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## CONSTITUTIONAL AND LEGAL CHALLENGES TO THE ANTI-TERRORIST FINANCE REGIME

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### I. INTRODUCTION

Contributors to this Symposium address several of the adverse consequences that have accompanied the United States' post-9/11 anti-terrorist finance initiatives, such as the humanitarian impact of the freezing of assets, and the effect of federal rules on financial institutions and routine criminal investigations.<sup>1</sup> Khalid Medani and others have written about the drying up of remittances to key regions where fundamentalist groups are now gaining ground.<sup>2</sup> There are also bureaucratic hurdles created in the sudden onslaught of Suspicious Activity Reports ("SARs") in response to the increased regulatory environment post-9/11.<sup>3</sup>

Examination of these areas is important for a thorough analysis of the current regime. Yet they are not my focus in this Article.

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1. See Nina J. Crimm, *The Moral Hazard of Anti-Terrorism Financing Measures: A Potential to Compromise Civil Societies and National Interests*, 43 WAKE FOREST L. REV. 577 (2008); and Richard K. Gordon, *Trusts or Terrorists? Financial Institutions and the Search for Bad Guys*, 43 WAKE FOREST L. REV. 699 (2008). See also LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY* (2008) (discussing legal issues surrounding terrorism such as torture and detention of prisoners of war, changes in counterterrorist finance law, privacy, and free speech); Laura K. Donohue, *Anti-terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303 (2006) (providing a history of antiterrorist finance initiatives in the United States and United Kingdom, and the two countries' international efforts to implement similar provisions); this Article draws in part from these earlier works.

2. See, e.g., Khalid Medani, *Political Islam and Militancy: A Political Economy Approach*, FORESIGHT Dec. 2007, at 1; Khalid Medani, *Financing Terrorism or Survival?: Informal Finance and State Collapse in Somalia, and the US War on Terrorism*, MIDDLE EAST REPORT, Summer 2002, at 2, 2–9.

3. See DONOHUE, *THE COST OF COUNTERTERRORISM*, *supra* note 1, at 333–60 (discussing the problems of increased government secrecy, the difficulty profiling terrorists, and the ineffectiveness of Suspicious Activity Reports in uncovering terrorist financing sources and describing the inefficiencies that result when terrorism is treated like traditional criminal activity).

Instead, I would like to draw attention to another area that has attracted little public attention: the potential constitutional deprivations effectuated by these measures.<sup>4</sup> New initiatives have given rise to procedural and substantive due process claims under the Fifth Amendment, the use of possibly vague and overbroad language that is problematic under the First and Fifth Amendments, seizure of assets without the probable cause required by the Fourth Amendment, and encroachment upon privacy rights associated with the Fourth Amendment. Apart from these constitutional concerns, there is reason to question whether new Executive Orders that have been the conspicuous mode of choice for expanding the regime are authorized by the governing statute. Some of these concerns have been addressed by the courts. Many have not.

Will these changes be greeted by expansions of existing constitutional authorities? Are they merely temporary shifts that will be rectified by judicial intervention? Or is there something endemic to anti-terrorist finance that blocks meaningful judicial review and shrouds these constitutional effects from judicial accounting?

This Article explores these questions by considering three sets of legislative authorities that have dominated the anti-terrorist finance realm post-9/11: Specially Designated Global Terrorists (“SDGT”), Foreign Terrorist Organizations (“FTOs”), and financial surveillance. Drawing from examples in each area, this Article suggests that the constitutional concerns are more than just growing pains. In some sense, they are an inevitable byproduct of legislative action in this area, which the courts are not particularly well-positioned to address.

The designation process of SDGTs and FTOs lies at the interstices of administrative law, foreign relations, national security, and counterterrorist law—all areas in which the judiciary is slow to intervene and quick to defer. Although the Executive

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4. *But see* Sahar Aziz, *The Laws on Providing Material Support to Terrorist Organization: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?*, 9 TEX. J. C.L. & C.R. 45 (2003) (discussing due process and First Amendment in the context of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the International Emergency Economic Powers Act (IEEPA)); Joshua A. Ellis, *Designation of Foreign Terrorist Organizations Under the AEDPA: The National Council Court Erred in Requiring Pre-designation Process*, 2002 BYU L. REV. 675 (2002) (claiming that the pre-designation process requirement of AEDPA does not violate substantive due process); Randolph N. Jonakait, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH. L. REV. 125 (2004) (arguing that the AEDPA contains provisions that violate due process); Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861 (2004) (discussing the AEDPA and freedom of association under the First Amendment).

Order laying out the SDGT process deviates from the governing statute, the sheer volume of orders issued under the International Economic Emergency Powers Act over the past decade makes it unlikely that the courts will be willing to find Executive Order 13,224—albeit the most radical expansion of authority under the statute—*ultra vires*. In the realm of financial privacy, third party doctrine and national security claims coalesce to weaken judicial scrutiny. The courts, moreover, are not institutionally positioned to take account of larger constitutional concerns that transcend the particular, individual claims that may reach them.

Many of these concerns are not unique to anti-terrorist finance. The Racketeer Influenced and Corrupt Organizations Act (“RICO”), for instance, has repeatedly survived facial and as-applied challenges of constitutional vagueness.<sup>5</sup> So, too, has it been found consistent with the First Amendment.<sup>6</sup> Equal protection claims have failed,<sup>7</sup> and due process concerns relating to notice and hearing have been a persistent issue in the evolution of the statutory authorities.<sup>8</sup> But this Article focuses more narrowly on counterterrorist law, where these concerns play out in a particularly severe way. In light of the relatively weak position of the judiciary, it is all the more important for Congress to take due account of constitutional considerations—particularly in considering any new initiatives—in the anti-terrorist finance realm.

## II. THE ANTI-TERRORIST FINANCE REGIME

In the closing decades of the twentieth century, the United States grew steadily more interested in anti-terrorist finance, both as a way to halt the flow of funds to terrorist organizations and as a way to gather more information. The actions it took, however, and the legal regime it adopted, were considerably more restrained than those it adopted in the post-9/11 environment. Prior to the attacks, for instance, “the Department of Justice tended not to bring criminal

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5. *See, e.g.*, *United States v. Keltner*, 147 F.3d 662, 667 (8th Cir. 1998); *United States v. Freeman*, 6 F.3d 586, 597 (9th Cir. 1993); *United States v. Coiro*, 922 F.2d 1008, 1017 (2d Cir. 1991); *United States v. Glecier*, 923 F.2d 496, 497 n.1 (7th Cir. 1991); *United States v. Van Dorn*, 925 F.2d 1331, 1334 n.2 (11th Cir. 1991); *United States v. Angiulo*, 897 F.2d 1169, 1178–80 (1st Cir. 1990); *United States v. Woods*, 915 F.2d 854, 862–64 (3d Cir. 1990).

6. *See, e.g.*, *Alexander v. United States*, 509 U.S. 544 (1993) (holding that assets forfeiture was a penalty for a previous act, not a prior restraint on speech); *United States v. Beasley*, 72 F.3d 1518, 1527 (11th Cir. 1996) (holding that specifying a religious organization as a racketeering enterprise is not a violation of the First Amendment).

7. *See, e.g.*, *United States v. Aleman*, 609 F.2d 298, 305–06 (7th Cir. 1979).

8. *See, e.g.*, *United States v. Michelle’s Lounge*, 39 F.3d 684, 694–95 (7th Cir. 1994); *United States v. Monsanto*, 924 F.2d 1186, 1202–03 (2d Cir. 1991); *United States v. Nichols*, 841 F.2d 1485, 1495–1505 (10th Cir. 1988); Bruce A. Baird & Carolyn P. Vinson, *RICO Pretrial Restraints and Due Process: The Lessons of Princeton/Newport*, 65 NOTRE DAME L. REV. 1009 (1990).

charges for contributions to terroris[m].”<sup>9</sup> No unit at the FBI focused on the financing of terrorist organizations.<sup>10</sup> Nor did the Criminal Division of the Department of Justice have an anti-terrorist financing program.<sup>11</sup> The CIA did not view interrupting the flow of money as a high priority.<sup>12</sup> Only a handful of people at the National Security Agency addressed terrorist finance.<sup>13</sup> Treasury’s Office of Foreign Assets Control (“OFAC”) was limited to domestic borders, while FinCEN, the Treasury’s Financial Crimes Enforcement Network, focused on Russian money launderers and other high-profile criminals.<sup>14</sup> The National Security Council only began to focus on anti-terrorist finance after the 1998 terrorist attacks in Nairobi and Dar es Salaam.<sup>15</sup> Congress introduced the first material support provisions in the mid-1990s.<sup>16</sup> The financial regulatory regime existed separately and was grounded in drug trafficking and money laundering.<sup>17</sup>

Following 9/11 the emphasis shifted, putting anti-terrorist finance front and center in the state’s counterterrorism efforts. Three of the five subsequent National Security documents discussed anti-terrorist finance.<sup>18</sup> Where the previous National Money Laundering Strategies ignored this area, from 2002 on, it became a central focus.<sup>19</sup> And agencies rapidly mobilized: the DOJ created a Terrorist Financing Unit to prosecute terrorist funding.<sup>20</sup> At the

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9. DONOHUE, THE COST OF COUNTERTERRORISM, *supra* note 1, at 146–47; JOHN ROTH ET AL., NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FIN.: STAFF REPORT TO THE COMMISSION 31–32 (2004) [hereinafter STAFF REPORT], available at [http://www.9-11commission.gov/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf).

10. STAFF REPORT, *supra* note 9, at 33.

11. *Id.*

12. *Id.* at 35.

13. *Id.* at 36.

14. *Id.* at 37–38.

15. *Id.* at 32.

16. See DONOHUE, THE COST OF COUNTERTERRORISM, *supra* note 1, at 149–51.

17. See *id.* at 151–53.

18. EXECUTIVE OFFICE OF THE PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5–6 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>; EXECUTIVE OFFICE OF THE PRESIDENT, THE NATIONAL STRATEGY FOR COMBATING TERRORISM 12, 16 (2006) (interdicting and disrupting material support for terrorists), available at <http://www.whitehouse.gov/nsc/nsct/2006/nsct2006.pdf>; OFFICE OF HOMELAND SEC., EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR HOMELAND SECURITY ix (2002) (eliminating terrorist financing), available at [http://www.whitehouse.gov/homeland/book/nat\\_strat\\_hls.pdf](http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf).

19. U.S. Dep’t of the Treasury, Terrorism and Fin. Intelligence: Money Laundering Strategy, [http://www.treas.gov/offices/enforcement/money\\_laundering.shtml](http://www.treas.gov/offices/enforcement/money_laundering.shtml) (last visited Sept 9, 2008).

20. STAFF REPORT, *supra* note 9, at 41–42.

FBI, a Financial Review Group centralized the 9/11 investigation.<sup>21</sup> Later transferred to the Bureau's counter-terrorist division—and renamed the Terrorist Financing Operations Section—it brought together Customs, the Internal Revenue Service, banking regulators, FinCEN, and OFAC.<sup>22</sup> The CIA formed a new section dedicated to terrorist finance, and Treasury created the Financial Action Task Force, as well as the Executive Office for Terrorist Financing and Financial Crimes.<sup>23</sup>

Complementing these institutional changes, legal and regulatory authorities rapidly expanded.<sup>24</sup> Three sets of authorities emerged: the creation of SDGTs under the International Emergency Economic Powers Act, alterations to the designation of FTOs under the Anti-terrorism and Effective Death Penalty Act, and the expansion of financial surveillance powers through the USA PATRIOT Act. The relevant histories of these authorities are discussed below.

*A. Specially-Designated Global Terrorists and the International Emergency Economic Powers Act*

Introduced within six months of U.S. entry into World War I, the 1917 Trading with the Enemy Act (“TWEA”) gave the President the broad authority to “investigate, regulate . . . prevent or prohibit . . . transactions” in times of war or declared emergency.<sup>25</sup> Congress, which amended the statute in 1933, intended the powers to be used only in times of active hostilities or extreme emergencies.<sup>26</sup> The frequent use of TWEA beyond its intended application led to efforts by the legislature to create a new framework, setting stricter conditions under which sanctions could be used.

The resultant 1977 International Emergency Economic Powers Act (“IEEPA”) explicitly limited TWEA’s applicability to wartime. It

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21. *Id.* at 41.

22. *Id.*

23. Press Release, Office of Pub. Affairs, U.S. Dep’t of the Treasury, U.S. Treasury Department Announces New Executive Office for Terrorist Financing and Financial Crimes (Mar. 3, 2003), <http://www.ustreas.gov/press/releases/js77.htm>.

24. USA PATRIOT Act of 2001 tit. III, Pub. L. No. 107-56, §§ 301–77, 115 Stat. 296 (2001) (codified in scattered sections of the U.S.C.), focused on new powers initiatives in this area. Later supplemented by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004) (codified at 50 U.S.C. § 401 (Supp. V 2005)), the White House kept step with new executive orders under the International Emergency Economic Powers Act (IEEPA); Executive Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); Executive Order No. 13,372, 70 Fed. Reg. 8499 (Feb. 16, 2005). Financial surveillance provisions added further authority.

25. Trading with the Enemy Act of 1917, Pub. L. No. 65-91, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. §5(b) (2000)).

26. Act of March 9, 1933, Pub. L. No. 73-1, ch. 1, § 2, 48 Stat. 1 (1933) (codified as amended at 50 U.S.C. app. §§ 1–44 (2000)).

separately empowered the President to declare a national emergency during peace time “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>27</sup> The statute authorized the President to:

[I]nvestigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States . . . .<sup>28</sup>

The legislation prohibits the President from regulating or prohibiting “donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine . . . except to the extent that the President determines that such donations . . . would seriously impair his ability to deal with any national emergency.”<sup>29</sup>

During the first twenty-three years of the IEEPA’s existence, successive administrations issued fewer than two dozen orders against countries “or a national thereof,”<sup>30</sup> placing sanctions on Afghanistan,<sup>31</sup> Burma,<sup>32</sup> Iran,<sup>33</sup> Panama,<sup>34</sup> the Russian Federation,<sup>35</sup> Sierra Leone,<sup>36</sup> Sudan,<sup>37</sup> and Yugoslavia.<sup>38</sup>

In 1995 President Clinton broke from this general pattern, issuing an order against non-state actors—Jewish and Palestinian groups threatening the Middle East Peace process—and sidestepping any specific reference to a foreign country.<sup>39</sup> This order

27. 50 U.S.C. § 1701(a) (2000); *see also* 50 U.S.C. § 1702 (2000 & Supp. V 2005).

28. 50 U.S.C. § 1702(a)(1)(B).

29. 50 U.S.C. § 1702(b)(2).

30. 50 U.S.C. § 1702(a)(1)(B).

31. Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (July 4, 1999).

32. Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 20, 1997).

33. Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (Aug. 19, 1997); Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (May 6, 1995).

34. Exec. Order No. 12,710, 55 Fed. Reg. 13,099 (Apr. 5, 1990).

35. Exec. Order No. 13,159, 65 Fed. Reg. 39,279 (June 21, 2000).

36. Exec. Order No. 13,194, 66 Fed. Reg. 7389 (Jan. 18, 2001); *see also* Exec. Order No. 12,730, 55 Fed. Reg. 40,373 (Sept. 30, 1990) (regarding export controls).

37. Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (Nov. 3, 1997).

38. Exec. Order No. 13,192, 66 Fed. Reg. 7379 (Jan. 17, 2001); Exec. Order No. 13,121, 64 Fed. Reg. 24,021 (Apr. 30, 1999); Exec. Order No. 13,088, 63 Fed. Reg. 32,109 (June 9, 1998).

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

created a special list of Specially Designated Terrorists (“SDTs”), which the Secretary of State could later amend to include further SDTs, where such individuals or entities were owned or controlled by (or acted on behalf of) any of the presidentially-designated organizations.<sup>40</sup> Three years later, the Administration added four more non-state entities to the order—including Usama bin Ladin, al-Qaeda, Abu Hafs al-Masri, and Rifa’i Ahmad Taha Musa.<sup>41</sup>

The Middle East order became the first of a series of Executive Orders issued under the IEEPA that targeted individuals. In 1995, Clinton placed sanctions on Colombian narcotics traffickers, giving the Secretary of the Treasury the authority to list individuals who were deemed to have played a significant role in the Colombian narcotics trade—or to have materially assisted in or provided financial or technological support to the named traffickers.<sup>42</sup> Two years later, Clinton separately placed restrictions on members of the *União Nacional para a Independência Total de Angola* (“UNITA”).<sup>43</sup> And in July 1998 Clinton built on an earlier order under the IEEPA, which targeted foreign persons knowingly contributing “to the efforts of any foreign country, project, or entity to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons,” so that sanctions would apply to attempted efforts to contribute to the proliferation of weapons of mass destruction (“WMD”).<sup>44</sup>

Starting in 2001, three characteristics came to define the pattern of executive orders issued under the IEEPA: their number significantly grew, they increasingly came to emphasize individuals and non-state actors, and they considerably expanded executive latitude. Within a seven-year period, President George W. Bush issued nearly three dozen orders under the IEEPA.<sup>45</sup> While some still related to states (Burma,<sup>46</sup> Libya,<sup>47</sup> Liberia,<sup>48</sup> Sierra Leone,<sup>49</sup>

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40. *Id.*

41. Exec. Order No. 13,099, § 2, 63 Fed. Reg. 45,167 (Aug. 25, 1998).

42. Exec. Order No. 12,978, § 1, 60 Fed. Reg. 54,579 (Oct. 21, 1995).

43. Exec. Order No. 13,098, 63 Fed. Reg. 44,771 (Aug. 18, 1998); Exec. Order No. 13,069, 62 Fed. Reg. 65,989 (Dec. 12, 1997).

44. Exec. Order No. 13,094, § 1, 63 Fed. Reg. 40,803 (July 28, 1998); Exec. Order No. 12,938, § 4, 59 Fed. Reg. 58,099 (Nov. 14, 1994).

45. Almost all of these carried new economic sanctions. For exceptions, see Termination of Emergencies with Respect to Yugoslavia and Modification of Executive Order 13,219 of June 26, 2001, Exec. Order No. 13,304, 68 Fed. Reg. 32,315 (May 28, 2003); Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans, Exec. Order No. 13,219, 66 Fed. Reg. 34,777 (June 26, 2001); Termination of Emergency with Respect to the Taliban and Amendment of Executive Order 13,224 of September 23, 2001, Exec. Order No. 13,268, 67 Fed. Reg. 44,751 (July 2, 2002); Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism, Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

46. Exec. Order No. 13,448, 72 Fed. Reg. 60,223 (Oct. 18, 2007); Exec. Order No. 13,310, 68 Fed. Reg. 44,853 (July 28, 2003).

Sudan,<sup>50</sup> and Syria<sup>51</sup>), a growing number focused on individuals or entities—accelerating the trend begun by the Clinton administration. President Bush placed economic sanctions on anyone threatening stabilization efforts in the Western Balkans;<sup>52</sup> contributing to conflict in the Democratic Republic of Congo<sup>53</sup> or Côte d'Ivoire;<sup>54</sup> exacerbating tension in Darfur;<sup>55</sup> undermining democracy in Belarus,<sup>56</sup> Zimbabwe<sup>57</sup> or Lebanon;<sup>58</sup> or threatening stabilization efforts in Iraq.<sup>59</sup> None of these orders made any reference to the nationality of the individual in question. In 2005, like Clinton before him, Bush targeted those involved in the proliferation of WMDs; however, he expanded the sanctions to apply beyond transactions materially contributing to the proliferation of WMD and reach transactions posing a *risk* of materially contributing to the same.<sup>60</sup> The order further prohibited financial support, and it made efforts to evade or avoid the order—or to conspire to do so—a violation of the IEEPA.<sup>61</sup>

In addition to these measures, less than two weeks after 9/11 President Bush issued Executive Order 13,224—an initiative he

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47. Termination of Emergency Declared in Executive Order 12,543 with Respect to the Policies and Actions of the Government of Libya and Revocation of Related Executive Orders, Exec. Order No. 13,357, 69 Fed. Reg. 56,665 (Sept. 20, 2004); Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 7, 1986).

48. Exec. Order No. 13,348, 69 Fed. Reg. 44,885 (July 22, 2004).

49. Exec. Order No. 13,213, 66 Fed. Reg. 28,829 (May 22, 2001).

50. Exec. Order No. 13,412, 71 Fed. Reg. 61,369 (Oct. 13, 2006).

51. Exec. Order No. 13,460, 73 Fed. Reg. 8991 (Feb. 13, 2008); Exec. Order No. 13,399, 71 Fed. Reg. 25,059 (Apr. 25, 2006); Exec. Order No. 13,338, 69 Fed. Reg. 26,751 (May 11, 2004).

52. Exec. Order No. 13,219, 66 Fed. Reg. 34,777 (June 26, 2001).

53. Exec. Order No. 13,413, 71 Fed. Reg. 64,105 (Oct. 27, 2006).

54. Exec. Order No. 13,396, 71 Fed. Reg. 7389 (Feb. 7, 2006).

55. Exec. Order No. 13,400, 71 Fed. Reg. 25,483 (Apr. 26, 2006).

56. Exec. Order No. 13,405, 71 Fed. Reg. 35,485 (June 16, 2006).

57. Exec. Order No. 13,391, 70 Fed. Reg. 71,201 (Nov. 22, 2005); Exec. Order No. 13,288, 68 Fed. Reg. 11,457 (Mar. 6, 2003).

58. Exec. Order No. 13,441, 72 Fed. Reg. 43,499 (Aug. 1, 2007).

59. Exec. Order No. 13,438, 72 Fed. Reg. 39,719 (July 17, 2007); Notice: Continuation of the National Emergency Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has an Interest, 72 Fed. Reg. 28,581 (May 18, 2007); Notice: Continuation of the National Emergency Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq has an Interest, 71 Fed. Reg. 29,237 (May 18, 2006); Notice: Continuation of the National Emergency Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has an Interest, 70 Fed. Reg. 29,435 (May 19, 2005); Exec. Order No. 13,364, 69 Fed. Reg. 70,177 (Nov. 29, 2004); Exec. Order No. 13,350, 69 Fed. Reg. 46,055 (July 29, 2004); Exec. Order No. 13,315, 68 Fed. Reg. 52,315 (Aug. 28, 2003); Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003); Exec. Order No. 13,290, 68 Fed. Reg. 14,307 (Mar. 20, 2003); Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (Aug. 2, 1990).

60. Exec. Order No. 13,382, § 1, 70 Fed. Reg. 38,567 (June 28, 2005).

61. *Id.*

considered “draconian.”<sup>62</sup> Executive Order 13,224 declared a national emergency and created a Specially Designated Global Terrorists (“SDGT”) list, blocking “all property and interests in property” of those providing material support to terrorism.<sup>63</sup> The national emergency was thereafter continued on an annual basis.<sup>64</sup> The order lists twenty-seven foreign persons the Secretary of State has determined pose a risk to national security, to foreign policy, to the economy, or to U.S. citizens.<sup>65</sup> It authorizes the Secretary of the Treasury to designate more SDGTs, requiring only that they “act for or on behalf of”, or are “owned or controlled by” a designated terrorist group.<sup>66</sup> It further empowers Treasury to designate anyone who assists, sponsors, or provides “services to,” or is “otherwise associated with,” a designated terrorist group.<sup>67</sup> Thus, any business that has not ceased to interact with the listed entities can itself be listed and have its assets frozen. Mere *association*—quite apart from demonstrated material support—is sufficient for the state to freeze the target’s assets.

Once property is blocked, the order makes it illegal for anyone to deal in the blocked assets or for any U.S. entity to try to avoid or conspire to avoid the prohibitions—or even to make donations to relieve human suffering to persons listed under the order or determined to be subject to it.<sup>68</sup> Foreign banks refusing to provide information to the U.S. government risk having their assets frozen.

The Bush administration amended Executive Order 13,224 in January 2003 to enable the Secretary of Homeland Security in a consultative function with the Secretary of State and Secretary of the Treasury to exercise the authority conferred by statute.<sup>69</sup> Two years later, the President again amended the instrument to clarify

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62. Richard Wolffe et al., *Bush Targets Terrorist Funds*, FIN. TIMES (London), Sept. 25, 2001, at 1.

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

64. Notice: Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 72 Fed. Reg. 54,205 (Sept. 20, 2007); Notice: Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 71 Fed. Reg. 55,725 (Sept. 21, 2006); Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 70 Fed. Reg. 55,703 (Sept. 21, 2005); Notice: Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 69 Fed. Reg. 56,923 (Sept. 21, 2004); Notice: Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 68 Fed. Reg. 55,189 (Sept. 18, 2003); Notice: Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 67 Fed. Reg. 59,447 (Sept. 19, 2002).

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

66. *Id.* § 1(b)–(c).

67. *Id.* § 1(d)(i)–(ii).

68. *Id.*

69. Exec. Order No. 13,284, § 4, 68 Fed. Reg. 4075 (Jan. 23, 2003).

that the IEEPA's humanitarian-aid exception does not authorize entities whose assets are blocked to donate humanitarian aid articles to anyone, even unblocked persons, without prior authorization from the OFAC.<sup>70</sup> The President declared that to allow humanitarian aid to anyone "would seriously impair my ability to deal with the national emergency declared in this order, and would endanger Armed Forces of the United States that are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances."<sup>71</sup>

Executive Orders are not the only change in the IEEPA legislative stream post-9/11. The USA PATRIOT Act amended the prior statute to, *inter alia*, give the president authority to block assets pending an investigation.<sup>72</sup> Additionally, in the event of judicial review of an IEEPA blocking order, an agency record containing classified information may now "be submitted to the reviewing court *ex parte* and *in camera*."<sup>73</sup> I return to the constitutional concerns raised by this order, and the regulations implementing it, in a moment.

*B. Foreign Terrorist Organizations and the Antiterrorism and Effective Death Penalty Act*

As with SDGTs, provisions banning material support to designated Foreign Terrorist Organizations are of fairly recent vintage.<sup>74</sup> They find their origins in the 1994 Violent Crime Control and Law Enforcement Act, which defined "material support or resources [as] currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets," while excluding "humanitarian assistance to persons not directly involved in [such] violations."<sup>75</sup>

Following the attack on the Murrah Federal Building in Oklahoma City, the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA") amended the statutory definition of material support, replacing the phrase "but does not include humanitarian

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70. Exec. Order No. 13,372, 70 Fed. Reg. 8499 (Feb. 16, 2005).

71. *Id.* § 1 (*cited with approval in Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 42 (D.D.C. 2005)).

72. USA PATRIOT Act of 2001, § 106, Pub. L. No. 107-56, 115 Stat. 272, (2001); International Emergency Economic Powers Act § 1702(a)(1)(B) (Supp. V 2005).

73. 50 U.S.C. § 1702(c) (Supp V 2005) (emphasis added). "Pursuant to this provision, this Court has reviewed the classified portions of the agency record . . ." *Islamic Am. Relief Agency*, 394 F. Supp. 2d at 41 n.8.

74. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in scattered sections of the U.S.C.).

75. Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 2339A(a) (2000).

assistance to persons not directly involved in such violations” with the phrase “except medicine or religious materials.”<sup>76</sup> Congress intended that “medicine” would “be limited to the medicine itself, and does not include the vast array of medical supplies.”<sup>77</sup>

Under AEDPA, in order for an organization to qualify for inclusion on the FTO list, it must meet three criteria: First, it must be foreign.<sup>78</sup> Second, it must engage in “terrorism,” defined in the statute as “any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State)” and involves hijacking a vessel, “seizing or detaining and threatening to kill, injure or continue to detain” others in order to compel a third person “to do or abstain from doing any act,” an assassination, or the use of any biological weapons, explosives, or firearms with the “intent to endanger . . . the safety of . . . individuals or cause substantial damage to property.”<sup>79</sup> Third, the designated group’s activities must have an effect on U.S. national security.<sup>80</sup>

AEDPA authorizes the Secretary of State to specify organizations that meet these conditions, outlawing the solicitation of funds or the provision of material support to them.<sup>81</sup> “Material support” is broadly defined to include “currency or . . . financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . transportation, [or any other physical assets,] except medicine or religious materials.”<sup>82</sup> A federal court has held that material support also includes food and shelter.<sup>83</sup> Threat, attempt, or conspiracy to do any of the above is similarly considered terrorist activity.<sup>84</sup>

As aforementioned, AEDPA gives the Secretary of State the discretionary authority to determine which groups are placed on the FTO list. One week before the designation goes into effect, she must

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76. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. III, subtit. A, § 303(a), 110 Stat. 1214, 1250–53 (1996) (codified as amended at 18 USC § 2339B (2000)).

77. H.R. REP. NO. 104–518, at 114 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 947.

78. 8 U.S.C. § 1182(a)(3)(B)(vi) (2006).

79. 8 U.S.C. § 1182(a)(3)(B)(iii).

80. 8 U.S.C. § 1182(a)(3)(C). For detailed discussion of these three criteria see *Aziz*, *supra* note 4, and *Ellis*, *supra* note 4, at 678–81.

81. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. III, subtit. A, §302(a), 110 Stat. 1214, 1248–50 (1996) (codified as amended at 8 U.S.C. § 1189 (2006)).

82. 18 U.S.C. § 2339A(b) (2000).

83. *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 297–99 (3d Cir. 2004).

84. *Id.* at 297 n.5 (citing INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii) (2000 & Supp. II 2002)).

submit written notice to “the Speaker and Minority Leader of the House of Representatives, the President pro tempore, the Majority Leader, the Minority Leader of the Senate, and [any] members of the relevant committees” in Congress.<sup>85</sup> At the close of the seven-day period, the secretary must “publish the designation in the Federal Register,” an act that serves as formal notice to the target of the designation.<sup>86</sup> All financial institutions in the United States are, from that moment, blocked from handling any of the target’s assets absent further direction from the Secretary of State.<sup>87</sup> At the expiry of two years the designation can be renewed.<sup>88</sup>

The second Clinton administration and the first and second Bush administrations have used these material support provisions to target dozens of organizations. In October 1997, Secretary of State Madeline Albright issued the first list of thirty entities.<sup>89</sup> Two years later, the State Department reissued the list, reducing it to twenty-seven.<sup>90</sup> Not until late October 1999 did al-Qaeda merit notice.<sup>91</sup> In 2000, the State Department expanded the list to include the Islamic Movement of Uzbekistan;<sup>92</sup> then, in 2001, Secretary of State Colin Powell added the Real IRA and the United Self-Defense Forces of Colombia.<sup>93</sup>

Following 9/11, the number of designated FTOs nearly doubled: the process began on October 8, 2001, when Powell redesignated twenty-five of the twenty-eight FTOs whose designations were set to expire.<sup>94</sup> Over the next eight months, Powell added five new organizations: al-Aqsa Martyrs Brigade, Asbat al-Ansar, Jaish-e-Mohammed, Lashkar-e Tayyiba, and Salafist Group for Call and Combat.<sup>95</sup> By October 2005, there were forty-two groups listed as Foreign Terrorist Organizations.<sup>96</sup> And by April 2008, the number had grown to forty-four.<sup>97</sup>

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85. 8 U.S.C. § 1189(a)(2)(A)(i) (2006).

86. 8 U.S.C. § 1189(a)(2)(A)(ii).

87. 8 U.S.C. § 1189(a)(2)(C).

88. 8 U.S.C. § 1189(a)(4)(B).

89. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, 2001 REPORT ON FOREIGN TERRORIST ORGANIZATIONS (Oct. 5, 2001), <http://www.state.gov/s/ct/rls/rpt/fto/2001/5258.htm>.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *State Department Redesignates 25 Groups as Foreign Terrorist Organizations*, 78 Interpreter Releases 1603, 1603 (2001).

95. OFFICE OF COUNTERTERRORISM, U.S. DEP’T OF STATE, FACT SHEET: FOREIGN TERRORIST ORGANIZATIONS (Aug. 15, 2002), <http://www.state.gov/coalition/cr/fs/12713.htm>.

96. OFFICE OF COUNTERTERRORISM, U.S. DEP’T OF STATE, FACT SHEET: FOREIGN TERRORIST ORGANIZATIONS (Oct. 11, 2005), <http://www.state.gov/s/ct/rls/rpt/fto/2001/5258.htm>.

97. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE FACT SHEET: FOREIGN TERRORIST ORGANIZATIONS (Apr. 8, 2008),

Notably, not only has the number of entities designated as Foreign Terrorist Organizations expanded, but the charge of providing material support to terrorist organizations has become a central feature of the government's counter-terrorist strategy: almost every criminal terrorism case post-9/11 has included charges related to the provision of material support.<sup>98</sup> Before turning to a constitutional analysis of these provisions, I briefly address alterations in the regulatory and information-gathering authorities of the USA PATRIOT Act.

*C. Financial Surveillance and the USA PATRIOT Act*

Counter-terrorist investigations require an enormous amount of information, much of which can be found within the private sector, such as bank account data, lifestyle details, and social network links.<sup>99</sup> In an effort to enable law enforcement to get at this information, the USA PATRIOT Act and its progeny significantly expanded state access to private, financial information. Like the SDGTs and the material support provisions, the accumulation of these powers, which are part and parcel of the anti-terrorist finance regime, has remained largely insulated from meaningful judicial scrutiny. Two areas are of note here: regulatory requirements and information-gathering authorities. The former centers on systems that automatically generate information for the state. The latter

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<http://www.state.gov/s/ct/rfs/fs/08/103392.htm> (listing: Abu Nidal Organization (ANO); Abu Sayyaf Group; Al-Aqsa Martyrs Brigade; Al-Shabaab; Ansar al-Islam; Armed Islamic Group (GIA); Asbat al-Ansar; Aum Shinrikyo; Basque Fatherland and Liberty (ETA); Communist Party of the Philippines/New People's Army (CPP/NPA); Continuity Irish Republican Army; Gama'a al-Islamiyya (Islamic Group); HAMAS (Islamic Resistance Movement); Harakat ul-Jihad-i-Islami/Bangladesh (HUJI-B); Harakat ul-Mujahidin (HUM); Hizballah (Party of God); Islamic Jihad Group; Islamic Movement of Uzbekistan (IMU); Jaish-e-Mohammed (JEM) (Army of Mohammed); Jemaah Islamiya organization (JI); al-Jihad (Egyptian Islamic Jihad); Kahane Chai (Kach); Kongra-Gel (KGK, formerly Kurdistan Workers' Party, PKK, KADEK); Lashkar-e Tayyiba (LT) (Army of the Righteous); Lashkar i Jhangvi; Liberation Tigers of Tamil Eelam (LTTE); Libyan Islamic Fighting Group (LIFG); Moroccan Islamic Combatant Group (GICM); Mujahedin-e Khalq Organization (MEK); National Liberation Army (ELN); Palestine Liberation Front (PLF); Palestinian Islamic Jihad (PIJ) Popular Front for the Liberation of Palestine (PFLP); PFLP-General Command (PFLP-GC); Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (QJBR) (al-Qaida in Iraq) (formerly Jama'at al-Tawhid wa'al-Jihad, JTJ, al-Zarqawi Network); al-Qa'ida; al-Qaida in the Islamic Maghreb (formerly GSPC); Real IRA; Revolutionary Armed Forces of Colombia (FARC); Revolutionary Nuclei (formerly ELA); Revolutionary Organization 17 November; Revolutionary People's Liberation Party/Front (DHKP/C); Shining Path (Sendero Luminoso, SL); United Self-Defense Forces of Colombia (AUC)).

98. David Cole, *The New McCarthyism: Repeating History in the War on Terror*, 38 HARV. C.R.-C.L. L. REV. 1, 8-9 (2003).

99. Anthony Kennedy, *Winning the Information Wars: Collecting, Sharing and Analyzing Information in Asset Recovery Investigations*, 14 J. OF FIN. CRIME 372 (2007).

stems from authorities that are actively exercised by law enforcement and intelligence agencies. Examples from both help to illustrate First, Fourth, and Fifth Amendment concerns.

1. *Regulatory and Reporting Requirements*

Just two months before the USA PATRIOT Act was enacted, Treasury Secretary Paul O'Neill assured the American public that the administration planned to reduce the regulatory requirements placed on U.S. financial institutions.<sup>100</sup> But following 9/11, Title III of the USA PATRIOT Act significantly expanded the amount of customer information that financial institutions must obtain and provide to the government. The statute requires banks, savings associations, credit unions, securities broker-dealers, mutual funds, futures commission merchants, and brokers to strengthen customer identification provisions.<sup>101</sup> Account-holders' passport numbers, social security numbers, names, and dates of birth must now be recorded and retained for five years to make it easier to link up accounts held at different institutions.<sup>102</sup> Under the statute, all financial institutions—from those listed above to casinos, mutual funds, and credit card companies—as well as a wide range of businesses (insurance companies, investment advisors, certain commodities dealers, travel agents, vehicle sellers, and those involved with real estate closings and settlements), must institute anti-money laundering programs, collecting personal information on their customers.<sup>103</sup> This information must then be made available to the government for help in its investigations.<sup>104</sup>

Title III of the USA PATRIOT Act also expanded the number of organizations required to file Suspicious Activity Reports ("SARs")<sup>105</sup>—a device traditionally used for money laundering but then transferred over to the anti-terrorist finance realm.<sup>106</sup> Previously, banks and credit unions were required to report any cash transfers of \$10,000 or more.<sup>107</sup> Title III amended the 1970 Bank Secrecy Act to read that "any person who is engaged in a trade or business" that receives more than \$10,000 in cash must file a SAR.<sup>108</sup> The USA PATRIOT Act also requires nonfinancial trades or

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100. Stephen Fidler & Haig Simonian, *IMF Chief Urges United Response to Slowdown*, FIN. TIMES (London), Oct. 6, 2001, at 4.

101. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 318, 115 Stat. 272, 326 (2001) (codified in scattered sections of the U.S.C.).

102. *Id.* § 326.

103. *Id.* § 352.

104. *Id.* § 358.

105. *Id.* § 356.

106. See DONOHUE, THE COST OF COUNTERTERRORISM, *supra* note 1, at 161, 347.

107. 31 C.F.R. § 103.30 (2008).

108. USA PATRIOT Act of 2001, § 365.

businesses to file Currency Transaction Reports with FinCEN.<sup>109</sup>

These requirements put industry on the front line of collecting and reporting customer activity. Yet financial institutions are not particularly well-placed to know who may be involved in terrorist activity. Bank managers do not hold security clearances—nor are they privy to a range of information otherwise available to the intelligence agencies. As a result, financial institutions began filing reports based on political sensitivities—and using crude ethnic, age, and religious distinctions to determine which transactions to report.<sup>110</sup>

## 2. *Information-Gathering Authorities*

In addition to creating new due diligence requirements and expanding SAR filings, Title III of the USA PATRIOT Act gives the government broad authority to obtain personal and financial information, to issue National Security Letters (which can target—and, indeed, have targeted—financial data), and to use the reduced safeguards on privacy in the exercise of surveillance as encapsulated in the Foreign Intelligence Act.<sup>111</sup>

a. *Broad Title III Authorities.* At the broadest level, Title III of the USA PATRIOT Act empowered the Treasury to specify any region, entity, person, or account, in regards to which financial institutions can be required to search their records for any relevant information.<sup>112</sup> Positive matches have to be reported within a fortnight or, in the case of an emergency, within two days.<sup>113</sup> Failure to disclose information exposes individuals to criminal and civil penalties.<sup>114</sup> The Treasury augmented its disclosure requirements in September 2002 when it issued regulations encouraging public/private cooperation and permitting the sharing of information between government agencies.<sup>115</sup>

This power to obtain financial data quickly became known as a “Google search.”<sup>116</sup> Importantly, no limit was set on which federal agencies could make such requests—allowing everyone from the Postal Service to the Treasury to obtain information about any offense related to money laundering, which in turn encompasses any

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109. *Id.*

110. See DONOHUE, THE COST OF COUNTERTERRORISM, *supra* note 1, at 348.

111. See generally USA PATRIOT Act of 2001, §§ 301–77.

112. USA PATRIOT Act of 2001, § 314.

113. STAFF REPORT, *supra* note 9, at 60; Donohue, *Anti-terrorist Finance in the United Kingdom and United States*, *supra* note 1, at 374.

114. USA PATRIOT Act of 2001, § 302.

115. U.S. TREASURY DEP’T, FACT SHEET: CONTRIBUTIONS BY THE DEPARTMENT OF THE TREASURY TO THE FINANCIAL WAR ON TERRORISM 10–11 (2002), available at <http://www.treas.gov/press/releases/reports/2002910184556291211.pdf>.

116. 31 C.F.R. §§ 103.100, 103.110 (2002); STAFF REPORT, *supra* note 9, at 60.

one of two-hundred different crimes. Banks became inundated with requests for information and immediately began complaining to the Treasury Department.<sup>117</sup> Fifteen days into the operation of this authority, FinCEN, whose mission is to enhance national security by promoting transparency in the U.S. and international financial systems, interjected itself into the process.<sup>118</sup> The organization began requiring that law enforcement go through the agency in approaching financial institutions—in essence, making FinCEN an information intermediary/broker.<sup>119</sup> Within the year, according to media sources, FinCEN had conducted searches on 962 suspects, two-thirds of whom appeared to have no relation to terrorism.<sup>120</sup>

b. *National Security Letters.* National Security Letters (“NSLs”) are a form of administrative subpoena for which no prior judicial warrant is required.<sup>121</sup> Under the USA PATRIOT Act and its renewal provisions, the individual served with such a subpoena is barred, on pain of criminal penalties, from discussing it with anyone.<sup>122</sup> By 2006, the executive branch annually issued approximately 30,000 such letters (each of which could obtain millions of records) to a wide range of institutions, banking and otherwise.<sup>123</sup>

While some attention has been paid to NSLs as a general matter, their impact on the financial industry is significant: in June 2006, for instance, the *New York Times* reported that, just after 9/11, the Bush administration served an NSL on a Belgian banking cooperative called SWIFT, which routes approximately six trillion dollars per day between thousands of financial institutions worldwide.<sup>124</sup> The surveillance program collected information on international transactions, including those entering and leaving the United States. The CIA, under the Treasury’s guidance, ran the

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117. Bruce Zagaris, *The Merging of the Anti-money Laundering and Counter-terrorism Financial Enforcement Regimes After Sept. 11, 2001*, 22 BERKELEY J. INT’L L. 123, 134 (2004).

118. For FinCEN’s mission statement see [http://www.fincen.gov/about\\_fincen/www/mission.html](http://www.fincen.gov/about_fincen/www/mission.html).

119. Zagaris, *supra* note 117, at 134.

120. Michael Isikoff, *Show Me the Money: Patriot Act Helps the Feds in Cases with No Tie to Terror*, NEWSWEEK, Oct. 23, 2007, available at <http://www.newsweek.com/id/60749>.

121. See DONOHUE, *THE COST OF COUNTERTERRORISM*, *supra* note 1, at 236–43.

122. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §117, 120 Stat. 192, 217 (2005) (codified in scattered sections of the U.S.C.); USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 505, 115 Stat. 272 (2001) (codified in scattered sections of the U.S.C.).

123. See Alex Koppelman, *Inspector General: FBI Is Misusing “National Security Letters”*, WAR ROOM, Mar. 9, 2007, [http://www.salon.com/politics/war\\_room/2007/03/09/letters](http://www.salon.com/politics/war_room/2007/03/09/letters).

124. Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

program.<sup>125</sup>

At the outset, lawyers at the DOJ and the Treasury debated whether the operation had to comply with the laws restricting government access to private financial records. In the end, they decided that it did not. SWIFT was defined not as a bank or financial institution, but, because it routed transactions, as a messaging service.<sup>126</sup>

The SWIFT banking incident highlights an important weakness: lack of oversight and accountability. In the absence of any reporting requirement, the executive branch did not initially notify Congress about the existence of the program. Senator Arlen Specter, the Republican chairman of the Senate Judiciary Committee, later objected that the Administration began telling members of Congress only after the *New York Times* had begun making inquiries.<sup>127</sup> Representative Sue Kelly, the Republican chairwoman of the House Financial Services oversight panel, confirmed that the Administration had failed to brief the appropriate committees.<sup>128</sup> The Democratic representative, Barney Frank, who said that the administration had offered to brief him only after the *New York Times's* inquiry, declined the invitation because the Administration had also said that Frank would not, following the briefing, be allowed to discuss the matter.<sup>129</sup> So, even once the program's existence was known, Congressional Members' ability to hold the Administration publicly accountable was limited.

The SWIFT banking operation was not the only financial surveillance program in place. The government, for instance, reached agreements with companies to provide the state with access to A.T.M. transactions, credit card records, and Western Union wire payments.<sup>130</sup> But the SWIFT operation was by far the largest effort under way.<sup>131</sup>

Two years into its operation, SWIFT officials, concerned that they were breaking the law, tried to end the program.<sup>132</sup> The Federal Reserve intervened, and the program continued with some new controls, including use of an auditing firm to verify that the searches conducted were based on intelligence leads about terrorist suspects.<sup>133</sup> According to SWIFT, the range of information made available to the United States narrowed.

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125. *Id.*

126. *Id.*

127. Sheryl Gay Stolberg & Eric Lichtblau, *Cheney Assails Press on Report on Bank Data*, N.Y. TIMES, June 24, 2006, at A1.

128. Edmund L. Andrews, *Republicans Criticize Lack of Briefings on Bank Data*, N.Y. TIMES, July 12, 2006, at A10.

129. *Id.*

130. Lichtblau & Risen, *supra* note 124, at A1.

131. *Id.*

132. *Id.*

133. *Id.*

When the story broke in the *New York Times*, the White House went on the offensive, immediately accusing the paper of hurting the United States and helping terrorists. President Bush stated:

We're at war with a bunch of people who want to hurt the United States of America, and for people to leak that program and for a newspaper to publish it does great harm to the United States . . . . [T]he fact that a newspaper disclosed [that we are trying to follow the money] it makes it harder to win this war on terror.<sup>134</sup>

Vice President Dick Cheney took a similar line: "What I find most disturbing about these stories is the fact that some of the news media take it upon themselves to disclose vital national security programs, thereby making it more difficult for us to prevent future attacks against the American people."<sup>135</sup> Some officials defended the program, saying that it provided "a unique and powerful window into the operations of terrorist networks."<sup>136</sup> But many officials also expressed unease and strong concern about the program's power to invade people's privacy.<sup>137</sup>

Anti-terrorist financial provisions also implicate First, Fourth, and Fifth Amendment rights through the weakened protections of the Foreign Intelligence Surveillance Act.<sup>138</sup> As soon as the Office of Foreign Assets Control designates an individual or organization as a Specially Designated Global Terrorist, the Department of Justice—or, indeed, any intelligence agency—can approach the Foreign Intelligence Surveillance Act court to obtain a warrant for the electronic monitoring of the individual.<sup>139</sup> A brief discussion of the history of this statute, and changes made post-9/11, is relevant.<sup>140</sup>

c. *Foreign Intelligence Surveillance Act.* The 1978 Foreign Intelligence Surveillance Act ("FISA") was introduced in the wake of congressional hearings into the misuse by the executive branch of invocations of national security to undertake domestic surveillance.<sup>141</sup> The Act created a surveillance framework for the executive branch to monitor foreign powers and their agents,

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134. PBS Frontline, Transcript of News War Part II: Secrets Sources, & Spin, Feb. 20, 2007, *transcript available at* <http://www.pbs.org/wgbh/pages/frontline/newswar/view>.

135. Stolberg & Lichtblau, *supra* note 127, at A1.

136. Lichtblau & Risen, *supra* note 124, at A1 (quoting Stuart Levey, an undersecretary at the Treasury Department).

137. *Id.*

138. Aziz, *supra* note 4, at 58.

139. Aziz, *supra* note 4, at 59.

140. Donohue, THE COST OF COUNTERTERRORISM, *supra* note 1, on which the following section is based, provides a more detailed discussion of the history of FISA.

141. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, (1978) (codified at 50 U.S.C. § 1801 (2000)).

including groups “engaged in international terrorism or activities in preparation therefor.”<sup>142</sup> Applications to a special Foreign Intelligence Surveillance Court departed from preexisting warrant procedures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which set the rules for obtaining wiretap orders for criminal investigations.<sup>143</sup> Whereas the latter requires prior judicial review and probable cause to believe that the target of the surveillance had committed, or is about to commit, a crime, the former requires only that the individual who was to be using the facilities be placed under surveillance qualify as a foreign power or agent thereof.<sup>144</sup> The application does not need to specify the likelihood that any foreign intelligence information would actually be obtained. Both U.S. persons and non-U.S. persons could fall subject to a FISA warrant, with slightly more protective measures instituted for the former. However, for both, lower thresholds apply than would under the general, default protections of the Fourth Amendment as reflected in the criminal code.

FISA also allows for the installation and use of pen register and trap and trace devices for international terrorism investigations.<sup>145</sup> To invoke this authority, the Attorney General, or a designated attorney, need only state under oath (to the FISA court or to a specially-appointed magistrate) that the device to be surveilled has been, or will in the future be, used by someone who either (i) is engaging or has engaged in international terrorism or (ii) is a foreign power or agent thereof.<sup>146</sup> The statute does not require that the target of pen registers or trap and traces ever be informed.

FISA subsequently underwent amendments that expanded its reach: in 1994, Congress extended the broad authorities under FISA to allow for warrantless, covert physical searches (not merely electronic communications’ intercepts) when targeting “premises, information, material or property used exclusively by, or under the open and exclusive control of, a foreign power or powers.”<sup>147</sup> Just two months before the Oklahoma City bombing, President Clinton issued Executive Order 12,949, extending FISA to physical searches.<sup>148</sup> Then, following the Oklahoma City bombing, Congress expanded FISA orders to include travel records.<sup>149</sup>

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142. *Id.* §§ 101–11.

143. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 18 U.S.C. §§ 2510–20 (2000)).

144. 50 U.S.C. § 1805(b) (2000).

145. 50 U.S.C. § 1842(a)(1) (2000). Pen registers obtain the number dialed from a specific telephone line; trap and trace devices record caller information.

146. 50 U.S.C. § 1842(c)(3).

147. 50 U.S.C. § 1822(a)(1)(A)(i) (2000).

148. Exec. Order No. 12,949, 60 Fed. Reg. 8169 (Feb. 9, 1995).

149. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat 272 (2001) (codified in scattered sections of the U.S.C.).

Following 9/11, the USA PATRIOT Act broadened FISA's reach in three ways. First, whereas previously the statute required that the gathering of foreign intelligence be "*the*" sole reason for search or surveillance, the new statute allowed for applications when foreign intelligence provided merely "a significant purpose."<sup>150</sup> The Attorney General quickly announced that authorization could be sought even if the primary object of the surveillance was ordinary criminal activity.<sup>151</sup> Following a series of legal challenges, the three-judge Foreign Intelligence Surveillance Court of Review endorsed the Attorney General's reading and, taking it one step further, said that FISA warrants could be sought "[s]o long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution."<sup>152</sup>

Allowing FISA to be used for investigations primarily criminal in nature undercuts the justification provided in the first place for instituting extraordinary powers and raises grave constitutional concerns. FISA has previously withstood constitutional challenge precisely because of its national security function.<sup>153</sup> This brought it outside the Fourth Amendment requirements. Applying exceptional procedures allows the government to bypass otherwise applicable constitutional constraints. Reflecting the reduced procedural protections, as a practical matter, the percentage of warrants sought under FISA, and granted, is strikingly high: between 1979 and 2003, the Foreign Intelligence Surveillance Court denied only three out of 16,450 applications submitted by the Executive Branch.<sup>154</sup>

Second, the USA PATRIOT Act expanded the types of records that could be obtained under FISA. While the original statute allowed for electronic surveillance, it did not specifically provide authorization to obtain business records. The amendment provided blanket authority to obtain any business or personal records<sup>155</sup>—effectively allowing FISA to "trump" privacy laws governing the dissemination of records.<sup>156</sup>

Third, the USA PATRIOT Act reduced the standard under which the Foreign Intelligence Surveillance Court would be *required* to grant the order; formerly, specific and articulable facts had to be

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150. *Id.*, § 218.

151. Memorandum from Attorney General John Ashcroft on Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI (Mar. 6, 2002), *available at* <http://www.fas.org/irp/agency/doj/fisa/ag030602.html>.

152. *In re Sealed Case*, 310 F.3d 717, 735 (FISA Ct. Rev. 2002).

153. *See In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 625 (FISA Ct. 2002).

154. *See generally* FAS.org, <http://fas.org/irp/agency/doj/fisa> (last visited Sept. 9, 2008). Statistics compiled by author.

155. USA PATRIOT Act § 215.

156. Peter Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1331 (2004).

provided to demonstrate that the target represented a foreign power (or an agent thereof).<sup>157</sup> But, under the PATRIOT Act, no particularized showing need be made.<sup>158</sup> Instead, the government need only say that “the records concerned are sought for an authorized investigation . . . to protect against international terrorism or clandestine intelligence activities.”<sup>159</sup>

Importantly, the judgment as to what qualifies as an investigation is wholly within the Department of Justice’s domain and Attorney General John Ashcroft substantially broadened that judgment following passage of the USA PATRIOT Act (a preliminary investigation will now suffice). FISA can thus now be used to obtain records of individuals who are not themselves the targets of any investigation nor an agent of a foreign power. Entire databases can be obtained, as long as an “authorized investigation” exists.<sup>160</sup>

The upshot of these statutory amendments, combined with Executive Order 13,224, is that the Executive Branch, absent any notice or hearing, and on the basis of secret evidence (potentially touching upon expressive and associational activity otherwise protected by the First Amendment), can list individuals as SDGTs. On that basis alone, those individuals’ assets, along with the assets of anyone associated with them, can be frozen. And simply as a result of the listing, expansive FISA authorities can be sought—not only for the designated individual, but for any other person linked to the “investigation” into the SDGT, thereby allowing the government to bypass requirements of the Fourth Amendment when it comes to intercepting electronic communications, searching premises, and obtaining business and personal records.<sup>161</sup>

### III. CONSTITUTIONAL AND LEGAL CHALLENGES

The three sets of statutory authorities, and their related administrative regulations, raise significant constitutional and legal concerns. The designation process for SDGTs and FTOs expands executive authority without providing even rudimentary procedural due process protections. The language in Executive Order 13,224 and the material support provisions give rise to concerns about vagueness and overbreadth—thereby implicating the First and Fifth Amendments. The indefinite freezing of assets without probable cause raises concerns related to the Fourth Amendment. Regulatory

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157. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 101, 92 Stat. 1783 (1978) (codified at 50 U.S.C. § 1801 (2000)).

158. USA PATRIOT Act § 501.

159. *Id.*

160. *Id.*

161. See DONOHUE, *THE COST OF COUNTERTERRORISM*, *supra* note 1, at 122–81 (discussing the Fourth Amendment requirements that would otherwise apply).

and information-gathering authorities involved in financial surveillance encroach upon privacy rights otherwise protected by the Fourth Amendment. And there is question about the extent to which the shift to focusing on individuals under the IEEPA, a trend that began with the Clinton Administration, is *ultra vires* the governing statute.<sup>162</sup>

A. *Procedural Due Process*

As was highlighted above, Executive Order 13,224 and the IEEPA legislative stream contemplate two modes of authorization: the first is exercised by the president directly under IEEPA, and the second is carried out by the Secretary of the Treasury, in consultation with the Attorney General, the Secretary of Homeland Security, and the Secretary of State. In June 2003, OFAC promulgated regulations implementing the Treasury's secondary designation authority.<sup>163</sup> Targets of either process may be foreign or U.S.-based individuals or organizations.

In considering due process protections in this context, three questions present themselves: first, whether the individual or entity listed as an SDGT has a constitutionally-protected presence in the United States; second, whether the action in question deprives the target of a constitutionally-protected interest; and third, whether the procedures are constitutionally adequate.<sup>164</sup>

Turning to the first of these considerations, a U.S. person or entity listed as an SDGT is automatically entitled to constitutional protections. For foreign entities, the U.S. Supreme Court has held that "[a] foreign entity *without property or presence* in this country has no constitutional rights, under the due process clause or otherwise."<sup>165</sup>

Individuals targeted by the freezing of assets, however, routinely meet the requirements of both property and presence, thus entitling them to protection under the Fifth Amendment. In regard to the former, bank accounts (the most common target of freezing orders), are considered to be a form of property.<sup>166</sup> The impoundment of bank accounts "during the pendency of . . . litigation . . . without notice or opportunity for an early hearing and

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162. This argument first appeared in Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss and for Summary Judgment at 2, *Al Haramain Islamic Found., Inc., v. U.S. Dep't of Treas.*, No. 07-CV-1155-KI, 2008 WL 2381640 (D. Or. June 5, 2008) [hereinafter Memo in Support of Plaintiffs' Motion].

163. 31 C.F.R. § 594.201(a)(4) (2003).

164. Ellis, *supra* note 4, at 684.

165. *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (emphasis added).

166. *N. Ga Finishing, Inc. v. Di-chem, Inc.*, 419 U.S. 601, 606 (1975).

without participation by a judicial officer,” violates due process.<sup>167</sup> Property interests extend well beyond real estate, chattels, or money.<sup>168</sup>

In regard to the latter—presence—foreign organizations with “substantial connections” in the United States merit constitutional protections.<sup>169</sup> Although the test for exactly what qualifies as a “substantial connection” is not clear,<sup>170</sup> in the realm of asset freezing and forfeiture, the courts have considered “an overt presence” and “an interest in a small bank account” to be sufficient to trigger constitutional protections.<sup>171</sup> A physical presence, moreover, when the individual is “engaged in activities appropriate to accepting service or receiving notice” on the behalf of an organization, is sufficient to ground U.S. courts’ jurisdiction over the entity in question.<sup>172</sup>

In regard to the second consideration, whether the interest in question is constitutionally protected, deprivation of the target’s assets in cases under Executive Order 13,224 or the material support provisions of AEDPA, where the target has property or a presence in the United States, always triggers the due process protections of the Fifth Amendment.<sup>173</sup> Indeed, the courts have stated that entities designated under the IEEPA are entitled to due process protections.<sup>174</sup> (So, too, does the confiscation or seizure of physical objects, in the course of freezing assets, trigger constitutional protections.)<sup>175</sup>

Inquiry thus turns on the third consideration: whether the procedural protections provided by Executive Order 13,224 and AEDPA afford due process. Before moving to this part of the analysis, it is worth noting that the due process requirements for U.S. persons attach even when national security is on the line.<sup>176</sup> In

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167. *Id.*

168. *Bd. of Regents v. Roth*, 408 U.S. 564, 571–72 (1972) (“The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.”).

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

170. *See Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 202 (D.C. Cir. 2001) (“[W]e are not undertaking to determine, as a general matter, how ‘substantial’ an alien’s connections with this country must be to merit the protections of the Due Process clause or any other part of the Constitution.”); *see also* Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672, 1672–73, 1675–76 (1989).

171. *Nat’l Council of Resistance of Iran*, 251 F.3d at 201–02.

172. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 444–45, 448 (1952).

173. U.S. CONST. amend. V.

174. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 163 (D.C. Cir. 2003); *see also Nat’l Council of Resistance of Iran*, 251 F.3d at 205 (holding the same with respect to AEDPA and the foreign terrorist organization designation).

175. *Nat’l Council of Resistance of Iran*, 251 F.3d at 204.

176. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 132 (1951)

*Joint Anti-Fascist Refugee Committee v. McGrath*, the Attorney General, acting under an Executive Order, designated certain organizations as Communist and provided the list to the Civil Service Commission.<sup>177</sup> Although no majority opinion was issued, four separate opinions issued by Justices Black, Frankfurter, Douglas, and Jackson stated that the Fifth Amendment's due process clause barred the government from listing the targets without providing them with notice and an opportunity to be heard.<sup>178</sup>

### 1. Notice and Hearing

Despite the applicability of due process to targets of IEEPA sanctions, both designation processes under Executive Order 13,224—from which the freezing orders and subsequent transactional restrictions follow—fall short of meeting even minimum due process standards. The exact contours of due process requirements—such as the form a hearing must take—vary by context,<sup>179</sup> but at a minimum they require notice of the factual and legal charges or claims being made against a target, a meaningful opportunity to answer the case, and appeal to a neutral finder of fact.<sup>180</sup> Neither the order nor the regulations, however, require that notice be given either before *or* after designation.<sup>181</sup> Neither requires that the legal or factual basis for the freezing of assets be provided to the target. And neither requires—or even provides for—a hearing, or any opportunity for the individual or organization to confront the claims made against it.

The courts have held that due process protections are not required prior to the initial seizure of an organization's assets. In *Islamic American Relief Agency v. Unidentified FBI Agents*, the court considered initial seizure permissible in advance of a hearing

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(Burton, J., concurring).

177. *Id.* at 125–26.

178. *See id.* at 143, (Black, J., concurring); *id.* at 173, (Frankfurter, J., concurring); *id.* at 176–77 (Douglas, J., concurring); *id.* at 186–87 (Jackson, J., concurring).

179. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (“The formality and procedural requisites for the hearing can vary depending upon the importance of the interests involved and the nature of the subsequent proceedings.”); *see also* *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970); *Hannah v. Larche*, 363 U.S. 420, 440–53 (1960).

180. *See* *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004) (holding that enemy combatants must be provided with notice, the opportunity to respond, and a neutral fact finder); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (holding that notice, an explanation of evidence, and an opportunity to contest this evidence constituted due process); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (holding that due process required notice and the opportunity to be heard “in a meaningful manner” (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

181. Global Terrorism Sanctions Regulations, 31 C.F.R. § 594 (2008).

where “(1) ‘the seizure [was] directly necessary to secure an important governmental or general public interest;’ (2) ‘there [was] a special need for very prompt action;’ and (3) ‘the [government had] kept strict control over its monopoly of legitimate force.’”<sup>182</sup> The court ascertained that the government had an important interest in protecting the public from terrorist attacks, that advance notice would have given the organization an opportunity to transfer the assets, and that it was the government, not a private party, which initiated the blocking.<sup>183</sup>

The current order and regulations, though, as I have said, do not require notice or a hearing even *after* a designation. In this context, the use of classified evidence is important. The USA PATRIOT Act, it will be recalled, explicitly allows for evidence to be presented *in camera* and *ex parte*.<sup>184</sup>

Certainly, as a general matter, the courts have been reluctant to uphold due process claims against the use of secret evidence *qua* secret evidence. The case of *Benevolence International Foundation v. Ashcroft* (2002), for instance, although decided on different grounds, cited anti-terrorist finance precedent for allowing classified information to be used.<sup>185</sup> In *Global Relief Foundation, Inc. v. Paul O’Neill* (2002), the court denied the plaintiff’s motion not to allow *in camera* and *ex parte* proceedings and suggested that just because the judiciary considers secret evidence does not mean that it relies exclusively on it.<sup>186</sup>

Whether the procedure adopted under Executive Order 13,224 satisfies due process requires consideration of three factors under the balancing test first articulated in *Mathews v. Eldridge*: private interests, the risk of error created by the procedures undertaken, and the public interest.<sup>187</sup> Applied to anti-terrorist finance, an individual’s private interest in access to his or her resources could reasonably be considered a substantial interest. Similarly, the risk of error associated with keeping critical factual bases classified and denying a target opportunity to be informed of the legal or factual

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182. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 49 (2005) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679–80 (1974)); U.S. CONST. amend. V (indicating that the person initiating the seizure is a government official responsible for determining, under the standards of a narrowly drawn statute, that it is necessary and justified in the particular instance).

183. *Islamic Am. Relief Agency*, 394 F. Supp. 2d at 49–50.

184. USA PATRIOT Act of 2001 tit. I, Pub. L. No. 107-56, § 106(2)(c) 115 Stat 272, (2001) (codified in scattered sections of the U.S.C.).

185. *Benevolence Int’l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935, 937, 940 (N.D. Ill. 2002); *see also* *United States v. Ott*, 827 F.2d 473, 476 (9th Cir. 1987) (holding that secret proceedings do not violate due process).

186. *Global Relief Found., Inc. v. O’Neill*, 207 F. Supp. 2d 779, 791 (N.D. Ill. 2002).

187. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970)).

basis of the reasons for the designation is considerable.

In considering the third prong, the Executive clearly has a strong interest in preventing terrorist attacks; whether this interest militates against a plaintiff's due process claim depends on the extent to which affording greater procedural protections would actually interfere with the government's ability to disrupt terrorist networks. Such an examination is deeply context-dependent: that is, under the unique circumstances presented in each case, the court would want to look at how critical the freezing of assets was to preventing violent attack. As in *Brandenburg v. Ohio*,<sup>188</sup> the immediacy of the threat surely is an issue. Here, the indefinite nature of the provisions is of substantial concern. Outside of an imminent threat, the argument for bypassing due process becomes substantially weaker.

The government's argument becomes even harder to sustain when one looks at the procedures that the Treasury has adopted for OFAC to impose civil penalties.<sup>189</sup> Here, unlike the designation process, a standard of reasonable cause and the provision of notice do not seem to undermine the state's ability to pursue terrorist finance. Under the designated civil procedures, where the Director of OFAC has reasonable cause to believe that a violation has occurred, he must "notify the alleged violator of the agency's intent to impose a monetary penalty by issuing a prepenalty notice," in writing, regardless of whether any other agency has or has not taken action.<sup>190</sup> The notice must describe the facts of the violation, the regulations allegedly violated, and the amount of the penalty to be levied.<sup>191</sup> It also gives the respondent the right to make a written presentation within thirty days, protesting the penalty, and it gives both parties the opportunity to reach an informal settlement prior to issuance of the pre-penalty notice.<sup>192</sup> And there are other ways in which the civil penalty procedures build in protections—protections lacking in the designation process. For instance, the time period within which decisions must be reached is limited.

The USA PATRIOT Act further exacerbates these problems. The statute's alteration of the regime ("during the pendency of an investigation") means that all of the effects of a designation—including indefinitely freezing an organization's or individual's assets—can follow even *without* formal designation, simply upon the Treasury opening an investigation into whether an entity ought to

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188. 395 U.S. 444 (1969) The Supreme Court held that states are not permitted to proscribe advocacy of the use of force except where such advocacy is directed to inciting or producing imminent lawless action. *Id.* at 447.

189. Appellants' Opening Brief at 9, Humanitarian Law Project v. U.S. Dep't of Treas., Appeal No.07-55893 (9th Cir. Jan. 7, 2008).

190. 31 C.F.R. § 594.702(a) (2008).

191. 31 C.F.R. § 594.702(b)(1).

192. 31 C.F.R. § 594.702(b)(2)–(c).

be included on the SDGT list.<sup>193</sup>

Like Executive Order 13,224, the material support provisions under AEDPA raise procedural due process concerns. The first such challenge, *People's Mojahedin Organization of Iran v. United States Department of State*, asserted that the absence of a hearing in the FTO process violated the Fifth Amendment.<sup>194</sup> The court avoided the procedural due process analysis by finding that the target failed to meet the first condition: a constitutional presence.<sup>195</sup> In *National Council of Resistance v. Department of State*, the D.C. Circuit subsequently found, where the target did have a constitutional presence, that the procedures were inadequate.<sup>196</sup> The decision reached by the Secretary of State depended upon an administrative record, which could include classified information.<sup>197</sup> The target had thirty days to contest the designation but was limited to the administrative record for purposes of its contestation.<sup>198</sup>

Despite these shortcomings, the court stopped short of finding the statute itself unconstitutional. Instead, it remanded the case back to the Secretary of State with directions to provide the target with the opportunity to answer the non-classified evidence against it and the chance to contest this evidence in an administrative hearing.<sup>199</sup>

Although the court directed the Secretary of State to provide notice to the entity (beyond publication in the Federal Register) of its impending status as a designated entity, it left open "the possibility of the Secretary, in an appropriate case, demonstrating the necessity of withholding all notice and all opportunity to present evidence until the designation is already made."<sup>200</sup>

The court, moreover, did not decide what procedures, at what point, would satisfy due process. It offered only broad guidelines, contemplating notice and an opportunity for meaningful review. The court hedged even these guidelines, though, with language recognizing "the privilege and prerogative of the executive" and the desire of the court "not . . . to compel a breach in the security which that branch is charged to protect."<sup>201</sup>

*National Council* came down three months before September

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193. 50 U.S.C. § 1702(a)(1)(B) (Supp. V 2005). See also Appellants' Opening Brief at 4, *Humanitarian Law Project v. U.S. Dep't of Treas.*, Appeal No.07-55893 (9th Cir. Jan. 7, 2008).

194. *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999).

195. *Id.*

196. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 196 (D.C. Cir. 2001).

197. 8 U.S.C. § 1189(a)(3) (Supp. V 2005).

198. 8 U.S.C. § 1189(c)(1)–(2).

199. *Id.* at 209.

200. *Id.* at 208.

201. *Id.* at 208–09.

11. Within months, *United States v. Rahmani*—unlike *National Council*, a criminal, not a civil case—challenged the government’s contention that only the D.C. District Court could handle FTO cases.<sup>202</sup> The court struck down AEDPA as unconstitutional on its face because the target could not inspect and respond to the administrative record, and because it had no meaningful opportunity to be heard, contrary to the due process protections of the Fifth Amendment.<sup>203</sup> The California court was critical of the D.C. Circuit’s decision, suggesting that it had been a mistake to uphold the statute in the face of a due process violation.<sup>204</sup>

The California court decision is by no means the conclusive word on the subject: a year after *Rahmani*, the Southern District Court of New York rejected the California court’s decision.<sup>205</sup> The Supreme Court has yet to rule on this matter—or to determine exactly what procedural devices must be afforded to designated groups or individuals to protect their interests and at what point.<sup>206</sup> In the meantime, courts have repeatedly hewed to a narrow view of the judicial role in FTO cases.<sup>207</sup>

## 2. Access to Legal Advice and Resources to Bring Suit

In addition to the absence of procedural protections, the ability of a United States or foreign target of Executive Order 13,224 to challenge the designation or freezing of assets through the judicial system itself is severely restricted, raising further due process concerns.

The 2003 regulations introduced by the Treasury applied “the prohibitions on transactions or dealings involving blocked property,” to a broad range of “services performed in the United States or by U.S. persons, wherever located.”<sup>208</sup> According to the regulations, U.S. persons, for instance, may not “provide legal, accounting, financial, brokering, freight forwarding, transportation, public relations, educational, or other services to a [target] whose property or interests in property” have been blocked under the order.<sup>209</sup> This means that U.S. lawyers are barred from providing legal services to

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

203. *Id.* at 1055.

204. *Id.* at 1050–52.

205. *United States v. Sattar*, 272 F. Supp. 2d 348, 363–64 (S.D.N.Y. 2003).

206. *See also Rahmani*, 209 F. Supp. 2d at 1058–59 (holding that the statutory scheme for FTO designation deprived supporters of their right to due process and any meaningful opportunity to be heard); *Due Process: Constitutional Violation in Terrorism Designation Process*, 16 CRIM. PRAC. REP. 13, July 24, 2002. *But see* *Fuentes v. Shevin*, 407 U.S. 67, 92 (1972) (explaining that it may be necessary to postpone notice or a hearing “to meet the needs of a national war effort”).

207. *See, e.g., United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004).

208. 31 C.F.R. § 594.406(a) (2008).

209. 31 C.F.R. § 594.406(b); *see also* 31 C.F.R. § 594.204 (2008).

any individual or entity targeted by OFAC and wanting to bring suit, without specific, prior approval from OFAC.

Not only is access to legal advice restricted, but so are the target's resources. In order to challenge the order in court, targets need money, but they do not have immediate access to any of their resources; nor can they obtain funding from anyone else—without that person (or entity) falling afoul of the Executive Order—and risking having their assets frozen as well. Yet, as a California District Court recently held in *Humanitarian Law Project v. United States Department of Treasury*, it is only the immediate target whose assets have been frozen who have standing to bring suit.<sup>210</sup> The court found that the “relaxed standing analysis for First Amendment claims” does not apply, because the president's authority to designate global terrorists stems from the IEEPA—a statute that “does not on its face implicate First Amendment rights”.<sup>211</sup>

The regulations do allow a designee to seek a license from OFAC to engage in any transaction involving blocked property.<sup>212</sup> That is, the regulations allow an individual whose assets have been frozen to ask OFAC to release funds—to allow him or her to then bring suit against OFAC. This creates a conflict of interest, giving the administrative arm significant power over the target of the sanctions and every reason to say “no” in order to foreclose unwanted legal resistance.

This concern is not merely academic. OFAC has used its power over legal advice and access to resources to head off legal challenges. In the case of *Al Haramain Islamic Foundation, Inc. v. United States Department of Treasury*, for four years OFAC barred the group from using its own funds, as well as from trying to obtain financial support within the United States, to bring suit.<sup>213</sup> Instead, the Treasury required that the organization generate funding for legal challenge from international sources.<sup>214</sup> Once Al Haramain Islamic Foundation-Oregon (“AHIF-Oregon”) finally filed suit, OFAC modified its policy. OFAC determined that it would release sufficient domestic funds to pay for two attorneys—while OFAC itself employed five attorneys to counter AHIF-Oregon's lawsuit.<sup>215</sup>

As an alternative to legal proceedings, OFAC's regulations establish a procedure to allow a person to “seek administrative reconsideration” of a designation or blocking if a party believes an

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210. *Humanitarian Law Project v. U.S. Dep't of Treas.*, 484 F. Supp. 2d 1099, 1108 (C.D. Cal. 2007).

211. *Id.* at 1107.

212. 31 C.F.R. § 501.801 (2008); *see also* 31 C.F.R. § 594.201 (2008).

213. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treas.*, No. 07-CV-1155-K1, 2008 WL 2381640, at \*1 (D. Or. June 5, 2008).

214. *Id.* at \*3.

215. Memo in Support of Plaintiffs' Motion, *supra* note 162, at 4.

error has been made.<sup>216</sup> The degree of protection offered by these regulations, however, is open to question: the information on the grounds which the individual has been designated is secret, with OFAC under no obligation to provide any evidence or even description of the basis for the target's inclusion on the list. In the case of AHIF-Oregon, the organization's assets were frozen for four years without any explanation.<sup>217</sup> When the organization finally brought suit, OFAC responded with a document, approximately eighty percent of which had been redacted for national security reasons.<sup>218</sup> Upon the target's application and submission of materials contesting the designation, the regulations give the Treasury the authority to demand *more* information from the target to consider the request.<sup>219</sup> OFAC is not bound to grant any of these requests for administrative reconsideration. In addition, the process takes place entirely within OFAC, without direct external oversight or accountability.

*B. Substantive Due Process and Equal Protection*

The discretionary use of the anti-terrorist finance authorities against certain ethnic and religious groups also raises substantive due process concerns, as each of the three legislative streams has had a disparate impact on the Arab Muslim community.

Consider first SDGTs: by April 2005, the Treasury Department's list had grown to include 743 people and 947 organizations, all of whom had had their assets frozen.<sup>220</sup> Ninety-eight percent of the individuals and ninety-six percent of the organizations appear to be Arab or Islamic.<sup>221</sup>

Like the SDGT list, most of the groups subject to designation orders under AEDPA are Arab and/or Muslim: fourteen of the thirty organizations on the list in October 1997; fourteen of the twenty-eight as of October 1999; twenty out of thirty-three in March 2002; and twenty-three out of thirty-eight in August 2004.<sup>222</sup> In cases involving the use of secret evidence to support allegations of

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216. 31 C.F.R. § 501.806–807 (2008).

217. *Al Haramain Islamic Found. Inc.*, 2008 WL 2381640, at \*1–2.

218. Memo in Support of Plaintiffs' Motion, *supra* note 162, at 2.

219. 31 C.F.R. § 501.807(b) (2008).

220. Donohue, *Anti-terrorist Finance in the United Kingdom and the United States*, *supra* note 1, at 407.

221. *Id.*

222. Aziz, *supra* note 4 (citing Pub. Notice No. 3130, Designation of Foreign Terrorist Organizations, 65 Fed. Reg. 55,112 (Oct. 8, 1999); Pub. Notice No. 2612, Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997)); *see also*, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT OF STATE, FACT SHEET: FOREIGN TERRORIST ORGANIZATIONS (Aug. 12, 2004), *available at* . <http://www.state.gov/s/ct/rfs/fs/2004/35167.htm>; OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT OF STATE, FACT SHEET: FOREIGN TERRORIST ORGANIZATIONS (Mar. 27, 2002), *available at* <http://www.state.gov/s/ct/rfs/fs/2002/9014.htm>.

material support to terrorism, almost all of the accused have been Islamic or of Arab descent.<sup>223</sup>

Even the regulatory surveillance authorities have a disproportionate impact on minority groups. By 2005, twenty percent of the SARs being filed by financial institutions for anti-terrorist finance were spurred by inquiries from law enforcement and matches with the Treasury Department's SDGT list—itsself overwhelmingly targeting one community.<sup>224</sup> The remaining eighty percent of the SARs, which were being voluntarily filed, also disproportionately targeted minorities. Depository institutions focused on charitable organizations and Islamic foundations; on individuals presenting personal identification from Iraq, Afghanistan, and specific Middle Eastern states; and on wire activity to or from suspect (Islamic) states.<sup>225</sup> Casinos, for their part, focused on individuals connected with the Middle East—i.e., having Arab-sounding names or carrying passports from Islamic states.<sup>226</sup>

Under the equal protection guarantee of the Fifth Amendment, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When a statute classifies by race or national origin, courts must apply a strict scrutiny standard of review.<sup>227</sup>

There is an enormous amount of literature on equal protection claims—and it is not my intent in this Article to provide an exhaustive analysis.<sup>228</sup> Instead, I simply want to highlight that

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223. David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267, 268 (2000); Aziz, *supra* note 4, at 70.

224. U.S. DEP'T OF THE TREASURY, BANK SECRECY ACT ADVISORY GROUP, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES, Issue 8, 10 (Apr. 2005).

225. U.S. DEP'T OF THE TREASURY, BANK SECRECY ACT ADVISORY GROUP, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES, Issue 5, 22–23 (Feb. 2003). This trend continued. *See* Bank Secrecy Act Advisory Group, Issue 8, *supra* note 224, at 15.

226. Bank Secrecy Act Advisory Group, Issue 8, *supra* note 224, at 12–13.

227. U.S. CONST. amend. V; *Besinga v. United States*, 14 F.3d 1356, 1360 (9th Cir. 1994) (citing *City of Cleburne v. Cleburne Living Cntr.*, 473 U.S. 432, 440 (1985)).

228. *See, e.g.*, Michael Delikat, *Selected Evidentiary and In Limine Issues in the Trial of Employment Discrimination Cases*, 776 PRACTICING L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES: LITIG. 37, 44 (2008); Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1206–22 (2008); Murad Hussain, Note, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920, 943–55 (2008); Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1044 (2008); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008); Robert M. Weems, *Selected Issues and Trends in Civil Litigation in Mississippi Federal District Courts*, 77 MISS. L.J. 977, 1021–84 (2008).

most of those who fall subject to the provisions will have a particularly difficult time demonstrating that they were victims of intentional discrimination, instead of bearing an incidental burden on account of their ethnic or religious identity.<sup>229</sup>

Under contemporary jurisprudence, intentional discrimination—disparate treatment—violates the equal protection clause (and thus the Fifth Amendment equal protection principle).<sup>230</sup> The courts consider discriminatory *effects*, such as those highlighted above, as disparate impact. They may be evidence of unconstitutional disparate treatment, but, standing alone, they do not fall afoul of constitutional requirements.<sup>231</sup>

Further inquiry by the courts into anti-terrorist finance cases is unlikely to yield a successful constitutional challenge. Anti-terrorist finance measures do not create explicit racial or religious categories. Even if strict scrutiny were triggered, the compelling state interest at stake—i.e., preventing terrorist attacks—could save a particular instance of disparate treatment from constitutional invalidation. The government can simply assert—and the courts are likely to accept—that the fact Arab or Muslim individuals or organizations are targeted more than non-Arab or Muslim groups is simply because these are the entities most likely to threaten U.S. national security. It was precisely this scenario that unfolded when an equal protection claim was raised in court. In *Islamic American Relief Agency v. Unidentified FBI Agents*, the judge found that blocking an Islamic organization's assets, following a finding that the organization funded terrorism, was rationally related to the government's interest in protecting the public from terrorist attacks and thus did not violate the Equal Protection Clause.<sup>232</sup> The court applied mere rationality review, without finding a basis to treat the blocking in that case as reflecting an overall policy that

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229. For scholarly critiques of the contemporary judicial understanding of disparate treatment as stemming from intentional discrimination, see Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006).

230. *Washington v. Davis*, 426 U.S. 229, 244–45 (1976) (holding that disparate racial impact, without the use of suspect classification, does not create an equal protection violation without demonstration of a racially discriminatory purpose); see also *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

231. *Washington*, 426 U.S. at 245–46.

232. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 50–51 (2005).

discriminates on the basis of race, religion, or national origin.<sup>233</sup>

Yet, given the examples of the application of the measures cited above, there is reason to question whether such a complaisant approach to equal protection review blinks reality. There is a stigmatic harm created, totally independent of any direct burden on law-abiding Muslims, which arises from the fact that Arab and Muslim organizations are targeted at a higher rate than terrorist organizations with other ethnic and religious affiliations. Contributions to religious and charitable Islamic organizations and interactions with Islamic businesses have slowed.<sup>234</sup> Islamic publications have seen the sudden withdrawal of advertisers.<sup>235</sup> Findings from the Casey Foundation survey in respect to mosques' loss of funds and Professor Louise Cainkar's report about the Islamic community's "fears of the federal government" directly mirror the expanded application of anti-terrorist financial authorities to the Islamic community.<sup>236</sup> Many Muslims have found it more difficult to support Islamic charity work.<sup>237</sup> And interviews I have conducted with investment banks in New York suggest that informal policies have been adopted that discourage doing business with Arab and Muslim organizations and individuals.

While some Arab or Muslim organizations do threaten U.S. interests, there is reason to believe that this threat has been greatly exaggerated. In the case of al-Barakaat, for instance, months of investigations carried out by the FBI overseas, as well as thousands of pages of documents and the complete cooperation of the United Arab Emirates, failed to substantiate a single case of links between al-Barakaat and terrorism, although the Bush administration had, for months, frozen the organization's assets under Executive Order 13,224.<sup>238</sup> Where information has been demanded by the United States' overseas partners to support the international freezing of assets even the countries' closest allies have found underlying evidence of involvement in the commission of terrorism to be wanting.<sup>239</sup>

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233. *Id.*

234. Riad Abdelkarim, *After Year of Uncertainty, American Muslim Charitable Donations Rebound*, WASH. REP. ON MIDDLE EAST AFF., Jan./Feb. 2004.

235. Interview with Editor, Arab-American News (Autumn 2004).

236. LOUISE CAINKAR, *ASSESSING THE NEED: ADDRESSING THE PROBLEM, WORKING WITH DISADVANTAGED MUSLIM IMMIGRANT FAMILIES AND COMMUNITIES* 27 (2003); see also Nancy Dunne, *U.S. Muslims See Their American Dreams Die: Since September 11 the Community Has Felt Threatened*, FIN. TIMES (London), Mar. 28, 2002, at 10 (discussing the disappointment of the Muslim community in the Bush Administration stemming from government raids).

237. Author participation in Global Security and Cooperation program of the Social Science Research Council on the impact of post-September 11 measures on the Islamic community in the United States.

238. STAFF REPORT, *supra* note 9, at 78–83.

239. *Id.* at 30–31.

Exaggerating the threat undermined the United States' international efforts to interrupt the flow of funds to terrorist groups. Sweden, for instance, brought suit in the European Court of Justice, claiming a violation of due process when three of its citizens found themselves on the U.S. anti-terrorist finance list.<sup>240</sup> (One of the men, Abdirisak Aden, had run for office in the 2000 Swedish elections; none of them had criminal records.) By 2004, the United Nations recognized that its list, which mirrored the list of targets under Executive Order 13,224 and had been largely constructed by the United States, had "begun to lose credibility and operational value" and needed updating.<sup>241</sup> By 2004, not a single person on the list had been stopped by the travel ban.<sup>242</sup> In March 2006, a UN Security Council report expressed concern about the program's effectiveness.<sup>243</sup> The Council of Europe issued a report that said the UN list violated the European Convention on Human Rights: it provided neither any protection against arbitrary decisions, nor did it include mechanisms to ensure that the allegations made by governments were accurate.<sup>244</sup>

Adding to this is the concern that many other organizations, which *do* pose a threat to U.S. national security—and are neither Arab nor Muslim—have escaped the more onerous provisions in the anti-terrorist finance regime. The State Department, for instance, did not include the Provisional Irish Republican Army on an FTO list, despite continued violence.<sup>245</sup> Neither did it include the Ulster Volunteer Force, the Ulster Freedom Fighters, the Loyalist Volunteer Force, the Orange Volunteers, Red Hand Defenders, and other Northern Ireland paramilitary organizations. The Revolutionary United Front ("RUF") in Sierra Leone, which held hundreds of UN peacekeepers hostage in 2000, has not been designated. Nor has Grupo de Resistencia Anti-Fascista Premero de Octubre ("GRAPO"), in Spain. Yet many of these groups—such as the Loyalist Volunteer Force, Orange Volunteers, Red Hand Defenders, RUF, and GRAPO—have been acknowledged by the State Department as active terrorist organizations.<sup>246</sup>

In sum, despite these concerns—that the burden of these provisions is unevenly distributed; that they create a stigmatic harm; that there is reason to believe the threat from Arab and

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240. *Id.* at 84–85.

241. *Al Qaeda Outsmarts Sanctions*, APS DIPLOMAT READER, Aug. 28, 2004. Only 21 states submitted names for the list—most of which originated from the United States—including approximately 174 people and 111 groups associated to al-Qaeda. *Id.*

242. *Id.*

243. David Crawford, *The Black Hole of a U.N. Blacklist*, WALL ST. J., Oct. 2, 2006, at A6.

244. *Id.*

245. Aziz, *supra* note 4, at 70.

246. *See also id.* at 70–75.

Muslim individuals and groups has been overstated; and that there are a range of individuals and organizations who are not Arab or Muslim, who pose a threat to U.S. national security interests, and who have not been subjected to the more onerous aspects of the U.S. anti-terrorist finance regime—it is unlikely that the courts will uphold equal protection claims. This does not mean that there is no substantive due process issue at stake.

*C. Constitutional Challenges on Grounds of Vagueness and Overbreadth*

Anti-terrorist finance designation authorities raise further First and Fifth Amendment concerns in relation to the use of possibly vague and overbroad language. Some of these have been addressed by the courts. Others have not.

In *Humanitarian Law Project v. United States Department of Treasury*, a district court found that Executive Order 13,224 was unconstitutionally vague on its face with regard to the president's designation authority, and that it was both vague and overbroad in respect to the phrase "otherwise associated with"<sup>247</sup>—implicating both First and Fifth Amendment concerns.<sup>248</sup> The district court subsequently determined that the order failed to provide an explanation of the basis upon which groups and individuals were designated.<sup>249</sup> Procedures for challenging designations were not clearly available, and nothing appeared to divest the president of his authority to make additional designations.<sup>250</sup> The term "otherwise associated" did not itself have a clear meaning.<sup>251</sup> It was not defined by statute or regulation, and it contained "no definable criteria for designating individuals or groups as SDGTs."<sup>252</sup> Enforcement was therefore subject only to the Government's unfettered discretion.

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247. *Humanitarian Law Project v. U.S. Dep't. of Treas.*, 463 F. Supp. 2d 1049, 1070 (C.D. Cal. 2006).

248. *Id.* at 1071. Under the First Amendment, statutes are unconstitutionally vague if they (1) punish people for behavior that they could not have known was illegal, (2) allow subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers, or (3) have a chilling effect on the exercise of First Amendment freedoms. *Id.* at 1057–58 (citing *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1988)). "[U]nder the Due Process Clause [of the Fifth Amendment], a criminal statute is void for vagueness if it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.'" *Id.* at 1058 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)). A person may challenge a statute as vague on its face when the statute clearly implicates free speech rights. Even then, though, it will survive a facial vagueness attack as long as it is clear what the statute proscribes in the vast majority of its intended applications. *Id.* at 1061. Outside the First Amendment context, a statute is unconstitutionally vague on its face only if it is vague in all of its applications. *Id.* at 1061 n.8.

249. *Id.* at 1066–67.

250. *Id.* at 1067.

251. *Id.* at 1070.

252. *Id.*

Further, the phrase “otherwise associated with” imposed penalties for mere association with an SDGT. This overbreadth was substantial in relation to the potential constitutional scope of the provision.<sup>253</sup>

In response to a court-ordered injunction, which prevented the Treasury from exercising Executive Order 13,224 against the plaintiffs, OFAC issued a new regulation in January 2007 defining “to be otherwise associated with” as “(a) [t]o own or control; or (b) [t]o attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services.”<sup>254</sup>

The Humanitarian Law Project (“HLP”) again brought suit, challenging whether 31 CFR § 594.316 remedied the vagueness and overbreadth of Executive Order 13,224 § 1(d)(ii).<sup>255</sup> The district court held that the treasury secretary’s delegated authority to designate SDGTs included the authority to define the operative terms of this designation authority. It also found the new language to be constitutional on its face—and, in a summary judgment, lifted the injunction against enforcing Executive Order 13,224 against the Plaintiffs.<sup>256</sup>

The case is now on appeal, and a range of constitutional concerns persist.<sup>257</sup> Despite the Treasury’s new regulations, the order and its implementing instruments still allow the president, or the Secretary of the Treasury, to stop political organizations from being able to carry out otherwise protected First Amendment activity, without a hearing, formal charges, or any direct connection to terrorism. Even declaring that a political organization is under investigation is a sufficient basis to freeze an organization’s assets indefinitely.<sup>258</sup>

The order and its related regulations continue to allow entities to be designated for providing “services,” which include any activity undertaken “for the benefit of” a target—even where the individual or entity acts completely independent of the target.<sup>259</sup> In this sense, contacting the Treasury Department—or, indeed, a local political representative—on behalf of a designated entity, or writing a law review article discussing the legal merits or demerits of an SDGT’s case would be sufficient to fall afoul of the order.

The order and its related regulations, moreover, continue to omit any requirement that the target “knowingly” provided support.

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253. *Id.* at 1070–71.

254. 31 C.F.R. § 594.316 (2008).

255. Humanitarian Law Project v. U.S. Dep’t. of Treas., 484 F. Supp. 2d 1099, 1104–07 (C.D. Cal. 2007).

256. *Id.* at 1109.

257. See Appellants’ Opening Brief, Humanitarian Law Project v. U.S. Dep’t of Treas., Appeal No.07-55893 (9th Cir. Jan. 7, 2008).

258. *Id.* at 16–17.

259. *Id.* at 19.

Unlike the material support provisions in the Antiterrorism and Effective Death Penalty Act, the courts have not yet “read into” the order a stronger mens rea element.<sup>260</sup> Absent a scienter requirement, substantial question about the overbreadth of the language persists.

Material support provisions also suffer from concerns about vagueness and overbreadth. Challenges along these lines began two years after AEDPA, when Humanitarian Law Project alleged that the FTO measures violated their First and Fifth Amendment rights and sought a preliminary injunction to stop the government from enforcing the material support provisions against them.<sup>261</sup> HLP, one of the six organizations that brought suit, is a Los Angeles-based non-profit, with consultative status to the United Nations. The organization advocates the peaceful resolution of armed conflicts and worldwide compliance with humanitarian and human-rights law. HLP wanted to help the Partiya Karkeran Kurdistan (“PKK”), a Kurdish separatist movement in Southeastern Turkey,<sup>262</sup> with human rights monitoring in Turkey. Another plaintiff, Dr. Jeyalangim, a Tamil-American physician concerned with welfare of Tamils in Sri Lanka, along with other physicians who are members of the Ilankai Tamil Sangam, wanted to provide expert medical advice on how to address shortages of medical facilities and trained physicians in the Tamil Eelam region of northeast Sri Lanka.<sup>263</sup> The problem was that the Liberation Tigers of Tamil Eelam (“LTTE”), designated by the U.S. State Department as a Foreign Terrorist Organization, ran a number of the regional hospitals, and the doctors were afraid of being prosecuted for material support.<sup>264</sup>

In June 1998, in *Humanitarian Law Project v. Reno*, the district court partially granted the plaintiffs’ motion, enjoining the Attorney General from enforcing AEDPA with respect to the prohibition on providing “personnel” and “training.”<sup>265</sup> The court considered both terms to be impermissibly vague. It rejected, however, the First Amendment claim based on infringement upon freedom of association, and the Fifth Amendment claim based upon a due process violation resulting from the absence of any requirement of specific intent as an element of the offense.<sup>266</sup> For the district court—and the Ninth Circuit on appeal—AEDPA did not criminalize mere membership; rather, it more narrowly outlawed conduct amounting to provision of material support to an FTO.<sup>267</sup> The

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260. See discussion, *infra*, pp. 678–81.

261. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1205, 1205 (C.D. Cal. 1998) [hereinafter *District Court HLP I*].

262. *Id.* at 1207–08.

263. *Id.* at 1209–10.

264. *Id.* at 1207, 1210.

265. *Id.* at 1215.

266. *Id.* at 1212–13.

267. *Id.*, 205 F.3d at 1133–34 (9th Cir. 2000) [hereinafter *HLP I*].

district court subsequently entered a permanent injunction against enforcing AEDPA's prohibition on providing "personnel" and "training" to foreign terrorist organizations.<sup>268</sup> At this time, the plaintiffs also raised a Fifth Amendment due process challenge, saying § 2339B imposed vicarious liability because it did not incorporate any mens rea requirement.

In the midst of the judicial challenges to the material support provisions, the attacks of September 11, 2001, and the sudden shift in attention to terrorist financing, brought new statutory language to the fore. The USA PATRIOT Act expanded the definition of material support to include a prohibition against providing not just personnel and training, but also "expert advice or assistance" to a designated FTO.<sup>269</sup>

The same plaintiffs from the first case filed a separate complaint in district court, challenging this new language. In *Humanitarian Law Project v. Ashcroft*, a California district court found the term to be unconstitutionally vague, but not overbroad, and granted plaintiffs injunctive relief.<sup>270</sup> Both parties appealed.

The Ninth Circuit affirmed the district court's holding that the terms "personnel" and "training" were void for vagueness.<sup>271</sup> A majority of the panel also read a mens rea requirement into the statute, holding that:

To sustain a conviction under § 2339B, the government must prove beyond a reasonable doubt that the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization's unlawful activities that caused it to be so designated.<sup>272</sup>

The parties sought, and were granted, an en banc review.<sup>273</sup> Within days of the en banc oral argument, Congress acted to bring the language of §§ 2338 and 2339 within constitutional constraints—

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268. *Humanitarian Law Project v. Reno*, No. CV 98-01971 ABC, 2001 WL 36105333, at \*12 (C.D. Cal. Oct. 2, 2001).

269. USA PATRIOT Act of 2001 tit. VIII, Pub. L. No. 107-56 § 805, 115 Stat. 272, 377–80 (2001) (codified at 18 U.S.C. § 2339A & § 2339B (Supp. V 2005)). In 2006 the USA PATRIOT Improvement & Reauthorization Act of 2005, Pub. L. No. 109-177, § 103, 120 Stat 192, 195 (2006) (codified at 50 U.S.C. § 1801 (2006)) extended the sunset provision relating to individual terrorists as agents of foreign powers until December 31, 2009.

270. *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1198–1203 (C.D. Cal. 2004).

271. *Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d 382, 403–04 (9th Cir. 2003) [hereinafter *HLP II*].

272. *Id.* at 403.

273. *Humanitarian Law Project v. U.S. Dep't of Justice*, 382 F.3d 1154, 1155 (9th Cir. 2004). On December 14, 2004, the en banc panel heard oral argument. *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1138 (C.D. Cal. 2005).

while further expanding executive authority.

The 2004 Intelligence Reform and Terrorism Prevention Act (“IRTPA”) defined, for the first time, the terms “training” and “expert advice or assistance.”<sup>274</sup> It also clarified the prohibition against providing personnel to designated organizations.<sup>275</sup> Training thus came to refer to “instruction or teaching designed to impart a specific skill, as opposed to general knowledge.”<sup>276</sup> Congress defined “expert advice or assistance” as “advice or assistance derived from scientific, technical or other specialized knowledge.”<sup>277</sup> Finally, the legislature specified that “personnel” referred to “one or more individuals who . . . work under th[e] terrorist organization’s direction or control or [who] organize, manage, supervise, or otherwise direct the operation of that organization.”<sup>278</sup> The statute added that, “[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction or control.”<sup>279</sup>

Anticipating the Ninth Circuit’s decision with regard to the mens rea problem, the legislature inserted a scienter requirement: “Whoever *knowingly* provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned . . .”<sup>280</sup> In other words, the individual need not know that money is to be used to engage in illegal activity—he or she must only be aware that the organization is a designated terrorist organization or that the organization engaged or engages in terrorism.<sup>281</sup> This language closely tracks the Ninth Circuit’s holding in *HLP II*:

To sustain a conviction under § 2339B, the government must prove beyond a reasonable doubt that the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization’s unlawful activities that caused it to be so designated.<sup>282</sup>

But the legislature did not simply use the opportunity to meet

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274. Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(a)(2), 118 Stat. 3762, 3763 (2004) (codified at 18 U.S.C. § 2339A(2)–(3) (Supp. IV 2004)).

275. 18 U.S.C. § 2339B(h).

276. 18 U.S.C. § 2339A(b)(2).

277. 18 U.S.C. § 2339A(b)(3).

278. 18 U.S.C. § 2339B(h).

279. *Id.* The IRTPA also gives the Secretary of State discretion, with concurrence of Attorney General, with certain forms of support, unless it “may be used to carry out terrorist activity.” 18 U.S.C. § 2339B(j).

280. 18 U.S.C. § 2339B(a)(1) (emphasis added).

281. 18 U.S.C. § 2339B(a)(1).

282. *Humanitarian Law Project v. U.S. Dep’t of Justice*, 352 F.3d 382, 403 (9th Cir. 2003).

the court's concerns: it further expanded the provisions. IRTPA amended the definition of "material support or resources" to include a ban on providing "service."<sup>283</sup> The legislation increased penalties for violation,<sup>284</sup> and it gave the Secretary of State the discretion, with the concurrence of the Attorney General, to allow certain forms of support—unless such actions "may be used to carry out terrorist activity."<sup>285</sup>

Four days after Congress passed the new legislation, a Ninth Circuit en banc panel vacated the injunction regarding "personnel" and "training" and remanded the case to the district court for further proceedings. In the meantime, the plaintiff brought suit anew, challenging the new language added to define expert advice or assistance.<sup>286</sup>

On remand, the district court consolidated the two cases (the initial "personnel/training" challenge, and the intervening "expert advice and assistance" challenge), and the plaintiffs added a new constitutional challenge to IRTPA's insertion of "service."<sup>287</sup> In July 2005, in *Humanitarian Law Project v. Gonzales*, the district court held that both "training" and "service" were unconstitutionally vague.<sup>288</sup> On the "expert advice or assistance," the "other specialized knowledge" part of the definition was held void for vagueness, but the court considered the terms "scientific" and "technical" to be sufficiently clear.<sup>289</sup> The court, in addition, found the new definition of "personnel" sufficient to remedy the previous vagueness of the term.<sup>290</sup> Once again, both parties appealed.

This brings us to the most recent decision, and the final one that I will consider in the area of material support. On December 10, 2007, in *Humanitarian Law Project v. Mukasey*, the Ninth Circuit first looked at plaintiffs' contention that IRTPA did not cure the mens rea deficiency: by the plaintiff's account, the law still did "not require the government to prove that the donor . . . acted with specific intent to further the terrorist activity of the designated [FTO]."<sup>291</sup> The court saw it otherwise, finding that the amended version—which requires the individual to act with "knowledge"—"comport[s] with the Fifth Amendment requirement of 'personal

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283. 18 U.S.C. § 2339A(b)(1).

284. 18 U.S.C. § 2339B(a)(1).

285. 18 U.S.C. § 2339B(j).

286. *Humanitarian Law Project v. U.S. Dep't of Justice*, 393 F.3d 902, 903 (9th Cir. 2004); On April 1, 2005, the court remanded plaintiff's separate challenge to term "expert advice or assistance" to district court to consider IRTPA's impact on the legislation. See *Humanitarian Law Project v. Gonzales*, 380 F. Supp.2d 1134 (C.D. Cal. 2005).

287. *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1138–39, 1142 (C.D. Cal. 2005).

288. *Id.* at 1148–52.

289. *Id.* at 1151, 1151 n.23.

290. *Id.* at 1152–53.

291. *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122, (9th Cir. 2007).

guilt.”<sup>292</sup> So, too, was the term “personnel” now sufficiently clear.<sup>293</sup> Nevertheless, there were other problems with the law.

Specifically, the Ninth Circuit said that the changes to “training,” defining it as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge”—were still vague.<sup>294</sup> It is too hard, the court said, to distinguish between what is a specific skill and what is general knowledge. Similarly, the definition offered to cure “expert advice or assistance” of its previous vagueness was valid as in relation to “scientific” and “technical,” but the appellate court agreed with the district court that the catch-all phrase “other specialized knowledge” specifically was too vague.<sup>295</sup> The lack of any statutory definition of “service” in IRTPA, moreover, made it too easy to imagine protected expression falling within the bounds of the term.<sup>296</sup>

Even as it found that these terms were too vague to pass constitutional muster, the Ninth Circuit held that the terms and definitions of “training,” “personnel,” “expert advice or assistance,” and “service” were not substantially overbroad.<sup>297</sup> Under a *Hicks* analysis, such a claim in relation to the First Amendment can succeed only if overbreadth is real and substantial relative to the law’s plainly legitimate application.<sup>298</sup> The material support provisions, however, were not aimed at stopping the expressive component of the plaintiffs’ actions; they sought, instead, to stop terrorist groups from obtaining resources with which to carry out their attacks. In this instance, the court said, the provisions were not facially overbroad.<sup>299</sup>

#### D. *Privacy Rights and the Fourth Amendment*

As discussed in Part IIC, above, the government is now requiring banks and financial institutions to obtain and turn over increasing amounts of customer data, and federal search authorities are expanding: under Title III of the USA PATRIOT Act, any federal agency can now obtain sensitive and private data without any

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292. *Id.* at 1122.

293. *Id.* at 1123.

294. *Id.* at 1133–35 (quoting 18 U.S.C. § 2339A(b)(2) (Supp. IV 2004)).

295. *Id.* at 1135.

296. *Id.* at 1136. In regard to the First Amendment claim, the district court rejected the plaintiff’s contention that “training,” “personnel,” “expert advice or assistance,” and “service” were overbroad. *Id.* Affirmed by the Ninth Circuit, the court said that overbreadth was related to the scope of the law’s plainly legitimate applications and would thus succeed only on rare occasion. *Id.* at 1137. Because the law was not aimed at stopping the expressive component of the plaintiffs’ conduct, but rather at stopping individuals and organizations from contributing to terrorist groups, the overbreadth claim would be harder to demonstrate. *Id.*

297. *Id.*

298. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003).

299. *Mukasey*, 509 F.3d at 1136–37.

subpoena or judicial intervention, so long as it is investigating one of some 200 possible offenses.<sup>300</sup> The privacy issues at stake in both the regulatory arena and the information-gathering realm loom large.

Consider SARs. Introduced in 1970 by the Bank Secrecy Act as a way to identify money launderers, financial institutions initially balked at being asked to report on their customers.<sup>301</sup> The statute required that the entity in question “know” its customers—namely, the beneficial owner of the account, the source of the funds, and whether the transaction was consistent with the customer profile.<sup>302</sup> Failure to file an SAR within thirty days, or failure to establish an SAR procedure, would result in criminal penalties, civil fines, and administrative sanctions.<sup>303</sup>

Constitutional challenges to these provisions on the basis of privacy and a Fourth Amendment property interest in bank records failed.<sup>304</sup> Congress responded with the 1978 Right to Financial Privacy Act,<sup>305</sup> limiting the government’s ability to request and obtain financial records. Investigators, for the most part, would have to make the requests in writing; and banks would be required to provide notice to customers when the government sought personal information.<sup>306</sup>

The number of institutions required to file SARs gradually expanded—but not without vigorous dissent from the financial community.<sup>307</sup> Concerns about privacy and the state of financial reporting continued through the end of the twentieth century. In 1998, for instance, the Treasury proposed more stringent “know your customer” requirements, which would have forced banks to

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300. USA PATRIOT Act of 2001, Pub. L. No. 107-56, §§ 301–77, 115 Stat. 272, 296–342 (2001) (codified in scattered sections of the U.S.C.).

301. Bank Secrecy Act of 1970, Pub. L. No. 91-508, §§ 221–42, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., 18 U.S.C., & 31 U.S.C.); *see also* United States v. Miller, 425 U.S. 435, 440–46 (1976) (focusing on the justifications for the record-keeping requirements); Cal. Bankers Ass’n v. Shultz, 416 U.S. 21, 47–49, 61 (1974) (upholding record-keeping as a way to detect criminal activity).

302. Bank Secrecy Act §§ 221–42.

303. INTERNAL REVENUE SERVICE, U.S. DEP’T OF TREAS., SUSPICIOUS ACTIVITY REPORTS, <http://www.irs.gov/businesses/small/article/0,,id=154555,00.html> (last visited Sept. 9, 2008).

304. United States v. Miller, 425 U.S. 435 (1976).

305. Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, tit. XI, §§ 1101–21, 92 Stat. 3697 (19e78) (codified as amended at 12 U.S.C. §§ 3401–22 (2000 & Supp. V 2005)).

306. *Id.*; *see also* H.R. Rep. No. 95-1383, at 34 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9306–07.

307. Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified as amended in scattered sections of the U.S.C.). Title XV is also known as the Annunzio-Wylie Anti-Money Laundering Act.

obtain yet more information on their customers.<sup>308</sup> More than 200,000 letters and appeals descended on the Treasury.<sup>309</sup> Congress began openly debating whether to roll back the existing controls and the Treasury abandoned its proposed measures.<sup>310</sup>

Many of the measures previously rejected—precisely because of privacy concerns—flew through the legislature under Title III of the USA PATRIOT Act. In January 2002, then Assistant Attorney General Michael Chertoff notified the Senate Banking Committee that, in relation to the USA PATRIOT Act's new information-gathering powers, "the principal provisions of the Right to Financial Privacy Act no longer apply to letter requests by a government authority authorized to conduct investigations or intelligence analysis for purposes related to international terrorism."<sup>311</sup>

The new powers had to be tailored to specific sectors, creating a dense and complex web of federal authority. The Treasury subsequently released hundreds of pages of regulations. These changes narrowed citizens' privacy, giving Treasury insight to everyday financial transactions. More than 24,000 banks and credit unions in the United States, as well as broker-dealers and commodity traders, are now required to file SARs.<sup>312</sup> In excess of \$160,000, money service businesses are required now to register with the Treasury Department, while any cash transaction in excess of \$10,000 must be filed by travel agencies, casinos, real-estate agents, automobile and boat retailers, jewelers, financial institutions, the Post Office, or, indeed, anyone who receives travelers' cheques or money orders.<sup>313</sup>

"Financial institutions" is understood under the implementing regulations to include any entity that "significantly engage[s]" in activities that range from appraising real estate and personal property, or providing general economic information or statistical forecasting services, to providing finance-related educational courses or instructional materials, or providing ancillary services through a bank (such as selling postage stamps or bus tickets).<sup>314</sup> Any organization or individual that provides support services for these activities—including data processing services and courier firms—is

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308. See Know Your Customer, 12 C.F.R. § 563 (withdrawn Mar. 29, 1999).

309. Robert O'Harrow, Jr., *Disputed Bank Plan Dropped; Regulators Bow to Privacy Fears*, WASH. POST, Mar. 24, 1999, at E01.

310. *Id.*

311. Rob Garver, *Will USA Patriot Act Prove A Recipe for Trouble?*, AM. BANKER, Apr. 23, 2002, at 10; see also Rob Garver, *Launder Rules Will Apply Across Financial Services*, AM. BANKER, Apr. 23, 2002, at 1.

312. DEP'T OF THE TREAS., A REPORT TO CONGRESS IN ACCORDANCE WITH § 357 OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 6 (Apr. 26, 2002).

313. *Id.*

314. Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 HARV. C.R.-C.L. L. REV. 435, 445 (2008) (citing 12 C.F.R. § 225.86 (2007)).

included.<sup>315</sup>

FinCen now receives millions of Currency Transaction Reports and SARs, and then combines the data “with other governmental and commercial information from a variety of data sources, researches and analyzes the information, and incorporates other critical forms of intelligence.”<sup>316</sup> “Third party doctrine”, which has long dominated the courts’ view of information, largely insulates these surveillance tools from falling afoul of constitutional constraints.

*E. Executive Order 13,224 as Ultra Vires the IEEPA*

In addition to the constitutional issues raised above, there is serious question as to whether the IEEPA authorizes Executive Order 13,224 or whether the instrument, and actions taken under it, are *ultra vires*.<sup>317</sup> The history and use of the IEEPA is here relevant.

TWEA, the IEEPA’s statutory predecessor, lay firmly within the realm of foreign relations. From its introduction in World War I, through its reconsideration in 1977, TWEA was aimed at states and individuals linked to country-targeted economic sanctions. Nine months before TWEA reform legislation was introduced into Congress, the National Emergencies Act, which terminated existing emergency authorities within a twenty-four-month period and established procedures for declaring further national emergencies, exempted § 5(b) of TWEA from its remit.<sup>318</sup> Difficult legal and policy questions surrounded the foreign policy component of existing measures. Accordingly, the National Emergencies Act directed the Committee on International Relations to examine these questions and to report to the House.<sup>319</sup>

The result was H.R. 7738—legislation crafted following deliberations by the Subcommittee on International Economic Policy and Trade. Representative Jonathan Bingham (D-NY) who chaired the committee, reported back to the House that the President’s authority under TWEA was extremely broad.<sup>320</sup> He noted that, under it, the President could:

regulate or prohibit any transaction in foreign exchange, any banking transfer, and the importing or exporting of money or securities; Prohibit the withdrawal from the United States of any property in which any foreign country or national has any interest; Vest—or take title to—any such property; and Use

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315. *Id.*

316. DEP’T OF THE TREAS., *supra* note 312, at 9.

317. Memo in Support of Plaintiffs’ Motion, *supra* note 162, at 2.

318. National Emergencies Act of 1976, Pub. L. No. 94-412 tit. I, § 101, 90 Stat. 1255 (1976) (codified at 50 U.S.C. § 1601 (2000)).

319. 123 CONG. REC. 22,475 (1977) (statement of Rep. Bingham).

320. *Id.*

such property in the interest and for the benefit of the United States.<sup>321</sup>

TWEA further empowered the President in his exercise of these powers to “seize the records of any person.”<sup>322</sup> Once an emergency had been declared, this power could continue indefinitely. Moreover, the statute did not require that the exercise of emergency authorities bear any relation to the initial declaration of emergency.

Under § 5(b) of this statute, “the United States ha[d] maintained trade embargoes on North Korea, Vietnam, Cambodia, and Cuba for . . . up to twenty-seven years” and, in the dying embers of World War II, it began blocking the assets of Eastern European countries.<sup>323</sup> Between September 1976 and June 1977, § 5(b) was used to continue export controls during a lapse in the Export Administration Act. Bingham explained, “[n]one of these uses of § 5(b) respond to any existing emergency; they are justified on the basis of emergencies long past. In short, these authorities are used because they are convenient—because they are there.”<sup>324</sup>

While such authorities might be necessary during times of war Bingham suggested:

It is the height of folly to make emergency powers routinely available to the President with no standards to guide their use and no opportunity for congressional review. It is an abdication of our responsibility to make available to the President, for the day-to-day conduct of foreign policy, powers originally designed exclusively for use in time of war declared by Congress.<sup>325</sup>

Other legislators agreed, saying that, under existing measures, the President had “the power to act unilaterally in a virtually unrestricted fashion in an emergency which he alone ha[d] declared.”<sup>326</sup>

H.R. 7738 sought to address these concerns by limiting the President’s power—and thus restoring the “organic relationship between the two branches.”<sup>327</sup> It was hailed on both sides of the aisle as “a significant milestone in the establishment of reasonable limits on the powers of the Presidency.”<sup>328</sup>

The powers contained in TWEA were to apply only in times of war—not merely national emergency. Title II of the new legislation, the IEEPA, provided authorities “both more limited in scope than

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321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. 123 CONG. REC. 22,477 (1977) (statement of Rep. Leggett).

327. 123 CONG. REC. 22,477 (statement of Rep. Whalen).

328. 123 CONG. REC. 22,477 (statement of Rep. Leggett).

those of § 5(b), and subject to various procedural limitations.”<sup>329</sup> Specifically, Title II omitted “the power to vest property, to seize records, or to regulate purely domestic transactions or noneconomic transactions.”<sup>330</sup> The “savings provision” allowed the President to “continue to block the assets of a foreign country pending settlement of American claims against that country.”<sup>331</sup>

The clear emphasis was on U.S. foreign relations with other states. The grant of authorities, according to the Chairman of the committee, purposefully did *not* include “the power to regulate purely domestic transaction[s].”<sup>332</sup> Throughout the House and Senate discussions, the explicit understanding was that the measures related to foreign—specifically, state to state—relations.<sup>333</sup> In none of the debates on the measures did representatives consider the possibility that the IEEPA would be applied to individuals unconnected with targeted country sanctions.<sup>334</sup>

The statutory language adopted by the legislature reflected this congressional intent. Following the declaration of a national emergency, the statute authorizes the President to prevent or prohibit “transactions involving any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.”<sup>335</sup> It allows transfers or payments to be blocked to the extent that they “involve any interest of any foreign country or a national thereof.”<sup>336</sup> The statute always refers to foreign nationals in connection with a foreign country, with “thereof” creating a nexus between the two.<sup>337</sup> Indeed, until 1995, Executive Orders under the IEEPA solely targeted foreign states and nationals connected with

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329. 123 CONG. REC. 22,475 (1977) (statement of Rep. Bingham).

330. *Id.*

331. *Id.* (emphasis added).

332. 123 CONG. REC. 22,476 (1977) (statement of Rep. Bingham); *see also* 123 CONG. REC. 22,477 (1977) (statement of Rep. Leggett) (“Notable among [the powers exempted from the IEEPA] is the power to regulate purely domestic transactions. It seems to me that this is an area particularly open to abuse. We will take an important step toward our goal of reasonable executive power by restricting this option.”).

333. *See, e.g.*, 123 CONG. REC. 22,477 (1977) (stating that § 203(b) was “designed . . . to preclude policies that would totally isolate the people of the United States from the people of any other country”); 123 CONG. REC. 38,166 (1977) (statement of Rep. Wolff) (“But what if we got involved in some other type of conflict that was not declared a national emergency, and the Congress desired at that point to put certain restrictions on trading with that particular country or countries involved, would we still, under the provisions of this act, have the opportunity of putting those restrictions in?”).

334. Appellants’ Opening Brief at 52, *Humanitarian Law Project v. U.S. Dep’t of Treas.*, Appeal No.07-55893 (9th Cir. Jan. 7, 2008).

335. 50 U.S.C. § 1702(a)(1)(B) (2000).

336. 50 U.S.C. § 1702(a)(1)(A)(ii) (2000).

337. 50 U.S.C. § 1702(a) (2000 & Supp V. 2005).

the target states. As the plaintiffs argued in *al Haramain Islamic Foundation*: “There is no evidence that in enacting IEEPA, a statute expressly designed to restrict Presidential power, Congress gave the President an entirely new and unprecedented power to blacklist political organizations or individuals, wholly apart from nation-targeted sanctions.”<sup>338</sup>

In strong contrast, AEDPA did expressly address the application of economic sanctions to groups not connected to state authorities.<sup>339</sup> The AEDPA defines which groups qualify as targets of economic sanctions, and it creates formal procedures for the designation of FTOs.<sup>340</sup> Had these authorities been available all along in the IEEPA, it presumably would not have been necessary for Congress to add these provisions to the later statute.<sup>341</sup>

It bears noting here that, while only approximately three dozen organizations have been listed under AEDPA as FTOs, the Executive Orders under the IEEPA have designated thousands of individuals and organizations, all under the auspices of legislation originally intended for international dealings with foreign countries.<sup>342</sup>

#### IV. THE LIMITS OF JUDICIAL SCRUTINY

Some would argue that the courts have not played a particularly strong role in anti-terrorist finance simply because the provisions described in the foregoing paragraphs, while giving rise to constitutional scrutiny and coming close to the line, ultimately pass constitutional muster. Where the law runs afoul of constitutional concerns, the courts will—and have—stepped in. Where they do not run afoul of judicial decision-making, controversy should cease. And, if Congress works hard enough, it will eventually get the definitions of “personnel,” “training,” and “expert advice and assistance” right.

But one could also argue—indeed, I am suggesting—that there are certain features of anti-terrorist finance provisions that diminish the court’s role in this area and produce unreliable, discomfiting results. Surviving judicial review is not the same as passing constitutional muster. There is a distinction to be drawn between constitutional norms that are legally valid up to their full conceptual limits, and federal judicial decisions that fall short of these boundaries and can be understood only as marking the edges

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338. Memo in Support of Plaintiffs’ Motion, *supra* note 162, at 37.

339. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of the U.S.C.).

340. 18 U.S.C. § 2339B (2000 & Supp. V 2005); 8 U.S.C. § 1189 (2000); *see also* Memo in Support of Plaintiffs’ Motion, *supra* note 162, at 38–39.

341. Appellants’ Opening Brief at 52–53, Humanitarian Law Project v. U.S. Department of the Treasury, Appeal No. 07-55893 (9th Cir. Jan. 7, 2008).

342. Memo in Support of Plaintiffs’ Motion, *supra* note 162, at 39.

of the judiciary's role in enforcing the norm.<sup>343</sup>

This general idea is not new. In arguing for judicial restraint, James Bradley Thayer long ago recognized a constitutional realm beyond judicial reach.<sup>344</sup> Professor Lawrence Sager later wrote about under-enforced constitutional norms.<sup>345</sup> The literature that followed shifted the discussion from constitutional meaning to constitutional doctrine, in the course of which scholars argued that it is appropriate for the judiciary to develop doctrinal tests that stop short of enforcing the Constitution's full conceptual meaning.<sup>346</sup> As Richard Fallon put it: "the court is entitled to share responsibility for implementing the Constitution."<sup>347</sup>

In the case of anti-terrorist finance, the question that presents itself is whether the courts have underenforced a range of constitutional norms—which ought to have binding force on the executive and legislative branches, quite apart from what the judiciary is willing to uphold. The weak standards of review that mark the designation process for SDGTs and FTOs, political concerns that trump the extent to which Executive Order 13,224 is outside the governing act's authorization, third party doctrine in the context of financial surveillance, and the inability of the courts to evaluate the broad range of provisions working together—that is, the cumulative impact of such provisions—suggest that the other branches have a key role to play in regard to the constitutional underpinnings of the anti-terrorist finance regime.

#### A. *Constitutional Challenge and Judicial Review in the Face of Terrorism*

Owing to the placement of anti-terrorist finance at the intersection of administrative law, national security, foreign relations, and counterterrorism, the standard of review employed by the courts to many of the initiatives introduced in this area tends to be light on critical inquiry and heavy on deference.

The IEEPA and its progeny, for instance, push the courts towards the realm of administrative law. Under the arbitrary and capricious standard of the Administrative Procedure Act, the court, in reviewing the decision of an agency, does not undertake its own

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343. LAWRENCE SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 88 (2004) ("Constitutional norms should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm.").

344. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

345. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

346. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

347. RICHARD FALLON, *IMPLEMENTING THE CONSTITUTION* 6 (2001).

fact-finding.<sup>348</sup> Instead, it must only review the administrative record as assembled by the agency.<sup>349</sup> There is, moreover, a presumption in favor of the validity of the administrative action. If the agency's reasons and policy choices conform to certain minimal standards of rationality, the decision is reasonable and must be upheld.<sup>350</sup> This was precisely the court's determination in the case of the Global Relief Foundation ("GRF")—one of the first entities to be listed under Executive Order 13,224.<sup>351</sup>

In December 2001, Deputy Attorney General Larry Thompson authorized a FISA search of GRF's offices and its director's home.<sup>352</sup> The FBI collected records, video equipment, financial literature, books, tapes, e-mail, and computers, as well as servers, modems, a cell phone, hand-held radios, diskettes, photographs, cassette tapes, a camera, an electronic organizer, credit cards, and cash. The federal government simultaneously froze all GRF assets, forcing the organization to close. Efforts by GRF to sue the state and have its property returned failed.<sup>353</sup> The court held that a federal agency's interpretation of its own regulations "must be given 'controlling weight [when challenged] unless it [was] plainly erroneous or inconsistent with the regulation,'" especially in matters involving foreign policy and national security.<sup>354</sup>

What is perhaps remarkable about this standard of review is that the decision whether to designate an organization can be reached in secret and without due process protections—at least raising questions as to whether such designations are thus arbitrary and capricious. They also can be based on hearsay—raising questions about possible abuses of administrative discretion.

The case of GRF highlights another problem that plagues regulation within the anti-terrorist finance realm: the substantive—and international—dimension of anti-terrorist finance itself. Decisions related to the conduct of foreign relations are so

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348. See 5 U.S.C. § 706 (2000).

349. 5 U.S.C. § 706(2)(A). In this context, the "substantial evidence" standard governing factual review can border on ridiculous: it operates to insulate agency decision making even more than the "arbitrary and capricious" review of overall decision making does. 5 U.S.C. § 706(2)(E).

350. 5 U.S.C. § 706(2)(A).

351. *Global Relief Found., Inc. v. O'Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002). GRF, which began operating in 1992 as a domestic, nonprofit enterprise headquartered in Illinois, funneled millions of dollars to alleviate human suffering in twenty-five states. *Id.* at 785. In 1995, it funded programs in Chechnya, Bosnia, Pakistan, Kashmir, and Lebanon. *Id.* In 1996, it expanded to Afghanistan and Azerbaijan; in 1997, to Bangladesh; in 1998, to Iraq and Somalia; in 1999, to Albania, Belgium, China, Eritrea, Kosovo, and Turkey; and in 2000, to Ethiopia, Jordan, and Sierra Leone. *Id.* It also funded programs in Gaza and the West Bank. *Id.*

352. *Id.* at 784; see also 50 U.S.C. §§ 1821–29 (2000).

353. *Global Relief Found., Inc.*, 207 F. Supp. 2d at 779, 787.

354. *Id.* at 792–93.

exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference. Courts have already accounted for this consideration by giving the Executive wide berth. In the second of four challenges that have been brought to date against the IEEPA, one court specifically cited foreign policy implications in finding that the blocking of assets does not raise a cognizable Fourth Amendment claim.<sup>355</sup>

The national security component of anti-terrorist activity further disempowers the judiciary. Thus, for instance, the Government's overriding interest in preventing terrorist attacks carries otherwise suspect measures past First Amendment challenges. In regard to speech impacted by Executive Order 13,224, the courts have found that the President has the authority to issue an executive order declaring a national emergency.<sup>356</sup> So, too, does he have the power to block and freeze an organization's assets.<sup>357</sup> Because these actions further the important governmental interest of protecting citizens from terrorist attack, this interest is unrelated to the suppression of free expression. In *Islamic American Relief Agency v. Unidentified FBI Agents*, the court concluded that the incidental restriction on the First Amendment was no greater than necessary.<sup>358</sup> The order did not fall afoul of the right to freedom of association. Although the blocking order completely prohibited contributions, it did not prohibit membership in the organization—or endorsement of its views. Nor did the order violate the First Amendment right to free exercise of religion.<sup>359</sup>

The national security interest also allows new initiatives to escape equal protection claims. Despite the uneven application of SDGT designation, FTO designation, prosecution of material support provisions, and, indeed, use of surveillance authorities, efforts to challenge these powers on such constitutional grounds have failed. The rational and neutral interest in blocking an organization's assets, following an administrative finding that an organization is linked to terrorism, is sufficient to keep the state from violating the equal protection clause.

In sum, administrative standards, the international component of anti-terrorist finance, and the national security interests entailed in the terrorist challenge work together to weaken the vigor with which the judiciary reviews ever-growing Executive authority in this area. It is not impossible to mount a successful constitutional challenge to orders issued under the IEEPA or AEDPA. But rulings

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355. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 46–48 (D.C. Cir. 2005); U.S. CONST. amend. IV; 50 U.S.C. § 1701 (2000).

356. *Islamic Am. Relief Agency*, 394 F. Supp. 2d at 46–47.

357. *Id.*

358. *Id.* at 53.

359. *Id.* at 54–55.

of unconstitutionality are far and away the exception and not the rule. In part, because of the nature of anti-terrorist finance, courts generally—and, it appears, the Supreme Court in particular, which has yet to weigh in on the circuit split—have sidestepped a number of challenges to the provisions. Similarly, they have refrained from exercising review over a range of areas, such as monitoring the conflict of interest created by OFAC being in charge of releasing funds for the target to bring suit against the Treasury, or examining the basis on which organizations are designated, to probing the ban on providing assistance to relieve humanitarian suffering thereby caused.

*B. Legal Considerations and Administrative Practice*

Executive Order 13,224 may well be *ultra vires* the governing statute. The legislative history indicates that the statute was meant to apply to foreign states and individuals linked to those states.<sup>360</sup> Yet there is reason to question whether the judiciary would uphold such a claim. For the past decade, the authorities have been applied to individuals unconnected to national affiliation.<sup>361</sup> It was not until 2008 that individuals challenged an executive order under the IEEPA as lacking legal authorization. The sheer avalanche of similar provisions, every one of which addresses issues related to national security and foreign affairs, makes it even less likely that the courts will uphold this claim. This does not mean that no Constitutional considerations attend: the trend raises concerns related both to individual rights and to the structural separation of powers between the branches.

*C. Financial Information and Constitutional Challenge*

Fourth Amendment concerns are engendered by the institution of due diligence requirements that allow for the broad collection of financial information. Here, too, courts have yet to sustain constitutional challenge. In part this may be because it is devilishly difficult to demonstrate standing when information is classified. When the scope, operation, and targets of surveillance are kept secret, how does a plaintiff know (and convince a court) that injury has resulted from a particular surveillance program, so as to give rise to standing to sue? Simultaneously, third-party doctrine—whatever its critics might say—is well-settled in American jurisprudence. Under this approach, third party records are considered voluntary when individuals have willingly relinquished them. What is not clear is how voluntariness plays into the current anti-terrorist regime—as the reporting requirements demanded of financial institutions somewhat curtail the judicial assumption of

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360. See *supra* notes 62–71 and accompanying text.

361. See *supra* notes 39–44 and accompanying text.

voluntariness.<sup>362</sup>

There is an associated constitutional concern in the realm of financial surveillance: in the absence of more specific guidance from the state, businesses are increasingly turning to political and religious affiliation as a way to minimize the expense of responding to increasingly onerous reporting requirements—raising substantive due process and equal protection concerns similar to those under Executive Order 13,224 and FTO provisions under AEDPA. While the provisions themselves may clearly survive constitutional challenge, their *de facto* operation raises troubling concerns.

SARs, for instance, under the USA PATRIOT Act, must now be filed by a wide range of financial institutions. By 2005, these institutions were submitting approximately twenty percent of their SARs in response to law enforcement inquiries and matches with OFAC's SDGT list.<sup>363</sup> In other words, *eighty percent of the SARs submitted by industry were voluntary*. Lacking information about who exactly might be involved in terrorism—as well as effective algorithms to uncover patterns in terrorist finance—industry turned to ethnic and religious profiling. According to the Bank Secrecy Act Advisory Group, depository institutions tended to focus on charitable organizations and Islamic foundations; on individuals presenting personal identification from Iraq, Afghanistan, and specific Middle Eastern states; and on wire activity to or from suspect states.<sup>364</sup> Casinos, in turn, focused on individuals connected with the Middle East—that is, those having Arab-sounding names or carrying passports from states considered suspicious.<sup>365</sup>

The filing of SARs based on these assumptions meant that otherwise innocuous activity became suspicious merely through someone's ethnicity and national origin. And suspects' names quickly ascended the reporting chain. In the United States, the number of names forwarded to federal law enforcement for further action correspondingly increased with the number of SARs filed: from just 9112 in all of 2000, the total increased to 13,649 in just the first ten months of 2002.<sup>366</sup>

These measures disproportionately impact individuals from particular ethnic, religious, and national groups; yet the likelihood of the courts upholding substantive due process or equal protection claims, particularly in light of the national security claim and the

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362. PRIVACY PROTECTION STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY: THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION ch. 9 (1977), available at <http://www.epic.org/privacy/ppsc1977report>.

363. Bank Secrecy Act Advisory Group, Issue 8, *supra* note 224, at 10.

364. Bank Secrecy Act Advisory Group, Issue 5, *supra* note 225, at 22–23. This trend continued. See Bank Secrecy Act Advisory Group, Issue 8, *supra* note 224, at 15.

365. Bank Secrecy Act Advisory Group, Issue 8, *supra* note 224, at 12–13.

366. Bank Secrecy Act Advisory Group, Issue 5, *supra* note 225, at 13.

deference granted the executive branch, is relatively low. This is especially so given the “shadow” role played by voluntary, intervening actions of private parties.

The use of such devices reverberates well beyond the immediate filing of the report: SARs, and documents that would disclose the existence of a SAR, are privileged from discovery in civil litigation—even if the discovery is necessary for an affirmative defense.<sup>367</sup> Moreover, from 2003, the United States began exchanging SARs with other states through the Financial Investigative Units,<sup>368</sup> raising questions about the international implications of these changes. By operating under international treaties, such as the UN Convention on the Suppression of Financing of Terrorism, and under “soft law” (for instance, FATF’s Forty Recommendations), the federal government can circumvent privacy laws that might otherwise block the transfer of financial data.<sup>369</sup>

#### *D. Cumulative Concerns*

The courts, in evaluating the expansion of authorities on a case-by-case basis, do not take a comprehensive view of the evolution of the anti-terrorist finance regime. Yet the cumulative effect is substantial. The foregoing conversation, moreover, highlights only three streams in the river of antiterrorist finance changes post-9/11.

Complex rights and policy considerations are at stake. Under such circumstances, Sager suggests, “the judiciary justifiably declines to enforce the Constitution to its outermost margins, and defers—at least in the first instance—to the political branches of the state and federal governments.”<sup>370</sup> With this admonition in mind, it is to the political branches—and, in particular, to the legislature—I turn to carefully consider the constitutional costs associated with the current anti-terrorist finance regime.

Congress has greater latitude than the courts in its approach to anti-terrorist finance. It can choose not to rely on the judiciary to “clean up” the measures and, instead, exercise extreme vigilance in the first instance. In the current environment, it is perhaps especially important for Congress to play an energetic role. The Executive is asserting itself vis-à-vis the other branches to an unprecedented degree. Anti-terrorism initiatives are continually intensifying. And extraordinary initiatives specially developed for anti-terrorism are bleeding over to anti-drug measures, anti-money

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367. See *Cotton v. Private Bank & Trust Co.*, 235 F. Supp. 2d 809, 813–15 (N.D. Ill. 2002). The Bank Secrecy Act is the source of this authority, although FinCEN regulations and federal bank regulators’ regulations establish absolute privilege. See Bank Secrecy Act Advisory Group, Issue 5, *supra* note 225, at 66–67.

368. Bank Secrecy Act Advisory Group, Issue 5, *supra* note 225, at 1.

369. Bruce Zagaris, *supra* note 117, at 136–42.

370. SAGER, *supra* note 343, at 87.

laundering initiatives, and criminal law, threatening the transfer of these authorities well beyond the anti-terrorist finance realm.<sup>371</sup>

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371. See DONOHUE, *THE COST OF COUNTERTERRORISM*, *supra* note 1, ch. 3.

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