Chapter 3

Lack of Appeal and Due Process Rights Leaves Charities and Foundations Open to Mistake and Abuse

The problems with the vague legal framework that governs when charities and foundations can be shut down are exacerbated by the lack of traditional due process in the International Emergency Economic Powers Act (IEEPA) to protect against mistake or abuse. Any challenge to the Department of Treasury's (Treasury) actions must happen within the context of no pre-seizure notice or hearing, classified evidence that the organization can never view, and a court system that gives extreme deference to Treasury actions when national security issues are involved. This standard makes it too easy for Treasury to create an inference of wrongdoing based on unsubstantiated evidence, rather than building a clear, accurate, and convincing case that a charity or foundation is supporting terrorism.

Due Process and the International Emergency Economic Powers Act (IEEPA)

IEEPA gives the Executive Branch unchecked power to designate any group as a terrorist organization.[71] Once a charity or foundation is designated for providing material support to a prohibited entity, all of its U.S. property and financial assets may be frozen without notice.[72] Unlike traditional criminal justice standards, the government does not need to demonstrate "probable cause";[73] it only needs to act "reasonably."[74] IEEPA permits enforcement actions prior to designating the organization. Consequently, property can be seized "pending an investigation," with no deadline on when the investigation must end. The 9/11 Commission Report of August 2004 noted, "The provision of the IEEPA that allows the blocking of assets 'during the pendency of an investigation' … raises particular concern in that it can shut down a U.S. entity indefinitely without the more fully developed administrative record necessary for a permanent IEEPA designation."[75]

IEEPA does not provide organizations affected by Treasury enforcement action any independent administrative review process to challenge seizure of assets. Consequently, appeals to the judicial system are the only recourse. Recent actions suggest that even basic due process protections, such as a right to counsel, are not guaranteed. As this

[71] 50 U.S.C. 1704-1706.
[72] EO 13224 Sec.10, Sept. 23, 2001.
[73] Probable cause "exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found," *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Illinois v. Gates*, 462 U.S. 213, 238 (1983); also see http://www.fas.org/sgp/crs/intel/m013006.pdf.
[74] Reasonable suspicion is more than a hunch but considerably below preponderance of the evidence; it occurs when an individuals has an articulable and particularized belief that criminal activity is afoot, *Ornelas v. United States*, 517 U.S. at 695; *Illinois v. Gates*, 462 U.S. at 235.
[75] *Terrorist Financing Staff Monograph to the 9/11 Commission*, p. 8.

chapter will show, the courts have deferred to Treasury because of national security implications, creating a legal "catch-22" for designated charities.

No Right to Hire Defense Counsel

Before an attorney can represent a designated organization, he or she must get a license from Treasury.[76] Representing a designated organization without a Treasury license is considered "material support" to a designated organization and is illegal. In addition, if an organization wishes to pay its legal fees with assets frozen and seized by OFAC (typically the only funding available), it must ask for a separate Treasury license.[77] In the past, OFAC provided licenses to designated organizations to either obtain counsel or access frozen funds for legal fees. However, recent license applications have been denied, so organizations cannot challenge their designations.

In 2004, Islamic American Relief Agency (IARA) applied to OFAC for a license to obtain access to its frozen funds for legal fees while challenging its designation. OFAC responded that any fees must be paid with "fresh funds." In other words, they must be funds raised by IARA *after* its designation and from foreign sources not subject to U.S. laws or in the possession or control of any U.S. person.[78]

In August 2007, Al-Haramain Islamic Foundation-Oregon (Al-Haramain) filed suit in federal court in Portland, OR, seeking removal from the SDGT list.[79] OFAC informed Al-Haramain in February 2008 that use of its frozen funds would be permitted to pay legal fees if:

- The attorneys signed a statement, under penalty of perjury, certifying that the group has no assets of any kind outside the U.S.
- Detailed billing information is submitted to OFAC, including hourly billing rates and number of hours for each phase of the case
- OFAC receives an itemized statement and description of costs
- The attorney signs a certification that the funds are not security for other financial obligations of the group[80]

Treasury's court filings in the Al-Haramain "de-listing" case argue that its policy regarding paying counsel is "rationally related to achieving legitimate government goals…"[81] However, there was no explanation of why allowing an organization to challenge its designation would hinder national security efforts.

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[76] 31 C.F.R. 595.204.

[77] OFAC may issue licenses authorizing a designated entity to access frozen funds for paying attorneys' fees. 31 C.F.R. 595.506; *Global Relief Found.*, 207 F. Supp. 2d at 786.

[78] See William B. Hoffman, How to Approach a New Office of Foreign Assets Control Sanctions Program, 27 *Stetson L. Rev.* 1413, 1422-23 (1998). At least one court has upheld OFAC's fresh-funds rule. *Beobanka d.d. Belgrade v. United States*, Nos. 95 Civ. 5138 (HB), 95 Civ. 5771 (HB), 1997 WL 23182, at *2 (S.D.N.Y. Jan. 22, 1997) (holding that the fresh-funds policy was "rationally related to the legitimate goals of the [Federal Republic of Yugoslavia] sanctions program").

[79] William McCall, "Ex-charity director pleads not guilty on return to Ore." Associated Press (Aug. 16, 2007).

[80] Declaration of Adam Szubin, Dir. Of OFAC, *Al-Haramain Islamic Foundation v. Treasury*, United Stated District Court, District of Oregon, C.V. 07-1155-K1, p. 28-30.

[81] Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss and for Summary Judgment, *Al-Haramain Islamic Foundation v. Treasury*, United Stated District Court, District of Oregon, C.V. 07-1155-K1, p. 34.

Courts Have Deferred to Treasury in Designation Challenges

The Global Relief Foundation (GRF) was shut down in 2001 "pending an investigation."[82] GRF contested the action in the U.S. District Court in the Northern District of Illinois, Eastern Division.[83] While the investigation was pending, GRF was permitted to submit information on its own behalf to Treasury, but it could only respond to Treasury's unclassified information. GRF counsel was not permitted to see secret evidence. The court, which only reviewed the administrative record, did not rule on the merits of Treasury's evidence, but instead only considered whether Treasury's actions were "arbitrary and capricious."[84] It upheld Treasury, and GRF appealed to the U.S. Court of Appeals for the Seventh Circuit. On Oct. 18, 2002, a few days before oral argument on the appeal, OFAC formally designated GRF as a Specially Designated Global Terrorist (SDGT).[85]

On Dec. 31, 2002, the appeals court upheld the lower court decision, finding Treasury's actions reasonable and authorized under IEEPA.[86] The court held the government's interest in stopping terrorism and preventing funds from being transferred out the country as compelling enough to justify the use of secret evidence and to omit a pre-seizure notice or pre-seizure hearing.

The ruling in the GRF case set the standard for cases to come. The courts have generally upheld Treasury's power to designate and shut down charities and foundations, denying organizations basic due process rights. In early 2002, the Holy Land Foundation (Holy Land or HLF) challenged the seizure of its assets in the U.S. District Court for the District of Columbia. Like GRF, Holy Land argued that Treasury violated its due process rights by freezing its assets without notice and using secret evidence. The court upheld Treasury's action,[87] noting that its review was limited to considering whether Treasury's actions were "arbitrary and capricious." Evidence presented by Treasury included hearsay and secret evidence, and Holy Land's evidence was never admitted for consideration.

The court's decision was upheld on appeal in the U.S. Circuit Court for the District of Columbia,[88] which found that "HLF has no right to confront and cross-examine witnesses" and Treasury's designation order "need not disclose the classified information" to be presented to the court in a closed hearing. The court also upheld the seizing and freezing of assets without prior notice, based on IEEPA and the national emergency declared by the president after 9/11, saying it "promotes an important and substantial government interest in combating terrorism."

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[82] Dept. of the Treasury Statement Regarding Designation of the Global Relief Foundation (Oct.18, 2002) PO 3553 at http://www.treas.gov/press/releases/po3553.htm.

[83] *Global Relief Foundation, Inc. v. Paul H. O'Neill, et al.* 207 F. Supp. 2d 779.

[84] "Arbitrary and capricious" is defined as a decision made without regard for the facts and circumstances presented and not based on an established rule or procedure.

[85] Dept. of the Treasury Statement Regarding the Designation of the Global Relief Foundation at http://www.treas.gov/press/releases/po3553.htm.

[86] *Global Relief Foundation, Inc, v. Paul H. O'Neill, Secretary of the Treasury, et al* 315 F.3d 748 U.S. Circuit Court.

[87] *Holy Land Foundation for Relief and Development v. John Ashcroft, et.al.* , 219 F. Supp. 2d 67.

[88] 333 F.3d 156, 2003.

On Dec. 30, 2004, Islamic American Relief Agency-USA (IARA-USA) filed suit in the U.S. District Court for the District of Columbia, asking for a preliminary injunction against its designation and release of its assets and challenging the constitutionality of Treasury's designation and blocking order. The court denied the injunction request in February 2005, and the following September granted the government's motion to dismiss. The court noted that IARA-USA "could challenge the blocking order by writing a letter to the Director of the OFAC." However, IARA-USA was not allowed to see the affidavits supporting the search warrant authorizing the raid on its office, so it could not know what allegations it needed to rebut in such a letter. [89]

In 2007, the U.S. Court of Appeals for the District of Columbia upheld the district court's ruling, saying that "[w]e may not substitute our judgment for OFAC's." The court also stated that "the unclassified record evidence is not overwhelming, but we reiterate that our review – in an area at the intersection of national security, foreign policy, and administrative law – is extremely deferential… [w]e owe the executive branch even more latitude than in the domestic context."[90]

Criminal Cases Expose Flaws in Evidence Used in Designations

To date, only three designated U.S. charities and foundations have faced criminal prosecution. There was a mistrial in the prosecution of the Holy Land Foundation, the case against Benevolence International was dismissed, and charges against IARA-USA are pending. Unlike the civil challenges explained earlier, in criminal trials the government must disclose its evidence, providing defendants and the general public its first glimpse of the administrative record used for designations. Consistently, this evidence has proven to be of poor quality, sometimes based on substandard intelligence or faulty translations. As a result, many observers in the nonprofit sector question the justification for Treasury's designations.[91]

The most revealing example is the evidence used to designate Holy Land. In July 2004, Holy Land requested an investigation by the Department of Justice Inspector General, alleging the Federal Bureau of Investigation (FBI) used erroneous translations of sensitive Israeli intelligence material as the crux of its designation.[92] The request alleged that the designation relied on secret evidence, including a 54-page FBI memo that Holy Land said contained distorted and erroneous translations of Israeli intelligence reports. Holy Land hired an independent translating service to review a four-page FBI document, and 67 discrepancies and errors were found. Instead of launching an investigation, the Justice Department indicted Holy Land and its top officials, charging them with money laundering and providing material support to Hamas.[93]

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[89] *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 2005 U.S. Dist. (D.D.C., 2005).

[90] *Islamic American Relief Agency (IARA-USA) v. Gonzales*, (D.C. Cir. Feb. 13, 2007). Available at http://pacer.cadc.uscourts.gov/docs/common/opinions/200702/05-5447a.pdf.

[91] Under the Classified Information Procedures Act, defense attorneys had government clearances that allowed them to review classified material. However, they were prohibited from sharing it with their clients. *Los Angeles Times*, "Evidence Against Muslim Charity Seems Fabricated" (Feb. 25, 2007).

[92] Eric Lichtblau, "Islamic Charity Says FBI Falsified Evidence Against It", *New York Times* (July 27, 2004). Available at http://query.nytimes.com/gst/fullpage.html?res=9F0CE6D6153DF934A15754C0A9629C8B63&sec=&spon=&pagewanted=all.

[93] Indictment available online at http://freedomtogive.com/files/HLF_indmt.pdf.

A June 2006 article in the *Los Angeles Times*[94] revealed the translation discrepancies found within the FBI memo and other problems with the prosecution's evidence, including:

- The prosecution argued that many of the orphans supported by Holy Land were children of suicide bombers. To support this argument, it presented an "orphans book" seized from Holy Land's office. The *Los Angeles Times* review of this document identified 69 of 400 orphans in the book labeled as children of "martyrs." Noting that the term "martyr" is used broadly to include "common accidents and incidents," the article quoted a sworn statement by the former head of Holy Land's Gaza office, who said social workers interviewed all 69 families and found only 4 had immediate family members that died from making bombs. Of the remaining 65 orphans, 12 lost family members to Israeli troops, 8 were killed by Palestinians for allegedly collaborating with Israel, and the remaining 45 were victims of robberies, heart attacks, accidents, and other non-political deaths.

- Prosecutors also disclosed in pre-trial filings that they had 21 binders with over 8,000 pages of Israeli intelligence information, in addition to previous Israeli intelligence used in the case. Legal scholars quoted in the article expressed concern over the interpretation of foreign intelligence. A former deputy attorney general in the Reagan administration explained, "What really makes me nervous is the foreign translations. Nuances are important in languages, so things can get lost in translations."

- An FBI memo quotes the manager of Holy Land's Jerusalem office as saying their money was "channeled to Hamas." However, Holy Land attorneys argued that the Arabic to Hebrew to English translation should correctly say there is "no connection."

Another serious question about the evidence became public in February 2007 when defense lawyers filed motions that revealed significant discrepancies between transcripts of a 1996 FBI-wiretapped conversation and the official summary. The defense motions asked for additional surveillance material to be made available to them because the summaries contained alleged anti-Semitic remarks attributed to Holy Land executive director Shukri Abu Baker that were not in the actual transcripts. In March 2007, federal Judge Joe Fish denied their request to declassify an estimated ten years of surveillance transcripts so they could be reviewed for accuracy, saying there was no evidence the problem was widespread. However, he said it was disturbing that the inflammatory language was included in the summary but not found in the transcripts and told the defense they could renew their motion if they discovered similar errors.[95]

On Oct. 22, 2007, the jury deadlocked on most of the 197 charges, resulting in a mistrial. David Cole, a Georgetown University law professor who specializes in constitutional

[94] Greg Krikorian, "Questions Arise in Case Over Islamic Charity," *Los Angeles Times* (June 18, 2006).
[95] Greg Krikorian, "Judge rejects request by Muslim charity," *Los Angeles Times* (March 1, 2007).

issues related to terrorism, told the *Los Angeles Times,* "This rais[es] serious questions about the administrative process that enabled the government to shut down Holy Land almost six years ago, long before criminal charges were brought."[96]

The government was also unable to prove support for terrorism when it prosecuted Benevolence International Foundation (BIF). The case began in January 2002 when BIF filed suit[97] to contest its designation and closure. In April 2002, the government charged BIF and its executive director, Ennam Arnaout, with making false statements in the BIF appeal when they denied association with al-Qaeda. At the criminal trial in February 2003, Judge Suzanne B. Conlon dismissed the charges against BIF,[98] holding that the prosecution had "failed to connect the dots" to prove a relationship between BIF, Arnaout, and bin Laden.

By the time the criminal case was resolved, BIF's financial resources were depleted, and it was not able to file another civil action challenging seizure of its assets.[99] In a speech at Pace University Law School, BIF attorney Matthew J. Piers described the legal action against BIF as the "malevolent destruction of a Muslim charity."[100] He noted that the government's case was founded on poor intelligence and a case of mistaken identity. Piers said, "[I]t is hard to see how the government's activities with regard to Muslim charities have had any positive effect on the war on terrorism … One thing is clear: critically needed resources for the many refugees and people living in poverty and other dire circumstances throughout the Islamic world have been terminated."

To date, the government has not successfully prosecuted any of the seven designated U.S. charities or foundations on terrorism charges. As with HLF and BIF, it is likely that insufficient evidence is to blame. If designated nonprofits were afforded adequate due process rights that would test the accuracy of Treasury's evidence, it would be possible to avoid what may be mistaken designations and the wasted time and resources involved when criminal prosecutions are based on questionable evidence. It is also important to note that despite being unable to successfully prosecute any of the seven organizations, Treasury's actions have devastated the groups' operations, and their assets remain frozen.

[96] "Mistrial in Holy Land terrorism financing case," *Los Angeles Times* (Oct. 23, 2007).
[97] *Benevolence Int'l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002).
[98] Arnaout pleaded guilty to a lesser charge of fraud, admitting that he led BIF donors to believe funds were being used for humanitarian purposes, but that some funds were diverted to Chechen and Bosnian soldiers. He is currently serving an 11-year sentence. This outcome – holding individual bad actors responsible – makes more sense than punishing the entire organization.
[99] In May 2002, the U.S. District Court for the Northern District of Illinois stayed the civil case pending the outcome of the criminal case, then dismissed the civil case on its own motion (200 F. Supp. 2d 935).
[100] Speech at Pace University School of Law, December 2004.

The Disconnect: U.S. Does Not Follow the State Department's "Guiding Principles on Non-Governmental Organizations"

In December 2006, the State Department launched an initiative to support the work of human rights defenders throughout the globe. Part of the initiative was the "Guiding Principles on Non-Governmental Organizations" (Principles), intended to guide the U.S. government's treatment of nonprofits and to assess the actions of other governments. However, there are glaring discrepancies between these Principles and the counterterrorism laws and policies applied to U.S. nonprofits by the federal government. This chart briefly compares existing U.S. counterterrorism measures to the Principles.

Guiding Principles on Non-Governmental Organizations

Dept. of State Bureau of Democracy, Human Rights, and Labor
December 14, 2006

Preamble: Recognizing that non-governmental organizations (NGOs)* are essential to the development and success of free societies and that they play a vital role in ensuring accountable, democratic government,

And recalling the right to freedom of expression, peaceful assembly and association enshrined in the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the UN Declaration on Human Rights Defenders,

We hereby pledge our commitment to the following principles and our determination to work for their full implementation throughout the world:

*As used here, the term NGOs includes independent public policy advocacy organizations, non-profit organizations that defend human rights and promote democracy, humanitarian organizations, private foundations and funds, charitable trusts, societies, associations and non-profit corporations. It does not include political parties.

Text	Commentary
1. Individuals should be permitted to form, join and participate in NGOs of their choosing in the exercise of the rights to freedom of expression, peaceful assembly and association.	National security programs have been used for surveillance of U.S. groups that openly dissent from the administration's policies.
2. Any restrictions which may be placed on the exercise by members of NGOs of the rights to freedom of expression, peaceful assembly and association must be consistent with international legal obligations.	The excessive use of watch lists interferes with NGOs working in countries where governments use such lists to suppress political opposition. The Council of Europe has said the lack of standards and due process for watch lists violates basic human rights. (http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=717)

3. NGOs should be permitted to carry out their peaceful work in a hospitable environment free from fear of harassment, reprisal, intimidation and discrimination.	Treasury's *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities* interfere with U.S. NGO operations by imposing inappropriate procedures that place charities in the role of government investigators. This can put the lives of international aid workers at risk.
4. Acknowledging governments' authority to regulate entities within their territory to promote the public welfare, such laws and administrative measures should protect – not impede – the peaceful operation of NGOs and be enforced in an apolitical, fair, transparent and consistent manner.	Because Treasury has the power to seize and freeze NGO assets without notice or meaningful appeal, NGOs fear reprisals if their operations do not align with U.S. government political objectives.
5. Criminal and civil legal actions brought by governments against NGOs, like those brought against all individuals and organizations, should be based on tenets of due process and equality before the law.	U.S. nonprofits can be shut down and have their funds frozen and seized, without notice and based on secret evidence. Nonprofits have no right to present their own evidence in court or get independent review of Treasury's action. Treasury has even denied them access to seized funds to pay for legal counsel to challenge Treasury actions.
6. NGOs should be permitted to seek, receive, manage and administer for their peaceful activities financial support from domestic, foreign and international entities.	Donors, including individuals and grantmaking foundations, are fearful of prosecution for supporting the peaceful activities of organizations in conflict areas or areas controlled by designatied organizations.
7. NGOs should be free to seek, receive and impart information and ideas, including advocating their opinions to governments and the public within and outside the countries in which they are based.	Some U.S. nonprofits, including academic institutions, have been unable to sponsor public forums and events because the government has denied visas for foreign speakers that are critical of its policies. Denial of visas has also affected the ability of universities to hire foreign faculty members.
8. Governments should not interfere with NGOs' access to domestic- and foreign-based media.	Government scrutiny of Internet sites has generated surveillance of groups that dissent from administration policies and even resulted in criminal prosecution of a nonprofit volunteer webmaster (who was acquitted).
9. NGOs should be free to maintain contact and cooperate with their own members and other elements of civil society within and outside the countries in which they are based, as well as with governments and international bodies.	Executive Order 13224 makes it illegal to be "otherwise associated with" any person or entity on the Specially Designated Nationals terrorist watch list. In addition, USAID has starting requiring grantees to collect detailed personal information on its staff and partner organizations overseas to be submitted to the government for "vetting." This puts USAID grant recipients in the role of government spies and threatens the integrity of civil society relationships.
10. Whenever the aforementioned NGO principles are violated, it is imperative that democratic nations act in their defense.	Congress has failed to provide adequate oversight of the impacts counterterrorism measures have on U.S. nonprofits, and the courts have failed to provide nonprofits with fundamental constitutional protections.

The Principles are online at http://www.state.gov/g/drl/rls/77771.htm.