

## **LIBERTY AND SECURITY: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS**

A coalition of more than twenty organizations and over seventy-five individuals collaborated to create “Liberty and Security: Recommendations for the Next Administration and Congress.” The Constitution Project coordinated the production of the report, which was released in November 2008.

“Liberty and Security” indexes policy proposals across 20 different issue areas, including privacy, secrecy and surveillance; detention, interrogation, and trials of so-called “enemy combatants”; and discrimination in immigration and charities policy. It includes recommendations for congressional and executive action, and provides in-depth background information to support action by policy makers. It also includes lists of issue-based resources and experts in the community. The report includes the following chapters:

- CHAPTER 1:** Eliminate Unnecessary Barriers To Legitimate Charitable Work
- CHAPTER 2:** Closing Guantánamo
- CHAPTER 3:** End Illegal Detention, Torture, and Rendition
- CHAPTER 4:** Prosecute Terrorist Suspects in Accordance with the Law
- CHAPTER 5:** Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material support for Terrorism.
- CHAPTER 6:** Ending Immigration Enforcement Based on National Origin, Ethnicity, and Religion
- CHAPTER 7:** Misuse of Immigration Detention Laws in Counterterrorism Efforts
- CHAPTER 8:** Revising Attorney General Guidelines on FBI Investigations
- CHAPTER 9:** Updating the Law Governing the Privacy of Electronic Communications
- CHAPTER 10:** Fusion Centers and the Expansion of Domestic Intelligence
- CHAPTER 11:** Promoting Government Transparency
- CHAPTER 12:** National Security Letters and Section 215 of the USA PATRIOT Act
- CHAPTER 13:** Reform of the National Security Surveillance Laws and Procedures
- CHAPTER 14:** Preventing Over-Classification and Retroactive Classification and Promoting Declassification of Government Documents
- CHAPTER 15:** Reforming the State Secrets Privilege
- CHAPTER 16:** Reforming Watch Lists
- CHAPTER 17:** Assertion of Executive Authority in National Security Matters
- CHAPTER 18:** Executive Privilege and Congressional Oversight
- CHAPTER 19:** Signing Statements
- CHAPTER 20:** War Powers Authority

The full report is available online at <http://2009transition.org/liberty-security/>, at [www.constitutionproject.org](http://www.constitutionproject.org), and on the websites of many members of the coalition.

For policy questions, please contact the individuals or organizations identified in the catalogue as allies. Please direct general questions to Daniel Schuman, Director of Communications and Counsel, the Constitution Project, at 202-580-6922.

# CHAPTER ONE

## **Eliminate unnecessary barriers to legitimate charitable work**

### **A. The Problem:**

At a time when the humanitarian aid and development programs and conflict resolution and human rights training offered by charities and foundations are needed the most, the combined effect of two U.S. laws has made it far more difficult for nonprofits to provide critical international aid and services. Rather than distributing aid on the basis of where the need and potential for positive impact are greatest, current counterterrorism measures have caused some nonprofits to avoid the very global hotspots that would benefit the most from their work. Indeed, in some cases these measures have damaged charities' relationships with the communities they serve, damaging the international goodwill and promise for stability that these relationships had helped to create. These laws are the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, amended by the USA PATRIOT Act, which bars material support for terrorism, and the International Emergency Economic Powers Act (IEEPA), which allows the government to designate U.S. charities as supporters of terrorism based on secret evidence and lacks due process protections. Funds of designated charities are frozen indefinitely.<sup>1</sup>

AEDPA prohibits any person or organization from knowingly providing, attempting, or conspiring to provide "material support or resources to a foreign terrorist organization," as designated by the U.S. government, regardless of the character or intent of the support provided. Beginning with Section 805 of the USA PATRIOT Act in 2001, the administration has incrementally expanded the notion of "material support" beyond direct transfers of goods or funds to include legitimate charitable aid to civilian non-combatants that may "otherwise cultivate support" for a designated organization. The Government has extended the notions of "material support," arguing that even non-monetary legitimate charitable aid is fungible and can support terror by allowing the group to conserve resources. The government has expanded and made vague the prohibition against providing material support to a "terrorist organization" so as to include organizations that are "otherwise associated" with designated terrorist groups; thereby criminalizing aid to any of those groups if the charity "should have known" that the group was associated with a group linked to violent activities.

Under the current statute, "any property, tangible or intangible," including the most fundamental of aid necessities such as water, sanitation equipment, all forms of shelter, and building materials, can be construed as "material support." The material support laws lack several crucial distinctions and as such undermine the ability of organizations to undertake legitimate, and necessary, charitable and humanitarian work. The statute makes no distinction between lethal and non-lethal aid, nor does it contain any general

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<sup>1</sup> 50 U.S.C. §§1701-1706 (2000).

exemption for humanitarian assistance. Furthermore, the prohibition on “material support” is not limited to material objects, but rather includes “training” and “expert advice or assistance.” Teaching medical workers to prevent the spread of disease and local volunteers to build adequate sanitation systems could all fall under this sweeping proscription. In a tragic example, aid organizations were forced to choose between providing desperately needed drinking water and blankets to victims of the tsunami in Sri Lanka, a criminal act because the territory is controlled by a designated terrorist organization, and preserving their organization to support other humanitarian causes in the future. This is in clear violation of fundamental standards of nondiscrimination in humanitarian aid as defined by the Red Cross Code of Conduct.

IEEPA and Executive Order 13224 allow the president to designate terrorist organizations and block transactions and freeze their assets to deal with “unusual and extraordinary” threats originating “in whole or substantial part outside the United States.” IEEPA was meant to be directed at nation states and organizations and individuals designated as terrorists. Using a tool created to freeze the funds of security threats presented by North Korea and the Taliban to regulate charitable organizations prevents law-abiding groups from providing critical humanitarian aid. The lack of due process and clear enforcement standards used against charities are at odds with the State Department’s own *Guiding Principles on Non-Governmental Organizations*.

The law is administered by the Department of Treasury’s Office of Foreign Assets Control (“OFAC”), which deals with embargoes, drug kingpins and money laundering. It has no expertise with the charitable sector. The standard for initiating a Treasury Department investigation is only “reasonable suspicion,” and without deadlines for or, the requirement of, filing charges, nonprofits can be shut down without the chance to say a word in their defense. Moreover, charitable organizations are left without meaningful redress, since the courts will rule only on whether the Treasury Department’s actions were “arbitrary and capricious,” not on the merits of the department’s evidence. The result is a climate of fear in which a host of nonprofit organizations fear that their charitable work will be misconstrued.

## **B. Proposed Solutions**

### **1. Guiding Principles**

The overbroad and discriminatory application of the “material support” laws undermines the ability of humanitarian organizations to provide essential services to those in the most dire straits. The use of designation and asset blocking laws without due process paired with draconian sanctions also impedes operations of grant makers and charities. Reforming the barriers of vague statutes, broad interpretations, and extremely limited redress will allow nonprofit organizations to return to performing their legitimate charitable work.

### **2. Proposed Measures**

a. **Executive:**

i. **Improve the national security regulation of charities by ending the use of the International Emergency Economic Powers Act (IEEPA) to regulate charities and allowing the Department of State to develop a more effective and appropriate framework.** This framework must include fundamental due process rights, procedures and intermediate sanctions for charities and foundations. Process recommendations include:

1. Cease and desist orders to charity from Treasury
2. Opportunity to cure: 60-90 days to sever a tie, restructure a program, fire employee, etc.
3. Administrative hearing to challenge designation that includes cross examination, ability to submit evidence, etc.
4. Process for releasing funds to beneficiaries via another charity (including a time limit on frozen funds).
5. Ensure charitable funds frozen by the Treasury Department are ultimately released and used for charitable purposes

ii. **Withdraw the Treasury Department's ineffective "Guidelines" and replace with real guidelines that help charities continue to meet critical needs while ensuring their scarce resources are used for legal and charitable purposes:** Withdraw Treasury's *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*. These vague and flawed quasi-voluntary guidelines demand burdensome investigation by charities into their partners, but do not serve the purported goal of preventing charities from diverting funds to terrorist or illegal purposes. Rather, the Guidelines prevent charities from delivering critical humanitarian services and provide them with no protection from legal sanction even if the Guidelines are painstakingly followed.

1. The Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors' *Principles of International Charity* and the Department of State's *Guiding Principles for Government Treatment of NGOs* are good starting points for developing guidelines that provide all charities with equal opportunity and access to good faith charitable giving and complement the extensive due diligence already being performed by grantmaking organizations to ensure that their grant funds are being used for charitable and legal purposes.

iii. **Direct the Secretary of State to use his or her authority under 18 USC 2339B(j) to waive the material support prohibition for technical**

**advice and assistance, training and personnel where no violent activity is involved.**

**b. Legislative**

- i. **Amend the “material support” statute to include intent and make it consistent with Red Cross standards for humanitarian aid:** Repeal the amendments enacted in Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, which punishes support to a designated terrorist group regardless of whether the person providing that support intended, or in fact did, further the group’s violent activities, and amend the law to require that the government prove that individuals charged actually intended to further terrorist activity when they provided humanitarian assistance. Further expand the exemptions beyond medicine and religious materials to include medical equipment and services, civilian public health services, food and food, water, clothing and shelter to noncombatants. In addition, human rights training and conflict resolution services should be entirely exempted.
  1. **Amend 18 U.S.C. § 2339B(a)(1) to clarify impermissibly vague language of “expert advice or assistance”:** This overly vague language conflicts with First Amendment rights of speech and association by potentially criminalizing virtually all interaction with designated organizations, including Constitutionally-protected political speech and advocacy.
  2. **Amend 18 U.S.C. §§ 2339A(b)1-2339A(b)(3) to clarify vague language, including the insertion of an intent requirement into the definition of the provision of training and expert advice or assistance**

**C. Allies\***

**American Association of University Professors**

John W. Curtis, Ph.D., Director of Research and Public Policy  
jcurtis@aaup.org  
202-737-5900 (ext. 143)

**Bill of Rights Defense Committee (BORDC)**

Kit Gage  
kgage@verizon.net  
301-587-7442

**Charity & Security Network**

Kay Guinane, Program Manager

kguinane@charityandsecurity.org  
202-683-4879  
<http://www.ombwatch.org/charitysecurityrecs.pdf>

**Council on American-Islamic Relations (CAIR)**

Corey Saylor, National Legislative Director  
csaylor@cair.com  
202-384-8857 (c)  
202-488-8787 (w)

**Electronic Frontier Foundation (EFF),**

Kevin S. Bankston  
bankston@eff.org  
415-436-9333 (ext.126)

**Essential Information**

John Richard or Robert Weissman  
202-387-8034

**Government Accountability Project**

Jesselyn Radack, Homeland Security Director  
JesselynR@whistleblower.org  
202-408-0034 (ext. 107)

**International Justice Network**

[www.IJNetwork.org](http://www.IJNetwork.org)

Mary A. Johnson  
majj12@gmail.com  
708-267-1673

**Liberty Coalition**

Michael D. Ostrolenk, Co-Founder/National Director  
[www.libertycoalition.net](http://www.libertycoalition.net)  
mostrolenk@libertycoalition.net  
301-717-0599

**Muslim Advocates**

Akil Vohra  
akil@muslimadvocates.org  
415-692-1486

**National Coalition Against Censorship**

Joan E. Bertin, Esq., Executive Director  
bertin@ncac.org  
212-807-6222

Fax: 212-807-6245

**OpenTheGovernment.org**

Patrice McDermott  
pmcdermott@openthegovernment.org  
202-332-6736

**South Asian Americans Leading Together**

Priya Murthy  
priya@saalt.org  
301-270-1855

**Stanford Law School - Mills International Human Rights Clinic**

Barbara J. Olshansky, Leah Kaplan Visiting Professor and Clinic Director  
Kathleen Kelly, Clinical Teaching Fellow  
bj.olshansky@gmail.com  
650-736-2312

**U.S. Bill of Rights Foundation**

Dane vonBreichenruchardt, President  
usbtor@aol.com  
202-546-7079

\* These groups and individuals support the general principles expressed and the general policy thrust and judgments in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposed solution, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.

**D. Counter-Arguments and Rebuttal**

1. *Don't we need these extreme powers because the Department of Treasury says charities are a significant source of terrorist financing and support?*

The Bush administration's has consistently justified its misplaced emphasis on nonprofits in its anti-terrorist financing efforts by claiming the sector is a "significant source of terrorist financing."<sup>2</sup> But these broad brush accusations have never been

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<sup>2</sup> U.S. Department of the Treasury, "Screening Tax-Exempt Organizations Filing Information Provides Minimal Assurance That Potential Terrorist-Related Activities Are Identified," May 21, 2007, *available at* <http://www.treas.gov/tigta/auditreports/2007reports/200710082fr.pdf>. The May 2007 report states: "a significant source of terrorist support has been the use of charities and nonprofit organizations..." Also citing the Treasury Guidelines. See fn.13.

supported by evidence. Instead OFAC cites "open source media reports" and refers to general information on its website.<sup>3</sup>

In the 2006 Annex<sup>4</sup> to its Guidelines Treasury claimed charities and individuals associated with them account for 15 percent of total Specially Designated Global Terrorists (SDGTs). This claim was based on 43 designated nonprofits worldwide and 29 designated individuals allegedly associated with them, totaling 72 nonprofit-related designations. The seven designated U.S. nonprofits only account for 1.4 percent of this total.

When the dollar value of blocked assets is used as a measure, it is even clearer that charities are a minor threat in the battle against terrorist financing. According to the 2007 OFAC *Terrorist Assets Report to Congress*<sup>5</sup> designated foreign terrorist organizations, charities and foundations, both U.S. and foreign, account for only 6.1 percent of total blocked assets. Treasury has blocked \$336.2 million of seized assets, and of that, \$20.7 million originated with foreign terrorist organizations, a category that includes charitable organizations. There is no public information on how much of this can be attributed to U.S. organizations. The remaining \$315.5 million originated with designated state sponsors of terrorism, such as Iran and North Korea.

The Terrorist Financing Staff Monograph to the 9/11 Commission,<sup>6</sup> said their investigation "revealed no substantial source of domestic financial support" for the 9/11 attacks. It further warns that "[i]n many cases, we can plainly see that certain nongovernmental organizations (NGOs) or individuals who raise money for Islamic causes espouse an extremist ideology and are "linked" to terrorists through common acquaintances, group affiliations, historic relationships, phone communications, or other such contacts. Although sufficient to whet the appetite for action, these suspicious links do not demonstrate that the NGO or individual actually funds terrorists and thus provide frail support for disruptive action, either in the United States or abroad."<sup>7</sup>

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<sup>3</sup> U.S. Department of the Treasury, webpage section on terrorism and financial intelligence. See <http://www.treas.gov/offices/enforcement/key-issues/protecting/index.shtml>, [Anti-terrorist Financing Guidelines](#), Annex at 14-16.

<sup>4</sup> U.S. Department of the Treasury, "U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities," 2006 version, Annex pp. 14-16, available at <http://www.treas.gov/press/releases/reports/0929%20finalrevised.pdf><http://www.treas.gov/press/releases/reports/0929%20finalrevised.pdf>.

<sup>5</sup> U.S. Department of the Treasury, Office of Foreign Assets Control, "Terrorist Asset Report: Calendar Year 2007 Sixteenth Annual Report on Assets in the United States of Terrorist Countries and International Terrorism Program Designees," available at <http://www.treas.gov/offices/enforcement/ofac/reports/tar2007.pdf>.

<sup>6</sup> Terrorist Financing Staff Monograph to the 9/11 Commission National Commission on Terrorist Attacks Upon the United States, p. 3 (2004), available at [http://www.9-11commission.gov/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf).

<sup>7</sup> *Ibid*, at 9

2. *If terrorist organizations are relieved of the financial burden of providing charitable programs won't the dollars saved be used for lethal attacks?*

The Bush administration has promoted a widely held but never proven assumption that charity dollars are fully fungible. As a result, the government's policy considers an entire organization tainted if any aspect of its work is associated with terrorism.

This fungibility assumption has never been subjected to factual scrutiny and U.S. organizations have never been consulted about the extent of this problem or possible appropriate solutions. The Bush administration policy has ignored differences between intentional diversion of charitable funds for lethal, terrorist activities and groups that work through a designated organizations to deliver aid when the terrorist organization controls territory and functions as a government in the area in need of assistance or in conflict zones where there are no practical alternatives for getting aid safely through.

The fungibility argument has not been applied to the for-profit sector. For example, on March 14, 2007 Chiquita Brands International was fined \$25 million for paying approximately \$1.7 million to two U.S.-designated terrorist organizations, the United Self-Defense Forces of Colombia (AUC) and the leftist Revolutionary Armed Forces of Colombia (FARC), for protection in a dangerous region of Colombia between 1997 and 2004.

The primary weakness of the fungibility argument is that it does not take public diplomacy into account. The U.S. reputation has suffered by freezing millions of charitable dollars. But when U.S. charities provide aid there is increased goodwill. For example, surveys in Indonesia two years after the 2004 tsunami found that after more than \$13.4 billion in U.S. humanitarian aid went to help victims<sup>8</sup> 44 percent of respondents reported a favorable view of the U.S., compared to 15 percent before the tsunami.<sup>9</sup> Support for Osama bin Laden was at its lowest level since 9/11. A similar survey after the 2005 earthquake in Pakistan<sup>10</sup> found that 75 percent of Pakistanis had a more favorable opinion of America, and most cited earthquake relief as the reason.

3. *Haven't the courts upheld all Treasury's actions in shutting down charities?*

In legal challenges to the first wave of designations of U.S. charities took several years the courts consistently deferred to Treasury because of national security concerns. In addition, their scope of review was limited to whether Treasury had acted arbitrarily, and the designated charity was never allowed to present or confront evidence.

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<sup>8</sup> [http://www.internationaldonors.org/issues/pdf/tlp\\_exec-summary.pdf](http://www.internationaldonors.org/issues/pdf/tlp_exec-summary.pdf)

<sup>9</sup> <http://www.terrorfreetomorrow.org/articlenav.php?id=82>

<sup>10</sup> <http://www.terrorfreetomorrow.org/articlenav.php?id=5#top>

Recently, that pattern has changed. On October 9, 2008 the U.S. District Court for the Northern District of Ohio issued a temporary restraining order barring Treasury from designating KindHearts for Charitable Humanitarian Development (KindHearts), a U.S. charity, as a supporter of terrorism without affording the organization basic due process.

4. *Doesn't the Terrorism Risk Insurance Act bar Treasury from transferring frozen funds to legitimate charities?*

No. Section 201(a) of the Terrorism Risk Insurance Act<sup>11</sup> allows blocked assets to be used to pay judgments from litigation "against a terrorist party." It does not authorize funds to be held where no lawsuits have been filed or judgments rendered. Holy Land is the only designated U.S. organization involved in litigation under TRIA. Treasury has repeatedly said that allowing transfers for humanitarian and disaster aid is not in the national interest.

#### **E. Recommended Documents for Further Information:**

1. OMB Watch, "Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve," July 2008, *available at*: <http://www.ombwatch.org/article/articleview/4290/>
2. Ahilan T. Arulanantham, American Constitution Society, " 'A Hungry Child Knows No Politics:' A Proposal for Reform of the Law Governing Humanitarian Relief and 'Material Support' of Terrorism," June 2008, *available at* <http://www.acslaw.org/files/Arulanantham%20Issue%20Brief.pdf>
3. U.S. Department of State, "Guiding Principles for Government Treatment of NGOs," 14 December 2006, *available at* <http://www.state.gov/g/drl/rls/77771.htm>
4. Professor David Cole Testimony before U.S. Senate Judiciary Committee on May 4, 2005, *available at* <http://www.bordc.org/resources/cole-materialsupport.php>
5. Duke Law, Civil Liberties Online: "Prosecutorial Tools: Sharpening the Government's Prosecutorial Tools Against Terrorism," *available at* <http://www.law.duke.edu/publiclaw/civil/index.php?action=showtopic&topicid=9>
6. Stephanie Strom, *Small Charities Abroad Feel Pinch of U.S. War on Terror*, N.Y. TIMES, *available at* <http://query.nytimes.com/gst/fullpage.html?res=9F0DE7DA1E3EF936A3575BC0A9659C8B63&scp=1&sq=small%20charities&st=cse>

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<sup>11</sup> 107 P.L. 297, Sec. 201, Reauthorization Act of 2007, signed by President George W. Bush on Dec. 26, 2007

7. Treasury Guidelines Working Group of Charitable Organizations and Advisors, “Principles of International Charity,” available at [http://www.usig.org/PDFs/Principles\\_Final.pdf](http://www.usig.org/PDFs/Principles_Final.pdf)
8. Ahilan T. Arulanantham, *A Hungry Child Knows No Politics:*
  - i) *A Proposal for Reform of the Laws Governing*
9. *Humanitarian Relief and “Material Support” of Terrorism*(June 2008), available at <http://www.acslaw.org/files/Arulanantham%20Issue%20Brief.pdf>

## **APPENDIX TO CHAPTER ONE**

### **Eliminate unnecessary and counterproductive barriers to legitimate charitable work**

#### **I. JURISDICTION**

##### **A. Legislative Branch**

1. House Judiciary Subcommittee on Crime, Terrorism and Homeland Security;
2. Senate Homeland Security and Governmental Affairs Committee;
3. Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security;
4. Senate Finance Committee

##### **B. Executive Branch**

1. The President has the authority to amend Executive Order 13224 regarding Treasury rules and regulations regarding financing activities in support of terrorism.
2. The Treasury Department has discretion to revise or withdraw the Treasury Guidelines (the Office of Terrorism and Financial Intelligence within the department of the Treasury oversees implementation of the Treasury Guidelines).
3. The Treasury Department's Office of Foreign Assets Control (OFAC) has the authority to release funds when a designated charity requests the money be transferred to another charity or entity like the UNHCR. Both of the parts of the federal regulations governing the sanctions that include the freezing of funds, Terrorism Sanctions Regulations, 31 C.F.R. Part 595 and Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. Part 597, refer to the Reporting Procedures and Penalties, 31 C.F.R. Part 501, which provides a process that authorizes otherwise blocked transactions by giving OFAC the power to grant two types of licenses:
  - a. General license— authorizes otherwise prohibited transactions under appropriate terms and conditions. See 31 CFR 501.801(a).
  - b. Specific license — authorizes successful applicant to engage in transactions otherwise prohibited and not authorized by a general license. See 31 CFR 501.801(b).

## II. STATUS OF ACTION

### A. Legislative Branch:

1. **Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)** was introduced by Senator Susan M. Collins (R-ME) and had ten co-sponsors. The House of Representatives passed the act on December 7, 2004 with a vote of 336-75; the Senate passed the act the next day with a vote of 89-2; and President Bush signed the act into law on December 17, 2004, as P.L. 108-458.
2. Hearings on the Material Support Statute/Treasury Guidelines:
  - a. On April 20, 2005, the Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security held a hearing concerning the material support statute. The following individuals testified: Daniel Meron, Principal Deputy Assistant Attorney General for the Civil Division of DOJ; Barry Sabin, Chief of the Counterterrorism Section of the Criminal Division of DOJ; and Andrew McCarthy, Senior Fellow at the Foundation for the Defense of Democracies.
  - b. On May 10, 2005, the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security held an Oversight hearing on Amendments to the Material Support for Terrorism Laws: Section 805 of the USA PATRIOT Act and Section 6603 of the IRTPA. The following individuals testified: Glenn Fine, Inspector General of DOJ; Gregory Katsas, Deputy Attorney General at DOJ; Barry Sabin, Chief of the Counterterrorism Section of the Criminal Division of DOJ; and Ahilan Arulanantham, a staff attorney for the ACLU and author of “‘A Hungry Child Knows No Politics:’ A Proposal for Reform of the Law Governing Humanitarian Relief and ‘Material Support’ of Terrorism.”
  - c. On May 10, 2007, the Senate Homeland Security and Governmental Affairs Committee (Senator Joseph Lieberman, I-CT, presiding) held a hearing which addressed, *inter alia*, the Treasury Department’s outreach to the charitable sector and Muslim-American communities. The following individuals testified: Chip Poncy, Director of the Office of Strategic Policy for Terrorist Financing and Financial Intelligence; Jeremy F. Curtin, Coordinator of the Bureau on International Information Programs at the State Department; John J. Miller, Assistant Director of the Office of Public Affairs at the FBI; and Jeffrey J. Greico, Acting Assistant Administrator of the Bureau for Legislative and Public Affairs, U.S. Agency for International Development.

- d. On April 1, 2008 the Senate Finance Committee held a hearing on anti-terrorism financing. Under Secretary for Terrorism and Financial Intelligence Stuart Levey was the only witness.

## **B. Executive Branch**

1. Executive Order 13224 (September 23, 2001): The Order bars anyone, including charities, from engaging in transactions with terrorists or terrorist organizations, and further authorizes and directs the Secretary of the Treasury “to take all appropriate measures within their authority to carry out the provisions of this order.”
2. Treasury Guidelines (November 2002; revised guidelines issued October 31, 2006): In 2007, the Treasury Department released a companion to the Treasury Guidelines, the *Risk Matrix for the Charitable Sector*, which purports to set forth criteria for assessing whether disbursing funds for resources to grantees present a low, medium or high risk.

## **C. Judicial Branch:**

1. Several federal district and circuit courts have addressed the whether the “intent” and “expert advice or assistance” aspects of the material support statute, as amended by the IRTPA, are constitutional.<sup>12</sup> These courts have upheld the statute’s intent requirement as constitutional; but have found portions of the “expert advice and assistance” definition of material support as unconstitutionally vague.

*Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9<sup>th</sup> Cir. 2007): The Court of Appeals for the Ninth Circuit affirmed that 18 U.S.C. § 2339B(a) does not require specific intent to further the unlawful aims of designated foreign terrorist organizations, and does not violate due process due to the lack of a specific intent requirement. Plaintiffs were six organizations and others who sought to help nonviolent and lawful activities of the Kurdistan Workers Party, a.k.a. Partiya Karkeran Kurdistan (“PKK”) and the Liberation Tigers of Tamil Eelam (“LTTE”), both of which have been designated as foreign terrorist organizations. Plaintiffs argued, *inter alia*, that the material support statute violated their due process rights because the statute imposed a criminal penalty for their association with PKK and LTTE without requiring a specific intent that Plaintiffs intended to further PKK’s and LTTE’s unlawful goals. *Id.* at 1127. After protracted litigation (and after and considering the IRTPA’s amendments to 18 U.S.C. § 2339B(a)), the Ninth Circuit noted that the statute requires intent

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<sup>12</sup> In *U.S. v. Al-Arian*, 308 F. Supp. 2d 1322, 1339, *reconsideration denied*, 329 F. Supp. 2d 1294 (M.D. Fla. 2004), the federal district court held that 18 U.S.C. § 2339B(a)(1) must require specific intent that defendant required to support the unlawful activities of a designated foreign terrorist organization in order to avoid due process problems. That case was decided before the IRTPA’s amendments to 18 U.S.C. § 2339B(a)(1).

that donors know that they are providing “material support or resources” to a designated terrorist organization or with knowledge that the organization is or has engaged in terrorist activities; as such, the statute “complies with the ‘conventional requirement for criminal conduct-awareness of some wrongdoing,’” and complies with constitutional requirements of “personal guilt.” *Id.* at 1131 (citation omitted). The court also refused to read a requirement into the statute, that donors specifically intended to further the unlawful activities of the designated terrorist organizations. *Id.* at 1131-32. Finally, while the court noted that Congress could have - but did not - required that donors act with specific intent to further terrorist activities of designated terrorist organizations, “it is not our role to rewrite a statute, and we decline to do so here.” *Id.* at 1133.

Plaintiffs also challenged the definition, in 18 U.S.C. § 2339B(a), of “material support or resources” as “training, expert advice or assistance” as unconstitutionally vague. 509 F.3d at 1133. The district court had invalidated that portion of the definition as unconstitutionally vague, but in 2007 the Ninth Circuit disagreed in part. Specifically, the Ninth Circuit considered that the IRTPA defined “expert advice or assistance” as “imparting ‘scientific, technical, or other specialized knowledge.’” *Id.* at 1135 (quoting 18 U.S.C. § 2339A(b)(3)), and held that the “other specialized knowledge” portion of the definition of “expert advice or assistance” was void for vagueness. However, the Ninth Circuit held that the “scientific and technical” portion of “expert advice or assistance” is not vague. *Id.*

*U.S. v. Taleb-Jedi*, 566 F. Supp. 2d 157 (E.D.N.Y. 2008): Defendant Taleb-Jedi was charged with providing material support to the People’s Mojahedin Organization of Iran (the “PMOI”) – a designated terrorist organization. Taleb-Jedi contended the material support statute, 18 U.S.C. § 2339B, should be interpreted to require a showing that she specifically intended to support PMOI’s “terrorist aims,” and if the statute did not require such a specific intent, it violated her constitutional right to due process. *Id.* at 173. Taleb-Jedi further argued that the statute violates her rights under the First Amendment to freedom of speech and freedom of association. The district court held that 18 U.S.C. § 2339B does not violate defendant’s first amendment or due process rights (on this point, noting that the statute’s requirement for a showing of scienter is sufficient to meet the due process standard of personal guilt). *Id.* at 177-180.

*U.S. v. Warsame*, 537 F. Supp. 2d 1005 (D. Minn. 2005): Defendant Mohamed Warsame was charged with providing material support to al Qaeda, and moved to dismiss portions of his indictment on the ground that 18 U.S.C. § 2339B is unconstitutional because it lacks a specific intent requirement. *Id.* at 1013. The court agreed that with Warsame, that 18 U.S.C. § 2339B does not require a specific intent that Warsame intended to further al Qaeda’s terrorist activities, but the court rejected Warsame’s contention that the statute violated his first amendment or due process rights.

*U.S. v. Paracha*, 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006): Defendant Uzair Paracha was charged with providing material support and resources to al Qaeda. Paracha was tried by a jury and convicted on all counts in 2005. The court's decision addresses issues that came up during the trial, including the defendant's requested jury instruction regarding the intent requirement under 18 U.S.C. § 2339B(a)(1). Paracha contended that the government was required to provide a specific intent that Paracha's support would further al Qaeda's unlawful activities. The court rejected that contention and held that the statute's requirement, that defendant's knowledge that he had provided material support or resources to a designated foreign terrorist organization, was not unconstitutional.

*U.S. v. Marzook*, 383 F. Supp. 2d 1056 (N.D. Ill. 2005): Defendant Mousa Marzook was charged with providing material support to Hamas, and moved to dismiss the indictment against him on the ground that the material support statute was unconstitutional because (1) it violated the first amendment; and (2) it violated the due process clause of the fifth amendment because it did not require a showing of specific intent. *Id.* at 1060. The court rejected the first amendment argument on the ground that the 18 U.S.C. § 2339B does not target speech or associations or mere membership in a group. Even if, however, the statute was overbroad, defendant had filed to demonstrate that the over breadth was substantial given its "legitimate reach" and the government interest in preventing terrorism *Id.* at 1062-63, 1067-68. The court then found that the statute sufficiently required intent by requiring that Marzook knowingly provided support to a designated foreign terrorist organization.

2. Key cases on the freezing of charitable organization assets include:

*KindHearts for Charitable Humanitarian Development v. Paulson*, No. 3:08 CV 2400.(N.D. Ohio) On Oct. 9, 2008 the court issued a temporary restraining order barring the Department of the Treasury (Treasury) from designating KindHearts for Charitable Humanitarian Development (KindHearts), a U.S. charity, as a supporter of terrorism without affording the organization basic due process. Treasury shut down the group "pending investigation" in February 2006, but the investigation has never been concluded and the group's assets, including about \$1 million, remain frozen.

*Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34 (D. D.C. 2005), *aff'd in pt and remanded in pt as Islamic Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007): IARA-USA challenged the blocking of its assets due to OFAC's designation of a separate entity, IARA, as a terrorist organization. The district and then the circuit court reviewed OFAC's actions under the "extremely deferential" "arbitrary and capricious" standard and upheld OFAC's actions –in the face of unclassified evidence that the court found was "not overwhelming," and substantial classified evidence to which

IARA-USA had no access. 477 F.3d at 734. The circuit court also rejected IARA-USA's claim that the blocking of its assets violated its constitutional rights (concluding, *inter alia*, that OFAC had blocked IARA-USA's assets "based on OFAC's funding that IARA-USA is a branch" of a terrorist organization).

*Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57 (D. D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003): The HLF challenged its designation as a terrorist organization and the blocking of its assets. The district court held, and the circuit court affirmed, that the treasury department's actions would be held only to the highly deferential "arbitrary and capricious" standard, and since it had met that standard the department did not violate HLF's substantive due process rights or rights under the Administrative Procedure Act ("APA"). The courts further held that the government had not violated HLF's rights by failing to provide notice and a hearing first – even though the Holy Land Foundation had no right to "confront and cross-examine witnesses" and did not have access to classified information that was presented to the district court. *Id.* at 164.

In its opinion the district court recognized that the seizure of Holy Land's property "d[id] raise significant Fourth Amendment [search and seizure] concerns" but held that freezing assets is not a seizure but a "temporary deprivation" of property. It did suggest that, "Plaintiff may...some day have a credible argument that the long-term blocking order has ripened into vesting of property in the United States." However, current law does not define when this "vesting" takes place. Holy Land's funds have been frozen since 2001.

*Global Relief Foundation, Inc. v. O'Neill*, 207 F.Supp.2d 779, *aff'd*, 315 F.3d 748 (7<sup>th</sup> Cir. 2002): GRF challenged its designation as a terrorist organization the blocking of its assets. GRF first argued that the IEEPA does not apply to it as a U.S. corporation, since the statute applies to "property in which any foreign country or a national thereof has a foreign interest." The circuit court rejected that argument, finding that the word "interest" means a beneficial interest (*i.e.*, "the funds are applied for the benefit of non-citizens"). 315 F.3d at 753-54. The court also rejected GRF's challenges that the district court was authorized to review classified evidence, to which GRF did not have access, and that there was no pre-seizure hearing. *Id.* at 754.

*Benevolence Int'l Foundation, Inc. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002): In December 2001, the Treasury Department blocked BIF's assets, and the FBI searched the offices of BIF and the home of its chief executive officer, Enaam Arnaout. BIF challenged the FBI's searches and the blocking of its assets; thereafter, the government filed criminal charges against BIF and Arnaout. The court stayed BIF's civil action against Ashcroft et al. pending resolution of the criminal charges. [Thereafter, charges against BIF were

dismissed, and Arnaout pled guilty to a lesser charge of fraud. BIF did not have funds at that point to file another action to challenge the blocking of its assets.]