responsible for daily control of funds; (3) selection and review of finances by a certified public accounting firm if the charity's total annual gross income exceeds \$250,000; (4) the use of generally accepted accounting principles with respect to the receipt and disbursement of funds, the name of each recipient of funds, and the amount of funds received; (5) the deposit of all cash funds into the charity's own bank account upon receipt; and (6) disbursement of funds by check or wire transfer rather than in cash.<sup>481</sup>

To enable evaluation of potential foreign recipient/grantee organizations, the Guidelines' recommendations suggest establishing procedures for collecting basic information. The recommendations suggest procedures for collecting information such as the organization's name in English, its language of origin, its physical place of jurisdiction, its legal place of jurisdiction, its contact information, its principal purposes, the contact information of subcontracting organizations that it utilizes, existing sources of income, and organizational documents.<sup>482</sup>

Finally, the Guidelines for basic vetting recommend that the U.S.-based charity or private foundation be able to demonstrate that it: (1) conducted a reasonable search of public information about the foreign recipient/grantee organization; (2) verified that the foreign

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480. *Id.* at 3-4.

481. *Id.* at 4-5.

482. *Id.* at 5-6.

organization does not appear on a list of any government or the United Nations as having links to terrorism or money laundering; (3) obtained identifying information on key staff; (4) required the organization to certify that it does not support terrorism or deal with persons who support terrorism; (5) identified and determined as legitimate the foreign organization's relations with financial institutions with whom it maintains accounts and seeks bank references; (6) requires periodic reports from the organization on its operations and disbursement of funds; (7) undertakes reasonable steps to ensure that the charity's funds are not used for terrorism; and (8) performs on-site audits of the organization on a regular basis.<sup>483</sup>

The Guidelines have been criticized as onerous, beyond the abilities of most grant makers, and unlikely to have an impact on terrorist financing.<sup>484</sup> The final category—procedures to enable

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483. *Id.* at 6-7.

484. See Harris, *supra* note 356, at 1009-10; Nancy Ortmeyer Kuhn, *Best Practices for Nonprofits to Stop Unintended Funding of Terrorists*, BNA DAILY TAX REP., May 19, 2003, at J1, J3; *Foundation Official Reports on Meeting on "Best Practices" Guidelines*, Tax Analysts: Doc. 2003-2405, Jan. 24, 2003, 2003 TNT 17-15; *Reps Say Guidelines for Charities on Terrorist Funding May Be Costly, Impractical*, 28 EOTR WEEKLY 1 (Nov. 25, 2002).

The IRS recently announced that it seeks public comments on the Guidelines to clarify how diversions of charitable funds for noncharitable purposes might be averted. I.R.S. Announcement 2003-29 I.R.B. 928 (May 19, 2003). In response to the IRS, Independent Sector, in cooperation with InterAction, recently issued public comments on the Guidelines. PUBLIC COMMENT ON "INTERNATIONAL GRANTMAKING AND INTERNATIONAL ACTIVITIES BY DOMESTIC 501(C)(3) ORGANIZATIONS" SUBMITTED JOINTLY BY INTERACTION AND INDEPENDENT SECTOR, (July 18, 2003) [hereinafter PUBLIC COMMENT ON INT'L GRANTMAKING], available at <http://www.independentsector.org/PDFs/IRScomments.pdf> (last visited Mar. 9, 2004). Using the experience of Independent Sector members, primarily domestic public charities, many of which have had long track records of global grant making and have longstanding relationships to foreign grantees, the comments clearly indicate that many of the "basic vetting" Guidelines "go way beyond what is practiced and practicable, requesting an overly broad sweep for information, much of it of no relevance to the charitable endeavor." *Id.* at 9. The comments criticize the Guidelines as having the potential to require substantial administrative costs, to impair, and in many cases, to preclude domestic nonprofit organizations from operating abroad effectively, and to end many essential humanitarian and development programs. *Id.* at 10. The comments further state that much of the requested information in the Guidelines may not be available or may be impossible to obtain, particularly by domestic grant makers without overseas field operations. *Id.* Also, the nature of the foreign government, the technology, the location of supported foreign programs, and suspicion of Americans by foreigners, particularly those operating in Muslim countries and Palestine, make it unlikely that charities will be able to obtain much of the basic vetting information recommended by the Guidelines. *Id.* at 11-12.



evaluation of any potential foreign recipient/grantee organization and for "basic" vetting of any such foreign recipient organization<sup>485</sup>—is reminiscent of the expenditure responsibility rule of I.R.C. § 4945(h).<sup>486</sup> I.R.C. § 4945(h) has been criticized as burdensome and a possible obstacle to global philanthropy, particularly for domestic private foundations without relatively large endowments or revenues and without substantial U.S. and foreign staffs or established global networks.<sup>487</sup> In much the same way, implementation of the Guidelines, particularly its latter category of recommendations, would be costly and administratively burdensome.

These criticisms certainly ring true with respect to the basic vetting recommendations. The Guidelines first recommend that a grant-making, U.S.-based charity or private foundation check public records about any intended foreign recipient organization. How would a grant-making organization check foreign language records in a foreign country where record systems may not be state of the art, where documents may be scattered geographically as well as throughout governmental administrative, judicial, and other operations? Is it possible to undertake a thorough verification that

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On July 17, 2003, The National Council of Nonprofit Associations (NCNA) issued its comments in response to IRS Announcement 2003-29. Letter from Audrey R. Alvarado, Executive Director, NCNA, to Robert Fontenrose, I.R.S. (July 17, 2003), *available at* <http://www.ncna.org>. The NCNA stated its support of the Treasury Department in strengthening rules "to preclude the diversion of charitable assets for non-charitable purposes" and reiterated its advocacy for nonprofit organizations' accountability. *Id.* The NCNA criticized the Treasury Department for not seeking more input from the nonprofit sector before issuing Guidelines. *Id.* It also suggested that the substance of many of the Guidelines are "vague and unclear," "have no relevance to federal income tax requirements at all," and "are redundant with existing federal law, and thus not necessary." *Id.* Also, the NCNA questioned: (1) the purpose of the Guidelines given the preamble's explicit statement that compliance does not preclude criminal or civil sanctions; (2) whether the Guidelines are intended to apply to private foundations, grant-making institutions, and private for-profit entities; and (3) whether the government intends them to be purely voluntary or mandatory. *Id.* If mandatory, the government should promulgate enforceable rules pursuant to the appropriate procedure. *Id.*

485. See *VOLUNTARY BEST PRACTICES*, *supra* note 354, at 5-7.

486. See I.R.C. § 4945(h) (2000). The expenditure responsibility rule, applicable under certain circumstances, requires a domestic private foundation to satisfy due diligence standards in making grants to foreign recipients. See Treas. Reg. § 53.4945-5(b), (c), and -6(c) (2003); see also Crimm, *supra* note 21, at 64-67 & nn.177-84 (discussing the expenditure responsibility rule).

487. See *PUBLIC COMMENT ON INT'L GRANTMAKING*, *supra* note 484, at 10.

a foreign recipient organization does not appear on any U.S. or foreign governmental or U.N. list linking the organization to terrorism, money laundering, or other illegal activities? At the very least, apart from any list that a particular foreign country might maintain separately, this part of the basic vetting process would require a check of the following sources,<sup>488</sup> which, for convenience are accessible through the Web site of the United States International Grantmaking Project:<sup>489</sup> (1) OFAC's regulations for exporting goods;<sup>490</sup> (2) OFAC's list of SDNs;<sup>491</sup> (3) the European Union's list, pursuant to EU regulation 2580<sup>492</sup> (4) the State Department's Terrorist Exclusion List;<sup>493</sup> and (5) the United Nation's list pursuant to U.N. Security Council Resolutions 1267 and 1390.<sup>494</sup>

Further consideration of the vetting recommendations raises a plethora of other questions. For example, how does a grant-making charity or private foundation undertake an adequate investigation from the United States to obtain sufficient information on whether the key employees and governing body of the foreign recipient organization are well intentioned and loyal? Must this search be performed abroad to be potentially and reasonably thorough? With respect to a signed statement submitted by a potential foreign recipient organization declaring that it does not support terrorists or terrorism, how much credence should the grant-making organization attach to the statement? Is it reasonable to rely upon such a

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488. In April 2003, the General Accounting Office recommended that the numerous "watch lists" should be consolidated. See GAO, GAO-03-322, *TERRORIST WATCH LISTS SHOULD BE CONSOLIDATED TO PROMOTE BETTER INTEGRATION AND SHARING*, (2003), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-03-322> (last visited Feb. 7, 2004).

489. See United States International Grantmaking Project, at <http://www.usig.org> (last visited Feb. 7, 2004).

490. See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT OF THE TREASURY, *FOREIGN ASSETS CONTROL REGULATIONS FOR EXPORTERS AND IMPORTERS* (2004), available at <http://www.ustreas.gov/offices/enforcement/ofac/regulations/t11facei.pdf> (last visited Mar. 9, 2004).

491. See OFAC SDN LIST, *supra* note 105.

492. Council Decision of 27 June 2003, Official Journal of the European Union, L160/81, available at <http://europa.eu.int/eur-lex/en/index.htm> (last visited Feb. 12, 2004).

493. U.S. Dep't of State, Terrorist Exclusion List, at <http://www.state.gov/s/ct/rls/fs/2002/15222.htm> (last modified Feb. 18, 2003).

494. United Nations, *The New Consolidated List of Individuals and Entities Belonging to or Associated with the Taliban and Al-Qaida Organisation as Established and Maintained by the 1267 Committee*, available at <http://www.un.org/Dcos/sc/committees/1267/1267ListEng.htm> (last visited Mar. 9, 2004).

statement after checking all governmental and United Nations prohibited recipient lists, or do good faith and reasonableness require more, particularly if the foreign recipient organization operates in a community or country that is predominantly composed of religious fundamentalists or people who may be politically antagonistic to American policies and values? With respect to banking relationships of the foreign recipient organization, how extensive a search is required to ensure legitimacy, given that an organization can have numerous relationships with financial systems, some of which may be open and legitimate but some of which may be hidden and unlawful? What further steps can be taken to assure that the funds of the grant-making institution are not diverted for terrorist purposes by the foreign recipient organization or its employees? Can an accounting or audit be taken at face value, or must there be continual on-site observation or supervision of programs?

Short of deciding that their § 501(c)(3) organizations should abstain from global philanthropy, officers, directors, and trustees of these organizations are left in a quandary as to what they must do to protect themselves and their organizations from potential civil and criminal liability on both the state and federal level. Now that the Guidelines are in the public domain, the measure of good faith and reasonable care required to discharge fiduciary duties would seem to encompass compliance with the Guidelines. Like the limited number of financially well-endowed private foundations that have personnel or networks abroad that successfully have complied with the expenditure responsibility due diligence rules, some U.S.-based charities and private foundations will develop and implement adequate procedures to comply with the Guidelines. Nonetheless, such compliance may not fully protect the organization or its officers, directors, or trustees from potential liability. Moreover, meaningful, let alone full, due diligence compliance seems virtually impossible especially for those charities and private foundations that have limited resources and want to make grants to foreign recipient organizations in technologically, linguistically, and politically inaccessible locales. If the charitable mission of a domestic § 501(c)(3) organization does not necessitate financial support of projects abroad, numerous directors, officers, and

trustees may opt to concentrate instead on domestic grant making. Such results would not bode well for an expansion of, or even stability in, the pecuniary level of global philanthropy.

### *B. Due Diligence by Donors*

Donors also are well-advised to undertake their own due diligence efforts prior to making any contribution to a domestic § 501(c)(3) organization.<sup>495</sup> There are several means by which donors may access and examine information about particular § 501(c)(3) organizations. Aside from obtaining literature and checking Web sites of specific organizations, there are a number of private, nonprofit watchdog organizations in the United States that work to safeguard charitable giving by promoting accountability by, and transparency of, domestic § 501(c)(3) organizations. Some of these watchdog organizations provide information on charitable organizations and make it readily accessible to the public, usually via Web sites. For example, the Better Business Bureau Wise Giving Alliance (BBB), focusing on hundreds of national organizations that conduct broad-based fundraising, collects and distributes materials about the organizations' governance, fundraising practices, programs, and finances. The BBB uses general guidelines, standards, and measures to compare the efficiency and effectiveness of select organizations and publicizes this information on its Web site.<sup>496</sup> Another group, the Philanthropic Research Institute, includes Guidestar, which maintains an internet database containing information on § 501(c)(3) organizations, including documents filed with the IRS, such as informational tax returns (Forms 990 and 990-PF).<sup>497</sup> Yet another, though more specialized, organization, the

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495. See Rev. Rul. 66-79, 1966-1 C.B. 48 (1966) (amplifying Rev. Rul. 63-252, 1963-2 C.B. 101 (1963)). This ruling requires that income tax deductibility for contributions to domestic charities that utilize the donations for foreign grants depends on the domestic charity maintaining "control and discretion" over the donated funds to ensure their use furthers the charity's exempt purposes. *Id.* at 48-49. The charities, independent of the donor, must review and approve the use of the donated funds. *Id.* The rulings provide guidance as to what constitutes sufficient "control and discretion." See Crimm, *supra* note 21, at 64-67 & nn. 177-81.

496. See BBB WISE GIVING ALLIANCE, STANDARDS FOR CHARITY ACCOUNTABILITY, available at <http://www.give.org/standards/index.asp> (last visited Mar. 9, 2004).

497. See GuideStar, Evaluating and Selecting Organizations that Match Your Giving Plan,

Evangelical Council for Financial Accountability is an accreditation organization that accredits organizations within its religious community based on an examination of the organization's financial practices and accomplishments. It too maintains an informational Web site on its more than 1100 member organizations.<sup>498</sup>

Several other resources are available to donors. Because state Attorneys General are responsible for supervising charitable organizations and their professional fundraisers, donors might consult the state Attorney General's office in which the § 501(c)(3) organization is registered and operates and in which the fundraiser operates. Finally, as discussed in Part V.A, with respect to § 501(c)(3) organizations, donors should consult U.S. and foreign governmental lists and the U.N.'s list of organizations and individuals who are considered terrorists, terrorist organizations, or supporters of terrorism.<sup>499</sup> The importance of due diligence cannot be overstated; donors, however, must realize that consultation of these various sources may not fully protect them.

#### CONCLUSION

Over the past several years, terrorist threats and attacks in the United States and abroad have prompted the government numerous times to declare the nation on "high alert" status, warning of potential intrusion and harm. The government has embarked on a multifaceted war on terrorism, including efforts to deprive terrorists and terrorist organizations of financial support. To accomplish this goal, Congress has enacted legislation, President Bush has issued Executive Order 13,224, and the Department of the Treasury and other governmental agencies have aggressively pursued regulatory and law enforcement efforts.

The government's evolving financial war on terrorism has had far-reaching effects that extend well beyond its impact on terrorists and foreign terrorist organizations. Some governmental attention has centered on domestic § 501(c)(3) organizations, the backbone of

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available at <http://www.guidestar.org/learn/evaluate.jsp> (last visited Mar. 9, 2004).

498. See Evangelical Council for Financial Accountability, Member Directory, at <http://www.ecfa.org> (last visited Mar. 9, 2004).

499. See *supra* notes 490–94 and accompanying text.

global philanthropy. Governmental reactions have been instigated by reports of the reprehensible use of § 501(c)(3) organizations, especially Muslim organizations, by unsavory individuals for the collection, diversion, and distribution of financial resources to terrorists and terrorist organizations. Terrorists and their supporters have targeted domestic § 501(c)(3) organizations—often religious organizations, which generally enjoy less governmental scrutiny and have long been considered upstanding pillars of American society—as ripe for exploitation. As a result of this exploitation, the reputations of Islamic and other domestic § 501(c)(3) organizations have been tarnished. Part of the government's announced response to this terrorist infiltration of the charitable community was to "seek to ensure a regulatory climate in which donors can give to charities without fear that their donations will be misused to support terrorism."<sup>500</sup>

It is not clear, however, that the government has achieved that goal. Instead, the government's arsenal of weapons—strengthened statutory authority, regulatory efforts, and improved law enforcement capabilities—that can be used in its financial war on terrorism has engendered fears and concerns among some well-intentioned and law-abiding donors and among domestic § 501(c)(3) organizations' officers, directors, and trustees.<sup>501</sup> As this Article has demon-

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500. See *Testimony of Kenneth W. Dam*, *supra* note 2.

501. Government officials have stated a contrary position. In his prepared testimony, David D. Aufhauser, General Counsel to the Department of the Treasury stated:

But we must remember that the problem underlying this concern is the abuse of charities by terrorist organizations. It is this abuse, not the consequential freezing actions taken by our government, which undermines donor confidence. In the absence of our designations, money intended for humanitarian assistance would not be frozen; rather, it would finance further destruction. Our designation actions protect U.S. charitable organizations and innocent donors from abuse by illuminating those charities that finance terror rather than need. These designations are essential in restoring donor confidence in the integrity of the charitable sector and form a crucial part of our larger strategy to protect charities from terrorist abuse. To assist U.S.-based charities concerned that their distribution of funds abroad might reach terrorist-related entities and thereby trigger a blocking action on the part of the Treasury Department, the Department has developed guidelines for all U.S.-based charities.... The Treasury Department developed these guidelines in response to requests from the Arab American and American Muslim communities, who reported a reduction in charitable giving and an increased apprehension among donors as a consequence of the Treasury Department's blocking of the three domestic

strated, these concerns are not totally unfounded. Protection against potential civil and criminal liabilities is costly and burdensome, and even impossible to obtain for many individuals and organizations. One natural, albeit unfortunate, outcome has been that some donors, especially Muslims, have reduced their level of, or abstained from, charitable giving to domestic § 501(c)(3) organizations, particularly Muslim charities. Furthermore, leaders of some of these philanthropic institutions have decided that their organizations should abstain from global philanthropic endeavors. While it is true that abuses by terrorists and their private supporters have tainted the reputations of some charities, and to some extent corrupted the sanctity of charitable giving, our government must be wise in waging its financial war on terrorism. It must guard against overzealous reactions, unjustifiable assertions, and the imposition of unwarranted sanctions against well-intentioned and law-abiding donors, domestic § 501(c)(3) organizations, and those organizations' officers, directors, and trustees.<sup>502</sup>

If such cautions are not heeded by our government, widespread withdrawal of legitimate global philanthropic support by U.S. donors and charitable institutions readily could follow. A wholesale blight on the provision of financial support for humanitarian aid, the promotion of health, the enhancement of education and other charitable causes, the facilitation of economic development, the building of social capital, and the strengthening of social stability could fuel the destabilization of struggling people abroad and enhance the appeal of terrorist groups to these people. In that event, the government ironically would have exacerbated, not reduced, one

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charities. Although wholly voluntary, the guidelines, if implemented, offer a means by which charities can protect themselves against terrorist abuse and are consistent with the principles espoused in both the private and international public sectors.

*Prepared Testimony of David D. Aufhauser, supra note 7.*

502. While not necessarily suggesting overzealousness, but likely cautiousness, to broaden a Congressional investigation into alleged ties between tax-exempt organizations and terrorist groups, the Senate Finance Committee sent a letter on December 22, 2003 to the I.R.S. requesting confidential tax records, including donor lists, of Muslim charities and foundations. See Dan Eggen & John Mintz, *Muslim Groups' IRS Files Sought; Hill Panel Probing Alleged Terror Ties*, WASH. POST, Jan. 14, 2004, at A1.

ultimate goal of fundamentalist and radical terrorists: the disruption of globalism.<sup>503</sup>

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503. *See supra* notes 20-21 and accompanying text.