

# Notes

## The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?

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## Introduction

On December 4, 2001, federal agents raided the offices of the Holy Land Foundation for Relief and Development, arrested the organization's officers, and froze \$5 million worth of assets.<sup>1</sup> Ten days later on December 14, 2001, the Global Relief Fund suffered the same fate when its assets were seized, and its co-founder Rabih Haddad was arrested.<sup>2</sup> That same day Benevolence International's assets were also frozen, and its U.S. citizen president, Enaam Arnaout, was arrested and taken into custody on charges of providing material support to terrorism.<sup>3</sup> Prior to their effective closure, the three organizations were the largest Islamic charities in the United States.<sup>4</sup> Although each charitable organization had been operating for more than a decade,<sup>5</sup> all three were systematically raided and shut down soon after the federal government's post-9/11 official declaration of its war on terrorism—a war that includes prosecuting anyone who provides material support to designated terrorist organizations.<sup>6</sup> By February 2003, the Department of Justice proudly announced its completion of 70 similar investigations into terrorism financing, designating 36 entities as terrorist organizations, and freezing over \$113 million in financial assets of 62 organizations allegedly supporting terrorism.<sup>7</sup> The fact that almost every criminal terrorism case filed after the September 11, 2001 terrorist attacks has included a charge of providing material support to a terrorist organization reveals the

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1. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 64 (D.D.C. 2002); John Mintz & Neely Tucker, *Judge Backs U.S. on Assets Seizure*, WASH. POST, Aug. 10, 2002, at A12.

2. *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 784-85 (N.D. Ill. 2002); David Shepardson, *Ruling Cuts at Justice Dep't's New Authority*, DETROIT NEWS, Aug. 27, 2003, at A1.

3. *Benevolence Int'l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935, 936-37 (N.D. Ill. 2002).

4. Dan Eggen & John Mintz, *Muslim Groups' IRS Files Sought: Hill Panel Probing Alleged Terror Ties*, WASH. POST., Jan. 14, 2004, at A1 ("The United States has frozen more than \$136 million in assets allegedly linked to al Qaeda or other terrorist groups and has effectively shut down the operations of the largest U.S.-based Islamic charities.").

5. Tanya Weinberg, *Muslims Feel Burden of Area's Ties to Terror; Many Suspects Have South Florida Link*, S. FLA. SUN-SENTINEL, Apr. 6, 2003, at 1B (citing the establishment of Benevolence International in 1993); see Shepardson, *supra* note 2 (citing the establishment of the Global Relief Fund in 1992); Steve McGonigle, *Ex-Agent Says Criminal Probe of Richardson, Texas, Firm Based on Charity Data*, DALLAS MORNING NEWS, Dec. 20, 2002, at 33A (citing the establishment of the Holy Land Foundation in 1989).

6. Richard Willing, *Trial For Muslim Terror Suspects is 'Test For Justice'; Prosecutors Say Group Belonged to Sleeper Cell*, USA TODAY, Mar. 18, 2003, at A11 (targeting suspects with charges of providing material support is key to stopping terrorists before they can strike).

7. Press Release, United States Department of Justice, Feb. 2003; William March, *Al-Arian Inquiry Took Turn After 9/11*, TAMPA TRIB., Feb. 23, 2003, at 1; Chaya Gil, *The Links Between Local Charities and Terrorist Groups: An Israeli Perspective*, CHI. DAILY HERALD, Jan. 10, 2003, available at 2003 WL 2842724 (citing the arrest of Jamil Sarsour in Milwaukee and the arrest of four men in Texas for providing material support to terrorism).

significance of material support laws as the linchpin of the ongoing war on terrorism.<sup>8</sup>

To many unsuspecting Americans, these events represent success stories on the part of the United States government with respect to the legitimate goal of terrorism prevention. To others, they raise red flags concerning fundamental constitutional rights.<sup>9</sup> Although critics of anti-terrorism laws generally accept the objective of terrorism prevention, the means currently utilized by the federal government in pursuing these legitimate ends are highly questionable from a legal as well as a normative perspective. For example, are these laws imposing guilt by association on individuals that support legitimate humanitarian aid projects? Do these laws provide adequate opportunity for defendants to face their accusers, the United States government in this case, and provide evidence in defense of their proclaimed innocence? Are these laws being used as a smoke screen to persecute politically unpopular individuals and groups affiliated with Islam and/or the Middle East rather than to eliminate bona fide criminal activity?

This Article attempts to answer these questions by illustrating how the current laws on designating foreign terrorist organizations and providing material support to terrorist organizations may violate organizations' and individuals' constitutional Due Process and First Amendment rights. Two specific fact patterns are the focus of this Article with respect to the constitutional analysis.

First, individuals in the United States who have knowingly donated large sums of money to the three Islamic charities previously mentioned are finding themselves under investigation for providing material support to terrorist organization. These investigations are taking place despite the individuals' original intent for their money to be spent on humanitarian projects in the Middle East or Central Asia. These donors not only lacked any specific intent to support terrorism, but they may have considered their donations to be a form of political expression and

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8. David Cole, *The New McCarthyism: Repeating History In The War On Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 8-9 (2003); see also Council on American-Islamic Relations – New York Chapter, *Sheikh Ala Al-Sadawi's Sentencing Hearing: No Charges of Terrorism, But Allusions Are Made*, Nov. 12, 2003 (criticizing U.S. government officials for "insinuat[ing] terrorism related activities to a case where the charges do not include those activities"); Rebecca Carr & Eunice Moscoso, *Virginia Group Finances Terror, U.S. Says*, AUSTIN AMERICAN-STATESMAN, Nov. 16, 2003, at A1 (describing the government's targeting of a network of 100 Islamic charities, educational organizations, and companies collectively called the Safa Group for conspiring to support several Islamic terrorist groups, yet after 18 months of investigation there have yet to be formal terrorism charges due to insufficient evidence of wrongdoing).

9. Of the 6,400 cases referred to federal prosecutors by investigators, only 2,001 cases had filed charges and 879 of those cases resulted in conviction. Of the 879 convictions, five received prison terms of 20 or more years, 23 received sentences between 5 and 20 years, 373 received between 1 day and 5 years, and the remaining 478 received no prison time at all. Rebecca Carr, *Terrorism Arrests Yield Little Jail Time*, AUSTIN AMERICAN-STATESMAN, Dec. 8, 2003, at A1. This low yield further discredits the federal government's anti-terrorism crusade as exaggerated and misdirected.

association.<sup>10</sup> The donations, for instance, may have represented their belief in the rights of the children in war-torn areas, such as the West Bank and Gaza, to have food, shelter, and clothing despite the prevalent acts of violence committed against their communities as well as by members of their communities.<sup>11</sup> In the context of pre-war, Saddam-run Iraq, U.S. donors may have given their money to Global Relief Fund to sponsor an Iraqi orphan as a form of political protest against the United States' sanctions on Iraq<sup>12</sup> and against Saddam's starvation of his people through the misallocation of state funds.<sup>13</sup>

The second fact pattern is similar to the first, but relates to the charitable activities of U.S.-based philanthropic organizations. These Islamic charities openly advertised their participation in humanitarian projects in the Middle East and Central Asia through their monetary donations to orphanages, medical clinics, hospitals and schools. Due to the reality of the situation in these war-torn, impoverished areas, some of the orphanages, clinics, and schools may receive money from a variety of sources, including from multi-purpose organizations,<sup>14</sup> such as Hamas (also known as the Islamic Resistance Movement), in order to stay open.<sup>15</sup> Although these civil institutions are not affiliated with the

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10. Manuel Roig-Franzia, *Florida Arrest Renews Debate Over Muslim Charities*, WASH. POST, Jan. 4, 2003, at A4 (describing the U.S. government's prosecution of Jesse Maali because of his large donations to Islamic charities during the 1990s and the government's inability to charge him for providing material support due lack of evidence); Steve McGonigle, *FBI Affidavit Says Dallas-Area High-Tech Firm Made Payments to Hamas Leader*, KNIGHT-RIDDER TRIB. BUS. NEWS, Feb. 22, 2003, available at 2003 WL 13607690 (describing the investigations of Mousa Abu Marzook, Bayan Elashi, and four brothers for providing material support to terrorism); Jerry Markon, *Prosecution Challenged in Islamic Charity Case: Judge Questions Numerous Allegations*, WASH. POST, Dec. 19, 2003, at A32 (describing the government's attempts to persuade a U.S. district court in Alexandria to impose a ten year penalty on Soliman S. Biheiri for providing material support to terrorism through his "social relationship" with Mousa Abu Marzook).

11. See, e.g., Maureen Haydeen, *Ramadan's Tradition in Turmoil*, COURIER & PRESS NEWS, at [http://www.myinky.com/ecp/news/article/0,1626,ECP\\_734\\_2379259,00.html](http://www.myinky.com/ecp/news/article/0,1626,ECP_734_2379259,00.html). "I think it's in our interest as Americans to make sure that money is getting in to the hands of the neediest people," stated the head of the Islamic Society of North America. *Id.* Yassar el-Banna, *Palestinian Orphans Left out in Ramadan*, at <http://www.islamonline.net/English/News/2003-11/05/article03.shtml> (Nov. 5, 2003) (documenting the deprivation of 15,000 Palestinian orphans of much needed aid after U.S. President George Bush froze the assets of five pro-Palestinians charities abroad).

12. George Bisharat, *Sanctions as Genocide*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 379, 381 (2001) (stating that "[i]n the twelve years that have followed [the imposition of sanctions], as many as one to two million Iraqis may have died as a result of sanctions, many of them children under the age of five").

13. U.S. Government Information and Resources, *Saddam Hussein 10 Years Later: No Regard for Humanitarian Needs of Iraqi People, Says UN*, at <http://usgovinfo.about.com/library/weekly/aa021601c.htm> (last visited Sept. 9, 2003).

14. Multi-purpose organizations are those that have both military and non-military, humanitarian branches of their organizations. The Irish Republican Army is another example. See Evelyn Brody, *The Twilight of Organizations Form of Charity: Musings on Normal Silber, A Corporate Form of Freedom: The Emergency of the Modern Non-Profit Sector*, 30 HOFSTRA L. REV. 1261, 1262-63 (2002) (describing the problems of dealing with multi-purpose bona fide charities that incidentally engage in illegal activities).

15. Hamas has been officially designated as a foreign terrorist organization since October 8, 1997. 62 Fed. Reg. 52650 (Oct. 8, 1997).

military branches of the local multi-purpose organizations, the U.S. government is treating them as linked with terrorism for purposes of laws on providing material support to terrorism. Therefore, if an orphanage, school, hospital, or medical clinic receives even \$1 from the non-militant, social welfare branch of a local multi-purpose organization, then no U.S. organization or donor may knowingly contribute any funds to these local institutions directly or via a U.S.-based charitable organization.<sup>16</sup> Ultimately, innocent, impoverished individuals such as children, pregnant women, the sick, the elderly, and orphans that have nothing to do with terrorism (and in fact bear the brunt of the ongoing violent conflict) are collectively being punished for their condition.<sup>17</sup> The U.S.-based charities as well as U.S. donors, including those who support the war on terrorism, may reasonably disagree on political grounds with the U.S. government's reasoning. Moreover, donors may believe that at the very least they should retain their due process rights with respect to having their First Amendment rights constrained.

Accordingly, this Article begins by describing the legal framework in which such designations occur, the various ways in which an organization can be designated as a foreign terrorist organization (FTO), the limits of judicial review, and the relationship between the designation process and the criminal provisions and criminal prosecutions on providing material support to designated organizations. Part II explains the comprehensive implications, for individuals and organizations, of designating an organization as an FTO, paying particular attention to criminal sanctions. Part III challenges the reasoning applied in existing case law in regard to procedural and substantive Due Process implications of FTO designation and providing material support to FTOs. Part IV challenges the courts' reasoning in providing material support cases with respect to First Amendment freedom of expression and association rights. Part IV emphasizes the past and ongoing targeting of Arab and Muslim individuals and organizations with respect to the enforcement of laws related to terrorism. Finally, Part V concludes with some recommendations on how to improve the existing FTO designation process and the criminal provisions for providing material support to FTOs or terrorist activities to minimize the risk of violating the Due Process Clause and First Amendment and avoid erroneous results.

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16. Benjamin Duncan, *US Islamic Charities In Trouble*, ALJAZEERA.NET, at <http://english.aljazeera.net/NR/exeres/F447DB5C-38CB-472C-AD-C22B75D17E56.htm> (Dec. 7, 2003) (describing the stringent and burdensome guidelines issued by the Treasury Department advising Islamic charities to "ensure that no individual employees of any foreign recipient organizations or subcontractors of those organizations support terrorism in any way").

17. See, e.g., *id.* (stating that the post-9/11 drop-off in funding is only hurting the people who need it the most, those that are primarily worried about where their next meal is coming from); el-Banna, *supra* note 11 (documenting the deprivation of 15,000 Palestinian orphans of much-needed aid after U.S. President George Bush froze the assets of five pro-Palestinians charities abroad).

The argument proceeds as follows: (1) the FTO designation process is inadequately transparent, creating a high risk of incorrect designations and erroneous deprivations of fundamental interests of liberty and property; (2) judicial review of the designation process should include a defendant's counter-evidence rather than be limited to an administrative record completely controlled by a federal official;<sup>18</sup> (3) the *mens rea* element for providing material support to terrorist organizations or terrorist activities should be changed from 'knowingly' to 'intentionally'; and (4) courts should protect individuals' and organizations' First Amendment freedom of expression and association rights by applying strict scrutiny with respect to accusations that a defendant aided terrorist organizations or activities. In the alternative, if intermediate scrutiny is the proper judicial test, then the existing criminal provision is not sufficiently narrowly tailored to protect First Amendment rights. Such a shortcoming can be overcome by applying the third recommendation above of changing the *mens rea* to "intentionally."

This Article's analysis is deliberately limited to the provision of material support in the form of money and physical assets rather than military training. Cases addressing visits to an Afghanistanian training camp are assumed to be of a different nature than attempts to provide humanitarian aid to impoverished individuals abroad, and therefore are beyond the scope of this analysis.<sup>19</sup> The Article focuses more on the implications of the laws for individuals who seek to donate money to purely humanitarian causes abroad rather than those contesting whether or not conduct is terrorism such that its assistance warrants criminal sanctions. For example, many individuals who merely intended to donate money to humanitarian projects in the Middle East find themselves subject to aggressive federal scrutiny and investigation. Numerous individuals who donated large sums of money to the above mentioned Islamic charities, prior to their FTO designations, are finding themselves targets of federal investigations for providing material support to terrorist organizations.<sup>20</sup> Observers of these individuals' ordeals are subsequently deterred from donating money or property to any humanitarian projects affiliated with the Middle East or Islam,

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18. See *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 19 (D.C. Cir. 1999) ("The information recited is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.").

19. *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002); *United States v. Goba*, 220 F. Supp. 2d 182 (W.D.N.Y. 2002).

20. See Roig-Franzia, *supra* note 10, at A4 (describing the investigation of Jesse Maali); see also March, *supra* note 7 (describing the investigation of Al-Arian); Gil, *supra* note 7 (citing the arrest of Jamil Sarsour in Milwaukee and the arrest of four men in Texas for providing material support to terrorism).

resulting in a chilling effect and suppression of their freedom of expression and association.<sup>21</sup>

## I. DESIGNATING A FOREIGN TERRORIST ORGANIZATION

This Section explains the two most common methods by which organizations have been designated as a “foreign terrorist organization.” The first is under the Anti-Terrorism and Effective Death Penalty Act of 1996<sup>22</sup> (AEDPA), and the second is under the International Emergency Economic Powers Act<sup>23</sup> (IEEPA). The AEDPA imposes some, albeit insufficient, limitations on the Executive’s power to designate an FTO. Meanwhile, the IEEPA only requires a declaration of an emergency in order to unleash the President’s plenary powers.<sup>24</sup> The latter has undoubtedly been deliberately used more frequently against the Islamic charities to offset the burden of gathering the dearth of evidence otherwise necessary to freeze their assets.

In order for an organization to qualify for designation as an FTO under the AEDPA, it must meet three qualifications.<sup>25</sup> First, the organization must be “foreign.”<sup>26</sup> Second, the organization must engage in terrorism.<sup>27</sup> The statute includes in the definition of terrorism the solicitation of funds or other things of value for a terrorist activity or a designated terrorist organization, and committing an act that the actor knows or should know affords material support to a terrorist activity or organization.<sup>28</sup> Third, the organization’s terrorist activities must impact

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21. See Haydeen, *supra* note 11 (discussing hesitancy of Muslims in America to donate to Islamic charities and humanitarian aid in the Middle East out of fear of criminal prosecution for providing material support to terrorism); Laura Goldstein, *Muslims Hesitating on Gifts As U.S. Scrutinizes Charities*, N.Y. TIMES, Apr. 17, 2003, at B1 (noting American Muslim’s fear of donating to Islamic charities due to federal government’s aggressive campaign against Islamic charities and donors in the United States); Madhu Krishnamurthy, *Fears About Charities Force Muslims to Change How They Give*, DAILY HERALD, Nov. 11, 2003, at [www.dailyherald.com/mchenry/main\\_story.asp?intID=3793610](http://www.dailyherald.com/mchenry/main_story.asp?intID=3793610); Duncan, *supra* note 16 (stating that the biggest reason for the 40% reduction in financial donations to Islamic charities since Sept. 11, 2001 is “a fear that the unproven allegations made against the [Muslim] charities will be leveled against the donors”).

22. Pub. L. No. 104-32, 110 Stat. 1214 (effective April 24, 1996) [hereinafter AEDPA].

23. 50 U.S.C.A. §§ 1701-1707 (West 2003) [hereinafter IEEPA].

24. *Id.* at § 1701(a) (2003).

25. 8 U.S.C.A. § 1182(a)(3)(B)(vi) (West 2003).

26. *Id.* at § 1182(a)(3)(B)(vi)(I).

27. *Id.* at § 1182(a)(3)(B)(iii) (defining terrorist activities as “any activity which is unlawful under the laws of the place where it is committed (of which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State)” and involves hijacking a vessel, seizing or detaining and threatening to kill, injure, or continue to detain another individual in order to compel a third person to do or abstain from doing any act, an assassination, the use of any biological weapons, explosive, or firearms with the intent to endanger the safety of individuals or cause substantial damage to property). A threat, attempt, or conspiracy to do the foregoing is also a terrorist activity. *Id.*

28. *Id.* at § 1182(a)(3)(B)(iv)(IV).

U.S. national security.<sup>29</sup> Although an entire Article could be devoted to the definition of terrorism and whether or not certain activities impact U.S. national security, this Article will focus more on the designation process itself and the legal ramifications of the designation.

Of the four methods available for FTO designations, two are most commonly applied.<sup>30</sup> The first method is set forth in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) provisions that modified the Immigration and Nationality Act (INA) in 1996.<sup>31</sup> These provisions give the Secretary of State the authority to designate an organization based on the three conditions stated above.<sup>32</sup> Seven days prior to making a formal designation, the Secretary must state her intent to designate in writing and communicate it to the Speaker and Minority Leader of the House of Representatives, the President *pro tempore*, the Majority Leader, the Minority Leader of the Senate, and any members of relevant committees in Congress.<sup>33</sup> Upon the expiration of seven days, the Secretary publishes the designation in the Federal Register. At no time during the designation process is the Secretary required to notify the organization that it is being considered for designation as an FTO.<sup>34</sup> The publication serves as formal notice to an organization regarding its designation.<sup>35</sup> The designation constitutes a requirement for U.S. financial institutions to immediately block all financial transactions involving the organization's assets until further instruction from the Secretary.<sup>36</sup> The deprivation of assets occurs on the same day notice is provided to the respective organization via publication in the Federal Register.<sup>37</sup> Generally, the designation is valid for two years, after which it can be renewed.<sup>38</sup>

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29. *Id.* at § 1189(a)(1)(C). National security is defined as “the national defense, foreign relations, or economic interests of the United States.” *Id.* at § 1182(c)(2).

30. *Id.* at § 1182(a)(3)(B)(vi); IEEPA §§ 1701-1706 (West 2003). There are two other designation methods that are the least often utilized. The first is a designation by the Secretary in consultation with the Attorney General (AG) or upon the request of the AG after finding that an organization engages in terrorist activities or provides material support to further terrorist activities. 8 U.S.C.A. § 1182(a)(3)(B)(vi)(II) (West 2003) (emphasis added). This method appears to be very similar to the first method cited in the text except for the direct involvement of the AG and the specific reference to providing material support to further terrorist activities as a basis for being designated as an FTO. The second least utilized method is designation based on an organization's composition of two or more individuals, organized or not, that engage in specific terrorist activities. *Id.* at § 1182(a)(3)(B)(vi)(III). The specified activities include committing or inciting to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; preparing or planning a terrorist activity; and gathering information on potential targets for terrorist activity. *Id.* at § 1182(a)(3)(B)(vi)(I)-(III).

31. 8 U.S.C.A. § 1189 (West 2003); *Id.* at § 1182(a)(3)(B)(iii).

32. *Id.* at § 1189.

33. *Id.* at § 1189(a)(2)(A)(i).

34. Humanitarian Law Project v. U.S. Dep't of Justice, No. 02-55082, D.C. No. CV-98-01971-ABC, \*6 (9th Cir. Dec. 3, 2003).

35. 8 U.S.C.A. § 1189(a)(2)(A)(ii) (West 2003).

36. *Id.* at § 1189(a)(2)(B).

37. *Id.* at § 1189(a)(2)(A)(ii).

38. *Id.* at § 1189(a)(4)(B).



The Secretary bases her decision on an administrative record, which may include classified information, that she creates and controls.<sup>39</sup> An organization has thirty days from the date of publication to challenge the designation only in the D.C. Circuit, but the review is based solely on the administrative record.<sup>40</sup> Therefore, when the limited judicial review that is permitted is invoked, much of the record is disclosed *ex parte* and *in camera*.<sup>41</sup> Moreover, courts have interpreted the statute as limiting judicial review to whether an organization is foreign and whether the organization has engaged in terrorist activities, but not whether U.S. national security is affected. The courts deem the final requirement as within the full discretion of the executive branch's plenary foreign affairs power.<sup>42</sup> Meanwhile, the court will invalidate a designation if it finds it to be (1) "arbitrary, capricious, an abuse of discretion;"<sup>43</sup> (2) "contrary to constitutional power, right, privilege, or immunity;"<sup>44</sup> (3) "in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;"<sup>45</sup> or (4) "lacking substantial support in the administrative records taken as a whole or in classified information submitted . . ." <sup>46</sup> When checking for such violations, the court reviews whether the Secretary has followed statutory procedures, made the requisite findings, and whether the record she assembled substantially supports her findings.<sup>47</sup> Due to the courts' application of a highly deferential standard of review towards administrative agency action, there are very few cases where a court has actually set aside a designation as unlawful.<sup>48</sup>

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39. *Id.* at § 1189(a)(3); Humanitarian Law Project v. U.S. Dep't of Justice, No. 02-55082, D.C. No. CV-98-01971-ABC, \*6 (9th Cir. Dec. 3, 2003) ("Nor does the statute require the Secretary to afford an organization the opportunity to submit or review evidence on its behalf during the designation process.").

40. 8 U.S.C.A. § 1189(b)(1)-(2) (West 2003). The court in *United States v. Rahmani* rejected the limitation of challenging the designation to the D.C. Circuit by interpreting the language "may seek judicial review . . . in the United States Court of Appeals for the District of Columbia Circuit" in 8 U.S.C.A. § 1189(b)(1) to be a recommendation rather than a requirement. 209 F. Supp. 2d 1045 (C.D. Cal. 2002). Moreover, the court could not find any clear and convincing evidence of Congressional intent to foreclose judicial review of a designation by other federal courts. *Id.*

41. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, n.4 (D.D.C. 2002) (noting the government's filing of a motion to submit classified information *in camera* and *ex parte*); see also *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 808 (N.D. Ill. 2002) (noting the defendant's submission of *ex parte*, *in camera* documents as legal and appropriate).

42. *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999); *Humanitarian Law Project v. Reno*, 9 F. Supp.2d 1176, 1201 (C.D. Cal. 1998).

43. 8 U.S.C.A. § 1182(b)(3)(A) (West 2003) limits the scope of judicial review to the five factors listed in the text.

44. *Id.* at § 1182(b)(3)(B).

45. *Id.* at § 1182(b)(3)(C).

46. *Id.* at § 1182(b)(3)(D) (emphasis added).

47. *Mojahedin*, 182 F.3d at 22.

48. See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (discussing what has come to be known as *Chevron* deference to administrative agency action). See also *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1055 (C.D. Cal. 2002) (holding AEDPA § 1189 as unconstitutional on its face rather than merely rejecting the designation in point); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001) (remanding the case back to the Secretary of State for further proceedings consistent with the opinion rather than deeming the designation itself unlawful with no remand).

The second designation method, and the one most commonly used with respect to U.S.-based Islamic charities, is found in the International Emergency Economic Powers Act (IEEPA).<sup>49</sup> The IEEPA authorizes the President to regulate international economic transactions during wars or national emergencies.<sup>50</sup> The statute's asset freezing provision applies to "any foreign person, foreign organization, or foreign country that [the President] determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States . . . ,” as well as to suspect domestic organizations, regardless of their affiliation with a specific attack.<sup>51</sup> The IEEPA authority was used for the first time with respect to terrorist organizations in 1995 when President Clinton declared the Middle East peace process as posing a national emergency.<sup>52</sup> Clinton issued Executive Order 12,947 on January 23, 1995, which designated ten Palestinian organizations and two Jewish extremist groups opposed to the peace process as "specially designated terrorists" (SDT).<sup>53</sup> Clinton's declaration authorized the Secretary of State to name additional SDTs based on their being owned or controlled by, or acting on behalf of, an entity designated by the President.<sup>54</sup>

President George W. Bush's Executive Order 13,224 of September 23, 2001 declared a national emergency to deal with the September 11, 2001 terrorist attacks.<sup>55</sup> Consequently, the President authorized the freezing of all assets of "specially designated global terrorists" (SDGT), who are defined as "foreign persons determined by the Secretary of State, in consultation with the Secretary of 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 national security, foreign policy, or economy of the United States,"<sup>56</sup> as well as persons who assist, sponsor, or provide financial, material, or technological support for acts of terrorism or persons subject to the

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49. 50 U.S.C. § 1701-1707 (West 2003); See *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 785 (N.D. Ill. 2002) (noting that the designation was made under the International Emergency Economic Powers Act); see also *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 62 (D.D.C. 2002) (noting that the designation was made under the International Emergency Economic Powers Act); *Benevolence Int'l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935, 936-37 (N.D. Ill. 2002) (noting that the designation was made under the International Emergency Economic Powers Act).

50. Barbara J. Van Arsdale, *Validity, Construction, and Operation of International Emergency Economic Powers Act*, 50 U.S.C.A. §§ 1701-1707, 183 A.L.R. FED. 57, § 1701(a)(b) (2003).

51. IEEPA § 1701(a)(1)(C) (West 2003).

52. Exec. Order No. 12,947, 3 C.F.R. § 319 (1995). See also *Boim v. Quranic Literacy Inst.*, 291 F.2d 1000, 1002 n.1 (7th Cir. 2002) (discussing Clinton's use of the IEEPA); *Holy Land Found.*, 219 F. Supp. 2d at 63 (describing Clinton's use of the IEEPA against Middle Eastern organizations).

53. Cole, *New McCarthyism*, *supra* note 8, at 26.

54. *Id.*

55. Exec. Order No. 13,224, 3 C.F.R. § 785 (2001), *reprinted in* 50 U.S.C. § 1701 (West Supp. 2002).

56. *Id.* at § 1(b).

order.<sup>57</sup> The IEEPA includes a humanitarian aid exception to asset blocking, pertaining to donations of articles intended to relieve human suffering such as food, clothing, and medicine.<sup>58</sup> However, an organization that donates both humanitarian goods and money cannot benefit from the exception due to its inability to access the blocked funds needed to purchase the humanitarian goods.<sup>59</sup>

Therefore, an organization can be designated by the Department of Treasury's Office of Foreign Assets Control (OFAC) as either an SDT under Clinton's 1995 Executive Order or as an SDGT under Bush's 2001 Executive Order. Either way, the organization's assets are immediately frozen. Moreover, the USA PATRIOT ACT strengthened the IEEPA by making an investigation into whether or not an organization provides material support to terrorists (i.e. an SDT or an SDGT) sufficient grounds for freezing its assets.<sup>60</sup> Pursuant to these new provisions and executive orders, the assets of the Holy Land Foundation, the Global Relief Fund, and Benevolence International were frozen despite the fact that none of these organizations has been formally charged or convicted in a court of law for providing material support to terrorist organizations.<sup>61</sup>

## II. IMPLICATIONS OF BEING A FOREIGN TERRORIST ORGANIZATION

The FTO designation process alone holds no intrinsic value. Rather, the designations trigger an array of other punitive laws that can be applied once an individual is found to have affiliated himself with an FTO. As discussed below, immigration laws involving inadmissibility, removal, mandatory detention, naturalization, asylum, and discretionary relief are affected by an individual's relationship with an FTO. Any individuals associated with an FTO may be criminally prosecuted for providing material support to a terrorist organization. Civil suits for wrongful death or injury from terrorist attacks can be brought against

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57. *Id.* at § 1(d)(i).

58. IEEPA § 1702(b)(2) (West 2003).

59. Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 69 n.14 (D.D.C. 2002) (noting that the humanitarian aid exception permitting donations of articles is meaningless to HLF since it cannot access its bank accounts and cannot purchase food, clothing, or medicine to send as statutorily permissible humanitarian aid).

60. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. 107-56, § 106, 115 Stat. 272 (Oct. 26, 2001) [hereinafter USA PATRIOT ACT](adding § 1702(a)(1)(B) to the IEEPA).

61. Note that the designation of a foreign terrorist organization is a separate process from the criminal prosecution for providing material support to terrorism or terrorist organizations. Those designated under the IEEPA are under investigation for providing material support to terrorist organizations, the results of which can be used to criminally prosecute them for providing material support to other terrorist organizations. Hence you must first be designated as an FTO based on allegations by the Executive branch of providing material support in order to be criminally prosecuted for providing material support.

organizations or individuals accused of aiding terrorist organizations.<sup>62</sup> As a result, the stakes are high and the consequences can be severe for any individual or entity accused of associating with a designated FTO.

#### A. IMMIGRATION

A non-citizen's entire life in the United States can be devastated upon any allegations of affiliation with an organization designated as an FTO.<sup>63</sup> It goes without saying that any American consulate abroad will refuse to admit, or re-admit, the non-citizen seeking entry into the United States.<sup>64</sup> More importantly, an accused alien terrorist<sup>65</sup> physically in the United States becomes ineligible for numerous forms of immigration relief including withholding of removal,<sup>66</sup> cancellation of removal,<sup>67</sup> voluntary departure,<sup>68</sup> adjustment of status,<sup>69</sup> registry,<sup>70</sup> and asylum.<sup>71</sup> The accused non-citizen, which includes permanent residents that have resided in the U.S. for many years, is also subject to mandatory detention for a potentially lengthy period due to the Attorney General's power to certify individuals as terrorist threats.<sup>72</sup> The mandatory detention process allows the government to detain the non-citizen without charge for seven days.<sup>73</sup> At the expiration of the seven days, the AG must charge the person with a criminal offense<sup>74</sup> (typically it is a minor immigration

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62. *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000 (7th Cir. 2002).

63. See Associated Press, *Lebanese Man Appeals Deportation Order*, WASH. POST, Dec. 28, 2002, at A (noting that Rabih Haddad, the co-founder of the Global Relief Foundation, was detained for over a year with no charges filed against him).

64. 8 U.S.C.A. § 1182(a)(3)((A)-(B)) (West 2003).

65. Although "alien terrorist" is not explicitly defined in the INA code, it may be inferred as an alien who engages in terrorist activities, intends to cause death or serious bodily harm, incite terrorist activity, is a representative of a foreign terrorist organization, or is a member of a designated foreign terrorist organization which the alien knows or should have known is a terrorist organization. 8 U.S.C.A. § 1182(a)(3)(B)(i)(I)-(V) (West 2003). It is worth noting that any officer, official, representative, or spokesman of the Palestine Liberation Organization is explicitly mentioned. *Id.* at § 1182(a)(3)(B).

66. 8 U.S.C.A. § 1231(b)(3)(B) (West 2003) (denying withholding of deportation from aliens described in 8 U.S.C.A. § 1227(a)(4)(B)).

67. *Id.* at § 1229b(c)(4) (denying cancellation of removal for aliens inadmissible under 8 U.S.C.A. § 1182(a)(3) or deportable under 8 U.S.C.A. § 1227(a)(4)).

68. *Id.* at § 1229c(b)(1)(C) (denying voluntary departure to aliens deportable under 8 U.S.C.A. § 1227(a)(4)).

69. *Id.* at § 1229b(c)(4) (denying adjustment for aliens inadmissible under 8 U.S.C.A. § 1182(a)(3) or deportable under 8 U.S.C.A. § 1227(a)(4)).

70. *Id.* at § 1259(d) (denying registry for aliens deportable under 8 U.S.C.A. § 1227(a)(4)(B)).

71. 8 U.S.C.S. § 1158(b)(2)(v) (West 2003) (denying asylum for aliens inadmissible under 8 U.S.C.A. § 1182(a)(3)(B)(i) or deportable under 8 U.S.C.A. § 1227(a)(4)(B)).

72. *Id.* at § 1226a(a)(3) ("The Attorney General may certify an alien . . . if he has reasonable grounds to believe that the alien [lists the various terrorism related statutes] . . . or is engaged in any other activity that endangers the national security of the United States.").

73. *Id.* at § 1226a(a)(5).

74. *Id.*

charge rather than a terrorism offense).<sup>75</sup> The charges trigger prolonged detention with no release on bond and allow for re-certification every six months.<sup>76</sup> For all practical purposes, the AG can extend the mandatory detention provision into indefinite detention up to the point of physical removal.<sup>77</sup> Moreover, a person physically in the U.S. who is deemed inadmissible for security, terrorism, or foreign relations grounds is subject to expedited deportation with no right to administrative or judicial review and forfeits discretionary waiver provisions.<sup>78</sup> As long as the Secretary of State makes a facially reasonable determination that the person's presence or activity would have potentially adverse foreign policy consequences, then the government has met its burden of proof, and the immigration judge will issue the removal order.<sup>79</sup>

The USA PATRIOT ACT expanded the grounds of inadmissibility from members of an FTO to anyone associated with an FTO. Additionally, the definition of a terrorist organization was expanded to include "any group of two or more individuals, whether organized or not, that commit or incite to commit terrorist activity, plans a terrorist activity, or gathers information for potential targets of terrorist activity."<sup>80</sup> The USA PATRIOT ACT utilizes these expanded definitions to impose an ideological test for entry into the U.S. by prohibiting entry of any representative of a political or social group "whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities."<sup>81</sup>

These new immigration laws do not require an individual to have actually known that the organization is a terrorist one, but simply that he should have known it is a terrorist organization.<sup>82</sup> According to INS Commissioner Ziglar, any act that the non-citizen knows, or should reasonably know, will provide material support to a terrorist organization makes him inadmissible and subject to removal, even if the non-citizen did not specifically intend to support the terrorist activity and did not know that the organization was a terrorist organization.<sup>83</sup> The only

75. Susan Sachs, *Court Asked to OK Secret Deportations*, CHI. TRIB., June 23, 2002, at 9 (noting that most of the 1200 Arabs and Muslims detained in the aftermath of September 11, 2001 were charged with immigration violations and not terrorism related charges).

76. 8 U.S.C.A. § 1226(a)(7) (West 2003).

77. Sachs, *supra* note 75 (noting that the Attorney General planned to secretly deport all post-9/11 detainees).

78. 8 U.S.C.A. § 1225(c) (West 2003).

79. *Id.* at § 1182(a)(3)(C)(i) ("An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.").

80. USA PATRIOT ACT § 411(a)(1)(F)(iv)(I-III) (2001) (creating 8 U.S.C.A. § 1182(a)(3)(B)(vi)).

81. *Id.* at § 411(a) (amending 8 U.S.C. § 1182(a)(3)(B)(i)(IV)(bb)).

82. Daniel Levy, *U.S. Citizenship and Naturalization Handbook*, 2002 NAT'L IMMIGR. PROJECT OF THE NAT'L LAW. GUILD ch. 8 app.8-1 (INS Commissioner Ziglar's Memorandum on the New Anti-Terrorism Legislation (Oct. 31, 2002) (USCITNAT APP 8-1 on Westlaw)).

83. *Id.*

exceptions include (1) if the organization was not designated as an FTO at the time of the individual's activity or (2) if the individual can prove that he did not know, and should not reasonably have known, that the activity would further the organization's terrorist activity.<sup>84</sup> The individual bears the burden of proof.

## B. CRIMINAL SANCTIONS

Citizens and non-citizens alike are subject to criminal sanctions under the AEDPA if found to have "knowingly provide[d] material support or resources to a foreign terrorist organization, or attempt[ed] or conspire[d] to do so,"<sup>85</sup> or knowingly provided material support to further terrorist activities.<sup>86</sup> Accused individuals face up to fifteen years of prison or life imprisonment if the death of any person results.<sup>87</sup> Material support is defined as the provision of "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious material."<sup>88</sup> The current limited exception for medicine and religious material replaced the broader pre-AEDPA exception for "humanitarian assistance to persons not directly involved in such violations."<sup>89</sup> The rationale for the change was 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>90</sup> Consequently, numerous organizations that donate humanitarian aid to hospitals, orphanages, and schools of impoverished, nonviolent refugees in the Middle East are legally exposed and vulnerable to this significant change in the statutory language.

Finally, it is worth mentioning that an individual accused of providing material support cannot "raise any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing."<sup>91</sup> It is probable that an individual will miss the limited opportunity to challenge a designation since she may not appreciate how the designation will personally impact her in the

84. *Id.*; 8 U.S.C.A. §§1182(a)(3)(B)(IV)(cc), (V)(cc), (VI)(dd) (West 2003).

85. 18 U.S.C.A. § 2339B(a)(1) (West 2003).

86. *Id.*

87. *Id.* at § 2339A(a), § 2339B(a)(1).

88. 18 U.S.C.A. § 2339A(b) (West 2003).

89. Jacqueline Benson, *Send Me Your Money: Controlling International Terrorism By Restricting Fundraising in the United States*, 21 HOUS. J. INT'L L. 321, 327, 331 (1999).

90. Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1194 (C.D. Cal. 1998) (quoting legislative history explaining the reasoning for limiting the exception)

91. 8 U.S.C.A. § 1189(a)(8) (West 2003). See *United States v. Sattar*, No. 02 Cr. 395, 2003 WL 21698266, \*11-12 (S.D.N.Y. July 22, 2003) (denying defendants' challenge to the Islamic Group's FTO designation due to a lack of standing and statutory limitations).

future. Therefore, any due process shortcomings imposed on the organization through the FTO designation process will inevitably affect the individual's subsequent criminal (or civil) prosecution.<sup>92</sup>

### C. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

The terrorist designation and the relevant criminal charges also trigger newly expanded powers under the Foreign Intelligence Surveillance Act (FISA). As soon as the Secretary of the Office of Foreign Assets Control (OFAC) designates the FTO, the government can go to a FISA Court, instead of an Article III court, for a search warrant "approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information."<sup>93</sup> As long as the investigation's "significant" purpose is to gather intelligence, the secretive FISA warrant can be obtained.<sup>94</sup> This condition is often easily met by a government showing that the accused is an agent of a foreign power.<sup>95</sup> If the accused is a "United States person"<sup>96</sup> there must be probable cause to believe she is aligned with a foreign power or agent of a foreign power.<sup>97</sup> The information gathered can be used against the individual or entity in subsequent criminal prosecutions. Therefore, terrorism-related charges serve as powerful tools to avoid an individual's First, Fourth, and Fifth Amendment rights, otherwise applicable in criminal prosecutions.<sup>98</sup>

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92. See generally Boim v. Quranic Literacy Inst., 291 F.2d 1000, 1002 n.1 (7th Cir. 2002).

93. 50 U.S.C. § 1803 (2003). Prior to the passage of the USA PATRIOT ACT, a FISA warrant required that the *primary* purpose of the investigation was to obtain foreign intelligence information. USA PATRIOT ACT § 218 (2001).

94. USA PATRIOT ACT § 218 (2001).

95. An agent of a foreign power is defined as any person other than a United States person (citizen or legal permanent resident) who acts in the United States as a member of a foreign power OR any person who knowingly engages in international terrorism, or activities that are in preparation therefore, for or on behalf of a foreign power. 50 U.S.C.A. § 1801(b) (West 2003). Someone accused of providing material support to an FTO will likely fall under one of these definitions.

96. A "United States person means a citizen of the United States, an alien lawfully admitted for permanent residence . . . an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States." 50 U.S.C.A. § 1801(h)(4)(i) (West 2003).

97. *Id.* at § 1824(a)(3); Global Relief Found. v. O'Neill, 207 F. Supp. 2d 779, 789 (N.D. Ill. 2002).

98. See generally David Hardin, *The Fuss Over Two Small Words: The Unconstitutionality of the U.S.A PATRIOT Amendments to FISA Under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291 (2003) (describing the negative impact of the new FISA laws on an individual's Fourth Amendment rights); Jennifer C. Evans, *Hijacking Civil Liberties: The U.S.A PATRIOT ACT of 2001*, 33 LOY. U. CHI. L.J. 933 (2002) (highlighting the abuse of the USA PATRIOT ACT's amendments lowering the probable cause requirement for warrants regarding criminal investigations); Dan Eggen, *FBI Applies New Rules To Surveillance*, WashingtonPost.com, Dec. 13, 2003, at <http://msnbc.msn.com/Default.aspx?id=3700237&pl=0&p1=0> (noting how the FBI's increased use of FISA search warrants for terrorism-related investigations has led to many more searches and seizures in secret).

These far-reaching implications, for citizens and non-citizens alike, of designating an organization as terrorist, are sufficient cause for inquiry into the constitutional ramifications. The bona fide risk of deprivation of liberty, in the form of physical liberty, free speech, and the right to property, mandates adherence to the Constitution. Therefore, all residents of the United States, regardless of visa status, have a significant interest in assuring the FTO designation process is not only accurate, but also constitutional.

### III. DUE PROCESS CONSTITUTIONAL ANALYSIS AND CRITIQUE OF THE DESIGNATION PROCESS

The Fifth Amendment Due Process Clause prohibits the government from depriving any person of life, liberty, or property without due process of law.<sup>99</sup> Liberty includes a person's physical liberty, as well as freedom of speech, expression, and association.<sup>100</sup> Property includes financial, as well as physical, assets. Due process is guided by the principle that a hearing occur "at a meaningful time and in a meaningful manner."<sup>101</sup> "The pre-termination hearing need not definitively resolve the propriety of the discharge, but should be an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the defendant are true and support the proposed action."<sup>102</sup> Therefore, the essential requirements of due process are that meaningful notice and an opportunity to respond be granted by the State to the defendant.<sup>103</sup>

Upon a finding that certain substantive rights of life, liberty, and property are implicated by government action, the question remains regarding what process is due. *Mathews v. Eldridge* provides a balancing test for the competing interests at stake as a means of deciding whether or not a pre-deprivation hearing is due.<sup>104</sup> In this case, the organization's interests in avoiding closure and erroneous seizure of their assets is balanced against the government's immediate interest in preventing the transfer of funds outside the country prior to a hearing or trial, as well as against the broader interest in preventing the funding of terrorist activities. In order to balance these competing interests, a court applies a three-pronged test.<sup>105</sup> First, the court must assess the importance of the private interest affected by the official action.<sup>106</sup> Then, the risk of erroneous deprivation of such interests is determined along

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99. U.S. CONST. amend V.

100. *Paul v. Davis*, 424 U.S. 693 (1976).

101. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

102. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 533 (1985).

103. *Id.*

104. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

105. *Id.* at 335.

106. *Id.*



with the probable value of additional or substitute procedural safeguards.<sup>107</sup> Finally, the courts consider the government's interest in preserving the existing procedures as well as the potential fiscal or administrative burdens imposed through additional or substitute procedural requirements.<sup>108</sup> Based on the results of these three prongs, a court decides whether or not to provide a pre-deprivation hearing to the organization or individual.

The FTO designation process undoubtedly implicates due process rights because of the ensuing government seizure of an organization's assets without a pre-deprivation hearing. Moreover, any person associated with the organization faces potential criminal liability that may result in up to fifteen years of imprisonment.<sup>109</sup> Hence, the FTO designation process must adhere to the Fifth Amendment Due Process Clause. However, existing case law, as well as ongoing federal investigations, reveal the likelihood that due process may be being violated. The following are problematic procedural and substantive due process issues to be considered in the next sections: (1) pre-deprivation hearings are denied to organizations; (2) organizations are not permitted to present counter-evidence during the procedures, (3) the administrative record is composed of classified evidence that is inaccessible to the defendants, and (4) the investigations after September 11, 2001 have focused almost entirely on Islamic and/or Arab defendants. This section begins by summarizing the reasoning applied by courts to justify the aforementioned issues in response to specific challenges of the FTO designation process on due process grounds. This Article will then challenge the courts' reasoning on procedural and substantive due process grounds.

#### A. DUE PROCESS AFFORDED IN THE TERRORIST DESIGNATION PROCESS

An organization designated as an FTO under the AEDPA receives notice of its designation on the day the designation is published in the Federal Register.<sup>110</sup> An organization designated under the IEEPA remains ignorant of the designation until the moment its assets are frozen, which is usually triggered by a mere investigation into its activities.<sup>111</sup> In all cases, the organization receives no prior notice or opportunity, in the form of a pre-deprivation hearing, to challenge the decision.

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107. *Id.*

108. *Id.* at 335.

109. 18 U.S.C.A. § 2339A(a), § 2339B(a)(1) (West 2003).

110. 8 U.S.C.A. § 1189(a)(2)(A) (West 2003).

111. *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 779 (N.D. Ill. 2002).

Before engaging in a due process analysis, a court must first determine whether the due process clause applies to the foreign person or entity. The test evaluates the following questions in creating a constitutional claim: 1) “whether the person or entity has a constitutional presence in the United States”; 2) “whether government action deprived the person or entity of a constitutionally protected interest”; and 3) “whether the procedural protections provided by the government, if any, were constitutionally sufficient.”<sup>112</sup>

The Supreme Court has found the “constitutional presence” test satisfied based on whether or not a person or entity had “substantial connections” in the U.S.<sup>113</sup> Although the test for finding “substantial connections” is vague at best,<sup>114</sup> cases relevant to this Article topic have based their decisions on an organization’s physical presence in the United States and its bank holdings within the United States.<sup>115</sup> The second question always applies in FTO cases because the U.S. government deprives a private party or entity of its assets. The third question regarding constitutionally sufficient procedural protections refers to the *Mathews* test for deciding what process is due.<sup>116</sup> Because the issue of whether sufficient procedural protections exist is the most complex and least straight forward,<sup>117</sup> the following section describes how the courts have applied the *Mathews* test with respect to specific organizations’ challenges to their designation as FTOs.

## 1. DESIGNATIONS UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA)

In 1999, *People’s Mojahedin Organization of Iran v. United States* became the first civil case involving an organization’s due process challenge to the FTO designation process.<sup>118</sup> The organization claimed that the AEDPA deprived it of due process because the AEDPA allowed the government to condemn the organization and criminalize any donations given to it without providing the organization notice and an

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112. 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, 684 (2002).

113. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

114. HARVARD LAW REVIEW ASSOCIATION, *Extraterritorial Applications of the Fourth Amendment*, 104 HARV. L. REV. 276, 281-82 (1990).

115. *Compare* *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (stating that “a foreign entity without property or presence in this country has no constitutional rights, under the due process clause, or otherwise”) *with* *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 201-02 (D.C. Cir. 2001) (asserting that plaintiffs’ overt presence in the National Press Building in Washington, D.C. and bank account in a U.S. bank is sufficient grounds for finding constitutional presence).

116. *See Mathews v. Eldridge*, 424 U.S. 319, 347-49 (1976).

117. The other two issues relating to constitutional presence a constitutionally protected interest are often easily resolved based on the facts of the case.

118. *Mojahedin*, 182 F.3d at 17.

opportunity to be heard.<sup>119</sup> The court, however, avoided the constitutional question by finding that the foreign entity lacked a constitutional presence in the United States.<sup>120</sup>

Two years later, the National Council of Resistance of Iran also challenged its designation as an FTO.<sup>121</sup> The D.C. Circuit found the organization was constitutionally present and that due process had been violated.<sup>122</sup> The dearth of procedural participation by the designated entity,<sup>123</sup> the lack of notice of the evidence used against it, and the unchecked possibility of third-hand accounts, press stories, and other hearsay evidence dominating the record created a very high risk of erroneous deprivation.<sup>124</sup> The court, however, did not declare the AEDPA designation process unconstitutional, but rather remanded the case back to the Secretary of State with instructions to afford the Plaintiff entity an opportunity to file responses to non-classified evidence against it, an opportunity to file evidence in support of its claims, and an opportunity to have a meaningful hearing with the Secretary upon the relevant findings.<sup>125</sup> The court also instructed the Secretary of State to provide notice to an FTO that a designation is impending and to afford the organization an opportunity to present evidence.<sup>126</sup> The Court, however, noted that the ruling did “not foreclose the possibility of the Secretary, in an appropriate case, demonstrating the necessity of withholding all notice and all opportunity to present evidence until the designation is already made.”<sup>127</sup> Consequently, the Secretary came to the same conclusion after giving the entity its court ordered due process rights.<sup>128</sup> In post-9/11 cases, the Secretary will likely invoke the exception to justify the withholding of notice and the use of secret evidence in terrorist-related cases.

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119. *Id.* at 22.

120. *Id.* (concluding that the organization had no bank deposits seized as a result of the designation, thus had no substantial connections in the United States and no constitutional rights).

121. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 197-98 (D.C. Cir. 2001) (challenging the Secretary of State's 1999 designation of the National Council of Resistance of Iran as an alias or alter ego of the designated Mojahedin e-Khalq).

122. *Id.* at 209.

123. *See supra* Part I for a detailed discussion of the limits of an FTO's participation in the designation process.

124. *Nat'l Council*, 251 F.3d at 196-97; *See Mojahedin*, 182 F.3d at 19 (“Because nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities, the “administrative record” may consist of little else.”); *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 71 (D.D.C. 2002) (“[A]gency designations can be based on a broad range of evidence including news reports, intelligence data, and hearsay declarations.”).

125. *Nat'l Council*, 251 F.3d at 209. Incidentally, the Secretary came to the same conclusion after giving the entity its court ordered due process rights.

126. *Id.* at 208-09.

127. *Id.* at 208.

128. *See Designation of Foreign Terrorist Organizations*, 66 Fed. Reg. 51,088 (Oct. 5, 2001) (citing the National Council of Resistance of Iran as an alias for the designation the Mojahedin-e Khalq Organization).

In 2002, a California federal district court in *United States v. Rahmani*<sup>129</sup> unconventionally rejected the government's claim that only the D.C. Circuit had jurisdiction over AEDPA FTO designation cases and declared jurisdiction.<sup>130</sup> *Rahmani* involved fifty-eight substantive counts of providing material support to an FTO against seven defendants of Middle Eastern heritage.<sup>131</sup> The defendants had contributed monetary support between October 8, 1997 and February 27, 2001 to Mujaheddin-e Khalq (MEK), a designated foreign terrorist organization.<sup>132</sup> The defendants moved to dismiss the indictment by contending that the FTO designation statute, both facially and under *U.S. v. Mendoza-Lopez*,<sup>133</sup> violated due process.<sup>134</sup> Although the court rejected the *Mendoza-Lopez* due process violation claim,<sup>135</sup> the court did strike down the AEDPA provisions as facially unconstitutional on Fifth Amendment Due Process grounds.<sup>136</sup> The relevant AEDPA provisions denied an organization the opportunity to be heard in a meaningful manner due to the organization's inability to object to the administrative record or supplement it with information to contradict the designation.<sup>137</sup> The judge criticized the D.C. Circuit's reasoning in *National Council of Resistance of Iran*<sup>138</sup> for engaging in judicial legislation, claiming the D.C. Circuit should have declared the designation process unconstitutional rather than upholding the statute after finding a due process violation.<sup>139</sup> Moreover, the judge refused to enforce the provisions denying criminal defendants the right to challenge the validity of an FTO designation as a defense.<sup>140</sup> Notably, the fact that *Rahmani* was a criminal case, versus the preceding civil cases, may have convinced the court that it was duty-bound to ensure that the prosecution comported with due process since a greater liberty interest was at stake. At the writing of this Article, *Rahmani* is only binding in the Federal Central District Court of California and has

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129. *United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D. Cal. 2002)

130. *See id.* at 1053 ("Although Section 1189 directs judicial review of foreign terrorist organization designations to the D.C. Circuit, such review is not restricted to that court."). *See also supra* note 24 and accompanying text.

131. *Rahmani*, 209 F. Supp. 2d at 1047.

132. *Id.* at 1047; *See* Designation of Foreign Terrorist Organizations, 62 F.R. 52650, (Oct. 8, 1997) (designating Mojahedin-e Khalq, as well as its aliases People's Mojahedin Org. of Iran, Org. of the People's Holy Warriors of Iran, and Mojahedin-e Khalq-e Iran).

133. *U.S. v. Mendoza-Lopez*, 481 U.S. 828 (1987) (ruling that the government cannot use a prior deportation against a defendant if it was a result of a due process violation and such violation was prejudicial).

134. *Rahmani*, 209 F. Supp. 2d at 1050.

135. *Id.* at 1055.

136. *Id.* at 1058.

137. *Id.* at 1055.

138. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 192 (D.C. Cir. 2001).

139. *Rahmani*, 209 F. Supp. 2d at 1056-57.

140. *Id.* at 1054; 8 U.S.C.A. § 1189(a)(8) (West 2003).

already been rejected by the Federal Southern District Court of New York.<sup>141</sup>

## 2. DESIGNATIONS UNDER THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT (IEEPA)

With respect to the three Islamic charities mentioned in this Article's introduction,<sup>142</sup> the government applied the IEEPA to either initially freeze their assets pending an investigation and subsequent designation as SDGTs<sup>143</sup> or designated the organization as an SDT or an SDGT followed by the immediate seizure of its assets.<sup>144</sup> Unlike the AEDPA designation cases, the courts reviewing IEEPA designations have been less flexible regarding challenges to the accuracy and completeness of the administrative record.

The treatment of the Holy Land Foundation for Global Relief and Development is an example of the less flexible approach. The Holy Land Foundation (HLF) is a non-profit organization founded in 1989 and headquartered in Richardson, Texas.<sup>145</sup> Despite HLF's claims that it is merely a 501(c)(3) charitable organization that provides humanitarian aid worldwide, it was designated on December 4, 2001 as an SDGT for acting for or on behalf of Hamas.<sup>146</sup> HLF was re-designated on May 31, 2002.<sup>147</sup> Consequently, all of HLF's funds, accounts, and real property were frozen pursuant to a Blocking Notice issued by the Office of Foreign Assets Control (OFAC).<sup>148</sup> Moreover, all transactions involving property in which HLF has any interest are prohibited without specific authorization from OFAC.<sup>149</sup>

The designation, as well as the Blocking Notice, was based on an administrative record compiled by the Secretary of State.<sup>150</sup> HLF requested a de novo review based on the administrative record's failure to include additional evidence submitted by HLF that was contrary to

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141. The Southern District of New York refused to adhere to *Rahmani* for the Defendants' constitutional challenges to AEDPA's FTO designation process. *United States v. Sattar*, No. 02 Cr. 395, 2003 WL 21698266, \*12 (S.D.N.Y. July 22, 2003).

142. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 57 (D.D.C. 2002); *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 808 (N.D. Ill. 2002).

143. IEEPA § 1702(a)(1)(B) (West 2003) (making an investigation into whether or not an organization provides material support to terrorists sufficient grounds for freezing its assets). This procedure took place with respect to the Global Relief Foundation. *Global Relief Found. v. O'Neill*, 315 F.3d 748, 750-51 (7th Cir. 2002).

144. This procedure took place with respect to the Holy Land Foundation. *Holy Land Found.*, 219 F. Supp. 2d at 64.

145. *Id.* at 57.

146. *Id.* at 64.

147. *Id.* at 66 n.8.

148. *Id.* at 64.

149. *Holy Land Found.*, 219 F. Supp. 2d at 64.

150. *Id.*

OFAC's position.<sup>151</sup> HLF accused OFAC of purposely excluding evidence available to it, making the record incomplete and inaccurate to the detriment of HLF.<sup>152</sup> The D.C. District Court rejected HLF's basis for requesting the inclusion of extra-record evidence as speculative and strictly applied a well-established rule limiting the scope of review under the Administrative Procedure Act to the original administrative record.<sup>153</sup> The court reasoned that because OFAC does provide an organization post-deprivation rights to present counter-evidence to supplement the administrative record, the administrative record becomes binding on the court's scope of review.<sup>154</sup> However, HLF's post-deprivation right to present evidence is limited to a brief fifteen-day period and applies only to redesignations.<sup>155</sup> OFAC also retains the power to reject the counter-evidence and reject any requests for time extensions to the fifteen-day window.<sup>156</sup> These decisions are not subject to judicial review. OFAC's unrestricted power to reject evidence is used more often than not to refuse incorporating the counter-evidence into the administrative record, making the right to present counter-evidence a meaningless formality.<sup>157</sup>

HLF also challenged the administrative record and designation process on procedural due process grounds because the organization was not provided with pre-designation notice (on the original designation) or a hearing to offer counter-evidence to include in the administrative record.<sup>158</sup> Although the Court acknowledged the Government's failure to provide prior notice and a hearing, the Court found that this failure did not constitute a due process violation.<sup>159</sup> The court clearly distinguished the case from *National Council of Resistance of Iran* based on the fact that the Presidentially-declared national emergency under the IEEPA constituted an "extraordinary situation in which postponement of notice and hearing until after seizure d[oes] not deny due process."<sup>160</sup> More specifically, the court found that the Government had satisfied the following requirements: 1) the deprivation served an important government interest (combating terrorism); 2) prompt action was necessary to prevent transfer of assets prior to the blocking order; and 3) government officials blocked the assets pursuant to the IEEPA.<sup>161</sup>

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151. *Id.* at 65.

152. *Id.*

153. *Id.* at 66.

154. *Holy Land Found.*, 219 F. Supp. 2d at 65 & 66 n.7.

155. Note that the April 30, 2002 notice of a 15-day response period for the redesignation administrative proceeding was not provided for the original designation on December 4, 2001. *Id.* at 66 n.8.

156. *Id.*

157. *Id.* at 66 n.8.

158. *Id.*

159. *Holy Land Found.*, 219 F. Supp. 2d at 76.

160. *Id.* at 57 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)).

161. *Id.* at 76-77.

In a similar case, an Illinois District Court in *Global Relief Foundation v. O'Neill* employed the same reasoning and arrived at the same conclusion.<sup>162</sup> The Global Relief Fund (GRF) was founded in 1992 and became one of the largest U.S.-based Islamic charitable organizations.<sup>163</sup> Over 90% of its approximately \$3.7 million in donations were spent on humanitarian relief programs abroad in Afghanistan, Albania, and Bosnia. On December 14, 2001, GRF's financial assets were frozen, without prior notice, in addition to the physical seizure of most of the property located in its main office.<sup>164</sup> OFAC utilized the amendment to the IEEPA by the USA PATRIOT ACT to freeze the assets pending an investigation on whether or not GRF was an SDGT.<sup>165</sup> The court concluded that the government's need to prevent transfer of assets or destruction of records justified freezing GRF's assets until the charity could be formally indicted and tried for supporting terrorism.<sup>166</sup> GRF was subsequently designated as an SDGT by OFAC on October 18, 2002.<sup>167</sup>

As for GRF's allegations of inadequate post-deprivation procedures, the court responded by blaming GRF for not taking advantage of post-blocking options that the court believed satisfied due process.<sup>168</sup> For example, on the day GRF's assets were frozen, OFAC gave notice of GRF's right to present evidence and arguments in its defense.<sup>169</sup> OFAC also informed GRF of its ability to apply for a license from OFAC to obtain funds to pay salaries, rent, utility payments, and attorneys fees.<sup>170</sup> Although GRF did apply for and receive the payment licenses, it did not act on the opportunity to present evidence because the same person responsible for GRF's prosecution would be receiving the evidence and deciding whether or not it should be admitted into the administrative record.<sup>171</sup> Despite GRF's seemingly valid concerns, the court ruled that any harm incurred from the lack of counter-evidence in the record was due to GRF's refusal to utilize the available administrative remedies. Consequently, the court refused to find any post-deprivation due process violations.<sup>172</sup> The Seventh Circuit

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162. *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 779 (N.D. Ill. 2002).

163. *Id.* at 785-86.

164. *Id.* at 786.

165. *Global Relief Found. v. O'Neill*, 315 F.3d 748, 751 (7th Cir. 2002) (noting that the asset freeze was justified based on a pending OFAC investigation as to whether GRF was a specially designated global terrorist).

166. *Global Relief Found.*, 207 F. Supp. 2d at 798.

167. Office of Foreign Assets Control, Recent OFAC Actions, at [www.treas.gov/offices/enforcement/ofac/actions/20021018.html](http://www.treas.gov/offices/enforcement/ofac/actions/20021018.html) (last visited Dec. 16, 2003).

168. *Global Relief Found.*, 207 F. Supp. 2d at 804.

169. *Id.*

170. *Id.*

171. *Id.* at 804-05.

172. *Id.*

subsequently upheld the trial court's decision, and the Supreme Court refused to grant a writ of certiorari.<sup>173</sup>

In summary, the courts have been more skeptical of FTO designations under the AEDPA than under the IEEPA with respect to procedural due process rights. The *Rahmani* court went as far as declaring the AEDPA procedures facially unconstitutional on Fifth Amendment procedural due process grounds, yet refused to find any substantive due process violations.<sup>174</sup> On the other hand, the courts in *Holy Land Foundation* and *Global Relief Foundation* acted much more deferentially due to the fact that the President's declaration of a national emergency served as the basis for their designations and denial of pre-deprivation notice and hearings.<sup>175</sup> The following section will challenge the courts' conclusions on constitutional as well as normative grounds.

## B. DUE PROCESS VIOLATIONS IN THE TERRORIST DESIGNATION PROCESS

Because the two major FTO designation processes involve different actions by the government, their respective constitutional shortcomings will be addressed separately. Each method impacts procedural due process by denying pre-deprivation notice and hearings, which increases the risk of erroneous deprivation. The disproportionately high application of these methods against Arab and Muslim entities may also implicate substantive due process rights.<sup>176</sup> The forthcoming analysis begs the question: Where should the line be drawn between permitting legitimate, although unpopular, humanitarian aid and preventing terrorism, while preserving fundamental constitutional rights?

### 1. DESIGNATIONS UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA)

The Antiterrorism and Effective Death Penalty Act was passed amidst numerous criticisms regarding the law's draconian nature and susceptibility to prosecutorial abuse.<sup>177</sup> The AEDPA's designation process allows for improper selective enforcement based on ethnic or religious background, poses a high risk of erroneous deprivation,

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173. *Global Relief Foundation v. Snow*, 72 USLW 3092 (2003); *Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002); Charles Lane, *Justices Rule on Detainee's Rights*, WASH. POST, Nov. 11, 2003, at A1.

174. *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1048 (C.D. Cal. 2002).

175. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 76-77 (D.D.C. 2002); *Global Relief Found.*, 207 F. Supp. 2d at 803-04.

176. See *infra* subpart III(B)(1)(a).

177. See Cole, *New McCarthyism*, *supra* note 8.



provides insufficient judicial review, and stifles freedom of association. More specifically, past and ongoing applications of AEDPA provisions reveal a disconcerting trend of discrimination against Muslims and Arab entities and individuals.<sup>178</sup> As a result, substantive as well as procedural due process rights are at risk. Each of these issues will now be addressed in turn.

a) DISCRETIONARY ABUSE BASED ON ETHNICITY AND RELIGION—VIOLATIONS OF SUBSTANTIVE DUE PROCESS

The AEDPA does not neutrally prohibit all material support to FTOs that use violence, but only to those designated by the Secretary of State. If the designation is “arbitrary, capricious, [or] an abuse of discretion . . . ,”<sup>179</sup> then it is an unlawful violation of the statute as well as a violation of substantive due process.<sup>180</sup> Therefore, the Secretary of State should not abuse her discretion through disproportionate application against politically unpopular groups and individuals based on their ethnic or religious backgrounds.<sup>181</sup> Islamic and Arab Middle Eastern groups, however, have been cited in disproportionately high numbers on past and current FTO lists. At least 15 out of the 31 organizations were affiliated with Islam and/or Arabs in the October 8, 1997 FTO list;<sup>182</sup> 14 out of 23 on October 8, 1999;<sup>183</sup> 21 out of 39 on the December 7, 2001, and 19 out of the 33 listed organizations on March 27, 2002.<sup>184</sup> The vast majority of those accused of aiding terrorism organizations, which usually entails the iniquitous use of secret evidence, have been of Muslim faith or Arab descent.<sup>185</sup>

Recently, the Senate Finance Committee has applied its rarely invoked powers to obtain private financial records held by the government.<sup>186</sup> The Committee has asked the Internal Revenue Service to turn over confidential tax and financial records, including donor lists, on dozens of Muslim charities and foundations.<sup>187</sup> Many Muslim leaders

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178. Adrienne R. Bellino, *Changing Immigration for Arabs with Anti-Terrorism Legislation: September 11th Was Not the Catalyst*, 16 TEMP. INT’L & COMP. L.J. 123, 131-32 (2002).

179. 8 U.S.C.A. §1189(b)(3)(A) (West 2003).

180. See *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 217 (1985) (defining substantive due process guaranteed by the Fourteenth Amendment as protection from arbitrary or capricious government acts).

181. Cole, *New McCarthyism*, *supra* note 8, at 10.

182. 62 Fed. Reg. 52,650 (Oct. 8, 1997).

183. 65 Fed. Reg. 55,112 (Sept. 12, 1999).

184. 66 Fed. Reg. 63,620 (Dec. 7, 2001).

185. For specific cases of the disproportionate use of secret evidence against Arabs and Muslims, see generally David Cole, *Secrecy, Guilty by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267 (2000-2001). See also *supra* note 11.

186. Eggen & Mintz, *supra* note 4.

187. *Id.*; see also MUSLIM CIVIL RIGHTS CENTER, *List of Muslim Groups Being Probed by Senate Committee*, at [www.mcrcnet.org/Enewsletters/Enews\\_details\\_2004.htm#7](http://www.mcrcnet.org/Enewsletters/Enews_details_2004.htm#7) (last visited Jan.

fear that such government tactics unfairly smear law-abiding Muslims and dry up financial support for groups trying to provide medicine, food, and other goods to the Middle East.<sup>188</sup> Moreover, “the Muslim community would view this as another fishing expedition solely targeting Muslims in America.”<sup>189</sup> Some, on the other hand, argue these results are due more to international political trends than U.S. foreign policy biases.<sup>190</sup> As discussed below however, non-Arab or non-Muslim FTO organizations and individuals have been treated more favorably in some cases than their Arab and/or Muslim counterparts.

Consider, for example, the Provisional Irish Republican Army (PIRA). PIRA is a multi-purpose organization in Ireland that operates similarly to Hamas (also known as the Islamic Resistance Movement) in Israeli-occupied Palestine. In addition to providing the population with humanitarian aid, PIRA has been held responsible for numerous terrorist attacks. In contrast to Hamas’ designation, however, the Secretary of State has not designated PIRA as a foreign terrorist organization. When a few Congressmen objected to the double standard and called for PIRA’s designation as an FTO, their colleagues accused them of bigotry and ignorance.<sup>191</sup> Similar outcries of prejudice would likely occur if the government were to treat individuals affiliated with (undesignated) Irish terrorist groups, exposing the politics behind the selective enforcement of anti-terrorism laws.<sup>192</sup> Likewise, the Secretary of State explicitly excluded the Irish Republican Army (IRA) from its 1997 list, yet the Palestinian Liberation Organization (PLO) is explicitly referred to as a terrorist organization in the Immigration and Naturalization Act and any officer, official, representative, or spokesman of the PLO is considered to be engaged in a terrorist activity.<sup>193</sup> Therefore, IRA officials were

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25, 2004) (citing Al Haramain Foundation, Alavi Foundation, Benevolence International Foundation, Global Relief Foundation, Help the Needy, Holy Land Foundation, Human Appeal International, Institute of Islamic and Arabic Sciences in America, International Islamic Relief Organization, Islamic American Relief Agency, Islamic Assembly of North America, Islamic Association for Palestine, Islamic Circle of North America, Islamic Foundation of America, Islamic Society of North America, Kind Hearts, Muslim Arab Youth Association, Muslim Student Association, Muslim World League, Rabita Trust, SAAR Foundation, Solidarity International, United Association for Studies and Research, and World Assembly of Muslim Youth).

188. *Id.*

189. *Id.* (quoting Ibrahim Hooper, the spokesman for the Council on American-Islamic Relations).

190. *Foreign Terrorists in America: Five Years After the World Trade Center Bombing: Hearing Before the Subcommittee on Terrorism, Technology, and Government Information of the Senate Judiciary Committee* (Feb. 24, 1998) (statement of Steven Emerson), at [www.geocities.com/CollegePark/6453/emerson.html](http://www.geocities.com/CollegePark/6453/emerson.html) (last visited Sep. 9, 2003).

191. Jacqueline Benson, *Send Me Your Money: Controlling International Terrorism By Restricting Fundraising in the United States*, 21 HOUS. J. INT’L L. 321, 344-47 (1999).

192. Cole, *Secrecy*, *supra* note 185, at 287.

193. 62 Fed. Reg. 52,650 (Oct. 8, 1997) (listing the foreign terrorist organizations as of October 8, 1997, which did not include the Irish Republican Army); *see also* Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176 n.5 (1998) (noting the fact that the IRA has not been designated as a terrorist organization); 8 U.S.C.A. § 1182(a)(3)(B)(i) (West 2003) (“An alien who is an officer,

admitted into the U.S. to raise funds, while their Palestinian counterparts were not.<sup>194</sup> The State Department rationalized the decision based on the IRA's recent cease-fire and peace negotiations.<sup>195</sup> However, the PLO's entrance into peace talks with Israel in 1993 was not treated with similar leniency.

Another illuminating example of the U.S. government's double standards pertains to two Israeli organizations, Kach and Kahane Chai, who were designated as FTOs by the Secretary of State.<sup>196</sup> One of Kahane's devout supporters, Baruch Goldstein, brutally shot 29 Muslims to death in Israeli-occupied Palestine while they were kneeling down in prayer in a mosque.<sup>197</sup> The Kahane's anti-Arab racism was so extreme that the group was outlawed in Israel.<sup>198</sup> Nonetheless, the United States permitted the organization to tour the U.S. in order to raise funds.<sup>199</sup> The government claimed it was afraid that by prohibiting the tour, it would stigmatize Jews and Israelis.<sup>200</sup> Most likely, strong domestic political interest groups, as well as U.S. foreign policy, influenced the U.S. government's preferential treatment. It is highly improbable that the same treatment would be afforded to Hamas or Jihad nor has the government been as concerned with stigmatizing Arabs and Muslims in America.<sup>201</sup>

The U.S. government has also failed to deal with homegrown (non-Arab and non-Muslim) domestic terrorist threats with the same stringency applied to Arab and Muslim groups and individuals. FBI statistics show that most acts of domestic terrorism are attributable to domestic groups.<sup>202</sup> Nearly 70 percent of all potential terrorist events between 1996 and 1998, including the Oklahoma federal building bombing, originated from domestic sources. Extreme right-wing armed militias have posed a real threat for years.<sup>203</sup> However, the FBI's haphazard and ethnically-based use of the "terrorist" label discounts the real threat of domestic terrorism to the American public.

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official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity.").

194. Michael J. Whidden, *Unequal Justice: Arabs in America and United States Anti-Terrorism Legislation*, 69 *FORDHAM L. REV.* 2825, 2870-71 (2001).

195. *Id.* at 2870.

196. Designation of Foreign Terrorist Organizations, 66 *Fed. Reg.* 51,088 (Oct. 5, 2001); Designation of Foreign Terrorist Organizations, Oct. 8, 1999, 64 *Fed. Reg.* 55,112 (Oct. 8, 1999); Designation of Foreign Terrorist Organizations, 62 *Fed. Reg.* 52,650 (Oct. 8, 1997).

197. Bradley Burston, *Slain Rabbi Meir Kahane Runs From the Grave*, HA'ARETZ, Dec. 12, 2002 (noting the glorification of Baruch Goldstein by Kahane for his 1992 shooting of 29 Palestinians kneeling down in prayer).

198. *Id.*

199. Whidden, *supra* note 194, at 2872.

200. *Id.* at 2873.

201. *Id.* at 2872-73.

202. *Id.* at 2852.

203. *Id.* at 2853-60 (describing in detail specific domestic terrorist groups engaging in violent forms of domestic terrorism).

The arrests that have taken place since September 11, 2001, in addition to the designation of the three major Islamic charities support the contention that the U.S. government has disproportionately targeted active Muslim and Arab organizations and individuals. All of the organizations have yet to be formally indicted for providing material support to terrorist organizations and some were mistakenly placed under investigation.<sup>204</sup> For example, in November of 2001 the U.S. Department of Treasury froze the assets of Al-Barakaat, Somalia's largest money-transfer company.<sup>205</sup> The company was accused of providing millions of dollars to terrorists abroad.<sup>206</sup> But in August of 2002, the government unfroze the assets upon discovering that Al-Barakaat was merely a legitimate channel for Somalians in America to transfer money to their family members in Somalia.<sup>207</sup> Another example is of Jesse Maali, a U.S. citizen millionaire residing in Orlando who was arrested in November 2002.<sup>208</sup> Although he has only been charged with illegally employing immigrants and tax fraud, the government's openly stated, but uncorroborated, suspicions of terrorist-related activities has created a public relations catastrophe for Maali's personal and professional life.<sup>209</sup> The mere fact that Maali donated money to the Holy Land Foundation and Benevolence International, long before they were placed under investigation, placed him under suspicion by the FBI.<sup>210</sup> However, even with FISA warrants, the government has yet to produce sufficient evidence to charge him with an AEDPA crime.<sup>211</sup> A similar situation exists with Bayan Elashi and his four brothers who were arrested in Dallas, Texas in 2002.<sup>212</sup> The government charged his company, Infocom Corp, Inc., with providing material support to terrorist groups in the form of shipping computer parts to Syria and Libya and hiding the unlawful investments in the internet company.<sup>213</sup> He claims the shipments were to Malta, after which he no longer had control of their distribution.<sup>214</sup> Lastly, on February 26, 2003, 110 federal agents and state troopers arrested four Syracuse-area men and froze the assets of

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204. Note that the asset seizures for the Holy Land Foundation, Global Relief Foundation, and Benevolence International are all based on the U.S. Government's investigations into these organizations' activities, which were justified by the Executive's unilateral designations of these groups as specially designated terrorists. None have been tried in a court of law for providing material support to terrorist organizations or terrorist activities.

205. *U.S. Case vs. 4 Area Men Latest of Several Nationally*, POST-STANDARD, Mar. 2, 2003, at A16.

206. *Id.*

207. *Id.*

208. Roig-Franzi, *supra* note 10, at A4.

209. *Id.*

210. *Id.*

211. *Id.*

212. Glenn R. Simpson & Jess Bravin, *New Power Boosts Terror Fight*, ASIAN WALL ST. J., Jan. 22, 2003, at A8.

213. *Id.*

214. *Id.*

Help the Needy Islamic charity.<sup>215</sup> They are accused of violating the sanctions on Iraq by sending money and humanitarian aid to Iraq.<sup>216</sup>

The facts stated above raise disconcerting questions on the existence of improper prosecutorial selection based on ethnicity and religion. Overly broad foreign policy, national defense, and economic justifications for designations have been utilized to target groups that focus their efforts on humanitarian projects in the Middle East and individuals who did not intend their money to be used for violent acts of terror.<sup>217</sup> The arbitrariness inherent in the selection process also weakens the government's so-called legitimate interest in using anti-terrorism laws to prevent terrorism. If the interest is so important, why haven't these laws been applied with similar vigor against non-Arab and non-Muslim domestic and foreign terrorist groups? It is thus no secret that most of the charities investigated thus far by the Financial Action Task Force are under investigation because they are Islamic.<sup>218</sup> Because the designation process is vulnerable to such discretionary abuse, there exists a high risk of erroneous deprivation, as exemplified by Al-Barakaat's experience.<sup>219</sup>

#### b) THE HIGH RISK OF ERRONEOUS DEPRIVATION OF FUNDAMENTAL INTERESTS

The interests affected by the government's FTO designation are undoubtedly significant. An individual or entity impacted by an FTO designation risks losing both liberty and property interests. As described in a previous section, a physically present non-citizen faces removal from the U.S. and inadmissibility upon her voluntary departure, thus restricting her freedom to travel.<sup>220</sup> Both citizens and non-citizens face imprisonment if convicted of providing material support to an FTO. With respect to the designated organizations, they are not only concerned

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215. John O'Brien & John Mariani, *How the Feds Broke the Iraq Charity Case; Help the Needy Probe Included Bugs, Trash Searches, and Financial Sleuthing*, POST-STANDARD, Mar. 9, 2003, at A1; *No Bail or Quick Trial For Terror Suspect*, DEMOCRAT & CHRONICLE, July 8, 2003, at B (upholding the constitutionality of the U.S. government's Iraqi sanctions and refusing bail for a prominent Muslim doctor accused of illegally sending money to Iraq through Help the Needy). Although prosecutors insist that he has links to terrorist groups or causes, the doctor has not been charged with any terrorism charges. *No Bail or Quick Trial for Terror Suspect*, DEMOCRAT & CHRONICLE, July 8, 2003, at B.

216. *Id.*

217. Cole, *New McCarthyism*, *supra* note 8, at 10.

218. *The Iceberg Beneath the Charity – Charities As Sources of Terrorist Finance*, ECONOMIST, Mar. 15, 2003 at <http://www.economist.com/finance/sisplastyory.cfm?sstory-id=1632610>.

219. See *supra* notes 205-07 and accompanying text (admitting the unjustified freezing of Somalia's biggest money-transfer company, Al-Barakaat, due to the lack of evidence and absence of terrorism related charges, thereby leading to its removal from the IEEPA list of suspect companies in August 2002).

220. See *supra* Part II(A).

with retaining control of their assets, but also preventing the high reputational costs associated with the designation and any criminal charges of providing material support to an FTO. Therefore, it is vital for the courts to assure there is not an erroneous deprivation of these significant interests.

The risk of erroneous deprivation under the AEDPA is very high. The Secretary of State's complete control over the composition of the administrative record combined with the courts' inability to allow extra-record submissions places the target organization in a precariously vulnerable position.<sup>221</sup> To begin with, the organization receives no notice of any ongoing investigation against it.<sup>222</sup> Therefore, it does not have an equal opportunity to collect and present evidence to the Secretary of State in its own defense. Due process is guided by the principle that a hearing occur "at a meaningful time and in a meaningful manner."<sup>223</sup> The organization's right to contest the designation within thirty days after the fact is too little, too late. Its defense is limited to challenging whatever unclassified evidence, which may be disproportionately low compared to the classified evidence, is in the administrative record.<sup>224</sup> Moreover, the high degree of deference traditionally practiced by the courts with respect to any foreign affairs claims by the Executive transforms the post-deprivation hearing into a meaningless formality, rather than a real opportunity to challenge the liberty or property deprivation. And since the designation is like a scarlet letter for anyone affiliated with the entity, it is imperative that the results are accurate.<sup>225</sup>

Accordingly, the rulings in both *National Council of Resistance of Iran* and *Rahmani* were correct. Ideally, the relevant AEDPA provisions should be modified to permit an organization to present evidence in its defense before the actual designation takes place. This places a safeguard on the Secretary's control of the record, a discretion susceptible to abuse. The response that the Secretary of State's consultation with the Attorney General and Secretary of Treasury provides a sufficient check on the Secretary of State is weak. They are all dependent agencies of the Executive branch susceptible to internal pressures and have no incentive for challenging each other's

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221. See *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 19 (1999) ("The information recited is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.").

222. See *supra* notes 31-37 and accompanying text.

223. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

224. *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 786 (N.D. Ill. 2002) (noting OFAC's use of substantial classified information with respect to its investigation of Global Relief's connections with terrorist organizations).

225. Laurie Goldstein, *A Nation at War: Charities, Muslims Hesitation on Gifts as U.S. Scrutinizes Charities*, N.Y. TIMES, Apr. 17, 2003, at B1 (highlighting the increasing reluctance of many American Muslims to donate money to any Islamic charities out of fear of persecution by the FBI).

discretionary powers. Additionally, the ability to present counter-evidence would create a more accurate and complete record that could be subject to judicial review after the designation.

One reasonable response to this recommendation to provide a pre-deprivation hearing is an entity's ability to transfer its assets during the investigation, minimizing the designation process's punitive objectives. A feasible response to this valid government concern is to permit the organization to present extra-record evidence upon its utilization of the thirty-day contestation period. Thus, a post-deprivation hearing is granted but without the evidentiary limitations imposed on the organization. Considering the high stakes involved, it is unfair to limit the organization's right to properly defend itself in pre- and post-deprivation hearings.

### c) INSUFFICIENT JUDICIAL REVIEW

The AEDPA currently limits judicial review to 1) whether or not an organization is foreign and 2) whether or not it has engaged in terrorist activities, meanwhile deferring the third element of the effect on national security to the Executive branch.<sup>226</sup> The high degree of subjectivity involved in foreign policy, national security, and economic interests mandates establishing safeguards against the improper targeting of groups. Since it is highly unlikely that a court will engage in rigorous judicial review of national security questions, one possible remedy for this problem would be to increase the scope of judicial review with respect to the first two elements. The element pertaining to engaging in terrorist activities is fact-specific and in some cases a subjective question. Considering that organizations are not given notice or an opportunity to supplement the administrative record prior to their designation, they at least deserve the opportunity to present evidence in court upon raising a timely challenge to the designation. What if the Secretary of State decides to use primarily classified information in the administrative record inaccessible to the organization and its attorneys, but the organization has its own counter-evidence?<sup>227</sup> By refusing to disclose the government's evidence or to review the plaintiff's counter-evidence, the court has stripped the organization of any meaningful defense, making the entire opportunity to challenge a charade. Moreover, the courts have not, and probably will not in the future, challenge the Secretary of State's judgment and expertise in compiling a foreign affairs related record. This result may in part be due to the courts'

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226. 8 U.S.C.A. § 1189(a)(1)(C) (West 2003). National security is defined as "the national defense, foreign relations, or economic interests of the United States." *Id.* at § 1182(c)(2) (2003).

227. See *Humanitarian Law Project v. U.S. Dep't of Justice*, No. 02-55082, D.C. No. CV-98-01971-ABC, \*7 (9th Cir. Dec. 3, 2003) ("The Secretary is authorized to base the designation on 'classified information,' which is unavailable for review by the designated organization.").

claims of inexperience in determining the validity of the information provided in the record. However, allowing the organization to offer its own evidence may offset the courts' deficiency because the organization is in the best position to substantially challenge the Secretary's evidence. Therefore, the organization should be afforded an opportunity to properly defend itself.

As a final note, the thirty day period for challenging a designation should be expanded to at least sixty days. It is unreasonable to expect an organization that is suddenly informed of its designation and unexpectedly has its assets frozen to find an experienced lawyer who can develop a meaningful defense within thirty days.<sup>228</sup>

## 2. DESIGNATIONS UNDER THE INTERNATIONAL ECONOMIC EMERGENCY POWERS ACT (IEEPA) AND THE RISK OF ERRONEOUS DEPRIVATION

The designation process under the IEEPA suffers similar due process shortcomings as those discussed above with respect to the AEDPA, thus this discussion will not be repeated in this section. However, IEEPA designates do not have the benefit of some of the AEDPA case law criticizing the flaws in the process.<sup>229</sup> The President's plenary power over foreign affairs, combined with his self-initiated emergency powers, essentially foreclose any possibility of meaningful judicial review.<sup>230</sup> Therefore, the courts' unfortunate failure to address two egregious flaws in the IEEPA designation process is cause for concern. The short fifteen-day period for submitting post-deprivation evidence<sup>231</sup> and OFAC's unilateral power to reject counter-evidence<sup>232</sup> invalidates the organization's limited post-deprivation due process rights.

Under the IEEPA, as soon as the government decides to investigate an entity for providing material support to terrorist organizations, it can immediately freeze the entity's assets.<sup>233</sup> The statutory designation process provides no substantive criteria for identifying how the organizations shall be designated, granting the President complete discretion.<sup>234</sup> Therefore, as is the case under the AEDPA, the

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228. See Miriam Rozen, *Foundation Without Representation? Some Law Firms Are Wary of Taking Clients Accused of Terrorist Ties*, TEXAS LAW., Dec. 17, 2001, at 1 (describing numerous law firms' concerns with how representing high profile terrorism-related cases will negatively impact their business and thus prevents them from accepting the cases).

229. This is also the case with the AEDPA. See Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 209 (D.C. Cir. 2001); *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1058 (C.D. Cal. 2002).

230. See generally *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

231. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 66 n.8 (D.D.C. 2002).

232. *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 804-05 (N.D. Ill. 2002).

233. USA PATRIOT ACT § 106 (2001).

234. Cole, *New McCarthyism*, *supra* note 8, at 27.



organization is taken by surprise and left almost helpless due to its inability to access its own money. Moreover, it may be unaware of the evidentiary basis for the asset freezing. So when OFAC informs it of its right to submit counter-evidence within a brief fifteen-day period, the organization's fears are only intensified. Obtaining a willing and qualified lawyer to immediately commit to working for a high profile, controversial case is hard enough in any situation.<sup>235</sup> Combine these circumstances with the urgency of gathering sufficient counter-evidence within fifteen days of the property confiscation and the right to a post-deprivation hearing becomes an illusion. Even if the entity requests an extension, OFAC has complete discretion to deny the request, as was the case with the Holy Land Foundation.<sup>236</sup> Therefore, the entity is placed at the mercy of an antagonistic government department that is already convinced of the entity's wrongdoing.

The entity's serious predicament can be resolved in one of two ways. The courts must either require pre-deprivation hearings or require OFAC to give the accused organization more time to gather counter-evidence. If the courts are willing to accept the government's arguments of exigent circumstances, pressing need for prompt action, and legitimate government interests, then the court should balance these interests with the organization's rights to prevent the erroneous deprivation of its assets. In return for accepting post-deprivation hearings, the entity under investigation should be afforded a reasonable time to hire a lawyer, apply for a license from OFAC for payment of certain expenses, and compile counter-evidence for its defense. Fifteen days is clearly an unreasonably short time frame to satisfy these needs. Consequently, OFAC should afford the accused at least thirty days with an automatic right of extension. In rare cases where the deprivation is clearly erroneous and the entity is immediately prepared to submit counter-evidence, OFAC should make every effort to schedule a timely hearing.

The next significant shortcoming in the IEEPA is OFAC's unilateral and unchecked power to refuse whatever counter-evidence is submitted by the entity under investigation.<sup>237</sup> The organization is positioned at a disadvantage throughout the entire investigation and prosecutorial process (assuming charges are ever filed). Its assets are frozen based on a unilateral and secretive decision-making process by the Executive branch. The majority of the evidence is classified and inaccessible to the entity's officers or lawyers.<sup>238</sup> The organization is

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235. See Rozen, *supra* note 228, at 1.

236. *Holy Land Found.*, 219 F. Supp. 2d at 66 n.8.

237. See *id.* at 65-66 (stating it was reasonable for OFAC to exclude HLF's counter-evidence); see also Humanitarian Law Project v. U.S. Dep't of Justice, No. 02-55082, D.C. No. CV-98-01971-ABC, \*7 (9th Cir. Dec. 3, 2003) ("The Secretary is authorized to based the designation on 'classified information,' which is unavailable for review by the designated organization.").

238. *Id.*; *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 786 (N.D. Ill. 2002) (noting OFAC's use of substantial classified information with respect to its investigation of Global Relief's

only entitled to a post-deprivation hearing. No formal criminal charge need be filed throughout this entire ordeal, and the courts exercise only limited judicial review.<sup>239</sup> The only meaningful procedural protection available is the organization's right to submit counter-evidence to defend its innocence. Any restraint on this essential right results in unabashed injustice. Therefore, the role of the courts in reviewing and adjudicating the organization's evidence is vital. Allowing OFAC to unilaterally select what counter-evidence to accept into the record is like allowing a prosecutor to decide whether or not a criminal defendant's evidence is permissible in court. Clearly this is the role of the judge. The courts in *Holy Land* and *Global Relief* seriously erred when they blindly deferred to the Executive and refused to review the organization's evidence. If the evidence was indeed inapplicable or unreliable, the judge must make that decision, not the party conducting the investigation and the ensuing prosecution. Otherwise, a defendant's due process rights, compromised as they may be by a post-deprivation hearing, are invalidated.

#### IV. FIRST AMENDMENT CONSTITUTIONAL ANALYSIS AND CRITIQUE OF THE DESIGNATION PROCESS

"Congress shall make no law . . . abridging the freedom of speech."<sup>240</sup> First Amendment free speech rights cover a gamut of activities that include pure speech, symbolic expression, funding of political campaigns, and commercial speech.<sup>241</sup> The right "to associate for the purpose of engaging in those activities protected by the First Amendment"<sup>242</sup> and "the freedom to associate with others for the common advancement of political beliefs and ideas" is protected by the First Amendment's freedom of association.<sup>243</sup> The act of donating money to humanitarian projects abroad is comparable to contributing to political campaigns, which the Court has defined as constitutionally-protected expressive and associational conduct where the spending of money advances one's ideas or political beliefs.<sup>244</sup> For example, an individual's decision to donate money to an Islamic charity that donates

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connections with terrorist organizations). The organization cannot access or review the confidential information. See *supra* note 39-41 and accompanying text.

239. The Holy Land Foundation, the Global Relief Foundation, and Benevolence International remain under investigation, but have not been formally charged with providing material support to terrorism. All three cases recognize that there has yet to be any official criminal charges of providing material support to terrorism, but merely the designation as a foreign terrorist organization. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002); *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002); *Benevolence Int'l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935 (2002).

240. U.S. CONST. amend I.

241. NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 467 (1999).

242. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

243. *Kusper v. Pontkes*, 414 U.S. 51, 56 (1973), *quoted in* *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

244. *Id.*, *quoted in* *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976).

medical supplies to West Bank hospitals serving pregnant Palestinian refugee women may be an expression of various constitutionally-protected political and social beliefs. He may believe the pregnant women have the right to basic medical services despite Israel's refusal to allow them to pass through the checkpoints to a Jerusalem-based hospital with adequate facilities.<sup>245</sup> Therefore, the medical supplies purchased with the donations serve as a direct expression of the donor's constitutionally protected belief. Or the donor may reject the tragic impact of the Israeli occupation on these women, as well as their unborn children, and by sending them medical supplies, he is peacefully expressing his rejection of the devastating impact of the occupation. Therefore, political expression and association in the form of humanitarian aid can be directly analogized with pure speech through conduct rather than limiting pure speech to direct verbal communication.

The FTO designation process implicates First Amendment rights because an individual's guilt is imputed based on her nonverbal expression of donating money, resulting in a suppression of otherwise valid free speech activities. The criminal and civil penalties that accompany the designations may stifle freedom of expression and association by limiting a person's ability to choose where her money will be donated. The charges of providing material support are also problematic under the First Amendment because they do not distinguish between humanitarian contributions and contributions to militant organizations that openly engage in violent activities. The application of a "knowingly" rather than an "intentionally" *mens rea* creates a high risk of punishing individuals engaged in constitutionally protected forms of expression. Therefore, the AEDPA criminal provisions are not sufficiently narrowly tailored to effectuate the government's terrorism prevention interests while protecting the donor's free speech rights.

Because free speech is a fundamental right, courts generally apply strict scrutiny against any government action seeking to regulate speech.<sup>246</sup> However, the courts may apply intermediate scrutiny if speech and non-speech elements are combined in the same course of conduct and a sufficiently important governmental interest, versus the compelling interest required under strict scrutiny, justifies incidental limitations on First Amendment speech.<sup>247</sup> The level of scrutiny applied

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245. See, e.g., *Israel's Army of Peace: Battle-Scarred Reservists Are Refusing to Serve in the Occupied Territories*, GUARDIAN, Mar. 6, 2002, at 19 (quoting an IDF soldier stating that he refused to serve after another soldier refused to let a pregnant Palestinian woman through a checkpoint, resulting in her giving birth to a stillborn child); *Birth and Death at the Checkpoint*, HA'ARETZ, Sept. 11, 2003 (describing in detail a Palestinian woman's stillbirth delivery of a baby girl behind a rock at an Israeli checkpoint in occupied Palestine due to the soldiers' refusal to let her pass to receive emergency medical attention in Nablus); Gideon Levy, *And The Twins Died*, HA'ARETZ, Jan. 9, 2004 (describing the death of twin newborn girls due to their Palestinian mother's inability to reach a hospital in time after being held up at an IDF checkpoint in the West Bank).

246. See *United States v. O'Brien*, 391 U.S. 367 (1968).

247. *Id.* at 376-77.

depends on whether the government law attempting to regulate the action in question is related to the suppression of constitutionally protected expression.<sup>248</sup>

This Article argues that, with respect to donating money to the Islamic charities discussed above, the courts mistakenly applied the O'Brien test of intermediate scrutiny. This conclusion is based on an analysis of two fundamental questions. First, is donating money a form of expressive conduct protected by the First Amendment? Second, is the criminal provision for providing material support to FTOs in the AEDPA related to the suppression of speech? The AEDPA criminal provisions, as currently written, are related to the suppression of free expression and the incidental restriction on these free expression rights is greater than the government interest. Before delving into a doctrinal challenge to the courts' decisions, a brief summary of existing case law regarding these questions is due after which this Article will challenge the legal reasoning of the courts.

## A. FIRST AMENDMENT FREEDOM OF ASSOCIATION RIGHTS AFFORDED IN THE DESIGNATION PROCESS

### 1. DESIGNATIONS UNDER THE AEDPA

*Humanitarian Law Project v. Reno*<sup>249</sup> was one of the first cases to challenge FTO designations on First Amendment grounds. The case was filed soon after the Kurdistan Worker's Party and the Tamil Tigers were designated under the AEDPA. The plaintiffs challenging these designations included two U.S. citizens who sought to provide material support to the humanitarian and political activities, but not the military activities, of these designated FTOs.<sup>250</sup> Fearing criminal prosecution and conviction if they provided such assistance, the plaintiffs filed suit to challenge the AEDPA's provision regarding providing material support to FTOs as a violation of their rights to freedom of speech and association.<sup>251</sup> Specifically, the Plaintiffs argued that the AEDPA's imposition of criminal sanctions without a showing of specific intent to

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248. *Id.* at 375 (justifying the government's action in this case as an appropriately narrow means of protecting the government's interests).

249. 9 F. Supp. 2d 1176 (C.D. Cal. 1998).

250. *Id.* at 1180. One of the Plaintiffs, The Tamil Welfare and Human Rights Committee (TWHRC), focuses on protecting the human rights of Tamils in Sri Lanka and promoting their health, social well-being, and welfare. Due to the FTO designation of the Tamil Tigers, the TWHRC is unable to provide direct relief, medical, and social services to Tamil refugees. The TWHRC is explicit in its intention to only support the Tamil Tiger's humanitarian efforts and not its military efforts. *Id.* at 1184.

251. *Id.* at 1185.

further the FTO's illegal objectives imposed guilt by association in violation of the First Amendment.<sup>252</sup>

Generally, any regulation that prohibits expression or association based on the denunciation of the speech's content is subject to strict scrutiny.<sup>253</sup> However, if the government's regulation is unrelated to the suppression of a specific message or idea, then it is content-neutral and subject to intermediate scrutiny.<sup>254</sup> The Court ruled that although the provision of material support in the form of donations is protected First Amendment activity, the AEDPA's criminal provisions are content neutral regulations because they do not distinguish between favored and disfavored speech.<sup>255</sup> Consequently, the court applied the O'Brien<sup>256</sup> standard of intermediate scrutiny to reject the Plaintiff's First Amendment claims.<sup>257</sup> O'Brien involves the following four-pronged balancing test: (1) whether the regulation is within the power of the government; (2) whether the regulation furthers an important or substantial governmental interest; (3) whether the proffered interest is unrelated to the suppression of free expression; and (4) whether the incidental restriction on the First Amendment freedoms is no greater than is essential to further the important interest.<sup>258</sup>

With respect to the first prong, the Plaintiffs did not contest the Secretary's authority to designate or the importance of preventing terrorism.<sup>259</sup> They were unsuccessful, however, in challenging the effective suppression of free speech that resulted from the ban on providing humanitarian aid. The plaintiffs' corresponding significant freedom of association rights were essentially trumped by the government's compelling terrorism-prevention interest.<sup>260</sup> The court rejected the plaintiff's free speech claims because the content-neutral restriction did not prevent the plaintiffs from conveying any particular message or idea in a communicative manner.<sup>261</sup> The donation of physical property was insufficiently "speech related" conduct to warrant First Amendment protection,<sup>262</sup> and the plaintiffs could still promote the organizations' political and humanitarian goals as long as they did not

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252. *Id.*; *Scales v. United States*, 367 U.S. 203, 224-28 (1961) (requiring that the government prove personal guilt in order to adhere to the Fifth Amendment's due process requirement).

253. *Humanitarian Law Project*, 9 F. Supp. 2d at 1186-87.

254. *Id.* at 1187.

255. *Id.* at 1188, *aff'd* 205 F.3d 1130 (9th Cir. 2000).

256. *United States v. O'Brien*, 391 U.S. 367 (1968) (stating that if the law is content-neutral and is directed at non-communicative elements of the Plaintiff's actions, then an intermediate level of scrutiny is sufficient)

257. *Humanitarian Law Project*, 9 F. Supp. 2d at 1192.

258. *Id.*

259. *Id.* at 1193.

260. *Id.*

261. *Id.* at 1193-94.

262. *Humanitarian Law Project*, 9 F. Supp. 2d at 1196 n.18.

send them material support.<sup>263</sup> In other words, the simple fact that the AEDPA made it more difficult for the plaintiffs to promote their organizations' political and humanitarian goals did not render the AEDPA excessively restrictive.<sup>264</sup> Ultimately, the U.S.'s substantial national security and foreign policy interests quashed the U.S. citizens' constitutionally protected activities with foreign entities and relieved the court of applying a strict scrutiny analysis.<sup>265</sup>

After five years of litigation on this case, the Ninth Circuit recently declined to reconsider the plaintiff's four prior legal challenges to its FTO designation.<sup>266</sup> However, the court correctly ruled that "18 U.S.C. § 2339B, by not requiring proof of personal guilt, raises serious Fifth Amendment due process concerns."<sup>267</sup> The court avoided the constitutional concerns by construing the statute as requiring "proof that a person charged with violating the statute had knowledge of the organization's designation or knowledge of the unlawful activities that caused it to be so designated."<sup>268</sup> The court based its ruling on numerous Ninth Circuit and Supreme Court cases from the McCarthy-era aimed at protecting individual members from having the organization's intent imputed upon them for prosecutorial purposes.<sup>269</sup> Other circuits should take heed of the Ninth Circuit's justified concerns with individuals' Fifth Amendment rights and interpret the FTO designation law in a similar manner.

## 2. DESIGNATIONS UNDER THE IEEPA

The Islamic charities, which were designated as terrorist under the IEEPA, were also subject to the AEDPA's criminal sanctions for

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263. *Id.* at 1194 n.14.

264. *Id.* at 1195-96.

265. Note, however, that even had the Court applied strict scrutiny to the AEDPA provisions, the ruling would have been the same. *Id.* at 1197 n.20 (affirmed in *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000)).

266. *Humanitarian Law Project v. U.S. Dep't of Justice*, No. 02-55082, D.C. No. CV-98-01971-ABC, \*22 (9th Cir. Dec. 3, 2003) ("[W]e decline to reconsider plaintiffs' four legal challenges that we considered in full in *Humanitarian Law Project II*, i.e., (1) that 18 U.S.C. § 2339B violated plaintiffs' First Amendment right to freedom of association because it impermissibly imposed a criminal penalty for their association with the designated organizations; (2) that 18 U.S.C. § 2339B violated plaintiffs' First Amendment right to association by prohibiting them from giving political contributions to the designated organizations; (3) that 18 U.S.C. § 2339B was a content-based restriction on symbolic speech and failed to survive strict scrutiny; and (4) that 8 U.S.C. § 1189 violated plaintiffs' First and Fifth Amendment rights because the scheme gave the Secretary unfettered licensing power to designate an organization as a terrorist organization.").

267. *Id.* at \*5.

268. *Id.* at \*24.

269. *Id.* at \*25-\*32 (citing *Scales v. United States*, 367, U.S. 203, 224-28 (1961); *Hellman v. United States*, 298 F.2d 810 (9th Cir. 1961); *Brown v. United States*, 334 F.2d 488 (9th Cir. 1964); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964)).

providing material support to terrorist organizations.<sup>270</sup> In addition, any donors to the charities themselves were subject to the same criminal sanctions.<sup>271</sup> Therefore, the organizations sought to continue donating humanitarian aid to recipients worldwide by challenging their designation on First Amendment grounds.

In *Holy Land Foundation for Relief and Development v. Ashcroft*,<sup>272</sup> the Plaintiff, an SDT under the IEEPA, also argued that the prohibition on its humanitarian contributions violated its First Amendment rights to freedom of association and speech.<sup>273</sup> HLF cited the Government's failure to adhere to the specific intent requirement in *Claiborne Hardware* as a violation of its freedom of association.<sup>274</sup> The Plaintiff claimed that by failing to establish HLF's specific intent to further Hamas' illegal objectives, the government had essentially imposed guilt by association.<sup>275</sup> The court rejected the claim by noting that the blocking order did not prohibit membership in Hamas or endorsement of its ideas. Moreover, the prohibition on providing material support is not constitutionally sanctioned. Therefore, the court concluded that the ruling in *Claiborne Hardware*, which focused on imposing liability on the basis of association alone was inapplicable to HLF's case, and therefore, the specific intent requirement was equally inapplicable to HLF.<sup>276</sup> The court believed a specific intent requirement would substantially undermine the efficacy of the economic sanctions.<sup>277</sup>

The Court agreed that the Holy Land Foundation's humanitarian contributions were a form of speech, but applied the O'Brien test for the same reasons it applied it in *Humanitarian Law Project* and reached the same conclusion.<sup>278</sup> The court held that *Buckley v. Valeo*'s<sup>279</sup> strict scrutiny requirement was inapplicable because humanitarian contributions abroad were distinguishable from "political contributions [that] implicated core First Amendment rights of political expression in a democratic society."<sup>280</sup> As long as the humanitarian aid restrictions did not restrict HLF's viewpoints, including endorsements of Hamas, then no free speech violation existed.<sup>281</sup> Finally, the Court emphasized the fungibility of money. Regardless of HLF's legitimate charitable intentions, the prohibition was necessary to assure that contributions for

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270. *See supra* Part II(B).

271. *Id.*

272. 219 F. Supp. 2d 57 (D.D.C. 2002).

273. *Id.* at 62.

274. *See NAACP v. Clairborne Hardware*, 458 U.S. 886, 919 (1982); *see also Scales v. United States*, 367 U.S. 203, 224-28 (1961) (requiring that the government prove personal guilt in order to adhere to the Fifth Amendment's due process requirement).

275. *Holy Land Found.*, 219 F. Supp. 2d at 80-81.

276. *Id.* at 81.

277. *Id.*

278. *Id.*

279. 424 U.S. 1 (1976).

280. *Holy Land Found.*, 219 F. Supp. 2d at 81 n.37.

281. *Id.* at 82.

peaceful purposes did not free up funds for terrorist activities.<sup>282</sup> The government's national security interest in combating terrorism trumped any incidental infringements on free speech.<sup>283</sup>

Another Islamic charity, the Global Relief Fund, also challenged its designation under IEEPA as a violation of its First Amendment rights.<sup>284</sup> GRF focused its claims on President Bush's September 23, 2001 Executive Order by claiming that it was unconstitutionally overbroad.<sup>285</sup> The Executive Order permits the freezing of assets of any person who "acted for, sponsored, or was otherwise associated with a person determined to be a terrorist."<sup>286</sup> GRF challenged the term "associated with" as overbroad and an infringement on free speech rights. However, the Court rejected GRF's argument, finding that the Executive Order did not directly regulate protected speech or expression, nor did it grant discretion to an official to determine content-specific guidelines on what is prohibited. Accordingly, any effects on speech that might result were merely incidental and were not substantially more than necessary to further the government's legitimate interest in preventing terrorism.<sup>287</sup> The Court's reasoning mirrored that in Humanitarian Law Project as it applied the O'Brien test. Ultimately, the Court concluded that the Executive Order, as applied to United States citizens, was unlikely to violate the First Amendment.<sup>288</sup>

## B. VIOLATIONS OF THE FIRST AMENDMENT FREEDOM OF ASSOCIATION

This Article argues that with respect to the Islamic charities cases,<sup>289</sup> the courts mistakenly invoked the O'Brien test of intermediate scrutiny, denying the organizations and their membership First Amendment freedom of expression rights. The answers and analysis relevant to two fundamental questions support this conclusion: (1) whether donating money is a form of expressive conduct protected by the First Amendment; (2) is the criminal provision for providing material support to FTOs in AEDPA related to the suppression of speech. The following sections explain why the answer to both questions is in the affirmative.

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282. *Id.* at 82 n.38.

283. *Id.* at 82.

284. *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002).

285. *Id.* at 805.

286. *Id.* at 806.

287. *Id.*

288. *Id.*

289. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 57 (D.D.C. 2002); *Global Relief Found.*, 207 F. Supp. 2d at 779; *Benevolence Int'l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002).



## 1. CHARITABLE DONATIONS ARE PROTECTED FIRST AMENDMENT SPEECH

Although the First Amendment only explicitly refers to speech, the Court has long recognized that the protection is not limited to spoken or written forms of communication.<sup>290</sup> Conduct falls under ‘speech’ for First Amendment purposes if it is “sufficiently imbued with elements of communication [that] fall within the scope of the First and Fourteenth Amendments.”<sup>291</sup> The Court decides whether or not the communication is sufficient to pass this vague test by inquiring into the actor’s “intent to convey a particularized message . . . and the likelihood . . . that the message would be understood by those who viewed it.”<sup>292</sup> Moreover, the distinction between written or spoken words and nonverbal conduct is irrelevant if the nonverbal conduct is expressive and the regulation of that conduct is related to expression.<sup>293</sup> The Supreme Court has ruled that donating money to political campaigns is a form of expressive conduct protected by the First Amendment as a form of political association or political expression.<sup>294</sup> Other examples of conduct as speech include burning the American flag, nude dancing, and cross burning.<sup>295</sup>

There is no satisfactory rationale for treating donations to humanitarian activities any different than donations to political campaigns with respect to their significance as First Amendment rights.<sup>296</sup> By focusing on the superficial differences between political parties and humanitarian projects as a means to deny charitable donors the rights of political donors, the courts overlooked the real value of the inclusion of financial donations as a form of free speech rights. For that reason, the Islamic charities cases did involve constitutionally-protected First Amendment freedom of political expression and association.

The courts in Humanitarian Law Project,<sup>297</sup> Holy Land Foundation,<sup>298</sup> and Global Relief Foundation<sup>299</sup> mistakenly disregarded the politically expressive value of sending humanitarian aid, whether in the form of monetary donations or physical property. The donor’s contribution is a clear expression of her political, ethical, or religious

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290. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

291. *Id.* (citing *Spence v. State of Washington*, 418 U.S. 405, 409 (1974)).

292. *Id.* (citing *Spence v. State of Washington*, 418 U.S. 405, 410-11 (1974)).

293. *Id.* at 416.

294. *Id.*

295. See generally *Texas v. Johnson*, 491 U.S. 397 (1989); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Virginia v. Black*, 539 U.S. 194 (2003).

296. *Cole, New McCarthyism, supra* note 8, at 11 (citing *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976)).

297. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1188 (C.D. Cal. 1998).

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

299. *Global Relief Found. v. O’Neill*, 207 F. Supp. 2d 779, 779 (N.D. Ill. 2002).

associations as incidental to a legitimate regulation of conduct.<sup>300</sup> Take, for instance, an individual's decision to donate money to an Islamic charity that donates toys to Palestinian refugees in Gaza. The individual's conduct may be an expression of various constitutionally-protected political and social beliefs. She may believe those children have the right to live as normal a childhood as possible given their oppressive circumstances. Therefore, those toys will serve as a direct expression of her constitutionally protected belief. Or she may reject the tragic impact of the Israeli occupation on these children, and by sending them toys, she is peacefully expressing her rejection of the occupation. If the right of expression excludes the right to contribute money, then it is a meaningless formality. "The right to join together for the advancement of beliefs and ideas . . . is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective."<sup>301</sup>

However, the courts concluded that as long as the law does not preclude membership in Hamas or endorsement of its views then the Plaintiffs' associational rights are not implicated.<sup>302</sup> This conclusion completely misses the very reason why the Islamic charities are challenging their designations. They are not seeking to freely join the ranks of Hamas or endorse their military activities. Rather they seek the right to donate funds to legitimate humanitarian aid projects that support hospitals, orphanages, and schools, without being collectively punished for a few individuals' illegitimate and violent activities.<sup>303</sup> Consequently, the government is suppressing individuals' rights to effectively associate with groups and activities (through the giving of humanitarian aid) that the government unilaterally deems contemptible. Such action is explicitly prohibited by the Constitution.<sup>304</sup>

The Islamic charity cases discussed above also mistakenly differentiate between pure speech activities and non-speech expression in the context of First Amendment rights. According to the courts, pure speech deserves First Amendment protection and strict scrutiny analysis, while non-expressive forms of conduct are secondary and subject to intermediate scrutiny. This reasoning is a reflection of current free speech jurisprudence where non-expressive association is protected only if it is intimate and affects the right to privacy.<sup>305</sup> Intimate conduct refers

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300. David Cole, *Hanging With The Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 210 (1999).

301. *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976). Note that this case focuses primarily on political campaign funding.

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

303. See *Duncan*, *supra* note 16 (describing an Islamic charity's, KINDER USA, objective of providing food, household products, and other day-to-day items to Palestinians in the West Bank and Gaza).

304. *Texas v. Johnson*, 491 U.S. 397, 416 (1989) (stating "the government may not prohibit expression simply because it disagrees with its message").

305. Cole, *Wrong Crowd*, *supra* note 300, at 209.

to marriage, childbirth, raising and educating children, and cohabitation of one's relatives, but not donating money for political or religious reasons.<sup>306</sup> Therefore, limiting one's charitable donations is perceived as a means of combating terrorism rather than suppressing an overt manifestation of an individual's personal belief that a specific humanitarian cause is worthy of her financial assistance. As long as this inaccurate distinction is accepted, the courts are unlikely to apply the traditional strict scrutiny test to future challenges to the laws governing providing material support to designated FTOs. As a result, numerous well-intentioned individuals have fallen prey to a witch-hunt by the government against anyone associated with politically unpopular causes, specifically those affiliated with Islam or Arabs.<sup>307</sup>

In the case of humanitarian aid to Palestinian refugees, the situation is particularly problematic. For various reasons beyond the scope of this Article, Hamas operates a large number of orphanages, nursing homes, hospitals, women's clinics, religious colleges, sports clubs, and vocational schools. In some parts of Palestinian refugee camps, only Hamas-affiliated welfare programs exist. Therefore, it is difficult to donate to a legitimate humanitarian project without indirectly interacting with one of Hamas's non-violent welfare programs.<sup>308</sup> Because Muslims worldwide are required to donate 2.5% of their annual income to charity, preferably to assist impoverished Muslims, numerous American Muslims want to donate money to humanitarian projects in war-torn areas in the Middle East.<sup>309</sup> However, they do not want their money to contribute to any political or violent activities in the region. Nonetheless, well-intentioned donors may still be criminally liable for these contributions because the statutory definition of wrongdoing has been expanded to include these otherwise innocent humanitarian activities. Donors must decide between practicing their constitutional non-speech expressive rights while running the high risk of criminal prosecution, and denying themselves these rights by ceasing to donate.<sup>310</sup>

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306. *Id.*

307. Roig-Franzia, *supra* note 10, at A4 (describing the U.S. government's prosecution of Jesse Maali because of his large donations to Islamic charities during the 1990s and the government's inability to charge him for providing material support due lack of evidence); William Kates, *U.S. Details Doctor's Fund-Raising*, TIMES UNION, Mar. 9, 2003, at D6 (describing the investigation into Dr. Rafil Dhafir's fund-raising for charities in Iraq which has not produced sufficient evidence to charge him with any terrorism crimes, but simply that he made donations to the Global Relief Foundation and Benevolence International); *No Bail or Quick Trial for Terror Suspect*, DEMOCRAT & CHRONICLE, July 8, 2003, at 5B (highlighting the government's failure to produce sufficient evidence to charge Dr. Dhafir with terrorist charges, yet their continued labeling of his charitable fund-raising activities as terrorist).

308. Bellino, *supra* note 178, at 138.

309. Goldstein, *supra* note 225.

310. *See generally* Spence v. Washington, 418 U.S. 405 (1974) (setting aside a conviction for using tape to form a peace symbol on the American flag in violation of a state law forbidding the exhibition of an American flag to which figures, symbols, and other extraneous materials are attached); *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (setting aside a suspension of students wearing black armbands to school in protest of the Vietnam War); *Buckley v.*

## 2. THE AEDPA'S "KNOWINGLY" *MENS REA* IMPOSES GUILT BY ASSOCIATION, AND SHOULD BE CHANGED TO "INTENTIONALLY"

Once it is established that conduct qualifies as speech under the First Amendment, the next question is whether or not the government's action is related to the suppression of that speech. The answer revolves around the "content-neutral" nature of the government regulation. Although the government has more leeway to restrict expressive conduct than it does with restrictions on the written or spoken word,<sup>311</sup> the government may not prohibit the expression simply because it disagrees with the expressive conduct.<sup>312</sup> However, determining content-neutrality is by no means a straightforward or predictable process. The Court's application of vague standards such as "content-neutral" laws has produced seemingly contradictory results. In one case, the Court struck down a Texas law prohibiting the burning of the U.S. flag because the law in effect suppressed the defendant's right to express his political beliefs.<sup>313</sup> In contrast, 20 years prior, the Court rejected any claims that burning one's draft card was necessarily expressive or a form of symbolic speech.<sup>314</sup> Consequently, a federal law prohibiting the knowing destruction or mutilation of draft cards on the grounds that the law was content-neutral was upheld and remains good law.<sup>315</sup> However, reasonable minds may disagree as to the degree of similarity between burning a draft card and burning an American flag with respect to First Amendment expression rights.

The government claims that the AEDPA does not distinguish between favored and disfavored speech, but rather is focused on combating terrorism, thus qualifying for the O'Brien test.<sup>316</sup> Admittedly, the objective of the AEDPA material support provisions is legitimate and facially content-neutral in that it does not explicitly prohibit behavior based on a viewpoint. However, the knowingly (rather than intentionally) *mens rea* element of the provisions, as well as the selective enforcement of the law against Islamic charities, results in direct suppression of otherwise constitutionally protected freedom of expression. Whether an organization is designated under the AEDPA or the IEEPA, anyone that 'knowingly' donates assets to the organization is susceptible to criminal prosecution for providing material support to

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Valeo, 424 U.S. 1 (1976) (acknowledging the direct relationship between spending money for political campaigns and expression, justifying its constitutional protection).

311. United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

312. Texas v. Johnson, 491 U.S. 398, 416 (1989).

313. *Id.* at 420.

314. O'Brien, 391 U.S. at 375.

315. See 50 U.S.C. App. § 462(b)(3) (Supp. II 1967).

316. Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1188 (C.D. Cal. 1998).

terrorism.<sup>317</sup> Criminal liability exists regardless of whether a donor intended for her money to be spent on feeding five-year-old children in a Palestinian refugee camp, and the money was indeed spent according to that intention, or to fund violent terrorist activities. The donor's specific intent to spend her money on otherwise legal activities is irrelevant to her criminal liability. As long as she "knowingly" donated the money to an FTO that is accused of engaging in lawful and unlawful activities, the donor is suspect of criminal behavior. Moreover, it is not clear whether the donor must "know" that the organization has been designated as an FTO.<sup>318</sup> Because there is a high probability that a person who donates money to an Islamic charity, versus directly to a strictly military organization, is expressing constitutionally protected ideas, the government should have a constitutional obligation to prove that the person specifically intended to further illegal terrorist acts.<sup>319</sup>

One easy way to avoid improperly imputing culpability would be to change the *mens rea* for providing material support from "knowingly" to "intentionally."<sup>320</sup> Numerous individuals have knowingly made charitable donations to Islamic charities that were designated as FTOs. However, most of the donors did not know of the designation, should not have known, or did not intend for their money to be spent on terrorist-related activities.<sup>321</sup> With respect to the accused Islamic charities, most donors intended for their money to be spent on orphans, schools, hospitals, and other social welfare programs.<sup>322</sup> The fact that the money may have been misappropriated without their knowledge should not make them criminally liable for supporting terrorism. Individuals should not be punished for the misconduct of others, but only for their own.<sup>323</sup> Moreover, to place the responsibility on an individual in the U.S. to know exactly what an organization does thousands of miles away is

317. 18 U.S.C.A. § 2339 (West 2003).

318. Only in the Ninth Circuit has it been recently established that the donor must know that the organizations is a designated FTO. *Humanitarian Law Project v. U.S. Dep't of Justice*, No. 02-44082, D.C. No. CV-98-01971-ABC, \*22 (9th Cir. Dec. 3, 2003).

319. For example, an individual who wants to support the military activities of the Kurdish independence movement, the Iraqi opposition movement, or the Palestinian liberation movement will probably not send his money to an orphanage, hospital, or elementary school that provides humanitarian needs to impoverished citizens.

320. Cole, *New McCarthyism*, *supra* note 8.

321. William Patton, *Preventing Terrorism Fundraising in the United States*, 30 GEO. WASH. J. INT'L L. & ECON. 127, 151 (1996).

322. Yasser el-Banna, *Palestinian Orphans Left out in Ramadan*, at <http://www.islamonline.net/English/News/2003-11/05/article03.shtml> (last visited Nov. 5, 2003).

323. Membership in an organization that has both lawful and unlawful ends cannot serve as the basis for imposing guilt. NANCY CHANG, *SILENCING POLITICAL DISSENT* 103 (2002) (citing *Scales v. United States*, 367 U.S. 203, 224-28 (1961); *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982)). See also *Humanitarian Law Project v. U.S. Dep't of Justice*, No. 02-55082, D.C. No. CV-98-01971-ABC, \*30 (9th Cir. Dec. 3, 2003) ("We believe that serious due process concerns would be raised were we to accept the argument that a person who acts without knowledge of critical information about a designated organization presumably acts consistently with the intent and conduct of that designated organization.").

unreasonably burdensome and not similarly imposed on donors to non-Islamic charities.

Finally, the selective application of anti-terrorism laws based on ethnicity, race, and religious affiliation<sup>324</sup> rather than individual conduct reveals that these laws are not necessarily content-neutral.<sup>325</sup> The neutrality ends as soon as the Secretary of State or the President considers designating an organization based on foreign policy concerns, which indisputably entail partiality. Domestic political pressures, for instance, play a large role in determining the selective application of these powers. As mentioned above, the Government was loathe to apply stringent anti-terrorism laws to multi-purpose Irish groups lest they anger their large Irish-American constituency. The same applies to the Government's attitude towards Jewish settler groups that engage in violent physical attacks against innocent Palestinian civilians in the West Bank and Gaza.<sup>326</sup> Perhaps the explanation for such disparate treatment is the realization that not all individuals who associate or support these groups are morally culpable. Thus, absent a clear intent to directly support illegal violent activities, the associated individuals are free to act on their beliefs as they choose, including the donation of money, because it is their constitutional right to do so. The same reasoning and approach is not equally applied to individuals associated with Islamic or Arab-related activities.

## V. RECOMMENDATIONS AND CONCLUSION

The authority to designate an organization as terrorist is indeed a powerful one. Individuals can be kept out of the country, kicked out of the country, detained, criminally prosecuted, and denied future rights to naturalized citizenship. Organizations can be immediately shut down as their assets are frozen without prior hearing or notice, and all officers and donors associated with the organization are vulnerable to criminal

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324. See *supra* Part III(B)(1)(a) and discussion on disproportionate representation of Arab/Muslim groups.

325. See Cole, *New McCarthyism*, *supra* note 8, at 29.

326. Despite widespread media coverage of illegal Jewish settler violence against innocent Palestinian civilians in the Palestinian occupied territories, the United States government does not prosecute an individual for joining the settler movement or donating money to the settler movement with the possible exception of direct affiliations with Kahan Chai and Kach – only two of numerous settler movement organizations. See Peter Enav, *3 Israeli Settlers Convicted of Bomb Plot*, *GUARDIAN*, Sept. 17, 2003 (reporting on the conviction of three Israeli settlers for attempting to blow up an Arab girls' school in Jerusalem in 2002); Stephen C. Warneck, *A Preemptive Strike: Using RICO and the AEDPA to Attack the Financial Strength of International Terrorist Organizations*, 78 B.U.L. REV. 177, 187 (1998) (describing the fund-raising activities in the United States of Jewish fanatical groups Kahan Chai and Kach for the preservation of Jewish settlements in the West Bank); see also Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129, 153 (1991) (pointing out the United States' failure to effectively pressure Israel towards removing the Jewish settlements in the West Bank and Gaza).

prosecution for providing material support to a terrorist organization.<sup>327</sup> Although the designation authority existed prior to September 11, 2001, it has been transformed into an aggressive tool for combating perceived Middle Eastern and Islamic terrorist threats worldwide. The government continues to effectively employ its designation authority to halt almost all domestic activities and organizations associated with the Middle East or Islam under the auspices of combating terrorism.

The severe consequences of the designation process should be sufficient cause for concern. However, the Executive branch has successfully distracted the courts from emphasizing and preserving constitutional rights. Procedural and substantive due process rights are being compromised in the name of national security. First Amendment rights of expression and association are being suppressed due to the government's more important war on terrorism. Unimpressive rationales differentiating between speech and non-speech, conduct and expression, and content-based and content-neutral laws have successfully distracted judges from protecting vulnerable First Amendment rights.

Accordingly, this Article proposes some changes to the procedures and laws to minimize the erosion of constitutional rights while respecting the government's legitimate efforts to combat terrorism. Due to the complexity of the Article topic, a brief summary of its conclusions is useful. First, an organization under investigation for FTO-designation purposes must have the opportunity to provide counter-evidence that will be included in the judicially reviewable administrative record. Otherwise, the Secretary of State has complete discretion to include unchallengeable classified information that biases the judge's analysis against the organization, increasing the risk of error. Moreover, designated organizations are effectively denied the right to properly defend themselves, as would any defendant whose lawyer was prohibited from conducting legal research and submitting evidence into the trial record. The court should accept amicus briefs from associated parties who are vulnerable to future criminal prosecution due to their associations with the organization. The authority to reject evidence should lie with the Article III judge, not the prosecution.

Second, the contestation period under AEDPA should be expanded from thirty to sixty days. Since organizations do not receive notice prior to designation, due to the government's fears that it will transfer its assets abroad, the organization needs more time to hire a lawyer and prepare an adequate defense. In all likelihood, organizations will not possess the resources, given the freezing of their assets, to defend themselves in such a short timeframe, making the contestation period a meaningless formality. In IEEPA cases where organizations' assets are

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327. *Global Relief Found. v. O'Neill*, 315 F.3d 748, 751 (7th Cir. 2002) ("Treasury has blocked GRF's accounts and thus effectively shut down its operations around the globe.").

frozen merely because they are under investigation,<sup>328</sup> the organizations' fifteen day contestation period is inadequate. For the reasons just stated, the organization must have more time, ideally up to sixty days, to gather and present evidence to OFAC in its defense. Moreover, OFAC should not retain the power to reject evidence from inclusion in the administrative record. Because the administrative record is the only evidence that an Article III court can review, OFAC's ability to deny the inclusion of counter-evidence effectively nullifies an entity's ability to adequately defend itself in court.

Third, criminal charges for providing material support to terrorism should be based on intent. Knowingly providing material support to a designated organization is insufficient because individuals may not know the organizations are formally designated or they may be unaware that their money might be spent on illegal activities. In order to prevent unconstitutional impositions of guilt by association, any wrongdoing by the organization should not be automatically imputed to associated individuals.<sup>329</sup> Finally, the courts should apply strict scrutiny with respect to an individual's association with organizations designated as an FTO or under investigation. The broad powers currently granted to the Executive branch must be restrained in order to prevent suppressing individuals' expressive advocacy of lawful activities, regardless of whether the advocacy takes the form of pure speech or nonspeech expression.

In sum, although combating terrorism is a legitimate government interest, the laws pertaining to providing material support to foreign terrorist organizations are highly susceptible to abuse. Anti-terrorism laws may be exploited as a cover for stifling a vulnerable ethnic and religious minority's (in this case Arabs and Muslims) fundamental First Amendment rights due to racist, ignorant, or majoritarian societal views.<sup>330</sup> And because the Bill of Rights exists precisely to protect vulnerable minority groups from the majority's prejudices, especially in times of crisis, the courts have a heightened responsibility to strictly scrutinize government actions that would be suspect if correspondingly applied against the majority. The U.S. government is correct in wanting to curtail the funding of terrorism, but that objective should not be synonymous with suppressing an individual's right to donate money or goods to humanitarian projects in the Middle East.

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328. Specially designated organizations under IEEPA investigation.

329. See Humanitarian Law Project v. U.S. Dep't of Justice, No. 02-55082, D.C. No. CV-98-01971-ABC, \*30 (9th Cir. Dec. 3, 2003) ("We believe that serious due process concerns would be raised were we to accept the argument that a person who acts without knowledge of critical information about a designated organization presumably acts consistently with the intent and conduct of that designated organization.").

330. *Muslim Charities*, 2002 WL 102816973, VOICE OF AMERICA, Press Release and Documents, Nov. 20, 2002 (describing the drastic decrease in charitable contributions by Muslims to Islamic organizations due to their fears of government prosecution); see also *supra* notes 8, 18-19 and accompanying text.