

SCARED TO DONATE: AN EXAMINATION OF THE EFFECTS OF DESIGNATING MUSLIM CHARITIES AS TERRORIST ORGANIZATIONS ON THE FIRST AMENDMENT RIGHTS OF MUSLIM DONORS

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INTRODUCTION

Since September 11, 2001, it has been hard to be a Muslim in the United States. After foreign Muslim terrorists attacked the World Trade Center and the Pentagon, Muslim Americans have experienced marginalizing incidents ranging from anti-Muslim graffiti on the walls of mosques to taunts of "terrorist" on public streets for no other reason

than their appearance or background.¹ Many Muslims have reacted to this harassment by trying to avoid calling attention to themselves: they have changed the way they dress, limited public prayer, and censored their religious and political discussions.² Others have attempted to educate Americans about Islam and to correct the assumptions that all Muslims are terrorist supporters.³ But changing public opinion has been slow and difficult. Part of the difficulty stems from actions by the United States government that have reinforced negative assumptions about the Islamic religion.

Since President George W. Bush declared a “war on terrorism,” his administration has engaged in an aggressive campaign to eradicate sources of funding for terrorist organizations. In the process, the government has investigated mosques and Islamic religious organizations,⁴ required Muslim citizens to submit to intrusive “voluntary” interviews about possible terrorist ties,⁵ and blacklisted twenty-seven Muslim charities for providing financial aid to terrorist groups.⁶ While such action may have improved the government’s ability to prevent terrorist attacks, this course of action has not helped Muslim Americans improve their public reputation and has treaded dangerously close to infringing upon their constitutionally guaranteed rights and civil liberties.

1. See, e.g., Jonathan Curiel, *Muslims Find Bay Area Leans Toward Tolerance*, S.F. CHRON., Sept. 10, 2004, at A1 (describing post-9/11 backlash experienced by Muslims); Cicero A. Estrella, *Muslims in U.S. Suffer Reaction to Terror Threats*, S.F. CHRON., May 27, 2004, at A19; see also Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 75 (2004) (suggesting that Muslims have been stereotyped as terrorists in both public and private spheres).

2. See Curiel, *supra* note 1.

3. See, e.g., Carla Hinton, *Organization Educates Others About Islam*, OKLAHOMAN, Sept. 11, 2004, at 1D (describing Islamic organization’s attempts to counteract “Islamophobia”); Amaya Wiegert, *San Jose State U.: Muslim Holy Month Begins*, SPARTAN DAILY (San Jose St. U.), Oct. 14, 2004, available at 2004 WL 95504681 (interviewing Muslim student leaders about practices of Islam and holy month of Ramadan for university newspaper).

4. See DEPARTMENT OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 21–22 (2002), www.usdoj.gov/olp/generalcrimes2.pdf; Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1228–31 (2004). For a historical look at government investigation of political and religious groups, see *id.* 1210–28; Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 628–35 (2004).

5. Curiel, *supra* note 1.

6. Laurie Goodstein, *Since 9/11, Muslims Look Closer to Home*, N.Y. TIMES, NOV. 15, 2004, at F1.

Although preventing American individuals and organizations from funding terrorism is indisputably a legitimate government objective, this Note critically examines the methods used by the Bush administration to achieve this objective. In particular, this Note focuses in on the negative—and possibly unconstitutional—consequences of one of the government’s primary means to prevent the funding of terrorism: investigating Islamic charities to determine whether they support terrorist acts or organizations and subsequently blocking the charities’ assets. Although this process of “blacklisting” Muslim charities successfully cuts off monetary support to terrorist groups, it has had a profound chilling effect on Muslim religious exercise. Not only are donor opportunities limited to those organizations not yet under investigation, but many Muslims are now scared to donate to religious charities for fear of being branded a terrorist. This chilling effect significantly interferes with the practice of annual charitable giving, known as *zakat*, one of the five pillars of Islam and a fundamental element of the Muslim faith.

This Note examines what First Amendment claims Muslim donors might make in challenging the government’s practices with respect to charity blacklisting. The conclusions it draws, however, are not promising because courts must balance donors’ religious interests against the government interest in fighting terrorist funding. While the right to give to charity is indeed a strong interest, courts invariably—and understandably—consider the interest in national security to be powerfully compelling and are therefore unlikely to find First Amendment violations.

In light of the likely failure of donors to achieve success through First Amendment litigation, this Note proposes that the executive branch take specific actions to respect the religious interests of Muslims, promote charitable giving, and encourage openness and cooperation with the government. Specifically, I propose two regulatory policy suggestions that the executive branch should consider in order to ameliorate the chilling effect on the exercise of Muslim First Amendment rights. First, the U.S. Treasury Department should provide Muslim charities with workable guidelines for complying with existing federal regulations. The Department must offer technical assistance and support to charities to facilitate compliance. Second, the U.S. Treasury Department should provide a “white list” of compliant charities to Muslim donors. This list will supply donors with information about charities that are working with the government, the extent to which those organizations are being regulated, and the areas of compliance in which they are lacking. By creating a registry of chari-

ties affirmatively working with the government to prevent terrorist funding, the white list will empower donors to give to the charities and humanitarian causes of their choice without fear of government suspicion or recrimination.

Part I of this Note describes the legal means by which the government designates a charity as a terrorist supporter and blocks its assets. While there are a number of tools at the government's disposal, this Note concentrates on the authority vested in the U.S. Treasury Department to make such designations by Executive Order 13,224, signed by President George W. Bush in the wake of the September 11th terrorist attacks. Part II looks at several cases in which the U.S. Treasury Department has used the legal tools described in Part I to blacklist and freeze the assets of Muslim charities. Thus far, these government actions have all been upheld in court. Part III provides an overview of some of the difficulties the government encounters in prosecuting terrorist supporters and describes how the government, in the face of these difficulties, resorts to a "collateral" use of the terrorist designation. The case of Omar Abdi Mohamed, a Muslim charity leader, typifies this collateral use of the designation—the government prosecuted Mohamed for immigration violations only, but accusations of terrorism were bound up in the case.

Having described the government's process of blacklisting in the case studies in Parts II and III, Part IV explores the social ramifications of the government's terrorist designations of Muslim charities. Fear of being branded a terrorist supporter has led many innocent Muslim donors to stop making donations to Muslim charities, thereby failing to fulfill their religious obligations. Some Muslim charities have made efforts to reassure donors of their legality and good works, but often to no avail. Part V analyzes the unsuccessful First Amendment claims made by one Muslim charity discussed in Part II, the Holy Land Foundation for Relief and Development, as it challenged its terrorist designation and the blocking of its assets. The challenge was denied because the court found that the compelling government interest in fighting terrorism overcame the charity's claims that the designation and blocking order violated its rights of freedom of speech, association, and exercise of religion.

Finally, in light of the *charity's* failed constitutional challenge, Part VI hypothesizes the possible First Amendment claims of a class of individual Muslim *donors*. It also examines how the donors' claims might be distinct from those of the charity and whether they might be more successful. This Part also describes the chilling effect the government's actions and the overall hostile climate towards Mus-

lims have on donors' exercise of their constitutional rights, and considers whether this would be a separate avenue to challenge the blacklisting process. Although litigation brought by individual donors seems more promising than that brought by the charity, it is unlikely to succeed considering the strong government interest in preventing terrorist funding. Accordingly, this Note concludes in Part VII with policy suggestions that, in light of the chilling effect just described, will nevertheless enable the United States government to encourage Muslim donors to exercise their rights without compromising national security.

I.

DESIGNATING MUSLIM CHARITIES AS "SPECIALLY DESIGNATED TERRORIST ORGANIZATIONS" THROUGH THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

The U.S. Government campaign against terrorist financing involves a broad array of weapons, from intelligence collection and operations to diplomatic pressure, from regulatory actions and administrative sanctions to criminal investigations and prosecutions. If we are to achieve success, we must bring all of these powers to bear in a coordinated and target-appropriate manner.⁷

Indeed, the government does possess a broad array of weapons to fight terrorist financing. Because the scope of the government's weapons is so extensive, this Note will focus on Executive Orders 12,947 and 13,224, issued pursuant to the International Economic Emergency Powers Act of 1977 (IEEPA), which allow the government to designate an organization or individual as a terrorist organization and to block that organization's or individual's assets.⁸

7. *Counterterror Initiatives in the Terror Finance Program: Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs*, 108th Cong. 273 (2003) (statement of Stuart A. Levey, Under Secretary, Terrorism and Financial Intelligence, Under Secretary for Enforcement, U.S. Dep't of Treasury) [hereinafter *Hearings on Counterterror Initiatives in the Terror Finance Program*].

8. Exec. Order No. 12,947, 60 Fed. Reg. 5,079 (Jan. 23, 1995); Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). This Note focuses entirely on the Executive Orders issued and government actions taken pursuant to the IEEPA because they have been more commonly used by the Treasury Department to shut down Muslim charities since September 11, 2001, than other available tools.

In addition to the IEEPA, the government has other tools at its disposal to combat terrorism. For example, the Secretary of State is authorized to designate organizations as Foreign Terrorist Organizations (FTO) pursuant to section 219 of the Immigration and Nationality Act. 8 U.S.C. § 1189 (2000). The Secretary of State makes this designation if three conditions are met: (1) the organization is foreign; (2) it engages in terrorist activity; and (3) such activity threatens the security of United States citizens

The International Economic Emergency Powers Act of 1977 grants congressional authority to the President of the United States to regulate, investigate, and block transactions between individuals or organizations within American jurisdiction and specifically designated foreign countries and nationals, all in the interest of national security.⁹ Prior to exercising this power, the President must declare a national emergency with respect to any unusual or extraordinary threat to the national security, foreign policy, or economy of the United States.¹⁰ Historically, the IEEPA's blocking power has been utilized against international governments, such as those of Sudan, Burma, Libya and Iran, rather than against private groups and individuals.¹¹

or the national security of the United States. Designations must be renewed every two years, are challengeable in court, and the State Department must therefore create a detailed administrative record in order to justify the designation. In late 2003, there were 36 FTOs designated by the Secretary of State, including al Qaeda. AUDREY KURTH CRONIN, *THE "FTO LIST" AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS*, CRS REP. NO. RL32120, at 6 (2003) [hereinafter *THE FTO LIST*].

The government also may prosecute terrorist supporters under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Antiterrorism and Effective Death Penalty Act of 1996 §§ 302–03, 18 U.S.C. §§ 2339A–39B (2000). Section 2339A of AEDPA requires imprisonment for anyone who provides material support or resources to terrorists. *Id.* § 2339A(a). Material support or resources is broadly defined as “currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials. *Id.* § 2339A(b).

Section 2339B of the AEDPA provides that any person who *knowingly* provides material support or resources to an FTO shall be fined or imprisoned. *Id.* § 2339B(a)(1). For more information about prosecutions under the AEDPA see Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1404–19 (2004); Sahar F. Aziz, Note, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?*, 9 TEX. J. C.L. & C.R. 45, 62–64 (2003).

9. 50 U.S.C. §§ 1701–07 (2000), amended by Pub. L. No. 107-56, § 106 (2001) [hereinafter IEEPA].

10. *Id.* § 1701(a).

11. Blocking orders pursuant to the IEEPA typically state with a fair degree of specificity the action, government, or commercial interest it seeks to target. *See, e.g.*, Prohibiting New Investment in Burma, Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 20, 1997); Prohibiting Certain Transactions With Respect to Iran, Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (Aug. 19, 1997); Blocking Sudanese Government Property and Prohibiting Transactions With Sudan, Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (Nov. 3, 1997); Barring Overflight, Takeoff, and Landing of Aircraft Flying to or from Libya, Exec. Order No. 12,801, 57 Fed. Reg. 14,319 (Apr. 15, 1992). In contrast, some are given broad scope. *See, e.g.*, Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers, Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 21, 1995). The orders prohibiting the financial

The IEEPA's grant of regulatory power is extremely broad in that it authorizes presidential regulation of *any person* or *any property* subject to the jurisdiction of the United States and as it pertains to the declared national emergency.¹² However, there are four enumerated limitations on the President's power. The President does not have the power to regulate or prohibit: (1) communications which do not involve a transfer of anything of value; (2) informational materials including publications, photographs, and CDs; (3) any transactions ordinarily incident to travel to or from any country, such as the payment of living expenses and the purchase of goods for personal use; and notably, (4) donations of articles intended to relieve human suffering such as food, clothing, and medicine.¹³

Under the IEEPA, three different lists are maintained to designate terrorist organizations, often referred to as "blacklists."¹⁴ The relevant blacklists are: (1) Specially Designated Terrorist, created by Executive Order 12,947, issued by President William Jefferson Clinton in 1995 to identify groups or individuals that sought to threaten the Middle East peace process;¹⁵ (2) Specially Designated Global Terrorist, created by Executive Order 13,224, issued by President George W. Bush after September 11, 2001,¹⁶ and (3) Specially Designated Nationals and Blocked Persons, an umbrella list compiled by the Office of Foreign Assets Control, a branch of the U.S. Treasury Department.¹⁷

support of and association with terrorism are notably some of the most broadly worded. *See infra* Part I.A.

12. 50 U.S.C. § 1702(a)(1)(A) (2000).

13. *Id.* § 1702(b).

14. There are two additional terrorist designation lists that will not be discussed for the purposes of this Note. One is the Terror Exclusion List (TEL), under which the Secretary of State designates individuals as terrorists strictly for immigration purposes. THE FTO LIST, *supra* note 8, at 5. There is also a list for state-sponsors of terrorism, created pursuant to the Export Administration Act of 1979. 50 U.S.C. app. § 2405(j) (2000). The seven states currently on the list are Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. *Id.* at 3.

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

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

17. The Office of Foreign Assets Control of the United States Department of the Treasury administers and enforces economic and trade sanctions based on United States foreign policy and national security goals. *See generally* United States Department of Treasury Office of Foreign Assets Control, <http://www.treas.gov/offices/enforcement/ofac>; *see also Oversight of the Department of Treasury: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. On Financial Services*, 108th Cong. 2 (2004) (statement of R. Richard Newcomb, Director, Office of Foreign Assets Control, U.S. Dep't of the Treasury) (describing OFAC's designation programs) [hereinafter *Hearing on Treasury Oversight*].

A. *Executive Order 12,947 (1995)*

On January 23, 1995, President William Jefferson Clinton issued Executive Order 12,947 (E.O. 12,947), creating the blacklist that has come to be known as the Specially Designated Terrorist (SDT) list.¹⁸ President Clinton predicated the Order upon a finding that grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.¹⁹ E.O. 12,947 includes an annex of terrorist organizations that threaten the Middle East peace process, including Hamas (the Islamic Resistance Movement) and several Palestinian and Jewish organizations.²⁰ The Order permits the Secretary of State, in coordination with the Secretary of the Treasury and the Attorney General, to designate additional organizations as SDTs.²¹ All transactions and dealings with such designated organizations are prohibited by the Order, including making and receiving contributions of funds, goods, and services.²² Donations of humanitarian aid such as food, clothing, and medicine, while excepted from presidential regulation under section 203(b)(2)(A) of the IEEPA,²³ are expressly prohibited to the extent that they impair the President's ability to deal with the national emergency he has declared.²⁴

B. *Executive Order 13,224 (2001)*

On September 23, 2001, President George W. Bush issued Executive Order 13,224 (E.O. 13,224), creating what has come to be known as the Specially Designated Global Terrorist (SDGT) blacklist.²⁵ President Bush issued the order in response to the terrorist attacks on the World Trade Center and the Pentagon that occurred on September 11, 2001.²⁶ The SDGT designation is more expansive than President Clinton's SDT designation in that it includes *all* global terrorists, not specifically those affecting the Middle East peace process.

At the time E.O. 13,224 was issued, United States officials did not fully know the details about who funded al Qaeda's attacks on

18. Exec. Order No. 12,947, 60 Fed. Reg. 5079.

19. *Id.*

20. *Id.* Annex, 60 Fed. Reg. at 5081; *see Aziz, supra* note 8, at 54.

21. Exec. Order No. 12,947 § 1(a)(ii), 60 Fed. Reg. at 5079.

22. *Id.* § 1(b).

23. 50 U.S.C. § 1702(b) (2000).

24. Exec. Order No. 12,947 § 3, 60 Fed. Reg. at 5080; *see infra* note 36.

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

26. *Id.*

September 11, 2001, or through what channels they did so.²⁷ However, subsequent investigations revealed that al Qaeda primarily financed the attacks on the United States through individual fundraisers and corrupt charities in Saudi Arabia and other Gulf countries.²⁸ Because the fundraisers, mosques, and charities that funneled money to al Qaeda took advantage of the centrality of charitable giving in the Islamic religion, it is not evident that all donors knew they were donating to organizations connected to al Qaeda or that their donations would be used to fund terrorism.²⁹ Although the United States was not a primary source of al Qaeda funding, some funds innocently raised or donated in the United States nevertheless may have indirectly made their way into the hands of al Qaeda.³⁰

In E.O. 13,224, President George W. Bush announced that due to the pervasive and expansive nature of the economic foundation of foreign terrorists, financial sanctions are appropriate for persons and organizations that support or associate with foreign terrorists.³¹ He called for the blocking of assets for: (1) individuals or groups on the annexed list; (2) anybody who has committed or is a significant risk for committing acts of terrorism; and (3) any person who is acting on behalf of a group on the annexed list.³² The annexed list is comprised entirely of Islamic and Arab individuals and groups, starting at the top with al Qaeda/Islamic Army and including Osama bin Laden.³³

The Order further allows the Secretary of the Treasury to freeze the assets of any person found to have assisted in, sponsored, or provided financial, material, or technological support for acts of terrorism or for those persons listed in the Annex and persons subsequently subjected to asset blocking under the order.³⁴ The extent of blocking ap-

27. THE 9/11 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 172 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

28. *Id.* at 170.

29. *Id.* Some donors may have been induced to donate to humanitarian or Islamic charities without knowing that the organization was corrupt or that it was a front for al Qaeda.

30. *Id.* at 170 n.115.

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

32. *Id.* § 2(b), 66 Fed. Reg. at 49,079.

33. *Id.* Annex, 66 Fed. Reg. at 49,083.

34. *Id.* § 1(d), 66 Fed. Reg. at 49,080. "Person" is defined as "an individual or entity." *Id.* § 3. In doing so, the Order expressly provides that the government need not provide prior notice to persons or groups subject to this Order, due to the ability to rapidly transfer funds. *Id.* § 10, 66 Fed. Reg. at 49,081. In other words, absent this provision, any time the government provided notice of investigation and/or designation to a charity, the charity would be able to either quickly transfer funds directly to terrorists, or transfer funds so as to launder their terrorist ties.

appears constrained by section 1702(b) of the IEEPA, which precludes the President from regulating or prohibiting donations made with the intent to relieve human suffering.³⁵ However, this limitation on presidential authority to block and designate has its own exception. Under the IEEPA, humanitarian donations may be prohibited or regulated where the President determines that such donations would “seriously impair his ability to deal with” the national emergency so declared, or in this case, the war on terrorism.³⁶

Because E.O. 13,224 applies to *all* global terrorists and confers broad powers on governmental agencies fighting terrorism, some U.S. officials see it as one of the best-suited tools to advance the administration’s overall mission to disable terrorist groups.³⁷ Shortly after its issuance, the government added to the SDGT list several terrorist organizations that had previously been the target of U.S. investigation under different guises, but were not related to the September 11th attacks, including the Revolutionary Armed Forces of Colombia (FARC) and the Real Irish Republican Army (RIRA).³⁸ Thus, the SDGT list purportedly does not single out Islamic or Middle East terrorism, but rather signifies a “global war on terrorism and terrorist financing” wherever it occurs around the world.³⁹ Indeed, by June

35. 50 U.S.C. § 1702(b) (2000).

36. *Id.* § 1702(b)(2). The terms “seriously impair” and “deal with” are conspicuously undefined and unqualified within the humanitarian donation exception. *See id.* They are also not defined in the legislative history of the IEEPA. *See S. REP. NO. 95-466*, at 5 (1977), as reprinted in 1977 U.S.C.C.A.N. 4540. The Senate Report states the abstract reasons why donations may be prohibited during a national emergency, but does not specify to what extent the donations must interfere with the President’s ability to deal with the threat and how that is to be measured:

The [President’s] exercise of emergency controls would be restricted in order to enable U.S. persons to make humanitarian contributions in accordance with their consciences, but not to permit transfers which subvert, contravene, or preclude effective exercise of emergency authority. Monetary contributions may be intended to serve humanitarian purposes, but the person making the contribution has no control over the end use of the funds. Donations of articles, on the other hand, are far more likely to serve their intended purpose.

Id.

37. *See Hearings on Counterterrorism Initiatives in the Terror Finance Program*, supra note 7, at 275–76 (statement of Stuart A. Levey, Under Secretary, Terrorism and Financial Intelligence, Under Secretary for Enforcement, U.S. Dept. of the Treasury) (highlighting “the value of the public actions the Treasury Department can take—particularly public designations”).

38. *Id.* at 163 (statement of R. Richard Newcomb, Director, Office of Foreign Assets Control, U.S. Dept. of the Treasury) (praising State Department for expanding “the war on terrorism beyond al Qaeda and the Taliban to other worldwide actors”).

39. *Id.*

2004, approximately 398 individuals and organizations had been designated SDGTs.⁴⁰

C. *Specially Designated Nationals and Blocked Persons (SDN)*

Finally, the Office of Foreign Assets Control (OFAC) maintains the Specially Designated Nationals and Blocked Persons (SDN) list, a comprehensive roster of several blacklists.⁴¹ The list encompasses all designated terrorist organizations and individuals from the SDT and SDGT lists and also includes groups that currently have their assets blocked for other reasons, such as narcotics trafficking.⁴² Furthermore, the SDN list plays an important role in the government's ability to regulate terrorist funding because an individual or group can be added to the SDN list and have its assets blocked *pursuant to* investigation without having been given a formal terrorist designation.⁴³ The ability to block assets during an investigation was the result of an amendment to the IEEPA by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act).⁴⁴ Section 106 of the USA PATRIOT Act expanded the presidential authority under the IEEPA to not only "investigate" transactions involving a declared national emergency, but also to "block during the pendency of an investigation" such transactions.⁴⁵

II.

SUCCESSFUL DESIGNATIONS AND BLOCKING ORDERS OF MUSLIM CHARITIES, POST-9/11

Of the twenty-seven Islamic charities designated as terrorist organizations or terrorist supporters by the U.S. Treasury Department, five have had offices in the United States.⁴⁶ The charities discussed in the following subsections have been effectively shut down by terrorist

40. *Id.*

41. OFFICE OF FOREIGN ASSET CONTROL, U.S. DEPARTMENT OF THE TREASURY, SPECIALLY DESIGNATED NATIONALS (SDN) LIST (2005), <http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>. For access to links to the current SDN, recent and past changes to the SDN, and the SDN in alternative formats, *see generally* <http://www.treas.gov/offices/enforcement/ofac/sdn/>.

42. THE FTO LIST, *supra* note 8, at 4–5.

43. 50 U.S.C. § 1702(a)(1)(B) (2000), *amended by* Pub. L. No. 107-56, § 106 (2001).

44. Section 106 of the USA PATRIOT Act amended the IEEPA by authorizing the president to block assets during the pendency of an investigation. USA PATRIOT Act, Pub. L. No. 107-56 § 106, 115 Stat. 272, 277 (2001).

45. *Id.*

46. Goodstein, *supra* note 6.

designations and blocking orders, and are often cited as great successes by the government in its fight against terrorist funding. All of the charities have challenged the government's actions in court, and each challenge has been rejected in favor of the U.S. Treasury Department. This section provides an overview of the charities, the means utilized by OFAC to apply the designation and block their assets, and the challenges brought by the charities. The First Amendment claims of these charities will be discussed in greater depth below at Part V.

A. *Holy Land Foundation for Relief and Development*

The Holy Land Foundation for Relief and Development (Holy Land) case presents the most "traditional" use of the terrorist designation and blocking order by the U.S. Treasury Department.⁴⁷ Holy Land began operating in 1989 as a section 501(c)(3) charitable organization providing humanitarian aid overseas, with a primary focus on Palestinians in the West Bank and Gaza.⁴⁸ On December 4, 2001, the Secretary of the Treasury designated Holy Land as an SDT and an SDGT, pursuant to E.O. 12,947 and E.O. 13,224, respectively, and issued a blocking order for all funds, property, and assets based on alleged links to the terrorist group Hamas.⁴⁹ In response, in March 2002 Holy Land filed an action seeking to enjoin the government from continuing to block its assets.⁵⁰

Holy Land argued that the SDT and SDGT designations and attendant blocking orders violated: (1) the Administrative Procedure Act; (2) the Due Process Clause of the Fifth Amendment; (3) the Takings Clause of the Fifth Amendment; (4) the Fourth Amendment; (5) First Amendment rights to freedom of speech and association; and (6) the Religious Freedom Restoration Act.⁵¹ The D.C. District Court rejected most of Holy Land's arguments and denied its request for a preliminary injunction. It found that OFAC's action was not arbitrary and capricious because the administrative record sufficiently demon-

47. Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

48. *Id.* at 64.

49. Hamas was designated an SDT in 1995 in the Annex to E.O. 12,947. *Id.* at 62; *see also* Exec. Order No. 12,947 Annex, 60 Fed. Reg. 5079, 5081 (Jan. 23, 1995).

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

51. *Id.* For an insightful examination of the due process concerns arising from the government's terrorist designation and ex parte asset blocking regime *see* Aziz, *supra* note 8, at 60–78.

strated, indeed provided “ample support,” that Holy Land had financial connections to and substantial involvement with Hamas.⁵²

Holy Land claimed that its funds supported medical and humanitarian aid and argued that the humanitarian exception to the IEEPA should apply to the blocking order.⁵³ However, the court agreed with the government that the exception merely applied to donations of “articles,” not transfers of money, even if intended to relieve human suffering.⁵⁴ Notably, the court also found that although the government did not provide Holy Land with notice and a hearing prior to blocking its assets, Holy Land’s due process rights were not violated because of the overwhelmingly important government interest in preventing terrorism and the special need for very prompt action.⁵⁵ The only finding the district court made in Holy Land’s favor was that the government’s entry on or in its premises and the removal of property without a warrant constituted an unreasonable search and seizure in violation of the Fourth Amendment.⁵⁶ In 2003, the D.C. Circuit Court affirmed the lower court’s decision in the Holy Land case.⁵⁷ Though other organizations have stepped forward to request the opportunity to distribute Holy Land’s aid money, its assets remain blocked and it is inoperable to this day.⁵⁸

52. *Holy Land Found.*, 219 F. Supp. 2d at 74, 84–85. The administrative record demonstrated that, among other things, Holy Land began raising funds for Hamas in 1988, Hamas provided financial support to Holy Land, Hamas and Holy Land leaders met twice in the 1990s, and Holy Land provided financial support to the orphans and families of Hamas martyrs and prisoners. *Id.* at 69–74.

53. *Id.* at 68–69.

54. *Id.* Under the IEEPA, the President does not have the authority to regulate or prohibit “donations . . . of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations . . . would seriously impair his ability to deal with any national emergency declared under section 1701.” 50 U.S.C. § 1702(b)(2) (2000).

55. *Holy Land Found.*, 219 F. Supp. 2d at 76–77. The District Court applied the *Calero-Toledo* test, which found that postponement of notice and hearing until after seizure did not deny due process due to circumstances that presented an extraordinary situation. *Id.* at 76 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679–80 (1974)).

56. *Id.* at 78–80.

57. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 159 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

58. Teresa Watanabe, *U.S. Muslims Temper Ramadan Giving with Caution*, L.A. TIMES, Nov. 6, 2004, at B2. Additionally, in November 2004 a federal magistrate judge in Illinois ruled that fundraisers for Holy Land were liable for the 1996 death of a student in Israel whose death was attributed to the terrorist group Hamas. *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885 (N.D. Ill. 2004); *see also* Laurie Cohen, *3 Islamic Fundraisers Held Liable in Terror Death*, CHI. TRIB., Nov. 11, 2004, at 1. The case was the first ruling against a United States organization under a 1990 law that allows victims of terrorism to sue for civil damages. *Id.* at 1. The court in the

B. *Global Relief Foundation, Inc.*

The Global Relief Foundation, Inc. (Global Relief) began operating in 1992 as a domestic, non-profit Islamic charitable organization headquartered in Illinois.⁵⁹ Global Relief characterized itself as the largest U.S.-based Islamic charity in terms of the geographic scope of its relief programs.⁶⁰ Over the years, Global Relief received millions of dollars in donations and funded humanitarian aid programs all over the world, including projects in Chechnya, Palestine, Iraq, and Sierra Leone.⁶¹

On December 14, 2001, OFAC placed Global Relief on its SDN list and issued a blocking order to freeze its financial assets pending the FBI's investigation into the possible relationship between Global Relief and the terrorists responsible for the attacks of September 11, 2001.⁶² Even though the government had not yet charged Global Relief or any of its employees with a crime nor designated the group as a terrorist organization, the blocking order was effected pursuant to President Bush's Executive Order 13,224 and the IEEPA.⁶³ On the same day the blocking order was issued, the FBI searched Global Relief's headquarters and seized materials for analysis.⁶⁴ Global Relief sought a preliminary injunction and declaratory judgment in federal district court to release the seized materials and unfreeze its funds while the investigation was ongoing, and argued that the blocking of its assets and records was both unlawful and unconstitutional.⁶⁵

The District Court denied the motions, finding that Global Relief was unlikely to succeed on the merits for any of its statutory and constitutional arguments.⁶⁶ Among its many challenges, Global Relief claimed that even though the blocking order could be used to preclude an organization from sending support or aid to *specific* foreign persons or organizations, the humanitarian exception in the IEEPA did

civil suit relied heavily on the findings of the D.C. District Court that Holy Land had extensive ties and financial contacts with Hamas. *See Boim*, 340 F. Supp. 2d at 893, 909.

59. *Global Relief Found., Inc. v. O'Neill*, 207 F. Supp. 2d 779, 785 (N.D. Ill. 2002), *aff'd*, 315 F.3d 748, 755 (7th Cir. 2002), *cert. denied*, 540 U.S. 1003 (2003).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 785–87; *see also* Montgomery Engel, Note, *Donating "Blood Money": Fundraising for International Terrorism by United States Charities and the Government's Efforts to Constrict the Flow*, 12 *CARDOZO J. INT'L & COMP. L.* 251, 267–68 (2004).

64. *Global Relief Found.*, 207 F. Supp. 2d at 786.

65. *Id.* at 786–87.

66. *Id.* at 809.

not permit the government to strip Global Relief of the right to provide humanitarian aid to *any* possible recipient—*i.e.*, even those clearly not associated with terrorism.⁶⁷ The court disagreed with this argument, reasoning that the statutory language of the IEEPA did not place any temporal or geographic limitations on the President’s ability to block humanitarian aid, nor did it require that the President only block international aid or humanitarian aid to specific foreign people or organizations.⁶⁸ Accordingly, the President had the power to block any and all humanitarian aid as long as he first declared a national emergency and showed that this particular aid impaired his ability to deal with the emergency.⁶⁹

The District Court also rejected as unripe for review Global Relief’s argument that E.O. 13,224 was unconstitutionally vague due to its failure to define the phrase “associated with a person determined to be a terrorist” and to give sufficient notice of the types of conduct prohibited.⁷⁰ The court found that the vagueness issue was not ripe for review because the U.S. Treasury Department had not yet designated Global Relief as a terrorist organization and was only blocking its assets while investigating any possible links to terrorist financing.⁷¹ On October 18, 2002, the government finally designated Global Relief as an SDGT,⁷² effectively rendering its Seventh Circuit appeal moot because the majority of Global Relief’s arguments attacked its SDN blacklist designation and the USA PATRIOT Act’s amendment that permitted the blocking of its assets while an investigation was pending.⁷³ Because Global Relief had been raised to SDGT status and the investigation was no longer pending, the appellate court did not address Global Relief’s arguments on the matter⁷⁴ and ultimately upheld the denial of preliminary injunctive relief.⁷⁵

C. *Benevolence International Foundation*

On December 14, 2001, OFAC notified the Benevolence International Foundation (BIF), an Illinois Muslim charity, that it was putting the charity on the SDN list and issuing an asset blocking order pend-

67. *Id.* at 795.

68. *Id.*

69. *Id.*

70. *Id.* at 802.

71. *Id.*

72. Engel, *supra* note 63, at 272.

73. *Id.* at 272–73.

74. *Id.*

75. Global Relief Found., Inc. v. O’Neill, 315 F.3d 748, 755 (7th Cir. 2002).

ing an investigation into possible violations of E.O. 13,224.⁷⁶ BIF claimed that it was a religious humanitarian charity that provided food, clothing, and medical services to individuals afflicted by war, natural disaster, and extreme poverty in places such as Afghanistan, Pakistan, and Azerbaijan.⁷⁷ BIF filed a lawsuit challenging the constitutionality of the OFAC blocking order and seeking to release its funds.⁷⁸ The Department of Justice filed criminal charges against BIF and its CEO for knowingly making false material declarations under oath when its CEO stated that BIF had never aided people or organizations known to be engaged in violence or terrorist activities.⁷⁹ Instead of addressing BIF's claims, the District Court chose to stay the civil proceedings until the conclusion of the parallel criminal case, leaving BIF in "administrative limbo."⁸⁰ BIF was finally taken out of administrative limbo when it was designated an SDGT by the U.S. Treasury Department in November 2002.⁸¹

D. *Islamic American Relief Association-USA*

In October 2004, the U.S. Treasury Department designated a Missouri charity, the Islamic American Relief Association-USA (IARA-USA) an SDGT for being part of an international front for terrorists such as al Qaeda and Osama bin Laden and ordered the blocking of its assets.⁸² A federal judge upheld the designation, find-

76. *Benevolence Int'l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935, 936 (N.D. Ill. 2002). BIF was placed on the SDN list pursuant to the USA PATRIOT Act amendment to the IEEPA. *Id.*

77. *Id.*

78. *Id.* at 937.

79. *Id.*

80. *Id.* at 941; *see also* Engel, *supra* note 63, at 274; Office of Foreign Assets Control, Recent OFAC Actions (Dec. 14, 2001), <http://www.treas.gov/offices/enforcement/ofac/actions/20011214b.html> (last visited Nov. 1, 2005) (announcing blocking of Global Relief Foundation); Office of Foreign Assets Control, Recent OFAC Actions (Dec. 14, 2001), <http://www.treas.gov/offices/enforcement/ofac/actions/20011214a.html> (last visited Nov. 1, 2005) (announcing blocking of BIF and Global Relief Foundation).

81. *See* United States Department of the Treasury, WHAT YOU NEED TO KNOW ABOUT U.S. SANCTIONS, <http://www.treas.gov/offices/enforcement/ofac/sanctions/t11ter.pdf> (designating BIF as SDGT). Meanwhile, the government chose to aggressively prosecute BIF's CEO for defrauding Muslim donors by appealing to their religious duties to make charitable donations and then commingling the innocent funds with the funds of other donors who intended the monies to be used to support violent causes. Engel, *supra* note 63, at 274–76. The CEO ultimately pled guilty to one count of racketeering conspiracy to defraud donors and send proceeds to Chechen and Bosnian fighters, although a terrorism enhancement was notably removed from his pre-sentence report. *Id.* at 278–79.

82. Matt Kelley, *Judge Upholds Designation of Missouri Charity as Terror Front*, SEATTLE POST-INTELLIGENCER, Feb. 18, 2005, at 1.

ing that the government had enough evidence to support a determination that IARA-USA was the U.S. branch of an international charity linked to terrorism, the Islamic African Relief Agency.⁸³ The case has garnered a large amount of media attention because it was discovered that a mosque established and funded by retired NBA basketball star Hakeem Olajuwon gave more than \$80,000 to the Islamic African Relief Agency.⁸⁴ Olajuwon, like many donors, claims to have had no knowledge of the links to terrorism and believed IARA was a legitimate organization dedicated to helping the needy in Africa.⁸⁵

III.

DIFFICULTIES IN PROVING MATERIAL SUPPORT TO TERRORISM

Despite the apparent governmental success in the cases discussed above and the vigor with which the war on terrorism has been touted,⁸⁶ the government has more commonly faced extraordinary difficulty in effectively proving many of the terrorism charges it makes. Indeed, it has been accused of being overzealous and using exaggerated facts to gain media attention, thus making the freezing of assets during a pending investigation particularly suspect.⁸⁷

A. *Prosecutorial Setbacks*

In September 2004, a federal district court in Detroit threw out the convictions of three Middle Eastern men, one for fraud and two for providing material support to terrorism, due to misconduct by the Department of Justice's (DOJ) lead prosecutor.⁸⁸ When defense lawyers accused the DOJ of withholding evidence, the district judge ordered

83. *Id.*

84. See David Picker, *Olajuwon Says He Gave in Good Faith*, N.Y. TIMES, Feb. 16, 2005, at D5; *Olajuwon Terror Scandal*, SPORTS ILLUSTRATED, Feb. 9, 2005, at 19, available at <http://sportsillustrated.cnn.com/2005/basketball/nba/02/09/hakeem.mosque.ap/index.html?cnn=yes>.

85. *Olajuwon Terror Scandal*, *supra* note 84.

86. See Engle, *supra* note 1, at 111 n.203, for an interesting comment on how President George W. Bush's subtle reference to the "war on terror," as opposed to the "war on terrorism," to describe government actions taken to prevent attacks on the U.S. makes it "possible for the government to motivate a situation of unending war and juridical crisis as though these practices constitute the just response of a representative state to the felt needs of its citizens."

87. Curt Anderson, *Detroit Terror Case Adds to Government's Legal Losses; But Prosecutors Say They'll Stick to Zero-Tolerance Policy*, CHI. SUN-TIMES, Sept. 7, 2004, at 36.

88. *United States v. Koubriti*, 336 F. Supp. 2d 676, 681–82 (E.D. Mich. 2004); see also Chitra Ragavan, *A Fine Legal Mess in Motown*, U.S. NEWS & WORLD REP., Sept. 13, 2004, at 39.

Attorney General John Ashcroft to conduct a complete file review.⁸⁹ After a nine-month investigation, the special attorney assigned to the case found that prosecutors had failed to give defense lawyers exculpatory evidence and “created a record filled with misleading inferences that such material did not exist.”⁹⁰ The accused men will receive a new trial on document fraud charges, but the charges of providing material support for terrorism have been dropped.⁹¹

In June 2004, a Muslim graduate student involved with Muslim charities was acquitted of all charges of providing material support to terrorists.⁹² The defendant, computer science student Sami al-Hussayen, ran websites for a Muslim charity on a volunteer basis.⁹³ Government prosecutors believed that messages on the websites encouraged violent attacks against the United States and sought donations for terrorist organizations.⁹⁴ Government suspicions were also raised due to the large donations that al-Hussayen personally made to several charities.⁹⁵ All told, due to his volunteer connections and charitable contributions to Muslim charities, al-Hussayen spent nearly a year and a half in jail prior to his acquittal on the terrorism charges at trial.⁹⁶

89. *Ragavan, supra* note 88, at 39.

90. *Id.*

91. *Id.*

92. Maureen O’Hagan, *A Terrorism Case That Went Awry*, SEATTLE TIMES, NOV. 22, 2004, at A1; *see also The Record in Court of U.S. Charges Brought Against Terrorism Suspects by the Justice Department*, S.F. CHRON., Sept. 17, 2004, at A3 [hereinafter *Record in Court*].

93. O’Hagan, *supra* note 92.

94. *Id.* The FBI spent nearly a year investigating al-Hussayen, surveilling his phone conversations, e-mails, and his movements and actions on campus. The effort turned up a “number of bogus clues leading to mistaken conclusions.” *Id.* For example, when al-Hussayen switched dissertation advisors half-way through the school year, government investigators suspected that he was trying to slow down his graduation and that his dissertation was “fictitious” in order to effect his true purpose for coming to the United States—raising money on the websites for jihad. Al-Hussayen’s explanation for the switch was that his first advisor was ill with cancer and that he switched advisors so that he could finish his dissertation on time. *Id.*

95. *Id.*

96. *Id.* Though the jury deadlocked on eight immigration counts against al-Hussayen, the government decided not to try him again after al-Hussayen agreed not to fight his deportation and voluntarily returned to Saudi Arabia in July 2004. *Record in Court, supra* note 92. In another case that demonstrates government prosecutorial difficulties, in August 2004, a federal judge released on bail the imam at an Albany mosque and another Muslim who owned a pizza parlor, both charged with providing material support to terrorist organizations. *See* Editorial, *Make the Case—Now: How Strong is the Evidence Against Two Albany Muslim Immigrants?*, TIMES UNION (Albany), Sept. 19, 2004, at E4. The judge expressed frustration with government delays in disclosing critical evidence and determining that the men were not as dangerous as prosecutors had made them out to be. *See id.*; Anderson, *supra* note 87.

While the cases discussed above do not highlight the use of an SDGT or SDT designation, they demonstrate hurdles that the government faces in proving charges of providing support for terrorism. In prosecuting such cases, the government's objective must be to prevent terrorist groups from gaining the money to mobilize while preserving the constitutional rights of Islamic donors.⁹⁷ It is a fine line to walk, and investigators often choose to err on the side of caution to try to stop funds from reaching terrorists as soon as possible; they do so by acting before the evidence has fully been developed, to the ultimate detriment of the prosecution. Indeed, at recent Senate hearings on the Tools to Fight Terrorism Act,⁹⁸ Senator Leahy expressed dissatisfaction with the DOJ's inability to effectively shut down terrorists and terrorist supporters using long prison sentences, noting that "[o]f the approximately 184 cases disclosed as International Terrorism matters [since 9/11], 171 received a sentence of one year or less."⁹⁹ Due to the DOJ's frequent inability to prove financial support to terrorists, the government has resorted to making collateral, or indirect, use of the terrorist designation in order to shut down what it believes to be an organization that actually funds terrorists, though it does not have the means to prove such a claim. The following case demonstrates the way the government has resorted to using the language of the terrorist designation while charging suspects with lesser crimes.

B. Collateral Use of the SDGT Designation

The case of Omar Abdi Mohamed, a Somali refugee who ran a small Muslim charity in San Diego and worked as a teaching aide, provides a telling example of the government's difficulties in prosecuting terrorist funding cases. In January 2004, the Office of the United States Attorney in San Diego indicted Mohamed for allegedly making false statements in a May 2002 naturalization interview about funds his charity received from a terrorist organization.¹⁰⁰ Mohamed and his charity, the Western Somali Relief Agency, were not designated SDGTs or SDTs by the U.S. Treasury Department, nor were

97. O'Hagan, *supra* note 92. For a brief description of some of the charges brought against terrorist suspects see *Record in Court*, *supra* note 92.

98. S. 2679, 108th Cong. (2004).

99. *A Review of the Tools to Fight Terrorism Act: Hearing before the S. Subcomm. on Terrorism, Technology and Homeland Security of the S. Comm. on the Judiciary*, 108th Cong. (2004), http://judiciary.senate.gov/member_statement.cfm?id=1301&wit_id=2629 (statement of Sen. Patrick Leahy, Ranking Member, Senate Comm. on the Judiciary).

100. Press Release, Office of the United States Attorney, Southern District of California (Jan. 22, 2004), <http://www.usdoj.gov/usao/cas> [hereinafter First Indictment].

they placed on the umbrella SDN list pursuant to the pendency of an investigation.¹⁰¹ Although Mohamed was only on trial for lying in an immigration interview, the indictment, pre-trial motions, and the media attention surrounding the case suggested that Mohamed was involved in raising funds for terrorist activities.

Omar Abdi Mohamed first came to the United States in 1995 on a religious visa in order to work at a San Diego mosque.¹⁰² Though Mohamed did not ultimately work at the mosque, he obtained Legal Permanent Resident status, and founded a small Koranic teaching center at a local Somali civic center.¹⁰³ In 1997, he established the Western Somali Relief Agency, a charity to send money for famine relief and medical and educational assistance to Somali refugees in the war-torn Ogaden region of Eastern Ethiopia.¹⁰⁴ Mohamed applied for U.S. citizenship in 2000 and had his first naturalization interview in May 2002.¹⁰⁵ At the time of his arrest for false statement charges in January 2004, Mohamed was employed part-time by the San Diego City School District and continued with his duties as President of the Western Somali Relief Agency.¹⁰⁶

According to the indictment unsealed on January 22, 2004, Mohamed told immigration officials during the naturalization interview that the Western Somali Relief Agency never received funds from other organizations and that, in fact, it lacked sufficient funds to send any significant aid to Somalia.¹⁰⁷ However, the indictment alleged that those statements were false due to the fact that between December 1998 and February 2001, the charity received over \$300,000 from the Global Relief Foundation, an SDGT-designated Muslim charity.¹⁰⁸ Mohamed was charged with making false state-

101. Office of Foreign Assets Control, Specially Designated Nationals (SDN) List (last updated Aug. 18, 2005), *available at* <http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf> [hereinafter SDN List].

102. David B. Ottaway, *U.S. Eyes Money Trails of Saudi-Backed Charities*, WASH. POST, Aug. 19, 2004, at A1.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*; Press Release, Office of the United States Attorney, Southern District of California (Mar. 26, 2004), <http://www.usdoj.gov/usao/cas/pr/cas40326.1.pdf> [hereinafter Superseding Indictment].

107. First Indictment, *supra* note 100.

108. *Id.* Note that Global Relief was not designated an SDN until December 14, 2001, eight months after the last time Mohamed is alleged to have received funds from it. At the time Mohamed allegedly received the money, Global Relief had yet to be designated an SDGT, its assets were not blocked, and it was operating lawfully in the United States. See *supra* Part II.B for a discussion of Global Relief's SDGT status.

ments in connection with an immigration application and in a matter relating to naturalization.¹⁰⁹ A superseding indictment, filed on March 26, 2004, added several additional counts of making false statements and withholding information.¹¹⁰ The superseding indictment also amended the amount of money Mohamed allegedly received from Global Relief and further alleged that Mohamed received \$5,000 from the Al-Haramain Foundation, a Saudi charity designated an SDGT by the U.S. Treasury Department.¹¹¹

Because U.S. investigators were unable to track what Mohamed did with the money he allegedly received from the Global Relief Foundation, they were not able to prove that he used it to fund terrorists and could not prosecute him accordingly. Thus, the government had to make collateral use of the SDGT designation by highlighting Mohamed's connection to an SDGT-designated charity.¹¹² According to investigations, most of the money was sent by checks to an informal money transmitter, but its final destination could not be traced.¹¹³ The government suspected that some of it went to al-Itihaad al-Islamiya,¹¹⁴ a Somali terrorist group allegedly linked to the head of the al-Haramain Foundation.¹¹⁵ Furthermore, because

109. First Indictment, *supra* note 100. Mohamed was charged with violating 18 U.S.C. § 1546(a), false statements in connection with immigration application, and 18 U.S.C. § 1015(a), false statements in matter relating to naturalization. *Id.* Each violation carries a maximum penalty of five years imprisonment and/or a \$250,000 fine. *Id.*

110. Superseding Indictment, *supra* note 106. The superseding indictment alleged that Mohamed made other false statements in the May 2002 naturalization interview pertaining to his place of employment in San Diego and the number of children he had. *Id.* The DOJ also alleged that he failed to state that he was employed by the Kingdom of Saudi Arabia from March 1994 through January 2004. *Id.*; see also THE FTO LIST, *supra* note 8, at 8 (describing links between charities and terrorism). The indictment alleged that Mohamed possessed his Legal Permanent Resident card on the date of arrest, knowing that the card was obtained by fraud, and accordingly charged him with violating 18 U.S.C. § 1546, possession of entry documents obtained by fraud. Superseding Indictment, *supra*.

111. Superseding Indictment, *supra* note 106. Al-Haramain, a large charity sponsored by the Saudi government, was set up to promote an extreme form of Islam known as "Wahhabism." See CHRISTOPHER BLANCHARD, THE ISLAMIC TRADITIONS OF WAHHABISM AND SALAFIYA, CRS REP. NO. RS21695, at 6 (2005); Ottaway, *supra* note 102. The al-Haramain Islamic Foundation was designated an SDGT on March 11, 2002. See Superseding Indictment, *supra* note 106.

112. Ottaway, *supra* note 102.

113. Informal money transmitters are known among Muslims as *hawalas*. *Id.* For more information about *hawala* money transfer networks see Rachana Pathak, Note, *The Obstacles to Regulating the Hawala: A Cultural Norm or a Terrorist Hotbed?*, 27 FORDHAM INT'L L.J. 2007, 2009–28 (2004).

114. Al-Itihaad al-Islamiya was designated an SDGT in the original Annex to E.O. 13,224. Exec. Order No. 13,224 Annex, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

115. Ottaway, *supra* note 102.

Mohamed allegedly received money from the al-Haramain Foundation, and was employed by the Saudi government as a preacher in the United States, he was suspected of propagating Wahhabism, a militant form of Islamic fundamentalism.¹¹⁶

Despite the allegations that Mohamed lied about receiving money from SDGTs, and the government's and media's damaging suspicions that he was connected to violent fundamentalism, the government did not charge Mohamed or his organization with providing monetary support to terrorists.¹¹⁷ Mohamed, in his defense, insisted that he was not involved with Islamic extremism and that the money his charity raised went to various local charities and tribal chiefs in the Ethiopian Ogaden region, home to many Somali refugees.¹¹⁸ His lawyers also claimed that any and all funds Mohamed received from the Global Relief Foundation and the al-Haramain Foundation came in *before* those groups were linked to terrorist fund-raising by the U.S. Treasury Department.¹¹⁹

Due to a series of pre-trial motions that delayed the start of trial, it took over a year for Mohamed to be tried for the immigration crimes alleged in the indictments. The first issue that caused delays was whether prosecutors could refer to terrorism and terrorist organizations in front of the jury.¹²⁰ The U.S. Attorney argued that it was necessary to refer to the terrorist organizations from which Mohamed allegedly received money in order to show that he tried to conceal these facts to obtain his citizenship.¹²¹ Initially the judge disagreed and found that references to terrorism would be prejudicial and inflammatory.¹²² However, after the prosecution's request to reconsider, in February 2005 the judge reversed himself and determined that mention of the terrorist fund-raising charities was material to the case

116. For more information about Wahhabism, see Abdulaziz H. Al-Fahad, *From Exclusivism to Accommodation: Doctrinal and Legal Evolution of Wahhabism*, 79 N.Y.U. L. REV. 485 (2004) (discussing evolution of Wahhabism from puritanical and uncompromising movement to ideology concerned with practical politics over ideological rigor).

117. See First Indictment, *supra* note 100; Superseding Indictment, *supra* note 106; see also SDN List, *supra* note 101.

118. Ottaway, *supra* note 102.

119. Kelly Thornton, *Judge's Reversal is a Blow to Somali*, SAN DIEGO UNION-TRIB., Feb. 16, 2005, at B2. Omar Abdi Mohamed's trial did not receive very much nationwide news attention. Kelly Thornton, a San Diego Union-Tribune staff reporter, appears to have provided the only extensive coverage of the trial.

120. Kelly Thornton, *Debate Over References to Terror Delays Somali's Immigration Trial*, SAN DIEGO UNION-TRIB., Aug. 13, 2004, at B3.

121. Kelly Thornton, *Terror References Ruled Out for Trial*, SAN DIEGO UNION-TRIB., July 31, 2004, at B1.

122. *Id.*

because it might allow the prosecution to show a motive for Mohamed to lie to immigration officials.¹²³

A second issue that delayed trial was whether the defense could have access to top-secret federal intelligence materials about Mohamed and whether the defense could cross-examine a federal agent about terrorist matters.¹²⁴ The defense sought to challenge the classified information, which it believed unfairly labeled Mohamed as a terrorist.¹²⁵ In January 2005, the judge reversed himself regarding this matter and ruled that prosecutors did not have to disclose the classified information and subject its investigator to cross-examination because disclosure could compromise national security interests without substantially benefiting the defense.¹²⁶ Prior to this ruling, the government invoked the Classified Information Procedures Act,¹²⁷ which allows the judge to privately review the classified evidence in a secret hearing.¹²⁸ Though the Act was originally intended for use in espionage cases, federal prosecutors have used it more frequently in “pursuing terrorism-related cases—disguised as immigration prosecutions—in the post-Sept. 11 era.”¹²⁹ In light of his ruling regarding references to terrorism, the judge interestingly justified his decision to prevent disclosure by reasoning that disclosure could subject Mohamed to undue prejudice and that the material would confuse the jury.¹³⁰

Mohamed’s March 2005 trial lasted four and a half days.¹³¹ After fifteen hours of deliberation, the jury acquitted him on all charges pertaining to lying about his association with terror-linked organizations.¹³² The jury convicted Mohamed of lying about the number of children he had and deadlocked on five of nine other counts pertaining to the alleged lies about working for the Saudi government and not fulfilling his work obligation at his sponsoring mosque.¹³³ Thirty Somali supporters and family members watched from the packed court-

123. Thornton, *supra* note 119.

124. Kelly Thornton, *Ruling in Immigration Case Sides With National Security*, SAN DIEGO UNION-TRIB., Jan. 27, 2005, at B1.

125. *Id.*

126. *Id.*

127. Pub. L. No. 96-456, § 6, 94 Stat. 2025, 2026 (1980), *reprinted in* 18 U.S.C. app. (2000).

128. *Id.*

129. *Id.*

130. *Id.*

131. Kelly Thornton, *Somali Man is Acquitted of Lies in Citizenship Case*, SAN DIEGO UNION-TRIB., Mar. 31, 2005, at B2.

132. *Id.*

133. *Id.*

room and many others waited outside to show support.¹³⁴ After the verdict was announced, Mohamed's friends expressed relief that the jury was not unduly influenced by the terrorism overtones created by the prosecution: "that's the most significant thing in the bigger picture, [the unanimous not guilty verdict on] the attempted connection to the suspicious web of terrorism. That door has been slammed shut with the unanimous verdict on those counts."¹³⁵

IV.

SOCIAL RAMIFICATIONS OF TERRORIST DESIGNATIONS AND INVESTIGATIONS

The previous sections have described how the government invokes its authority under the IEEPA to prevent terrorist funding, and how this process has several immediate effects on the charities themselves. More broadly, this government action also has effects on individual Muslims' religious practice of charitable giving. It is important to understand the role charitable giving plays in the Islamic religion in order to evaluate the viability of First Amendment claims challenging the blacklisting of Muslim charities.

Charitable giving, known as *zakat*, is one of the five pillars of Islam.¹³⁶ Muslims are required by their faith to give 2.5% of their income and savings to the poor annually.¹³⁷ *Zakat* is supposed to be given to those who need it most, especially widows and orphans, the homeless, and the dispossessed.¹³⁸ For this reason, American Muslims have traditionally made donations to Muslim charities that send money overseas to help other Muslims in war-torn and impoverished areas.¹³⁹ Additionally, there is a requirement to pay *zakat fitr*, a fee to feed a needy family during Ramadan, the Islamic holy season.¹⁴⁰ Charitable giving increases tremendously during the holy season because it is said that "the blessings of all donations are multiplied 70 times in the book of God."¹⁴¹

134. *Id.*

135. *Id.*

136. JOHN BOWKER, WHAT MUSLIMS BELIEVE 19–20 (1998). The five pillars of Islam are: (1) faith; (2) prayer; (3) the *zakat*; (4) the fast; and (5) the pilgrimage. *Id.*; see also *Muslims Alter Ramadan Giving*, L.A. TIMES, Nov. 2, 2002, at B20.

137. BOWKER, *supra* note 136, at 20.

138. IGNAZ GOLDZIEHER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW 20 (1981); Goodstein, *supra* note 6.

139. Goodstein, *supra* note 6.

140. AL-QADI AL-NU'MAN, THE PILLARS OF ISLAM 331 (Ismail Kurban Husein Poonawala ed., Asaf A.A. Fyzee trans., Oxford Univ. Press 2002); Watanabe, *supra* note 58.

141. Watanabe, *supra* note 58.

Muslims regard charitable giving as a religious obligation rather than a voluntary act.¹⁴² If unable to make the *zakat fitr* contribution during Ramadan, for instance, many “Muslims believe [that the] spiritual benefits gained from fasting and praying will be forfeited.”¹⁴³ Furthermore, successful fulfillment of the *zakat* obligation also depends on where the money goes and whom it supports. For example, while Muslims are permitted to donate to non-Muslim charities on a voluntary basis, they must give first priority to the needs of Muslims around the world when distributing *zakat* contributions.¹⁴⁴ Muslims must first give “to the needy and disadvantaged in the Muslim community, and if the Muslim community has been taken care of, then beyond the Muslim community to non-Muslims.”¹⁴⁵ Because of the religious obligation to help the people most in need, “giving money to American Muslim mosques, schools and advocacy groups [is] a ‘remote second choice’ to donating to poor and suffering Muslims overseas.”¹⁴⁶

A. Donor Reactions to Blacklisting Muslim Charities

The heightened scrutiny on Islamic charities since September 11, 2001 has not only reduced the amount of donations to corrupt organizations that ultimately fund terrorist activities,¹⁴⁷ but has also reduced the amount of donations to Muslim organizations working in good faith to eliminate human suffering around the world.¹⁴⁸ Some reticence to donate stems from the very real fear that a donation may wind up in the hands of a terrorist, in spite of the donor’s honest and non-violent intentions. Donor due diligence is critical to ensuring the legality of contributions.¹⁴⁹ However, the media storm surrounding

142. Damien Henderson, *Shaking the Pillars of Islam*, THE HERALD (UK), Dec. 7, 2004, at 12.

143. Watanabe, *supra* note 58.

144. Henderson, *supra* note 142.

145. BOWKER, *supra* note 136, at 20.

146. Goodstein, *supra* note 6 (quoting Nazih Hassan, President of the Muslim Community Association of Ann Arbor, Mich.).

147. See *supra* notes 27–30 and accompanying text (describing al Qaeda’s use of charities to fund attacks of September 11th).

148. See, e.g., Crimm, *supra* note 8, at 1349 n.16; Engel, *supra* note 63, at 284 n.197.

149. For a discussion of several means by which “donors may access and examine information” about charitable organizations, see Crimm, *supra* note 8, at 1447–48. Crimm recommends that prospective donors obtain literature and check the websites of specific organizations, access information compiled by charity watchdog groups such as the Better Business Bureau Wise Giving Alliance, consult the state Attorney General about non-profits, and review U.S. and foreign government lists of organizations that are considered terrorist organizations or supporters. *Id.*

basketball star Hakeem Olajuwon's contributions to SDGT-designated charities highlights that the burden on donors to ensure the innocence of the final destination of charitable funds may be too high to meet.¹⁵⁰ Olajuwon, a wealthy donor with advanced administrative and legal capabilities, was nevertheless unable to discern that the charities he donated to were associated with terrorist organizations. He described his own inability to weed out suspect charities: "You see their work, you see their brochure, they've been doing it for years and they're approved by the government."¹⁵¹ Other wealthy donors express similar concerns that they do not know where the money will end up, even when it is donated to a well-established organization.¹⁵² Moreover, donors must confront the fact that some American Muslims genuinely support militant Islamic causes and are willing to mix their money with innocent donations in order to do so.¹⁵³

While newspaper commentary has focused on the personal fears of Muslim donors, some of the legal scholarship surrounding the terrorist designations and government asset blocking only cursorily notes that after September 11, 2001, Muslim charities experienced large drops in donations and that many Muslims became fearful of giving.¹⁵⁴ While some of those fears are grounded in the possibility of actually funding terrorism, a greater reason for the drop in religious donations is that many Muslims are afraid of becoming targets of law enforcement and branded as terrorists due to their connections with a charity that comes under investigation.¹⁵⁵ Charity leaders have recognized that since September 11, 2001, many American Muslims feel that whatever their actions, they are perceived as having bad intentions and that an overall climate of fear has kept donors from making their annual charitable contributions.¹⁵⁶

150. See *supra* notes 84–85 and accompanying text.

151. Picker, *supra* note 84.

152. Watanabe, *supra* note 58.

153. See Noreen S. Ahmed-Ullah et al., *Hard-liners Won Battle for Bridgeview Mosque*, CHI. TRIB., Feb. 8, 2004, at 1 (describing takeover of mosque by ultra-conservative Muslims and mosque's connections with several SDGT-designated charities); Joseph Braude, *Something's Gotta Give*, NEW REPUBLIC ONLINE, Dec. 3, 2004, <http://www.tnr.com/doc.mhtml?i=express&s=braude120304>.

154. See, e.g., Crimm, *supra* note 8, at 1349 n.16 (discussing donor fears); Engel, *supra* note 63, at 284 n.197.

155. *Muslims Alter Ramadan Giving*, *supra* note 136.

156. As one charity leader simply put it, "People generally are scared." *Id.* However, not all Muslims have ceased giving. Some continue donating to charities that send aid overseas, some give only to domestic charities, some have cut out the charity middleman altogether and give cash directly to the needy or to people going overseas to disburse it. This last method has its own challenges, however. For instance, in 2004, Ali Sher Khan was convicted under the Bulk Cash Smuggling Provi-

This climate of fear has arisen in several ways. First, the government has blacklisted twenty-seven Islamic charities as SDGTs, SDTs, or SDNs since September 11, 2001, and many that still remain in operation are under investigation.¹⁵⁷ Second, the way in which high-profile Muslims have been tarnished by connection with the terrorist designation has engendered fear in ordinary donors. For instance, Ha-keem Olajuwon was deeply distressed that articles linking him to terrorism were published around the world, including in his home country of Nigeria.¹⁵⁸ Another example is Omar Abdi Mohamed, who prior to his indictment for immigration violations was a religious educator and teacher in the San Diego Muslim community.¹⁵⁹ Third, ordinary donors likewise feel similar pressures to maintain a good reputation in their Muslim and greater non-Muslim communities and fear they will not be able to do so under a cloud of suspicion. Lastly, mosques themselves are educating donors that they must exercise caution when deciding where to give. Many mosques are exercising their own brand of caution in response to the government investigations by refusing to permit international aid groups to raise money on their premises.¹⁶⁰ Also, in May 2004, law enforcement officials and the Muslim Public Affairs Council launched a five-step program to teach Muslims at the nation's thirty largest mosques how to contact law enforcement if they suspect terrorist activity in a mosque.¹⁶¹

In notable contrast to the reactions of many Muslim donors and leaders who prefer to lay low, however, several groups and mosques

sion of the USA PATRIOT Act for carrying close to \$300,000 in cash to Pakistan without declaring it to U.S. officials. *United States v. Ali Sher Khan*, 325 F. Supp. 2d 218 (E.D.N.Y. 2004). Khan was carrying money for over forty individuals, mostly Muslim immigrants from Pakistan, and intended to distribute it to families and villagers in western Pakistan. *Id.* at 220. Although the court found that the money was not linked to terrorism or drug trafficking, Khan received a sentence of five years probation, a \$300 special assessment, and a \$7,500 fine. *Id.* at 234. In a subsequent civil forfeiture action brought by the DOJ, half of the \$67,000 Khan claimed as his own was successfully forfeited to the government. *United States v. \$293,316 in U.S. Currency*, 349 F. Supp. 2d 638, 651 (E.D.N.Y. 2004). Civil forfeiture proceedings are still ongoing with the other forty claimants to the money.

157. Goodstein, *supra* note 6; *see also* Aziz, *supra* note 8, at 69 n.187 (listing Muslim groups being probed by U.S. Senate Finance Committee, including Islamic Society of North America and Muslim Student Association).

158. Picker, *supra* note 84. In a press conference that he initiated, Olajuwon said, "It took my whole career to build my name and the causes I choose to support, . . . and it's difficult to accept when my name is coming linked in to anything such as terrorism." *Id.*

159. Ottaway, *supra* note 102.

160. Goodstein, *supra* note 6.

161. Mark Clayton, *How are Mosques Fighting Terror?*, CHRISTIAN SCI. MONITOR, Aug. 12, 2004, at 12.

are increasing their outreach and community education in order to dispel public sentiment associating Islam with terrorism. For example, the Islamic Society of Greater Oklahoma City now has a small paid staff that is available to the public for lectures and other outreach explaining Islam.¹⁶² Though the number of Muslim American political candidates dropped considerably after September 11, 2001, Muslims are slowly beginning to run for office again.¹⁶³ In San Diego, a series of protests were staged at the city's Federal Building in support of Omar Abdi Mohamed.¹⁶⁴ Even if these actions prove futile, they nonetheless provide a sense of agency to individuals affected by the government crackdown on Muslim charities, and by what many perceive to be a crackdown on Muslims generally. They also demonstrate that, in spite of government suspicions, Muslims in communities across the country are making good faith efforts to dispel those suspicions and voice their concerns to the public.

B. Charity Reactions to Terrorist Designations

As international charities have been shut down entirely or come under governmental suspicion, Islamic charities that fund only domestic projects realize that they may receive more funding as a result, but that the onus is on them to reassure donors of their good works. The Council on American-Islamic Relations (CAIR), an organization that advances Muslim civil rights and religious education, has experienced budget increases and staff growth primarily because it only supports domestic advocacy efforts.¹⁶⁵ While this means more money to fund the projects of their choice within the United States, at least one CAIR representative regrets the increased funding because of the resulting loss of support to widows, orphans, and refugees overseas.¹⁶⁶ The

162. Carla Hinton, *Organization Educates Others About Islam*, OKLAHOMAN, Sept. 11, 2004, at 1D.

163. See Danna Harman, *More US Muslims Run for Office: The Number of Muslim American Political Candidates Dropped Considerably After 9/11, But Is Now Beginning to Grow Again*, CHRISTIAN SCI. MONITOR, Nov. 7, 2003, at 13; see also Wayne Parry, *3 Years After 9/11, Muslims Getting Political: Many Immigrants Are Shifting Focus from Homeland to Their Back Yards*, HOUS. CHRON., Sept. 5, 2004, at A3.

164. See, e.g., Immigrant Support Action SD, <http://sandiego.indymedia.org/en/2004/02/103077.shtml> (last visited Sept. 28, 2005); see also Jesse Mills, *Omar Mohamed's Daughter*, COLORLINES, Fall 2004 at 3; John Catalinotto, *World Movement Protests U.S. Escalation in Iraq*, WORKERS WORLD, Apr. 22, 2004 at 9, available at <http://www.workers.org/pdf/2004/ww042204.pdf>; Blue Triangle Network, Reports from the National Day of Solidarity with Muslim, Arab and South Asian Immigrants, Feb. 20, 2004, <http://www.bluetriangle.org/feb20/2004/reports/#sandiego> (last visited Nov. 9, 2005).

165. Watanabe, *supra* note 58.

166. *Id.*

Islamic Council, a thirty-year-old, U.S.-based charity, has reacted to the crackdown on international aid by cutting off all donations overseas and adding disclaimers to direct mailings and fundraising appeals to raise awareness of its legitimacy with potential donors.¹⁶⁷ Other groups have added statements to their websites which highlight close ties with the U.S. government and respond to donor questions by assuring their compliance with auditing and record keeping standards.¹⁶⁸

Despite the government investigations, some international Islamic charities continue to operate. Islamic Relief, which funds programs in twenty countries, has actually seen its contributions increase due to the crackdowns on other international agencies.¹⁶⁹ Mercy USA for Aid and Development, another international charity, remains in business but has emphasized its connections to the U.S. government in its promotional materials.¹⁷⁰

However, not all international relief charities have been able to withstand the pressure of government investigations. One organization, Dallas-based KinderUSA, attempted to structure its practices so as not to violate anti-terrorism laws. In order to eliminate some of the risk that its donations would wind up with terrorists, KinderUSA altered its practices so that it only sent vouchers for food, clothing, and school supplies overseas, instead of cash; it also posted its financial statements online.¹⁷¹ Similarly, when providing aid to Palestinian orphans, the charity chose not to find out how the child's parents died, lest it be accused of knowingly supporting the families of suicide bombers.¹⁷² In spite of these efforts, KinderUSA suspended its operations in February 2005 because it believed it had unfairly become the target of government investigation.¹⁷³ The charity alleged that it had been subjected to obtrusive FBI surveillance, wiretapping, attempts to subvert employees, and the spreading of malicious information by the government.¹⁷⁴ KinderUSA stopped soliciting donations because it could not guarantee to its donors that the federal government would

167. Press Release, Voice of America, Muslim Charities (Nov. 20, 2002), available at 2002 WL 102816973.

168. *Id.*

169. Watanabe, *supra* note 58.

170. *Muslims Alter Ramadan Giving*, *supra* note 136.

171. See Watanabe, *supra* note 58; Mark Wrolstad, *Islamic Group Quits Fund Raising*, DALLAS MORNING NEWS, Feb. 3, 2005, at 1B (reporting KinderUSA's decision to halt fundraising due to alleged government investigation).

172. See Watanabe, *supra* note 58. Holy Land Foundation, for instance, was accused of providing aid to families of suicide bombers. See Engel, *supra* note 63, at 253.

173. Wrolstad, *supra* note 171.

174. *Id.*

not seize its assets as they had done with many other blacklisted charities.¹⁷⁵

V.

FIRST AMENDMENT CLAIMS BROUGHT BY CHARITIES CHALLENGING SDGT DESIGNATIONS

This section looks at the various First Amendment claims made by charities that have been designated as SDTs or SDGTs. In every case litigated thus far, the courts have found that the terrorist designation and blocking order did not violate the charities' rights of speech, association, or free exercise of religion. An immediate hurdle to several of the claims was that the charities failed to hold themselves out as religious organizations, despite the fact that their donors contributed for religious reasons. I will re-analyze the First Amendment claims presuming the religious nature of the charities and build on those claims in Part VI in the context of a hypothetical constitutional challenge made by individual Muslim donors. Though the First Amendment arguments made by the charities and donors seem compelling, administrative policy changes are likely to be the most successful way to encourage Muslims to donate.

A. *Muslim Charity's Right to Free Exercise of Religion*

In its challenge to the blocking order imposed on it by the government pursuant to a terrorist designation, the Holy Land Foundation claimed the order was a constitutional violation of its First Amendment right to free exercise of religion and the free exercise rights of its Muslim employees and donors.¹⁷⁶ Holy Land alleged that by issuing the blocking order and invoking the terrorist designation, the OFAC violated the Religious Freedom Restoration Act of 1993 (RFRA).¹⁷⁷

175. *Id.* A voluntary shut down does not preclude the U.S. Treasury Department from seizing an organization's assets if it is necessary to do so during an investigation into terror links or after an SDGT designation. *Id.*

176. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 75, 83 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

177. *Id.* at 83; *see also* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a) (2000). Although the RFRA was declared unconstitutional as applied to the states in *Boerne v. Flores*, 521 U.S. 507, 536 (1997), the level of scrutiny it calls for is still valid as applied to actions by the federal government. *See, e.g., United States v. Any and All Radio, Station Transmission Equip.*, 2004 WL 2848532, at *7 n.3 (S.D.N.Y. Dec. 9, 2004) (“[I]t is assumed that RFRA is constitutional as applied to federal authority.”); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) (“[W]e have held that without doubt ‘the portion [of

Congress passed the Religious Freedom Restoration Act in response to the Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,¹⁷⁸ which eliminated the compelling interest test in cases where government action substantially burdens the free exercise of religion.¹⁷⁹ The Act lays out that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,"¹⁸⁰ and calls for a return to the use of the compelling interest test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*.¹⁸¹ The only exceptions to this general ban against substantial burden of religion are where the government: (1) must apply a burden in furtherance of a compelling governmental interest, and (2) does so by the least restrictive means of furthering that compelling governmental interest.¹⁸²

In its disposition of Holy Land's RFRA claims, the D.C. District Court split the claims into two parts: (1) Holy Land's claim of substantial burden on its free exercise of religion and (2) its claims of substantial burden brought on behalf of its Muslim employees and donors.¹⁸³ Holy Land argued that its charitable work fulfilled its religious obligation to engage in *zakat* and that its use of donations from Muslims for charitable and humanitarian purposes was an exercise of religion.¹⁸⁴ While conceding that "charitable activities may constitute religious exercise if performed by religious believers for religious reasons," the court reasoned that because the charity had failed to prove

RFRA] applicable to the federal government . . . survived the Supreme Court's decision striking down the statute as applied to the States.'") (citation omitted).

178. In *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 874 (1990), a free exercise challenge was brought against an Oregon law that denied unemployment benefits to Native American Church members who lost their jobs due to their use of peyote in religious rituals. The Supreme Court upheld the state law because it was not specifically directed at a religious practice and was otherwise constitutional as applied to those who did not engage in the drug use for religious reasons. *Id.* at 890.

179. 42 U.S.C. § 2000bb(a)(3)–(4) (2000) (stating that *Smith* decision "virtually eliminated the requirement that the government justify burdens of religious exercise imposed by laws neutral toward religion" and that "governments should not substantially burden religious exercise without compelling justification").

180. *Id.* § 2000bb-1(a).

181. *Id.* § 2000bb(b)(1) (citing *Sherbert v. Verner* 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). "Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883 (citing *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)).

182. 42 U.S.C. § 2000bb-1(b)(1)–(2).

183. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002).

184. *Id.*

that it was a religious organization *per se*, it thereby had failed to establish that the organization itself was exercising religious beliefs.¹⁸⁵ Rather, Holy Land had merely defined itself to the court as a “nonprofit charitable corporation” without reference to the religious character of the charity.¹⁸⁶ Accordingly, under the claim of burden to the organization itself, the court found that Holy Land failed to show that an exercise of its religion had been substantially burdened.¹⁸⁷ As such, the court did not need to reach the question of whether the exceptions to the RFRA applied—that the government interest was compelling, and that it used the least restrictive means to further that interest.¹⁸⁸

In support of its claim on behalf of its Muslim employees and donors, Holy Land argued that it had associational standing to bring those claims pursuant to *Hunt v. Washington State Apple Advertising Commission*.¹⁸⁹ Under *Hunt*, Holy Land reasoned that it could raise claims on behalf of third parties “because: (1) its donors and employees would otherwise have standing to sue in their own right; (2) the interests HLF seeks to protect are germane to its purpose as a Muslim charity; and (3) neither the claim asserted nor the relief requested required the participation of individual donors and employees in the lawsuit.”¹⁹⁰ The District Court, however, concluded that Holy Land did not have associational standing to raise claims on behalf of employees and donors, finding that free exercise claims categorically required individual participation so that the individual could prove to the court the extent of the burden the government had placed on religious practices.¹⁹¹ Additionally, the court determined that Holy Land did not sufficiently show there were genuine obstacles preventing the employees and donors from bringing claims in their own right.¹⁹² In other words, without the direct involvement of Holy Land member-donors, the charity was unable to present a compelling case.

On appeal, the Court of Appeals for the District of Columbia affirmed the district court’s dismissal of Holy Land’s RFRA claim.¹⁹³

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)).

190. *Id.* (internal quotations omitted).

191. *Id.* at 84.

192. *Id.*

193. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003).

The circuit court noted that Holy Land had not proposed that spreading terrorism was mandated by the Islamic religion, and at most they had argued that charitable giving was a pillar of Islam.¹⁹⁴ However, unlike the district court, the circuit court did not decide the question of whether Holy Land could bring a claim under the RFRA without defining itself as a religious organization.¹⁹⁵ Instead, the circuit court affirmed on the grounds that, even if the charity could in fact exercise religion as protected by the First Amendment, “[t]here is no free exercise right to fund terrorists” and “preventing such a corporation from aiding terrorists [did] not violate any right contemplated in the Constitution or the RFRA.”¹⁹⁶

B. Muslim Charity's Right to Free Association

The district court in *Holy Land* also rejected the organization's free association claims.¹⁹⁷ Holy Land argued that the government actions were unconstitutional under *NAACP v. Claiborne Hardware Co.*¹⁹⁸ because the government's imposition of guilt by Holy Land's association with Hamas failed to establish that Holy Land actually had a specific intent to further terrorists' illegal aims, specifically those of Hamas.¹⁹⁹ The court rejected the guilt by association argument because the Executive Orders did not prohibit membership in Hamas or endorsement of its views, but simply prohibited Holy Land from providing financial support to a terrorist organization, an activity receiving no constitutional protection.²⁰⁰ The court also rejected the contention that the First Amendment required specific intent to further terrorists' unlawful aims, reasoning that a specific intent requirement only attached when the government sought to impose guilt by association alone, whereas here, it was not mere association that created guilt but rather the possible funding of terrorism.²⁰¹ In dicta, the court went

194. *Id.*

195. *Id.* In dicta, however, the circuit court did indicate that it found the proposition to be dubious. *Id.*

196. *Id.*

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

198. *Id.* at 80. In *Claiborne Hardware*, the Supreme Court reversed a state court judgment against the NAACP and its members who participated in an economic boycott of white merchants because liability had been “unconstitutionally imposed ‘by reason of association alone.’” *Id.* at 81. (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982)).

199. *Id.* at 80. The Supreme Court in *Claiborne Hardware* also imposed a “specific intent requirement on Government restrictions that impose liability on the basis of association alone—classic First Amendment activity.” *Id.* at 81.

200. *Id.* at 81.

201. *Id.*

on to state that, regardless of Holy Land's intent, the court would be wary of imposing a specific intent requirement on the blocking orders because Holy Land could not control whether Hamas chose to use its financial support for lawful or unlawful purposes.²⁰² A specific intent requirement would undermine the purpose of the government's blocking orders because such charities lack the ability to exert control over the subsequent use of its donated funds.²⁰³

C. Muslim Charity's Right to Free Speech

In addition to making free exercise and free association arguments, Holy Land also unsuccessfully argued that the terrorist designation and blocking order pursuant to Executive Orders 12,947 and 13,224 unconstitutionally violated its freedom of speech by prohibiting it from making humanitarian donations.²⁰⁴ Reasoning that donating to charity was a speech act similar to donating to political campaigns, Holy Land asserted that restriction on its speech required the court to apply strict scrutiny under *Buckley v. Valeo*.²⁰⁵ In a footnote, the district court quickly dismissed the claim, finding that the *Buckley* test applied only to political contributions which implicated "the core First Amendment right of political expression," whereas Holy Land had made charitable and humanitarian contributions not involving political expression.²⁰⁶

The court found that the contributions of humanitarian aid implicated both speech and nonspeech elements, and thus under *United States v. O'Brien*, "a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."²⁰⁷ The *O'Brien* test states that a government restriction:

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*, n.37; see also *Buckley v. Valeo*, 424 U.S. 1, 16–17 (1976) (noting that dependence of communication on expenditure of money does not in itself reduce exacting scrutiny required by First Amendment).

206. *Holy Land Found.*, 219 F. Supp. 2d at 81 n.37. Global Relief Foundation also argued that its SDN designation violated its freedom of speech on the same grounds. *Global Relief Found., Inc. v. O'Neill*, 207 F. Supp. 2d 779, 805 (N.D. Ill. 2002) (finding that Global Relief Foundation was "unlikely to prevail on th[is] argument[].").

207. *Holy Land Found.*, 219 F. Supp. 2d at 81 (citing *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968)). The court did not specifically state what the speech and non-speech elements were, but presumably it referred to the non-speech *act* of giving aid, and the expressive speech, or *message*, behind that aid.

passes intermediate scrutiny if (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial government interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.²⁰⁸

The district court found that the government restriction satisfied this test. First, the Presidents clearly had the power to issue the Executive Orders.²⁰⁹ Second, the Executive Orders promoted an “important and substantial government interest”—that of preventing terrorist attacks by cutting off financial support for terrorists.²¹⁰ Third, the government’s action was unrelated to the suppression of free expression; it merely suppressed the charity’s ability to fund terrorists.²¹¹ Finally, the incidental restriction was no greater than necessary.²¹² The court explained that the fungibility of money precluded the government from pursuing narrower means of cutting off financial support to terrorists.²¹³

VI.

CONSTITUTIONAL CLAIMS OF A HYPOTHETICAL CLASS OF MUSLIM DONOR PLAINTIFFS

In *Holy Land*, the district court held that the charity did not have associational standing to bring constitutional claims on behalf of its donors since, among other things, there was no obstacle to the individual donors bringing First Amendment claims themselves.²¹⁴ The first part of this section discusses potential legal claims individual donors could bring in response to government blacklisting of charities. These legal claims will arise when a donor is unable to donate to a charity because the government has affirmatively shut it down or effectively precluded it from accepting donations by freezing its assets. The second part will discuss policy implications of the chilling effect the government’s actions and collateral uses of the terrorist designation have had on the First Amendment rights of Muslim donors, even when the government is not taking direct action to blacklist a charity. This part

208. *Id.*; see also *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

209. *Holy Land Found.*, 219 F. Supp. 2d at 82.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* Given the ample evidence in the administrative record linking Holy Land to Palestinian terrorist organizations, the court reasoned that the government had no less restrictive alternative.

214. *Id.* at 84.

will examine the effects that methods used to investigate or shut down charities, as well as media coverage of the investigations, have on individual Muslim donors. Although free exercise and chilling effect considerations suggest that Muslim donors' First Amendment rights have been curtailed, this section concludes that the magnitude of the government's interest in preventing terrorist funding and the lack of more narrowly tailored alternatives will mean that constitutional litigation cannot solve the problems associated with Muslim charitable giving. Finally, this section concludes that extralegal approaches are the only viable way to eliminate Muslim individuals' fears of donating and explores opportunities for the government to implement this important social policy.

A. *First Amendment Claims*

1. *Donors' Right to Free Exercise of Religion*

Though the courts thus far have determined otherwise,²¹⁵ this Note assumes that in their claims of free exercise, individual donors will be able to show that, beyond being simply charitable non-profits, Muslim charities are, in fact, religious organizations with religious purposes. In making their claims, donors will emphasize that such charities exist not only to provide humanitarian aid overseas, but also to provide a means for practicing Muslims to fulfill their religious duty to pay *zakat*. The highly religious nature of the charitable activity of the organization was disregarded by the Court of Appeals in *Holy Land*, for example, which in effect only looked to the practical consequences of the blocking order and terrorist designation on Holy Land through the narrow lens of the purpose that the order and designation were designed to serve.²¹⁶ In other words, because Holy Land was designated a terrorist organization and its assets were blocked, it was unable to fund terrorism. By failing to allege that funding terrorism was mandated by the religion of Islam, Holy Land did not prove a burden on its religious exercise.

The circuit court declined to permit blanket protection of charitable giving under the RFRA, even as a central tenet of the Islamic

215. *See id.* at 83 (holding that Holy Land could not claim RFRA relief because it had not defined itself as religious organization in its complaint); *Holy Land Found.*, 333 F.3d at 167 (declining to decide whether corporation so defined is "a person whose religious exercise has been burdened in violation" of RFRA).

216. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003).

religion.²¹⁷ By maintaining that Holy Land's free exercise claims, as stated, included general constitutional protection of donations that ultimately reached the hands of terrorists and emphasizing that "there is no constitutional right to fund terrorism,"²¹⁸ the court reflexively ignored the overall effects of the government's actions on *zakat*. By precluding an organization from engaging in *any type* of religious charitable giving, the charity, its employees and its donors were unable to satisfy a fundamental duty of the Muslim religion. In short, in deciding that the charity was not a religious organization, the court ignored important considerations about the role of charities in the Islamic religion.

With this understanding of the *Holy Land* analysis in mind, a class of Muslim donors could bring a credible claim under the RFRA that the SDGT designation and blocking order by the U.S. Treasury Department—a federal action—substantially burdened its exercise of religion. Individuals with sincerely held religious beliefs are entitled to protection of their right to engage in religious practices under the First Amendment.²¹⁹ For Muslim donors, Islam's mandate of charitable giving is a sincerely held belief—it is one of the fundamental duties of the religion.²²⁰ A critical element of that belief is that the donors' annual religious tax must go to the neediest recipients.²²¹ While the elimination of a single opportunity to give to a particular charity may not be a compelling infringement, the investigative freezes permitted under OFAC's SDN list not only create an aggregate effect with respect to alternative opportunities, but also chill the willingness of donors to fulfill their religious obligation.

a. Substantial Burden on the Exercise of Religion

In making the RFRA claim, the donors must first prove that the government action is a substantial burden on their exercise of relig-

217. *Id.* Given the "dubious proposition" that a charitable corporation can exercise religion and Holy Land's failure to argue that all uses of charitable funds (including terrorism) are a central tenet of their religion, the court refused to grant blanket protection of Muslim charitable giving. *Id.*

218. *Id.* at 164–67.

219. See *Frazee v. Ill. Dept. of Employment Sec.*, 489 U.S. 829, 834 (1989) (holding that unemployment compensation benefits cannot be withheld from worker who refused job that would force him to work on Sundays, in violation of his sincerely held religious beliefs, regardless of lack of membership in particular, established religious sect with Sabbatarian tenets).

220. See *supra* Part IV.

221. See *supra* notes 145–146 and accompanying text.

ion.²²² The donors will argue that the U.S. Treasury Department's SDGT and blocking order against the Holy Land Foundation substantially burdens their exercise of religion because it prevents them from providing charitable aid to those whom they perceive to be the neediest recipients, Palestinian women and children. In response to the suggestion that the blocking order merely prevents the donors from aiding terrorists,²²³ the donors will reply that while the blocking order may indeed preclude any of their money from reaching terrorists, it also prevents them from fulfilling a religious duty by preventing all innocent donations from actually reaching the proper intended beneficiaries. This response is tenable because the donors have not claimed a right to fund terrorists, nor do they have the intent to do so. Rather than cutting off terrorist funds, the blocking order cuts off all means of giving legitimate aid to the needy in the regions served by the charity, leaving the donor with no avenue for giving. Thus, a substantial burden can be shown by the coercive effect of the federal action: the donor plaintiffs are compelled to refrain from doing an act required by their religion by the government's broad "investigative" power.²²⁴

b. Compelling Government Interest

Once a substantial burden on religious exercise has been established, the government may defend its action by invoking an exception to the RFRA's religious protection. The RFRA permits the federal government to burden the exercise of religion with a rule of general applicability if it "is in furtherance of a compelling governmental interest."²²⁵ The terrorist designations and blocking orders authorized

222. See *United States v. Hardman*, 297 F.3d 1116, 1129 (10th Cir. 2002) (discussing elements of RFRA claim).

223. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) ("[P]reventing such a corporation from aiding terrorists does not violate any right contemplated in the Constitution or the RFRA.").

224. Donating to domestic charities or needy individuals in the U.S. is a "distant second" when fulfilling the *zakat* contribution. See *supra* note 146 and accompanying text. The donors might cite the fact that twenty-seven Islamic charities have been designated SDGTs since September 11, 2001 and the remaining meaningful avenues of donation to overseas recipients are rapidly diminishing. See Goodstein, *supra* note 6. Including organizations whose assets are frozen while under investigation on the SDN list, "only a handful" of such avenues remain. *Id.*; see also *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (noting that Free Exercise claim is predicated on coercive effect of governmental action).

225. 42 U.S.C. § 2000bb-1(b)(1) (2000). The RFRA was enacted in response to the Supreme Court's decision in *Employment Division Dep't of Human Resources v. Smith*, 494 U.S. 872, 885 (1990), which held that generally applicable or neutral laws should not be subject to a compelling interest test when applied to religious practices. See *Boerne v. Flores*, 521 U.S. 507, 512-15 (1997). Congress explicitly rejected this

by Executive Orders 12,947 and 13,224 serve the compelling government interest of preventing individuals and groups from providing support and assistance to terrorists.²²⁶ Muslim donors will likely agree that this interest deserves high governmental priority and thus the compelling interest argument will be difficult to overcome. However, it may be challenged using the second part of the RFRA exception—that the burden on religion must be the “least restrictive means of furthering that compelling governmental interest.”²²⁷

c. Least Restrictive Means of Fulfilling the Government Interest

In the context of the RFRA, “‘least restrictive means’ is a severe form of the more commonly used ‘narrowly tailored’ test” first expressed in *Sherbert v. Verner*.²²⁸ Under *Sherbert*, if Islamic charities were abused in order to fund terrorism, the government must “demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”²²⁹ The government will argue that it has no other way to prevent charitable donations from reaching terrorist groups because the fungibility of money thwarts effective monitoring of its destination.

The “narrowly tailored” problem ultimately rests on the fungibility of the donated funds. As noted in section 10 of Executive Order 13,224, charities are not entitled to receive notice of an OFAC investigation or an SDGT designation because they could rapidly launder any terrorist funding by electronically transferring or hiding the

reasoning in the RFRA and instead declared that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise” and “governments should not substantially burden religious exercise without compelling justification.” 42 U.S.C. §§ 2000bb(a)(2), (3).

226. See Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995); Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

227. 42 U.S.C. § 2000bb-1(b)(2). The Supreme Court has not clarified what factors must be evaluated in a “least restrictive means” claim because it has not reached the merits of a RFRA claim as applied to the federal government. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 104 n.1 (2001) (noting District Court dismissed plaintiff’s RFRA claim because unconstitutional as applied to states); *Boerne v. Flores*, 521 U.S. 507, 536 (1997) (finding RFRA unconstitutional as applied to states); see also *United States v. Hardman*, 297 F.3d 1116, 1130 n.20 (10th Cir. 2002) (noting lack of federal case law discussing merits of RFRA claim). Only one circuit has stated that RFRA’s “least restrictive means” question is a legal issue. *In re Young*, 82 F.3d 1407, 1419 (8th Cir. 1996). However, several district courts have found it to be a purely factual question. See, e.g., *Sledge v. Cummings*, 1996 WL 665450, *4 (D. Kan. 1996); *Rust v. Clarke*, 851 F. Supp. 377, 380 (D. Neb. 1994).

228. *Hardman*, 297 F.3d at 1129–30 (citing *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)).

229. *Sherbert*, 374 U.S. at 407.

money.²³⁰ Where the charity and its donors have been found to have provided aid to terrorist groups, even if unintentionally,²³¹ the donor plaintiffs will find it particularly difficult to propose a less restrictive alternative to blocking *all* of the charity's assets. The court will not likely find any such alternative to be viable, safe, or persuasive. Furthermore, a court might be inclined to believe that prior proof of a charity's incidental or accidental support of terrorist activity creates a presumption of repeat behavior, magnifying the government's concerns about partial or modified asset blocking. Furthermore, the viability of less restrictive alternatives to total blocking is diminished when the charity has *intentionally* provided aid for terrorist activities, as opposed to sending the money to a group that is involved with relief efforts as well as aggressive political or military tactics.²³² It would be extremely risky to permit the charity to continue sending aid overseas, even in a modified form, such as sending vouchers for food and medical supplies instead of cash, because such aid could be sold or bartered for cash and goods which could then be used for illicit purposes.

A stronger claim for less restrictive regulation could be made on behalf of a charity that has been put on the SDN list pursuant to the pendency of investigation,²³³ but has not yet been designated a terrorist organization.²³⁴ Shutting down an SDN-designated charity that has not officially been found to support terrorism, without providing alternative means for distributing at least some of the aid it has collected would eliminate numerous meaningful avenues for Muslim donors to

230. Exec. Order No. 13,224, 66 Fed. Reg. 49,079, 49,081 (Sept. 23, 2001).

231. Holy Land Foundation, for example, was found to have provided aid to Hamas, a designated terrorist organization. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003). This fact alone was sufficient to block Holy Land's assets, regardless of whether they intended to fund Hamas' terrorist activities specifically or the group's other activities. *Id.*; *cf. Aziz, supra* note 8, at 48, 87 (noting that Hamas does legitimate humanitarian aid projects, not just military or terrorist activities).

232. *See, e.g., Ahmed-Ullah, supra* note 153 (explaining that mosque leader asked people to donate in memory of Palestinian suicide bombers).

233. The Office of Foreign Assets Control maintains the Specially Designated Nationals and Blocked Persons list, a comprehensive roster of several blacklists. The list encompasses all designated terrorist organizations and individuals and also includes groups that currently have their assets blocked for other reasons as well, such as narcotics trafficking. *See THE FTO LIST, supra* note 8. The SDN list plays an important role in the government's regulation of terrorist funding because an individual or group can be added to the SDN list by reason of having its assets blocked *pursuant to* investigation, though it has not yet been given a terrorist designation. 50 U.S.C. § 1702(a)(1)(B), *amended by* Pub. L. No. 107-56, § 106.

234. *See supra* Part II.B-C for a discussion of organizations that fall into this category.

pay their religious tax to the neediest recipients, thus contravening one of the basic tenets of the Muslim religion. While First Amendment claims of individual donors may fail when the charity in question has been placed on the SDT or SDGT lists, such claims may succeed in redefining the strictures that government may place on SDN organizations as the government investigation proceeds.

2. *Donors' Rights of Expressive Association*

The freedom of association claim in *Holy Land* was analyzed from the perspective that the designation and blocking order imposed guilt by association on Holy Land for its association with Hamas.²³⁵ The court found that the IEEPA, the two Executive Orders, and the blocking order did not implicate Holy Land's associational rights because the government action did not, on its face, prohibit Holy Land from membership in Hamas or endorsing the views of Hamas.²³⁶ The only association prohibited by the government was that Holy Land could not provide financial support to Hamas.²³⁷ A freedom of association claim brought by a hypothetical class of donors would differ from this analysis because the donors could instead argue that the government's terrorist designation and blocking order prohibits membership *in the charity itself*, a type of expressive association.

In general, the Supreme Court's First Amendment jurisprudence protects the right to associate for purposes of engaging in expressive First Amendment-protected activities such as speech and the exercise of religion.²³⁸ Constitutional protection for expressive association is derived from the purposes motivating the creation of the organization, regardless of its size or selectivity of membership. The Supreme Court in *Roberts v. United States Jaycees* noted, "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious, and cultural* ends."²³⁹ Unconstitutional government infringements on such associations include imposing penalties on individuals because of membership in a disfavored group or interfering

235. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 80–81 (D.D.C. 2002).

236. *Id.* at 81.

237. *Id.*

238. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

239. *Id.* at 622 (emphasis added) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 86, 907–09, 932–33 (1982); *Larson v. Valente*, 456 U.S. 228, 244–46 (1982); *In re Primus*, 436 U.S. 412, 426 (1978); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977)).

with the affairs of the group.²⁴⁰ In other words, to receive constitutional protection, the regulated organization must show that the government action will substantially impede its ability to engage in the protected activities.²⁴¹ Limits on free association protection may arise, however, when the government regulates the group or relationship due to “compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”²⁴²

The donor plaintiffs therefore must first prove that the designated charity engages in “expressive association” in order to qualify for First Amendment protection.²⁴³ The donors can show that the charity is an expressive association by arguing that the charity was, in fact, formed to pursue social, religious, and cultural ends—categories of association recognized as deserving of First Amendment protection.²⁴⁴ In order to show that a charity satisfies this standard, donors must demonstrate that the charity was founded for the purpose of enabling fulfillment of the religious duty of *zakat* and of providing distribution outlets that are particular to certain cultural groups. Although blocking does not preclude donating to other unblocked charities, it expressly eliminates the possibility of associating with this particular religious and cultural organization by donating funds.

As it did in the free exercise of religion claim, the government will argue that it is permitted to infringe upon expressive associational rights when faced with a compelling government interest that cannot be achieved through means significantly less restrictive of those freedoms.²⁴⁵ Assuming that donors can establish the religious or cultural import of the charity, the government will argue that the blocking order prohibits the donors from providing financial aid to terrorist groups, but does not inhibit them from endorsing the religious and cultural views of the charity. This argument, however, ignores the practical effect of the designation and blocking order and misunderstands the donor motivation behind the charitable giving. While donor money is successfully withheld from the hands of terrorists, donors are further cut off from providing any aid at all through that charity. It

240. *Id.* at 622–23.

241. *Id.* at 626.

242. *Id.* at 623.

243. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (explaining that to receive First Amendment protection of their associational rights “a group must engage in some form of expression, whether it be public or private”).

244. *See* *Roberts*, 468 U.S. at 622.

245. *See id.* at 623; *see also* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

must also be noted that frequently, the donors' desire to provide humanitarian aid is the only kind of association they seek to have with that charity²⁴⁶ and charitable giving may be the only means by which they may endorse the organization's religious and cultural views.²⁴⁷ By ignoring that the designation and blocking order are wholly restrictive of the donors' ability to associate with the charity, the government suppresses the donors' right "to effectively associate with groups and activities" (by providing humanitarian aid).²⁴⁸ The government's claim that less restrictive means of regulating the charities do not exist due to the problems of tracking donated money allows it to easily brush aside First Amendment claims without careful consideration of the practical effects on Muslim donors.²⁴⁹

3. *Donors' Rights of Free Speech/Expressive Conduct*

Although the *Holy Land* district court determined that the government's restriction on Holy Land's charitable contributions should not receive strict scrutiny under *Buckley v. Valeo* because charitable and humanitarian aid did not involve protected political expression,²⁵⁰ some commentators and courts have disagreed with this analysis. A class of donor plaintiffs could argue that charitable donations to Muslim charities are protected First Amendment speech because the donations themselves are manifestations of political values and the individual's personal belief that a specific cause is worthy of assistance. Such a claim is necessarily bound up with the freedom of expressive association claim and courts have examined both using similar standards.²⁵¹ Indeed, at least two federal courts have applied *Buckley* to determine the constitutionality of a regulation prohibiting contributions to Islamic organizations because both speech and association components are implicated by regulations that restrict or prohibit

246. See Aziz, *supra* note 8, at 86.

247. For example, Omar Abdi Mohamed's Western Somali Relief Agency, an organization expressing religious and cultural views through its disbursement of donations, seemingly did not do *any other* activities in addition to this by which individuals could associate with the charity. See *supra* section III.B.

248. See Aziz, *supra* note 8, at 86.

249. See *supra* Part IV.A.; see also Fisher, *supra* note 4, at 660 (arguing that current threat of international terrorism is not more dangerous than other threats faced by United States in last century, such as Cold War's nuclear standoff, and thus, "the current domestic threat does not justify complete deference to the executive branch with respect to the associational rights of those within the U.S.>").

250. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 81 n.37 (D.D.C. 2002).

251. Aziz, *supra* note 8, at 85–87 (noting that political donations have been regarded as political expression by courts and arguing that donations to Islamic charities are similarly political in nature).

a person's ability to contribute or raise funds on behalf of such organizations.²⁵² The court in *United States v. Al-Arian* saw no basis for engaging in different constitutional analyses that distinguish between political contributions and other forms of contributions.²⁵³ Under *Buckley*, regulations of fundraising must be precisely drawn to further a sufficiently important government interest in order to pass constitutional review.²⁵⁴ The donor plaintiffs will again need to demonstrate that the terrorist designation regulations are not so narrowly tailored as to protect their fundamental interest in free speech even though they serve the compelling government interest in stopping terrorist funding.

B. *Chilling Effect on Exercise of Donors' First Amendment Rights*

Standing alone, Muslim donors will face enormous challenges making legal arguments in support of their First Amendment rights to free exercise, free association, and free speech. In each argument, the overwhelmingly strong governmental interest in stopping terrorist funding will tip the balance in favor of upholding the U.S. Treasury Department's terrorist designation and blocking orders. Every argument made by the Muslim donors calling for a more narrowly tailored means of advancing the government's purpose will be answered with the justification that less restrictive means cannot be reliably implemented due to the fungibility of money. Accordingly, unless donors are able to identify for the court less restrictive solutions that will prevent funds from reaching terrorists, they are likely to remain subject to the ramifications outlined above.

Another legal argument donor plaintiffs could make is that Executive Orders 12,947 and 13,224 are unconstitutionally overbroad because they have a chilling effect on the free speech, association, and religious exercise of Muslim donors by impairing their ability to donate to legal causes. Because conduct, as well as speech, is involved, the Muslim donors must show that the overbreadth of the Executive Orders is "not only real, but substantial as well, judged in relation to the [Orders'] plainly legitimate sweep" in order to make a successful claim of overbreadth.²⁵⁵ The donors must argue that blacklisting a

252. See *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1026–27 (7th Cir. 2002); *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1342–43 (M.D. Fla. 2004).

253. *Al-Arian*, 308 F. Supp. 2d at 1343 n.41.

254. See *id.* at 1343 (citing *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) and its progeny).

255. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) ("To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."). This "requires the court to find a

given charity is unconstitutional because it prevents donors from making *all* donations to that charity, even contributions with innocent intent that go toward fulfilling their religious obligation. The donors can show that the overbreadth of the Executive Orders is substantial because every time the terrorist designation is made, it achieves this effect for *all* donors and all recipients of aid from that charity. The effect of the designation is not limited to a single, impermissible application.²⁵⁶

The court may, however, undermine the donor plaintiffs' overbreadth claim by subjecting the Executive Orders to a limiting construction that "so narrows [them] as to remove the seeming threat or deterrence to constitutionally protected expression."²⁵⁷ In this regard, the government can argue that applying the terrorist designation and blocking order to a charity does not prohibit all forms of religious donation by Muslim donors, but rather, merely prohibits them from donating to an organization that has been found to support or associate with terrorist groups.²⁵⁸ The Executive Orders do not restrict the donors' First Amendment rights in an impermissible number of instances by shutting down all avenues of donating; they do so only in those instances in which the U.S. Treasury Department must apply the Orders in the interest of national security. The Executive Orders are potentially overbroad only when the U.S. Treasury Department affirmatively applies them to make a terrorist designation and all means of donating to that charity for even its good works are eliminated. Thus, the overbreadth doctrine would not apply to the overall chilling effect on Muslim donors, which is caused in part by non-affirmative government actions, such as investigations leading to the voluntary shutdown of charities or the collateral use of the SDGT designation.

This section illustrates that although government blacklisting of a charity prevents donors from making donations to that particular charity, this provides no basis for a successful overbreadth claim. More

realistic danger that the [Order] itself will significantly compromise recognized First Amendment protections of parties not before the court." N.Y. State Club Ass'n, Inc. v. New York, 487 U.S. 1, 11 (1988) (recognizing that facial challenges to statutes on First Amendment grounds will only succeed if court finds that statute is so overbroad it may inhibit constitutionally protected speech of parties not before court).

256. See *New York v. Ferber*, 458 U.S. 747, 771 (1982) ("The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel.").

257. *Broadrick*, 413 U.S. at 613.

258. As the *Holy Land* appeals court noted several times, there is no constitutional right to fund terrorism. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164-67 (D.C. Cir. 2003).

generally, the above analysis of the hypothetical donor plaintiffs' First Amendment claims illustrates the limited utility of the courts to protect the rights of marginalized Muslim donors. The doctrine of strict scrutiny, which provides the greatest amount of First Amendment protection to donors, nevertheless fails to yield protective results in every case because courts will continue to view charitable giving in the Muslim context as an all-or-nothing proposition when balanced against the compelling government interest in preventing terrorist attacks. When the government maintains that no less restrictive alternative to blocking exists due to the fungibility of money, judges, who are naturally risk-averse in terrorism matters, pay attention. The wholesale acceptance of the government's ominous formulation of its compelling interest—that these charities must be stopped now, *or else*—prevents courts from engaging in more subtle and finely-grained analyses of alternatives to total asset blocking. Judicial conservatism may be further compounded because, as the charity shutdown cases demonstrate, the charities before the court have already been shown to have established ties to terrorist or blacklisted organizations.

VII.

POLICY CONSIDERATIONS AND SUGGESTIONS TO ENCOURAGE THE EXERCISE OF MUSLIM DONORS' FIRST AMENDMENT RIGHTS

Judges are not well-equipped, nor are they necessarily authorized, to engage in creative problem-solving in order to accommodate both the important religious interests of Muslim donors and the important safety and security interests of the United States government. Policymakers, particularly the executive branch, will be better able to gather information about the needs of Muslim donors and Muslim charities, as well as national security interests, and strike a balance between them. Of course, this balancing is predicated upon the Executive's recognition that more protections need to be implemented to respect Muslim religious practices. This Note, therefore, concludes with a policy analysis of the chilling effect on Muslim First Amendment rights and recommends policy changes for agencies regulating Muslim charities.

A. *Examining the Chilling Effect from a Broader Policy Perspective*

The religious and cultural participation of Muslim donors has undoubtedly been chilled not only by direct government actions, but also by the *manner* in which the government has pursued its efforts in the

war on terrorism with regard to Muslim charities. As this Note has described, there are numerous examples where donor fear of fulfilling *zakat* can be attributed to governmental actions and media attention.

The Department of Justice's prosecution of Omar Abdi Mohamed for immigration violations pertained to his connection with a blacklisted charity.²⁵⁹ Even though Mohamed purportedly accepted money from two SDGTs *before* they were designated as such, he faced jail and deportation for allegedly lying about those transactions to the government. The government's focus on the terrorism aspects of the case before the jury, as well as the media's description of the proceedings as a "terrorism trial disguised as an immigration trial," sends a message to Muslim donors that they too could be put on trial for connections to terrorism without having any intent to support terrorist activities. Second, the media attention on Hakeem Olajuwon's donation to subsequently-designated terrorist organizations demonstrates that a donor can be branded a terrorist supporter in the court of public opinion, even if the donation occurred years prior to the blacklisting without knowledge of the final recipients or intent to reach them.²⁶⁰ Third, the blacklisting of the Islamic American Relief Agency-USA in concert with the Islamic African Relief Agency occurred immediately before the start of Ramadan, a time when there is a heightened duty to give to Islamic charities. The timing of the designation disturbed Muslim donors, who saw it as a deliberate failure by the government to give consideration to their religious practices.²⁶¹ Finally, voluntary shutdowns of Islamic charities such as KinderUSA have chilled charitable giving due, in part, to the charities' claims of being unfairly targeted by the government and unable to function under intense scrutiny.²⁶²

259. For a discussion of the government's collateral use of terrorist designations in charging Omar Abdi Mohamed with a lesser crime, *see supra* Part III.B.

260. For a discussion of the effects of the blacklisting of Muslim charities on donors, *see supra* Part IV.A.

261. *Analysis: Treasury Department Freezes Assets of the Islamic African Relief Agency in Columbia, Missouri* (NPR: All Things Considered, Oct. 26, 2004), available at 2004 WL 57380788 [hereinafter *NPR Broadcast*].

262. For a discussion of the effects of the pressure of government investigations on organizations such as KinderUSA, *see supra* Part IV.B. Donors do not feel comfortable giving to these charities, knowing that a cloud of suspicion hangs over them. *NPR Broadcast, supra* note 261. Other government actions that have led to chilling include shutting down charities while they are under investigation but not yet designated, and the fact that the blacklists do not distinguish between those who are essential targets of the blacklist, and those who had peripheral involvement with the blacklisted entity. *See* Peter L. Fitzgerald, *Managing "Smart Sanctions" Against Terrorism Wisely*, 36 *NEW ENG. L. REV.* 957, 975 (2002).

Although this Note has described the difficulty of making viable legal arguments against overbreadth, the chilling of Muslim religious practice is important to discuss from a policy perspective. Chilling the practice of *zakat* is harmful to Muslim donors who feel robbed of the opportunity to fulfill their religious duty and also to the needy would-be recipients of the aborted donations.²⁶³ Treasury Department Assistant Secretary Juan Zarate has suggested that Muslims should direct their frustration over charity shutdowns not at government officials but at terrorist groups.²⁶⁴ But this is cold comfort for Muslims who remain unable to fulfill their religious duty because the United States has caused the voluntary shutdown of charities with a special focus on the Muslim world, such as KinderUSA.

B. Policy Suggestions to Encourage the Exercise of Muslim Donors' First Amendment Rights

There are several reasons why the government should acknowledge the general chilling effect on Muslim First Amendment rights and take affirmative steps to quell it.²⁶⁵ As noted in the Introduction, Muslims in the United States have been increasingly singled out and marginalized for their religious beliefs since September 11, 2001. They have been stereotyped as terrorists and “[t]he terrorism-Islam conflation has become so ingrained in the American mindset”²⁶⁶ Though the administration has expressed the notion that Americans should be tolerant of Muslim religious beliefs,²⁶⁷ that message is undermined by the highly publicized blacklisting of charities and the government’s collateral use of the terrorist designation.²⁶⁸ One

263. Engel, *supra* note 63, 283–86. “To chill this practice by blacklisting by reason of showings made in *ex parte* and *in camera* hearings, particularly with respect to a growing and self-conscious minority community, may contribute to a deepening sense of marginalization and exclusion.” *Id.* at 286.

264. *NPR Broadcast*, *supra* note 261.

265. This policy argument is made with the understanding that the Constitution does not impose affirmative obligations on the State. See *Yñiguez v. Arizonans for Official English*, 69 F.3d 920, 937 n.22 (9th Cir. 1995) (citing *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 196–97 (1989)); *cf.* *Lininger*, *supra* note 4, at 1243 (arguing that concern about chilling religious freedom merits consideration as policy argument, even if government practices withstand scrutiny under First Amendment and citing examples where courts and legislatures have protected religious privacy even when not required to by Constitution).

266. Engle, *supra* note 1, at 75.

267. *See id.* at 107–08; Engel, *supra* note 63, at 285.

268. For a discussion of the successful post-September 11, 2001 designations and blocking orders of Muslim charities and the government’s collateral use of the SDGT designation, *see supra* Parts II.–III. *Cf.* GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM*

scholar has critically suggested that American Muslims must effectively sacrifice their religious practices in order to show that they are loyal Americans, thus giving legitimacy to the war on terrorism.²⁶⁹

Muslim donors are unlikely to be able to counteract this marginalization through activism, lobbying, or legal challenges because the constant fear of persecution keeps them from asserting their rights.²⁷⁰ Moreover, government policies continue to marginalize Muslims with no foreseeable end or refinement,²⁷¹ which will continue to lead to resentment and susceptibility to anti-American extremist rhetoric.²⁷² Concern about growing extremism involves not only Muslims living in America, but also in unstable overseas communities that no longer receive the charitable aid.²⁷³ Without this aid, there is a very real risk that former recipients will turn to other organizations for support, some of which may be adverse to U.S. interests. The government should recognize these factors and consider ways to ameliorate the chilling effect of its national security policies.

1. *Workable Voluntary Compliance Guidelines for Muslim Charities*

In November 2002, the U.S. Treasury Department issued Voluntary Best Practices Guidelines (Guidelines) to assist U.S.-based charities sending aid overseas.²⁷⁴ The Guidelines create due diligence

551 (2004) (“President Bush deserves credit for his response to the risk of hostile public reactions against Muslims and Muslim Americans.”).

269. Engle, *supra* note 1, at 109–10.

270. For a discussion of the climate of fear among donors ensuing from the government’s blacklisting of Muslim charities, *see supra* Part IV.A. Essentially, Muslim donors suffer from a collective action problem in which “free riders” do not fail to act out of apathy, but rather fail to act out of valid fear of being branded a terrorist supporter. *See id.*

271. *See* STONE, *supra* note 268, at 554 (“[I]f the administration is correct that the war on terrorism will grind on indefinitely, that is all the more reason to be scrupulous in scrutinizing proposed restrictions of civil liberties.”).

272. Engel, *supra* note 63, at 286.

273. Crimm, *supra* note 8, at 1450

A wholesale blight on the provision of financial support for humanitarian aid, the promotion of health, the enhancement of education and other charitable causes, the facilitation of economic development, the building of social capital, and the strengthening of social stability could fuel the destabilization of struggling people abroad and enhance the appeal of terrorist groups to these people.

Id.

274. U.S. DEP’T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2002), available at <http://www.treas.gov/press/releases/docs/tocc.pdf> (last visited Sept. 22, 2005) [hereinafter ANTI-TERRORIST FINANCING GUIDELINES]; *see also* Crimm, *supra* note 8, at 1418.

standards to help charities steer clear of ties to terrorist organizations and therefore avoid administrative sanctions.²⁷⁵ Using the Guidelines, Muslim charities may take affirmative steps to avoid inclusion on a blacklist by increasing the transparency of the organizations' practices and its accountability. In theory, the Guidelines represent governmental acknowledgement that charitable organizations need federal assistance in creating procedures and standards to reassure donors. In practice, however, the Guidelines have been criticized as costly and administratively burdensome, particularly for small organizations with limited resources.²⁷⁶ Moreover, *even full compliance* with the Guidelines will not create a safe legal harbor for the charity and its management from civil and criminal liability.²⁷⁷

The Guidelines include best practices recommendations under four broad categories: (1) development of an adequate governing structure; (2) disclosure and transparency guidelines; (3) financial practice and accountability provisions; and (4) procedures enabling evaluation and review of "foreign recipient organizations," including basic vetting of foreign grantee organizations.²⁷⁸ Above all, the category involving basic vetting of foreign recipients is extremely onerous for Muslim charities. In order to satisfy the basic vetting procedures, the organization must be able to demonstrate that it:

- (1) conducted a reasonable search of public information about the foreign recipient . . . ;
- (2) verified that the foreign organization does not appear on a list of any government or the United Nations as having links to terrorism or money laundering;
- (3) obtained identifying information on key staff;
- (4) required the organization to certify that it does not support terrorism or deal with persons who support terrorism;
- (5) identified and determined as legitimate the foreign organization's relations with financial institutions with whom it maintains accounts and seeks bank references;
- (6) requires periodic reports from the organization on its operations and disbursement of funds;
- (7) undertakes reasonable steps to ensure that the charity's funds are not used for terrorism; and
- (8) performs on-site audits of the organization on a regular basis.²⁷⁹

The challenges these requirements pose for a small, local Muslim charity such as Omar Abdi Mohamed's Western Somali Relief Agency are significant. That charity lacked overhead, personnel, and

275. ANTI-TERRORIST FINANCING GUIDELINES, *supra* note 274; *see also* Crimm, *supra* note 8, at 1418.

276. Crimm, *supra* note 8, at 1443–47.

277. *Id.* at 1440.

278. *Id.* at 1441–43.

279. *Id.* at 1442–43 (citing ANTI-TERRORIST FINANCING GUIDELINES).

expertise, and upon receiving its donations, the majority of the funds were sent to a money transfer agency in Chicago for distribution.²⁸⁰ Additionally, the ultimate recipients of the donations were refugees in Ethiopia—individuals likely to be transient and lacking extensive record-keeping capabilities. Even with the Guidelines, Omar Abdi Mohamed would not be able to reassure his Muslim donors that his charity was a safe organization through which to fulfill their religious obligation because he would be unable to comply with the Guidelines.

Suggestions that Muslim charity leaders form self-monitoring organizations using well-run charities as models have received lukewarm receptions because they would not do enough to reassure donors who want to give legally; self-monitoring alone does not carry the stamp of U.S. government approval that donors may be seeking.²⁸¹ Other commentators have suggested that Muslim charities operate as “Smart Charities”—charities run like well-governed corporations with sophisticated management expertise.²⁸² This goal is laudable, but difficult to attain given the limited resources available, and it, too, lacks government endorsement.

A more feasible solution would be for the government to create an agency, establish a branch within the U.S. Treasury Department, or subsidize a consulting business that would provide technical assistance, financial advice, and legal and regulatory expertise to Muslim charities. The entity would train charity leaders and personnel in the administrative skills necessary to monitor the organizations’ operations, establish procedures and protocols for disbursing donations, and help navigate the maze of government regulation. The ultimate goal of this project would not only be to provide charities with the resources necessary to function responsibly but, more importantly, to reassure Muslim donors that the charity has worked with the United States government to comply with its regulations and to account for the proper disbursement of funds.

Additionally, the government should modify the Voluntary Best Practice Guidelines to give consideration to the spectrum of resources and projects available to various Muslim charities. Well-established charities that already have board of directors oversight, adequate support staff, and raise millions of dollars, such as the Holy Land Foundation in its operational days, have a greater likelihood and a greater

280. For a detailed description of the Western Somali Relief Agency and the government’s collateral use of the SDGT designation in that case, *see supra* Part III.B.

281. Goodstein, *supra* note 6.

282. Raja Kamal & Rosanne Model, *The Need for Smart Muslim Charities*, CHI. TRIB., Dec. 2, 2004, at 31.

duty to make every effort to comply with the Guidelines, including the basic vetting procedures. However, smaller and less-endowed organizations that give to specific causes or regions for specific religious and cultural purposes should be given alternate Guidelines, predicated on their cooperation with the proposed technical assistance agency. Under this model, the smaller Muslim charities could institute vetting procedures that would be more stringent than simply sending funds to a *hawala*, yet would sufficiently accommodate traditional aid recipients, including at-risk, unorganized populations such as refugees and orphans.

Each charity's compliance with regulatory guidelines would be fully disclosed to current and prospective donors. Therefore, in addition to choosing which charities to support based on personal religious or cultural preferences, donors could also choose based on their own tolerance for risk. Extremely risk-sensitive donors who would otherwise not donate due to the fear of being branded a terrorist supporter may choose to support only charities that are fully compliant with the government-imposed guidelines. Informing donors about the compliance status of charities, particularly those charities that donate overseas, may help reduce the chilling effect.

2. *White List of Muslim Charities in Compliance with Federal Regulations*

From the creation of modified Guidelines and the charity technical assistance agency, it follows that the U.S. Treasury Department should produce a "white list" of Muslim charities that are either in compliance with the Guidelines or meeting accountability goals in working with the assistance agency.²⁸³ Muslim charities have repeatedly asked the government for a white list of approved Islamic charities so that Muslims can fulfill their religious obligations without fear of persecution or illegality.²⁸⁴ The white list will reassure donors that the government approves of or monitors the organization to which they want to donate; this will help minimize the climate of fear. Additionally, the white list will prevent donors from being deceived by unscrupulous individuals taking advantage of the *zakat* obligation in

283. For suggestions of a government white list in a related context see Walter Perkel, Note, *Money Laundering and Terrorism: Informal Value Transfer Systems*, 41 AM. CRIM. L. REV. 183, 208–09 (2004) (suggesting government should establish a "white list" of regulation-compliant *hawalas*, also known as "informal value transfer systems").

284. See Goodstein, *supra* note 6 (discussing two years of failed negotiations between Muslim leaders and U.S. Treasury Department on development of white list); Watanabe, *supra* note 58.

order to fund illegitimate activities.²⁸⁵ Deception of Muslims by other Muslims can have its own chilling effect on religious donations, and because researching individual charities can be exceedingly difficult for donors, the government is best equipped to take affirmative steps to prevent this.

The U.S. Treasury Department has consistently resisted proposals for a white list, claiming that granting government approval risks misleading the public because new national security intelligence is received all the time, some of which might pertain to a white listed charity.²⁸⁶ Furthermore, the government has worried that it could be accused of favoritism by singling out acceptable charities in a multibillion-dollar industry.²⁸⁷ The government has also noted that there are “potentially First Amendment concerns” with producing a white list.²⁸⁸

There may be some validity to the government’s First Amendment concerns with a white list. In theory, the creation of a charity white list may result in the exclusion of certain viewpoints from the list that the government deems objectionable or unsupportable. For example, the U.S. Treasury Department could exclude potentially controversial charities, such as those that donate to Palestine or are associated with Islamic fundamentalism. The U.S. Treasury Department, through its maintenance of the white list, may seek to channel donations into charities it considers to be more “safe” or politically acceptable. Understandably, some charities may balk at the idea of cooperating with the U.S. government; they may not want to work with the U.S. Treasury Department because of the government intrusion into its religious practice and expressive speech. Although this is certainly a practical risk arising from the maintenance of a charity white list, such a government practice would be constitutionally unacceptable and could be litigated in the event of such infringement.

When dealing with private speech or expression—that of privately-run religious charities—government “may not favor one speaker over another” through regulation.²⁸⁹ By agreeing to accommodate Muslim charities through its modified regulatory guidelines

285. See, e.g., Engel, *supra* note 63 at 275–76 (describing government allegations that leader of Benevolence International Foundation preyed upon donors’ religious sensibilities to extract funding for terrorism).

286. Watanabe, *supra* note 58.

287. Goodstein, *supra* note 6.

288. *Id.*

289. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (holding that denial of funding for religious student group publications was unconstitutional viewpoint discrimination under First Amendment).

and the creation of an assistance agency, the government shows that it endorses religious-based charitable giving, generally. Because it would be a blatant First Amendment violation if “the government targets not subject matter, but particular views taken by speakers on a subject,” the U.S. Treasury Department should not unduly restrict access to the white list for certain charities.²⁹⁰ Indeed, “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”²⁹¹

In addition to the constitutional protection that charities would enjoy in connection with the creation of a government-run white list, the creation of such a list would also signal a paradigmatic shift in the U.S. Treasury Department’s relationship with Muslim charities. By modifying the Guidelines and creating an assistance agency, the government will move the relationship from adversarial to one of greater cooperation. The U.S. Treasury Department would be working with the Muslim charities to ameliorate the chilling effect of its investigations, thereby enabling charities and donors to maintain their religious and expressive freedom. Putting the duty on donors alone to educate themselves about the practices of Muslim charities is an insufficient solution to the chilling effect because many donors lack access to information; the Islamic African Relief Agency, for instance, did not appear on any OFAC watch lists prior to its blacklisting.²⁹²

Furthermore, the white list does not need to be a permanent clean bill of health, but can instead be treated as a status list of operational Muslim charities that are cooperating with the government. For instance, if an organization lacks a key administrative procedure, the white list can note the failing and indicate whether or not the organization is working to correct it. The government’s concerns about charity favoritism are mitigated by the purpose of the entire scheme, which is to reassure donors about the legality of Muslim charities, not to pick out organizations the government favors.

Finally, charities with concerns about potential government restriction of their speech may opt not to participate with the technical assistance agency, with the understanding that they will not therefore be eligible for inclusion on a white list. Uncooperative charities can take steps on their own to notify donors why they are not participating, but the government itself will not censor the charity’s message; it simply will not endorse the charity to Muslim donors. However, both the

290. *Id.* at 829.

291. *Id.*

292. See NPR Broadcast, *supra* note 261.

charities' and the government's First Amendment concerns should be somewhat mitigated by the overall good faith purpose of the new regulatory scheme—through cooperation and compromise, the government can seek to *increase* Muslim charitable giving, not unduly restrict it.

CONCLUSION

In this Note, I have attempted to demonstrate the many ways in which the government has chilled the First Amendment rights of Muslim donors and the reasons why the government should want to stop. It is unclear when the war on terrorism will end, if ever, and Muslims cannot be called on to sacrifice their religious practices indefinitely. The government must understand that it is beneficial to work with Muslim donors, not against them, and that accommodation of Muslim religious practices is critical to protecting their civil liberties during the war on terrorism.