FEEDING HUMANITY, STARVING TERROR: THE UTILITY OF AID IN A COMPREHENSIVE ANTITERRORISM FINANCING STRATEGY

Aloke Chakravarty

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FINANCING STRATEGY

ALOKE CHAKRAVARTY*

INTRODUCTION

The current approach to combating the financing of terror relies heavily upon trying to deprive resources from developed economies from flowing to terrorist organizations. An effective long-term strategy to reduce support to terrorist groups also requires the building of a popular capacity to deter terrorism as a means to an end. In underdeveloped economies, the influx of humanitarian and development aid by both private and public sectors can do so by helping to mitigate the socioeconomic factors that exacerbate the attraction to violence. Simply reacting to existing funding streams

* J.D., Assistant United States Attorney, District of Massachusetts; former Assistant General Counsel, Federal Bureau of Investigation. This work reflects solely the views of the author and does not represent the views of the United States Department of Justice or any other component of the government. Special thanks to Denise Katz for her invaluable assistance.

1. The use of the phrase terrorist organization in this paper is designed to capture those organizations that directly or indirectly engage, in whole or in part, in terrorism to achieve their ends. See generally JIMMY GURULE, UNFUNDING TERROR (2008).


does little to systemically undermine the ideological bases for terrorism’s resonance. Even as sanctions, regimes, and blocking actions have been expanded internationally with increasing cooperation and technical savvy, they do not fully reach the most crucial regions, where government is weak and where terrorists find safe haven. In addition, the current regulation of informal value transfer systems (IVTS) and alternative funding models lack the sophistication necessary to penetrate these havens. Though a supply-based approach of monetary controls is essential to starve terror, in order to be effective in the long-term, there must be complementary conduits for the provision of development aid to reduce demand. Fostering both public and private aid renders vulnerable populations more resilient to terror groups’ attempts to recruit, find safe harbor, and manipulate toward their political objectives. Moreover, the utility of terror becomes less attractive when other means fill the humanitarian void.

In the United States, the collateral effect of encouraging private charitable aid also stands to increase the enfranchisement of domestic diaspora who feel chilled in the support of their native countrymen. These communities are essential partners to homeland security and are responsible for millions of dollars of wealth transfer. In addition to encouraging private aid, the United States can also decrease demand through targeted public aid. Such lubrication of aid will also likely reduce the domestic disgruntlement that increases the incentives for radicalized Americans to undermine or attack U.S. interests. The international effects of increased public and private aid, while directly impacting the populations where the aid is deployed, may also logically improve the status of the American brand and the perception of the motivation of its foreign policy objectives which so often fuels the recruiting fire of terrorist organizations. By increasing counterterrorism development aid uncoupled to broad geopolitical objectives, policy makers will have greater flexibility on more parochial talking points. This outflow of financing, however, if uncoupled with procedural safeguards, vetted recipients, and continued vigilance in blocking transfers to terrorists, would risk those organizations becoming the greatest beneficiaries of the aid. In addition, the perception that

such aid is strictly an act of grace risks perpetuating a patronizing tone of west-centric neocolonialism. Consequently, in lieu of direct governmental aid, developing strategic private-sector and non-governmental organization (NGO) partners with local government involvement—but not control—may buttress the value of government while avoiding the risks of graft, corruption, and resentment, which frequently infect aid dispersal.

It stands to reason that a government that cannot sustainably provide for its population’s needs is less likely to be an effective adopter of international antiterrorism financing mandates. The stabilization and concomitant empowerment of governments where terrorist groups thrive is essential to promote the rule of law and to compete with the ideological drivers that sustain the terrorists. Instability allows terrorist groups to fill the civil infrastructure vacuums created when governments are weak or international sanctions prevent the influx of resources. The role of terrorist organizations that also provide development and humanitarian services lies at the heart of the problem. Developing a sustainable strategy includes

4. A brief vignette illustrates the importance of building a locally governed humanitarian infrastructure. Shortly after noon on October 5, 2009, a uniformed man walked into a heavily fortified United Nations compound in Islamabad, Pakistan. There, inside the World Food Program office, the man triggered a device that blew him and five others into oblivion. At the time, the World Food Program was feeding twenty million Pakistani people. For the bomber’s part, his Taliban handlers had taught him to attack the infidel, no matter how benevolent their ostensible purpose. He was surely assured of a trip to the afterlife, or that he would avenge what the United States had done to his family, or that it would solve some other grievance that could not be combated by a strategy of trying to win this man’s heart or mind. The Taliban targeted this particular site, not only to demonstrate the relative ease with which they could penetrate hardened targets, but also because it distributed humanitarian aid. According to their spokesman, they sought to make the point that any “non-Muslim” aid was unwelcome; the Infidels’ aid was just as bad as their military presence. The Taliban surely calculated the ramifications. The attack would cause locals to question the acceptability of international aid (and international presence) under Sharia (interpretation of Qur’an-based Islamic law), it would further demonstrate the irrelevance of Pakistani governmental support systems, and ultimately it would solidify the value of the Taliban as the organization that, although sanctioned as a terrorist organization, controlled the delivery of social services and humanitarian aid to certain parts of the country. The lesson here in the face of a terrorist act should not be that sanctions do not work, nor is it to withdraw international humanitarian assistance in needy countries, but rather that the U.S. interests are served when they help build local civil infrastructure with local partners in place of a foreign presence, and that the coupling of aid to foreign policy objectives must be flexible. The United States must surely block support for terrorist organizations, but it must also reinforce the rule of law in the countries where they operate, a goal only achievable when basic humanitarian services are being provided to the domestic population.
decreasing the ability for these organizations to thrive among hostile populations.\textsuperscript{5}

This Article explores some of the interlinked domestic legal frameworks and those areas warranting additional attention, which can help a long-term strategy capitalize on the temporary disruption of financing streams that monetary controls provide. The Article describes the major applicable frameworks pertaining to domestic regulation of terrorist financing. It moves on to focus on the conundrum of charitable organizations. The Article then discusses legal aspects of private and public aid remittance, followed by a conceptual proposal for additional tools that may be helpful to make existing antiterrorist financing structures more effective.

\textit{Prudent Regulation and Increased Aid—Supply and Demand}

A realistic way to shift to a more holistic long-term strategy in reducing the financing of terror does not abandon the best of the current practices. It is an unavoidable conclusion that blocking funds to terrorist groups reduces their ability to achieve their illicit goals, at least temporarily. Similarly, there is no denying that there are people in the United States and elsewhere who intentionally seek to fund terrorist organizations and are resourceful and creative in finding ways to achieve their goal.\textsuperscript{6} Ideology fuels most terrorism. Consequently, an economic approach to eliminating terror as a recognized tool for political action must dry up the physical means by which an organization can engage in terror and reduce the ideological drivers which can sustain even the poorest of organizations. In some cases, one is dependent on the other. The battle


\textsuperscript{6} While many of those who intentionally fund terrorist organizations do so in order to support their humanitarian activities, it cannot be denied that many U.S. residents have intended to support terrorist activities. The Muslim-American community recognizes the existence of a few extremists who do most Muslims significant harm in the public eye. See Pew Research Center, Muslim Americans: Middle Class and Mostly Mainstream 6, 54 (2007) [hereinafter Muslim Americans], available at http://pewresearch.org/assets/pdf/muslim-americans.pdf (finding that approximately five percent of the U.S. Muslim population is supportive of Al-Qaeda, eight percent support suicide attacks against civilians, and fifty-eight percent view Al-Qaeda very unfavorably); see also Perl, supra note 2, at 255.
against the financing of terror must be premised on the macroeconomic strategy of reducing demand for the service by making it an undesirable and unnecessary choice in the marketplace of ideas. While this approach is not a panacea for the ideologically intransigent, those outliers are more susceptible to other tactics. The more practical barriers that can be erected, such as sanctions regimes, the more difficult it is for would-be donors to terrorist organizations to be successful.

There are, however, significant inefficiencies in a reactive system of formal monetary controls relying on international cooperation and financial transparency. This is especially the case in the developing world, where IVTS are more frequently used than bank accounts, and where Al-Qaeda’s method of operation is increasingly decentralized and increasingly reliant on inspiring disconnected terrorist operations. Moreover, when such monetary restrictions deprive communities of humanitarian assistance, they conversely reinforce ideological opposition. In those circumstances, the financing of terrorism will prosper wherever there are networked populations who are desperate enough to perceive terrorism as a palatable and effective political option. In addition to the other tools of international power, this perception must be combated internally and externally.

Partnering with the Muslim-American Community

At present, the predominant attention of terrorism financing is focused on the Muslim world. With this concentration, the impact

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8. Organizations and individuals, such as the Taliban, Al-Qaeda, and Usama bin Laden, who, in the name of Islam, have declared war on the United States, have been identified by the intelligence community and policymakers as currently posing the
on and of the diaspora should not be underestimated. Approximately $62 billion is remitted from diaspora communities in the United States to their native lands every year.9 Some of this transfer is pursuant to the religious obligation of Muslims to give obligatory alms, known as zakat. This market power is wielded, in part, by the disproportionately impacted population of Muslim and various ethnic groups who have felt the brunt of civil rights implications of post-September 11, 2001 counterterrorism strategies. Foreign Muslims similarly view the U.S. counterterrorism strategy as imprudent and discriminatory from afar, further chilling their willingness for economic or humanitarian engagement. The cry from the domestic Muslim community (albeit heterogeneous and only partially represented) has been that their desire to support their families and needy overseas communities is being squelched. They also complain that their desire to express their support for organizations or populations who may hold values different from the United States mainstream or to its foreign policy interests has erected barriers to their cooperation with the government.10 By recognizing the impact of this perception, policymakers and those who execute the laws will be better equipped to wield these tools responsibly, and with a longer view on both domestic and foreign policy fronts.

I. LEGAL FRAMEWORK FOR COMBATING TERROR FINANCING

A. Blacklists and Monetary Transfer Regulations

Counterterrorism professionals basically have two categorical tools at their disposal to root out and prevent terrorism financing. The first is the very public act of designating specific individuals and entities as being bad actors and prohibiting financial transactions

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10. According to the Pew Study, seventy-six percent of Muslim Americans viewed their obligation to give zakat as very important. Muslim Americans, supra note 6, at 25. The ACLU and various Muslim advocacy organizations have criticized the existence of the designation process as a violation of the freedom of religion of Muslims whose ability to discharge their obligations to give zakat are allegedly being chilled. See American Civil Liberties Union, Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the “War on Terrorism Financing” 23 (2009), available at http://www.aclu.org/files/pdfs/humanrights/blockingfaith.pdf.
with them. This tactic has been favored by U.S. policymakers and the arms of government that engage in public actions, such as the Departments of Justice and Treasury. The United Nations and other international bodies have followed suit. Public designation serves both a specific and general deterrent purpose and provides a mechanism for enforcement that also provides some objective metric as to the impact of a government’s regulation of terrorism financing. The second approach is that preferred by intelligence professionals and diplomats: to “follow the money.” With this tactic, once the conduits of financing are identified, other tools of national power are used to take action, sometimes covertly. In fact, these approaches are not mutually exclusive and should be blended appropriately to counter varied financing streams.

In addition to requiring increased financial transparency by instituting rigorous currency and suspicious activity reporting, a central pillar of the U.S. government’s effort to combat terrorist financing has been the public campaign to expose the sources and conduits of terrorist financing by designating them on “blacklists.” While the impact of the governmental measures to prevent terrorism financing may have been perceived by some as heavy handed on internal and external relationships, the absolute flow of money to terrorist organizations has been limited. Adequate metrics have not been established to test this value proposition. Yet, one fact is clear: the blocking actions since September 2001 have prevented millions of dollars from going overseas from the United States and

11. The blocking of assets as a metric for the effectiveness of designation is an imperfect barometer but perhaps the only quantifiable one that can be compared across paradigms. When a terrorist organization is deprived of funds, whether earmarked for humanitarian purposes or not, it must poach from other sources in order to engage in its activities. This creates a barrier to their activities, whether acts of terrorism or otherwise.

12. See Anne L. Clunan, U.S. and International Responses to Terrorist Financing, in TERRORISM FINANCING AND STATE RESPONSES, supra note 2, at 260, 277 (suggesting a nonpublic route allows greater flexibility for traditional intelligence-disruption techniques—such as military action, capturing and detaining terrorists, assassinations, covert assistance, pure intelligence gathering, and more liberal information sharing with private sector—and leaves more options at the diplomatic tables).

13. Pursuant to the Bank Secrecy Act and the USA PATRIOT Act, a host of regulations require financial institutions to gather information about the true identities of their customers, a so-called “know your customer” program, which also requires data retention and obligations to file Suspicious Activity Reports (SARs) with the government in the face of unusual patterns or practices. See generally 31 U.S.C. §§ 5311-5330 (2006); 31 C.F.R. pt. 103 (2009).
international partners.\textsuperscript{14} Even if the designations were only partially accurate and only a fraction of this money was destined for terrorist organizations, its absence either prevented operations or forced the depletion of alternative sources of money. By blacklisting terrorists and their financiers and facilitators, the United States and its international partners restrict the flow of funds to these entities, at least through the traditional financial channels.\textsuperscript{15}

Domestically, there are three similar and often parallel designation processes designed to block the flow of funds. The first is the designation of certain foreign organizations and entities as Foreign Terrorist Organizations (FTOs) by the Secretary of State, in consultation with the Attorney General and the Secretary of Treasury.\textsuperscript{16} This designation provides notice of organizations with which one cannot transact business without risking criminal prosecution pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA) for providing material support to terrorist organizations.\textsuperscript{17} Anyone providing funds or other types of material support to these organizations can suffer serious sanctions under the criminal law as implemented under AEDPA.\textsuperscript{18} A related but distinct list that the State Department controls is the Terrorist Exclusion List.\textsuperscript{19} This list authorizes Department of State and Homeland Security authorities to exclude from admission into the United States anyone associated with, including those who donate to, an organization on the list.\textsuperscript{20}

The second relevant designation pertains to Specially Designated Global Terrorist (SDGT) entities or nationals made by the Secretary of Treasury through the Office of Foreign Assets Control


\textsuperscript{15} The preamble to Executive Order 13,224, which is aimed at blocking assets and prohibiting financial transactions with terrorists and their supporters or affiliates, states, “[B]ecause of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists.” Exec. Order No. 13,224, 3 C.F.R. 786 (2002), available as amended at http://www.ustreas.gov/offices/enforcement/ofac/programs/terror/terror.pdf.

\textsuperscript{16} The Secretary of State is authorized to designate FTOs under 8 U.S.C. § 1189.

\textsuperscript{17} 18 U.S.C. § 2339B.

\textsuperscript{18} See id.

\textsuperscript{19} The Secretary of State is authorized to create a Terrorist Exclusion List under 8 U.S.C. § 1182.

\textsuperscript{20} 8 U.S.C. § 1189.
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The authority for this process is based on the International Emergency Economic Powers Act (IEEPA). Designations under IEEPA can only be made if the President has declared a national emergency as required in IEEPA. Although some organizations had previously been blocked based on prior orders, Executive Order 13,224 blocks, pursuant to IEEPA and the United Nations Participation Act (UNPA), the assets of those terrorists and terrorist organizations as well as their affiliates and sponsors.

22. 50 U.S.C. §§ 1701-07. The IEEPA is, among other things, also the enabling criminal statute that continues to provide an enforcement mechanism of the Export Administration Regulations (EAR), 15 C.F.R. pts. 730 and 744, which were established while the Export Administration Act (EAA) was in effect. Exec. Order No. 13,222, 3 C.F.R. 783 (2002); Notice of July 23, 2008, Continuation of Emergency Regarding Export Control Regulations, 73 Fed. Reg. 43,603 (July 25, 2008) (most recent presidential extension of 13,222). The EAA regulates the transfer of technologies that have both civilian and military use, called “dual-use” technologies. Through the EARs, the reach of IEEPA’s criminal-sanction regime prohibits transactions beyond merely the blacklist of SDGTs to those entities and countries to which a license is required prior to exporting dual-use technologies. A similar law, the Arms Export Control Act (AECA), applies to the regulation of exporting technology that has been designated by the Secretary of State as having military application pursuant to the United States Munitions List located within the International Traffic in Arms Regulation (ITAR). 22 U.S.C. § 2778; 22 C.F.R. § 121.1 (2009). AECA is not implemented by IEEPA and carries its own criminal penalty structure. 22 U.S.C. § 2778(c).
23. The President may declare a national emergency if he finds “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.” 50 U.S.C. § 1701(a). The President’s authority “may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared . . . and may not be exercised for any other purpose.” Id. § 1701(b).

Federal courts have upheld the constitutionality of the designation process. See United States v. Afshari, 426 F.3d 1150, 1154-55 (9th Cir. 2005) (holding that Secretary’s designation statute is not facially unconstitutional because judicial review is restricted to D.C. Circuit and that § 8 U.S.C. § 1189(a)(8) of title 8, which prevents an organization from challenging designation in defense of material support charge, does not violate due process); People’s Mujahedin Org. of Iran v. U.S. Dep’t of State, 327
When the Secretary of Treasury designates an individual or an entity as an SDGT, all U.S. persons and U.S.-based organizations, including charities, are prohibited from engaging in financial transactions with those individuals or entities unless authorized by the Treasury Department’s OFAC. \(^{25}\)

In addition to financially isolating designees by freezing or blocking their U.S. assets and stopping the funneling of funds by terrorist supporters, designations also help scrupulous donors and charitable organizations identify persons and entities involved in terrorist fundraising and support activities. \(^{26}\) Under the implementing regulations, even humanitarian aid can be restricted upon a finding of good cause. \(^{27}\) The ability of government to quickly block an organization upon sufficient cause, but before a lengthy investigation can be concluded, is essential to the effectiveness of this paradigm built upon denial of resources to terrorist organizations. Consequently, an important but controversial aspect of IEEPA in the context of terrorist financing is the authorization it gives the government to block an organization’s assets “pending investigation.” \(^{28}\) The final mechanism for blocking assets, not discussed in

\(^{25}\) Protecting Charitable Organizations, supra note 24.

\(^{26}\) Designations thus act to deter supporters from directly funding terrorist activity or facilitating terrorist financing. See Juan Carlos Zarate, Bankrupting Terrorists, EJOURNAL USA, Sept. 2004, at 3, 4 (explaining the inherently preventive function of designations).

\(^{27}\) The Department of Treasury’s regulations promulgated to implement Executive Order 12,947 are found at 31 C.F.R. pt. 595. Specifically, section 595.408(a) prohibits charitable contributions to SDTs, including “donation[s] of funds, goods, services, or technology to relieve human suffering, such as food, clothing or medicine.” 31 C.F.R. § 595.408(a) (2009). This prohibition extends to inchoate offenses. \(^{R}\) Id. § 595.205.

\(^{28}\) 50 U.S.C. §§ 1701, 1702(a)(1)(B). The constitutionality of this preemptive freezing of assets has been brought into question by at least one U.S. district court. Compare KindHearts for Charitable and Humanitarian Dev., Inc. v. Timothy Geithner, 647 F. Supp. 2d 857, 872-76 (N.D. Ohio 2009) (holding that IEEPA’s authorization to block assets of an organization which was under investigation for designation by OFAC constitutes a violation of the Fourth Amendment), with Islamic Am. Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34, 37-48 (D.D.C. 2005) (determining that asset-blocking was a nonseizure under the Fourth Amendment), and Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 79 (D.D.C. 2002) (same). In
great detail here, is the Secretary of State’s authority to designate entire countries who are State Sponsors of Terrorism.29

B. International Regulation

In addition to domestic blacklists, the United States and other countries have successfully lobbied many international partners to participate in the recommendations of the United Nations and the Financial Action Task Force30 (FATF), among other international working groups. The United Nations and some of its members have also created their own blacklists to restrict the financing of terror.31 In addition, many countries have ratified the United Na-
tions Convention on the Suppression of the Financing of Terrorism (Terrorism Financing Convention) and have, at least in principle, agreed to provide meaningful assistance to other sovereigns who are trying to “follow the money” to terrorist groups. Finally, many countries, both those that are economically developed and those that are not, have enacted domestic versions of the antiterrorism financing regimes that international groups have encouraged. The importance of the international component of a sanctions regime cannot be overemphasized as essential to a sanctions regime. Opprobrium from the international community of the financing of terror is essential to prevent safe-haven or pass-through countries and to stigmatize the behavior that creates further deterrence to its adoption as an attractive political choice.

The role of international criminal law and international tribunals in preventing cross-border financing of terrorism has also been underutilized. The lack of such multilateral, cross-cultural prosecution does nothing to dissuade the common refrain from terrorist sympathizers that sanctions and prosecutions are politically motivated tools designed to continue the discrimination that the Western world imposes upon those who do not agree with them. More practically, when adjudications in unsophisticated domestic courts carry accusations of political manipulation, a multilateral tribunal provides a unique and necessary forum through which to expose and punish offenders of the covenants against terrorism that member states have agreed upon. In this context, the United Nations has not brought a criminal case or convened a special court or tribunal to specifically address international terrorism financing. In fact, with one exception, the United Nations has largely left the prosecution of terrorism to eager member states, despite the cross-border, universally condemnable, and deeply impacting nature of many of

the designation lists. The UNMG was disbanded in 2004. See generally Colum Lynch, UN Dissolves Panel Monitoring Al Qaeda, WASH. POST, Feb. 2, 2004, available at http://www.globalpolicy.org/component/content/article/202/41452.html. The designation of individuals pursuant to Resolution 1267, along with multinational designation schemes such as that promulgated by the European Union, remains in effect.


these crimes.\textsuperscript{34} Notwithstanding the glacial pace of international justice and the limits of its breadth and efficiency, the option of utilizing an international tribunal under international law should be a forward-looking weapon in the global community’s arsenal to deter terror. Moreover, the persuasive impact of a neutral and inclusive court proceeding will resonate much more in areas of the world that instinctively criticize the Western system of justice as self-serving, open-ended, and oppressive, such as the criticism levied against Guantanamo Bay.

C. \textit{Alternative Financing Systems}

Blacklists do little to monitor IVTSs. While international norms of regulation, technical assistance, and information sharing must increase for them to be effective in a shrinking world, they must be implemented both for the formal money transfer systems as well as the opaque IVTSs that permeate the developing world. Informal systems account for billions of dollars of money transfers every year.\textsuperscript{35} A truly effective antiterrorist financing program requires extensive international cooperation, transparent governmental participation, and legal frameworks that reach both formal and informal channels of commerce.\textsuperscript{36}

\textsuperscript{34} The only United Nations tribunal thus far convened specifically to address an act or acts of terror is the Special Court of Lebanon, which is investigating the assassination of Lebanese President Rafiq Hariri. \textit{See generally} Global Policy Forum, Special Tribunal for Lebanon, http://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/special-tribunal-for-lebanon.html (last visited Feb. 3, 2010). The political circumstances leading to the creation of this tribunal are significantly unique to be an unlikely source of precedent. United Nations Security Council resolution 1757 endorsed the tribunal only after a variety of unique circumstances. S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007). Other tribunals (Rwanda and former Yugoslavia) have allowed for the prosecution of terrorism offenses but only in the context of other human rights violations. The International Criminal Court has yet to demonstrate its efficacy in this regard.

\textsuperscript{35} The imagination is the only limit to the mechanisms of alternative financing systems. From traditional money laundering vehicles such as drug trafficking, petty crime, cigarette smuggling, gambling, and cash businesses, to more sophisticated financial tools like investments in publicly traded companies and mutual funds, money destined for terrorist organizations comes from all manner of financing. \textit{See} U.S. Gen. Accounting Office, \textit{Terrorist Financing: U.S. Agencies Should Systematically Assess Terrorists’ Use of Alternative Financing Mechanisms} 24 (2003) [henceforth \textit{Terrorist Financing}], available at http://www.gao.gov/new.items/d04163.pdf. Estimates of the volume of informal financial channels necessarily vary; the United Nations estimates it in the $200 billion range, while the World Bank and International Monetary Fund estimate the amount to be in the tens of billions. \textit{Id.}

\textsuperscript{36} Classic IVTSs, such as hawalas, cash exchanges, or bartering for services, are the primary methods of commerce in some parts of the world and are extremely hard to
Informal channels pose a special set of problems because they require regulation in a world in which regulation is frequently foreign. Informal channels must be formalized to prosper in a modern economy. Some countries, like the United States, have implemented a licensing requirement, which brings with it some reporting obligations. Consequently, unreported transactions must be presumed to be operating with “black” or dirty money. Registration of hawalas and other recipient nodes, instituting “know your customer-type” (KYC) regulations, establishing requirements to retain records, and subjecting services to audit and supervision must be measures mandated to international norms and with independent oversight.

D. Potential Overinclusiveness

The constitutional tensions in a framework of laws that criminalize the transfer of money to an entity simply because it is contrary to the Executive’s political determination are readily apparent. Equally obvious, however, is the necessity and prerogative of the commander-in-chief to protect U.S. interests against supporting terrorist organizations. This tension has led to the systematically regulate. See Clunan, supra note 12, at 261. Licensing systems have been used to bring these systems into the light in other countries. See generally 18 U.S.C. § 1960 (2006); 31 U.S.C. § 5330. The effectiveness of stemming terrorist financing by requiring licenses for money remitting services is yet unknown.


38. While the decision to designate an organization is ultimately one of policy, these political decisions are traditionally well within the unique province of the Executive to manage international and national security affairs. The constitutional and statutory authority in the areas of foreign policy and national security are exclusively entrusted to the elected branches of government. See, e.g., Regan v. Wald, 468 U.S. 222, 242 (1984) (“Matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”); Haig v. Agee, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”); People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 182 F.3d 17, 23 (D.C. Cir. 1999).

39. Prior to the enactment of IEEPA, the declaration of national emergencies was done at the discretion of the President, who claimed such power as necessary to address the emergency. Compare Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 637 (1952) (“A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who
quent constitutional challenges of the designation decisions and § 2339B prosecutions based on support to a FTO, and IEEPA prosecutions based on transactions with SDGTs. In the context of terrorism financing, the primary arguments are (1) the statutes are overbroad and violate individuals’ First Amendment rights, (2) the Executive’s unilateral blocking of assets violates the Fourth Amendment, and (3) the designation process denies due process. Despite these attacks, the constitutionality of these statutes remains intact. The limitation on freedom of expression has been upheld under the intermediate constitutional scrutiny associated with content-neutral regulation of expression.

The administrative-designation process has also survived due process scrutiny, even when a designated entity is not privy to any classified national security information that may have been part of the administrative record reviewed by the Secretary who designated

might attack it.”), with United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936) (holding that the President may exercise powers in the field of international relations without needing “a basis for its exercise [in] an act of Congress”). With the enactment of IEEPA, Congress also passed the National Emergencies Act, clarifying the termination of the authorities invoked by prior presidents in past emergencies, and specifying a selective process by which certain emergency powers, including sanctions regimes, could be exercised by the President in an emergency situation. See 50 U.S.C. §§ 1601-51.

40. See, e.g., People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 327 F.3d 1238, 1240-41 (D.C. Cir. 2003). “Such questions concerning the foreign policy decisions of the Executive Branch present political judgments, decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.” Id. (internal citation and quotation marks omitted).

41. The Supreme Court confirmed that strict constitutional scrutiny does not apply to facially neutral laws. Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990). The transfer of money to selected recipients has been held to be a form of speech protected by the Constitution. Buckley v. Valeo, 424 U.S. 1, 16 (1976). The Ninth Circuit Court of Appeals has held that prohibiting transactions and activities that would assist designated FTOs are content-neutral restrictions reasonably tailored to the government’s legitimate national security interests. Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1127 (9th Cir. 2007); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135-36 (9th Cir. 2000). As such, the Court has held that such neutral designations do not violate the First Amendment, see Reno, 205 F.3d at 1134-36, and are not overbroad, see Mukasey, 509 F.3d at 1136-37. The Fourth and Seventh Circuits have followed suit. See United States v. Hammoud, 381 F.3d 316, 329-30 (4th Cir. 2004) (en banc); Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev., 291 F.3d 1000, 1026-27 (7th Cir. 2002). The District of Columbia Court of Appeals employed the same analysis to uphold the constitutionality of IEEPA restrictions on expression. See Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 166 (D.C. Cir. 2003) (holding no constitutional right to support terrorists).
the entity. Finally, courts have held that in post-designation blocking and asset-freeze actions, the Executive acts pursuant to statutory authority and thereby does not usurp the legislative or judicial prerogative.

The primary complaints of civil libertarian groups and affected communities are that these sanctions increase alienation, undermine U.S. efforts in Muslim countries, encourage less transparent means of funding, and chill humanitarian relief. From a legal perspective, sympathetic constituencies seek to ensure that regardless of whether an organization deserves to be blocked, it should have a right to advocacy. That is to say, an organization’s supporters should be permitted to use the organization’s own funds to pay for legal counsel to fight its designation, and it should be able to advocate on its own behalf without fear of crossing a line of providing material support to a designated organization. While notably none of the designation statutes prohibit membership or “association” with a terrorist organization, the criteria for what could be construed as material support for the organization is broad.

42. The process to designate FTOs involves an administrative determination by the Secretary of State, with notice to Congress, a preservation of the record, publication in the Federal Register, and an opportunity to seek judicial review. 8 U.S.C. §§ 1189(a), (c). The United States Court of Appeals for the District of Columbia found that this procedure was constitutionally adequate; however, the organization could not challenge the procedure’s constitutionality because “[a] foreign entity without property or presence in this country has no constitutional rights.” People’s Mojahedin Org. of Iran, 182 F.3d at 22. After a later challenge by an organization with sufficient connections to the United States, the District of Columbia Circuit Court held that the designated organization had a due process right to respond to the unclassified predication for the designation decision. See Nat’l Council of Resistance of Iran v. U.S. Dep’t of State, 251 F.3d 192, 208-09 (D.C. Cir. 2001).

43. See Global Relief Found., Inc. v. O’Neill, 315 F.3d 748, 754 (7th Cir. 2002). There is no separation-of-powers problem, as Dames & Moore [v. Regan] shows. The Steel Seizure Case, Youngstown Sheet & Tube Co. v. Sawyer, dealt with a seizure of private assets under a President’s inherent powers, which the Court deemed insufficient; Executive Order 13224, by contrast, delegates to the Secretary only those powers provided by statute. Id. (citation omitted). For pre-designation blocking actions, a district court has found the process constitutionally infirm. Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner, 647 F. Supp. 2d 857, 884-85 (N.D. Ohio 2009).

44. See American Civil Liberties Union, supra note 10, at 16.

45. See id. at 21.

46. Id. at 18.

47. Id. at 21-22.

48. While the material support and IEEPA laws stop short of criminalizing membership, there is a constitutional basis to do so in limited circumstances. Scales v. United States, 367 U.S. 203, 228-30 (1961). During the height of the Cold War, Scales, a chairman of the Communist Party, was arrested for violating the Smith Act (which
speculate that terrorist organizations may seek to selfishly exploit this advocacy immunity. The effect may be to manipulate their adversaries to discourage such actions because of the inordinate amounts of resources and time necessary to navigate the legal process which inhibits the efficiency and potency of counterterrorism actions. Moreover, there is no right to counsel in civil proceedings. Should policymakers seek a prophylaxis to future due process attacks, a reasonable compromise position could be taken that balances the concerns. For example, providing a limited ability for advocates to be rationed a capped limit of the blocked assets at a rate commensurate to how such funds are dispersed to court-appointed private counsel (such as in the Criminal Justice Act) would likely obviate the due process attack without creating sufficient incentives to open the floodgates of litigation to the marketplace. Alternatively, a charitable-trustee framework, as proposed at the conclusion of this paper, may provide a solution, whereby a trustee determines whether, and to what extent, funds of an organization shall be devoted to advocacy on behalf of an organization under investigation.

criminalized membership in the Communist Party). Id. at 264. The Supreme Court upheld the criminalization of membership and association in an organization, provided that the individual was an “active” member and that the individual intended to further the objectives of the organization. Id. at 228-30. These standards have essentially been articulated within the AEDPA and IEEPA statutes. 18 U.S.C. § 2339B(a) (2006); see 50 U.S.C. §§ 1701-07. Ironically, on immigration forms that query bases for inadmissibility or ineligibility for certain immigration benefits, aliens are still asked whether they are members of the Communist Party (as well as whether they have any associations with terrorist organizations).

49. In 2001, Usama bin Laden called for a financial jihad against the United States, “to look for [and strike] the key pillars of the U.S. economy.” BRAD K. BERGER, QUOTATIONS FROM OSAMA BIN LADEN 46 (2007). This concept of depleting resources or engaging in financial sabotage as a method to effect political change is frequently mislabeled “economic jihad.” See infra notes 97-100 and accompanying text. Terrorist organizations may also avail a related strategy of “lawfare,” which has been described as “seizing the earliest opportunity to set up regulations.” QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE 55 (1999), available at http://terrorism.com/sites/default/files/unrestricted.pdf (discussing “international law warfare”).


52. See infra Part VI.C.
E. Criminal Enforcement

The designation of terrorist groups serves as a deterrent because of its public notice and the direct impact on financial institutions that will not execute transactions with the prohibited entities. However, the designation of groups also provides notice to donors that they will suffer substantial criminal penalties if they disregard the blocking orders. The possibility of criminal prosecution provides teeth to the designation of terrorist groups and serves to reaffirm the deterrent purpose of designating organizations and individuals. Laws that criminalize the transfer of funds to terrorist organizations constitute a departure from the traditional financial crimes that are prosecuted in the United States, which typically involve “dirty money.” In dirty-money cases, there is always an underlying crime involved to either generate the dirty money, or for which the money is being cleaned. In “clean-money” cases, the criminality does not come from the source of the funding but, rather, by examining the intended recipient of the funds. The transfer is rendered criminal because of the fiat of the Executive. Because clean money is not easily tied to any specific criminal act, it becomes much harder to detect. Indeed, even when successful, some argue that such prosecutions are actually counterproductive.


54. Proving intent of the donor is a challenge for evidentiary reasons but also because what facts about a recipient organization a donor must know in order to be held criminally liable is an area of evolving law. Section 2339B of title 18 of the United States Code prohibits a person from “knowingly provid[ing] material support or resources to a” designated FTO. Id. § 2339B(a)(1). After some cases held that the government was obligated to prove that a criminal defendant knew that the Secretary of State had designated the organization as an FTO and that the government was obligated to show that a criminal defendant knew that the aid was going to support the terrorist objectives of the organization, the statute was amended. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603, 118 Stat. 3638, 3762 (2004) (extended permanently in USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 104, 120 Stat. 192, 195 (2006)); see also United States v. Al-Arian, 329 F. Supp. 2d 1294, 1304 n.24 (M.D. Fla. 2004). Section 2339B now reads as follows:

To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).


55. See Clunan, supra note 12, at 261.
to the preventative measures necessary to stop the succor of terrorist groups.  

Since money that is funneled to terrorist organizations cannot frequently be shown to be of the “dirty” variety, to block such transfers, statutes criminalize “material support” for terrorism or designated terrorist organizations. The narrower of such statutes, 18 U.S.C. § 2339A, proscribes the act of providing “material support or resources” to a recipient when the provider knows or intends such support to be used “in preparation for[ ] or in carrying out” specified crimes of violence. This statute, which has existed since 1994, is not a substantial departure from existing criminal conspiracy laws because the purpose of financing still is to further the crimes of international terrorism. While proving such intent is difficult, there is now a substantial history of criminal cases in which the individuals intentionally sought to further the terrorist objectives of various organizations. Section 2339A also does not rely on the designation lists as the source of its criminalizing transfers.

Consequently, the principal material-support statute used to discourage systemic terrorist financing is 18 U.S.C. § 2339B, which prohibits anyone from knowingly providing (or knowingly attempting or conspiring to provide) “material support or resources to a [designated] foreign terrorist organization.” Unlike § 2339A, § 2339B does not require proof that the donor specifically intended that his support or resources be used for terrorist activity; therefore,

56. Id. at 270. Consider also that providing funds to support terrorists may be considered malum in se, but that a blacklist regime relies on accountability primarily under a theory of the conduct being malum prohibitum.

57. 18 U.S.C. § 2339A(a). According to the statute, the term “material support or resources means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities [and] financial services,” thereby covering a wide range of asset types. Id. § 2339A(b).

58. See, e.g., United States v. Aref, 285 F. App’x 784, 789 (2d Cir. 2008); United States v. Hir, 517 F.3d 1081, 1084 (9th Cir. 2008); United States v. Chandia, 514 F.3d 365, 371 (4th Cir. 2008); United States v. Koubriti, 509 F.3d 746, 748-49 (6th Cir. 2007); United States v. Lakhani, 480 F.3d 171, 175 (3d Cir. 2007); United States v. Hassoun, 476 F.3d 1181 (11th Cir. 2007); United States v. Arnaout, 431 F.3d 994, 1003 (7th Cir. 2005).

59. 18 U.S.C. § 2339B(a)(1). The statute explicitly requires that the “person must have knowledge that the organization is a designated terrorist organization, . . . [and] that the organization has engaged or engages in terrorist activity . . . [or] terrorism.” Id. Because there is a scienter requirement that the accused knowingly committed the crime, the fair warning concerns are lessened and hence raise the bar for a defendant’s due process claim. See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); United States v. Ragen, 314 U.S. 513, 524 (1942) (“A mind intent upon willful evasion is inconsistent with surprised innocence.”).
§ 2339B makes it a crime to provide support to even the nonviolent activities of a designated terrorist organization. Thus, charges brought under § 2339B turn on whether the donor knew the organization or individual she funded was a prohibited recipient. The AEDPA and IEEPA statutes therefore work in concert with the designation process by criminalizing knowing support for a designee.

Supplementing these statutes is the seldom-used offense of terrorism financing, 18 U.S.C. § 2339C, which responded to the obligation to implement the Terrorism Financing Convention effective in 2002. The jurisdictional breadth of the statute is broad but largely symbolic, as terrorism-financing prosecutions are already typically covered within existing jurisdiction criteria for criminal cases. Moreover, because § 2339C requires a double-intent element for conviction, a person must intend that the financing go both to a designated FTO and for a terrorism purpose; it is an unattractive charging choice when § 2339A and § 2339B capture the same conduct.

Where § 2339C can help fill an important void, however, lies in its concealment prong. Under the statute, concealing the past, present, or future intended provision of support or assets to a terrorist organization is also implicated as terrorist financing. This tailored

60. See 18 U.S.C. § 2339B(a)(1). The knowledge requirement of § 2339B(a) has been upheld by the federal courts. See Humanitarian Law Project v. Mukasey, 552 F.3d 916, 927 (9th Cir. 2009). The Ninth Circuit held that “due process is satisfied without proof of specific intent” because the statute does not allow punishment of a “donor defendant for crimes [of the] donee foreign terrorist organization”; therefore, the statute “does not impose vicarious criminal liability.” Id. Additionally, Congress, in enacting the Intelligence Reform and Terrorism Prevention Act, explicitly said that “knowledge of an organization’s designation [or] engagement in . . . terrorism is required to convict under [§] 2339B(a).” Id.


64. 18 U.S.C. § 2339C(c) provides a ten-year felony for whoever (2) knowingly conceals or disguises the nature, location, source, ownership, or control of any material support or resources, or any funds or proceeds of such funds—(A) knowing or intending that the support or resources are to be provided, or (B) knowing or intending that any such funds are
liability for those who shield individuals and organizations who operate as fronts and shells for terrorist organizations recognizes the reality of the tradecraft necessary to function as a financier. Financiers rely on concealment by themselves and others. Here too, however, the evidentiary hurdle will require proof of a specific intent to conceal and, arguably, the specific knowledge of the act or terrorist group that the money was intended to finance. Despite § 2339C’s ambition, other criminal statutes usually reach the same conduct and offer comparable penalties, including the other material support statutes, as well as statutes criminalizing the giving of false statements or scheming to conceal in matters involving terrorism, money laundering, obstruction of justice, conspiracy, and aiding and abetting. Still, charging under § 2339C not only imposes a targeted deterrent remedy to the crime, especially one involving so-called clean money, but it also brings with it a greater likelihood of detention pending trial and applicability of the influential terrorism enhancement under the United States Sentencing Guidelines.

The legal framework for combating terrorist financing also includes the utilization of criminal statutes that are not exclusive to terrorist-related activity. Such statutes are useful for prosecuting terrorist financing because connecting such activity beyond a reasonable doubt to terrorist acts overseas is difficult and because ter-

65. The Supreme Court is expected to imminently articulate the constitutional parameters of the “I didn’t know that was illegal” defense in the material-support context, albeit in a slightly different paradigm. In Holder v. Humanitarian Law Project, the Court granted certiorari to determine whether certain provisions of AEDPA, namely those dealing with the provision of “technical assistance,” “expert advice or assistance,” and “services,” are unconstitutionally vague. Humanitarian Law Project v. Mukasey, 552 F.3d 916 (9th Cir. 2009), cert. granted sub nom. Humanitarian Law Project v. Holder, 130 S. Ct. 49 (2009). It is reasonable to expect that the Court’s vagueness analysis might include whether a person of ordinary intelligence must be aware of the FTO status of a recipient and that the nature of his assistance would be materially helpful to the FTO within broad prohibitions of § 2339B. The Court could also discuss the fungibility of assistance, the mixed motives of provision of support, and the overbreadth of sanctions regimes, and it may clarify the bounds of statutory limitation on an individual’s right to support (through words or advocacy) a terrorist organization. These facts drive the policy reasons for a vigorous financial sanctions regime. The Court’s decision will invariably provide some guidance to the discussion of terrorism financing and, perhaps more practically, publicly deter or encourage certain behavior among the donor community.


rorists often use alternative financing mechanisms—including various forms of criminal activity—facially unconnected to terrorism and that are not readily forensically reconstructible.68 For instance, terrorist-financing prosecutions may rely on money laundering statutes, which prohibit financial transactions involving proceeds that derive from unlawful activity.69 Thus, regulatory regimes and reporting requirements pertaining to ordinary financial crimes also provide mechanisms to help both detect and disrupt potential terrorism financing. For example, by requiring financial institutions to establish anti-money laundering programs, there are greater systemic indicators of potential terror financing.70 Similarly, requiring adherence to the currency-transaction reporting requirements related to the movement of monetary instruments serves to detect and punish aberrant activity, such as smuggling cash, that is indicative of money laundering and terrorist-financing activity.71 Requiring such offense-neutral data to be liberally shared within the Treasury Department’s Financial Crimes Enforcement Network also strengthens detection of all-hazards by security agencies.72 These tools, in addition to existing prosecution theories such as mail and wire fraud, money laundering, structuring and unlicensed money remitting, and general conspiracy laws, provide diverse legal theories by which terrorist financiers can be detected and held accountable.73

The challenge to terrorism-financing prosecutions, however, is not typically the theory of liability. Rather, the most common hur-
dle is obtaining admissible evidence of what happens or is intended to happen to money once it makes it overseas. The Terrorism Financing Convention and Mutual Legal Assistance Treaties were designed to create a more robust information-sharing environment, but they have not adequately rendered that information in an authenticable form that is admissible in a criminal court.74

F. Civil Actions

Another important legal construct relied upon in terrorist-financing prosecutions derives from civil forfeiture statutes, which generally authorize the forfeiture of property traceable to specified violations or offenses.75 All assets can be forfeited, regardless of whether they are foreign or domestic, or in possession of any person, entity, or organization derived from, used for, or intended to support, plan, or perpetrate an act of international terrorism or a federal crime of terrorism against the United States, its citizens, or U.S. property.76 These added tools have generally helped ease the government’s ability to initiate forfeitures in the terrorist financing context by extending civil forfeiture statutes to various serious offenses committed abroad in violation of foreign law if the property is located in the United States. This allows, for instance, for the forfeiture of funds deposited in a foreign bank that has an interbank account in a U.S. financial institution.77

A dynamic component of the U.S. legal framework for terrorist-financing enforcement involves civil suits brought by U.S. citizen-victims of international terrorism against domestic organizations that allegedly finance such terrorism.78 These lawsuits aim to

74. See International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/54/109 (Dec. 9, 1999) (requiring states to criminalize the financing of terrorism and provide investigative assistance, but, according to article 12, denying use of information provided in a criminal proceeding without prior approval of the requested state).

75. See 18 U.S.C. § 981 (civil forfeiture); cf. id. § 982 (criminal forfeiture).

76. Id. § 981(a)(1)(G); see, e.g., Verified Amended Complaint at ¶ 148, United States v. All Right, Title, & Interest of Assa Corp., No. 08-CIV-10934 (RJH) (S.D.N.Y. Nov. 16, 2009), available at 2009 WL 5161058 (seeking forfeiture of skyscrapers in New York City).


78. Under the Alien Tort Statute, any U.S. national (or the estate or survivors of such person) who is injured by an act of international terrorism may sue in district court for treble damages. 18 U.S.C. § 2333(a); see Sosa v. Alvarez-Machain, 542 U.S. 692, 698-99 (2004) (clarifying the viability of a private domestic cause of action when the act
compensate victims of terrorism and enable U.S. citizens to stand in place of the government and enforce domestic laws prohibiting U.S.-based persons and entities from financing terrorist organizations. These lawsuits are often criticized, however, for being wasteful and ineffective in satisfying judgments from overseas state sponsors and terrorist organizations. The impact of these civil suits, consequently, is likely to be greater when employed in concert with governmental action.

II. THE REGULATION OF CHARITABLE ORGANIZATIONS

The crossroads between the erection of financial controls and the provision of foreign aid epitomizes the challenges in regulating charitable organizations. Until recently, charitable organizations were mildly regulated as tax-exempt organizations, with only modest and unverified annual reporting. Such an honor system was

79. In Boim v. Holy Land Foundation for Relief and Development, the parents of a U.S. citizen who was murdered overseas brought suit under the federal terrorism-victim statute against an individual and three U.S.-based nonprofits, claiming that their son was murdered by Hamas and that the nonprofits provided financial support to the terrorist organization before his death. 549 F.3d 685, 687-88 (7th Cir. 2008). The Boim court reached two conclusions of particular importance in the context of terrorist-financing enforcement. The court held that the act of giving money to a terrorist group outside the United States falls within the scope of the federal statute that provides a civil cause of action for victims of international terrorism. Id. at 690-91. The court also held that when someone gives money to an organization with knowledge that the entity is engaged in terrorism, the fact that the donor earmarked such funds for non-terrorist activity does not preclude liability. Id. at 698. In reaching the latter conclusion, the court reasoned that money is fungible and that the terrorist organization’s social welfare activity often reinforces and supports its terrorist activity. Id.

80. See In re Islamic Republic of Iran Terrorism Litigation, 659 F. Supp. 2d 31, 129 (D.D.C. 2009) (criticizing the exception to sovereign immunity provided in the Foreign Sovereigns Immunities Act (FSIA) as a false hope for recovery for victims of terrorism, and explaining that FSIA, without governmental assistance, encourages them to engage in a “meaningless kabuki dance” of civil litigation).

tied to the fact that charity, after all, is a universally laudable activity. More recently, the reality that some ostensibly charitable organizations have been diverting funds to terrorist organizations has forced a reexamination as to the role of government regulation.\textsuperscript{82} This is especially the case when some of the aid funneled to terrorist organizations is in fact used for humanitarian purposes. Given the ostensible purposes of charitable aid, it is not uncommon for domestic donors to give money without knowing that some of these organizations have ulterior motives to support violence. Others, however, give with the implicit knowledge that some of their donations will go to terrorist organizations, if even for humanitarian assistance.\textsuperscript{83} While it is true that some donors undoubtedly falsely claim ignorance of the fact that their donations go to support mujahideen (holy warriors), some are more genuine. The fear of being an unwitting donor to such an organization may be as prevalent a concern as the risk that the government will lump all donors to an ostensible charity as willing donors to terrorist organizations.\textsuperscript{84} This is often given as one reason why some people have reverted to giving their zakat via cash, leaving no record of the donation.\textsuperscript{85} Reactive measures, such as this cash-only practice, undermine the transparency encouraged by reporting requirements and also lead these communities to a perception of unfair discrimination based on the ideas they support, or worse, the faith that they practice.

\begin{footnotes}

\footnote{http://www.irs.gov/pub/irs-pdf/p3847.pdf (citing 655\% increase in counterterrorism indictments for cases investigated by the IRS).


\footnote{Numerous religious scholars, charitable organizations, and zakat committees translate the proper recipients as listed in the Qur’an (9:60) as including “for Allah’s cause, i.e for Mujahideen,” which, while capable of being interpreted broader than violent combatants, necessarily includes them. Ziaul Islam, Zakat—A Solution for Muslim Poverty, http://www.contactpakistan.com/news/news188.htm (last visited Apr. 23, 2010); see also Tawfiq Chowdhury, Is Zakat Permissible for Islamic Dawah Organisations?, available at http://www.masnet.org/donation/is-zakat-permissible-for-islamic-dawah-organisations.pdf (last visited Apr. 23, 2010); A Zakat Calculation Guide, http://www.islamvoice.com/5pillars/zakat/calculator.htm (last visited Apr. 23, 2010). Community groups, often for defensive purposes, seldom publicly acknowledge this reality or deny that such interpretations prevail elsewhere; a necessary recognition in order to establish normative behavior among domestic Muslim charities.

\footnote{See \textit{American Civil Liberties Union}, supra note 10, at 13-15 (noting anecdotal concerns by some donors that they do not know which organizations to trust nor who the government will scrutinize).

\footnote{See \textit{id. at 122.}}}
\end{footnotes}
This reaction fails to recognize that the government has no interest in overinclusiveness either. Because of the standards required for government blocking actions and the mens rea requirements under the criminal statutes, an individual's rights cannot be impinged without a sufficient evidentiary showing. In addition, not only is the national security interest great in minimizing the flow of funds to terrorist organizations, but the fact that many donors knowingly give money to these organizations because they are supportive of their ultimate mission is a sad reality in the face of such prohibitions. Moreover, the ideological underpinning is relied upon by terrorist organizations in order to maximize assets. Such financing, when sanctioned or ignored within a community, builds a culture of criminal tolerance. When this enabling is discovered by the government, the community is further alienated from the broader American fabric, and a pall is cast over an entire community rather than solely over the individuals who disobeyed the law. Mutual retrenchment follows. In some cases, the intentional shielding of community members can itself be prosecuted under obstruction laws.

The government’s enforcement decisions must, however, continue to be heavily weighed. In addition to alienating a community and undermining long-term national interests of enlisting community support, prosecutions of unwitting donors would fail because they lack the requisite intent. These are resource-intensive investigations, only a fraction of which ultimately result in enforcement actions. In these actions or investigations, very seldom do members of the Muslim or other communities actually agree to cooperate with the government investigation. This reality reflects both the deficiencies in the government’s efforts to educate and to sincerely

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86. Though seldom publicly acknowledged, there is a population that knowingly provides to mixed-motive campaigns soliciting funds using euphemisms for humanitarian aid, when in fact some of the money will support those fighting for their interests. See, e.g., United States v. Sabir, 628 F. Supp. 2d 414, 424 (S.D.N.Y. 2007) (permitting prosecution of medical services on behalf of terrorists); United States v. Shaw, 474 F. Supp. 2d 492 (S.D.N.Y. 2007) (same). Still other organizations appeal to the religious obligations under zakat or other tithes in order to support the fighters. See United States v. Mubayyid, 567 F. Supp. 2d 223, 231 (D. Mass. 2008). Under the doctrine of willful blindness, these individuals cannot stick their heads in the ground in order to avoid the intent element when every indication is that they were aware of the mixed motives of the aid. "A willful blindness [jury] instruction is appropriate 'if (1) a defendant claims a lack of knowledge, (2) the facts suggest a conscious course of deliberate ignorance, and (3) the instruction, taken as a whole, cannot be misunderstood as mandating an inference of knowledge.'” United States v. Coviello, 225 F.3d 54, 70 (1st Cir. 2000) (quoting United States v. Richardson, 14 F.3d 666, 671 (1st Cir. 1994)).
partner with these communities as well as the culture of protective­ness which further insulates a community from the mainstream. The cycle of distrust alienates one from the other. Additional resources must be devoted not only to transparency and education within these communities but also to encourage cooperation with more tangible rewards, such as offering selective amnesties and special dispensations of immigration or other administrative benefits to those who decide to play by the rules. Conversely, political correctness should not prevent the criticism of those who do not satisfy their civic responsibilities and setting normative expectations within the community.

The model of terrorist groups that also serve humanitarian functions is not a new one.87 “Charitable donations represent a major source of revenue for [many terrorist] organizations.”88 Conse­
quently, a crucial component of the legal framework for terrorist-financing enforcement involves improved oversight and regulation of U.S. charitable organizations, due to the potential for misuse of charitable contributions and the exploitation of such entities by terrorists to conceal the movement and use of funds overseas. In fact, private aid through U.S. NGOs, charitable organizations, and private donations (not including business investments) has been more than three times the amount of public governmental foreign aid provided by the United States. Encouraging business investment and the creation of multilateral capital investment funds should be a large component of a sustainable development model but will not be discussed within the limitations of this Article.

Terrorist fundraisers masquerading as charities can easily use tax laws to maximize funds for terrorist activity—primarily by using Hezbollah’s substantial control of charitable distribution networks in southern Lebanon—demonstrate the ongoing intent and effectiveness of terrorist organizations in exploiting charitable organizations and relief efforts.

Id. at 14.

89. Recognizing the past and continued present potential for abuse of charities by terrorists, the Treasury Department has published several versions of its Anti-Terrorism Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities. Although the guidelines are not binding, they “are designed to assist charities that attempt in good faith to protect themselves from terrorist abuse.” Anti-Terrorism Financing Guidelines, supra note 88, at 1 n.1.

90. In 2006, for example, public aid from the United States amounted to approximately $28 billion, while private aid amounted to approximately $95 billion. See Hudson Institute, supra note 9, at 10. According to the methodology of the Hudson Institute, which includes measures such as examination of tax-exempt organizations’ annual returns, public reporting requirements, and analysis of OECD and U.S.-government data, the breakdown of almost $200 billion in estimated aid to developing countries in 2005 appeared as follows:

<table>
<thead>
<tr>
<th>Type of Aid</th>
<th>Dollars (billions)</th>
<th>% Total Aid</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Official Development Assistance</td>
<td>27.6</td>
<td>14</td>
</tr>
<tr>
<td>U.S. Private Assistance</td>
<td>95.2</td>
<td>50</td>
</tr>
<tr>
<td>Foundations</td>
<td>2.2</td>
<td>2</td>
</tr>
<tr>
<td>Corporations</td>
<td>5.1</td>
<td>5</td>
</tr>
<tr>
<td>Private and Voluntary Organizations</td>
<td>16.2</td>
<td>17</td>
</tr>
<tr>
<td>Universities and Colleges</td>
<td>4.6</td>
<td>5</td>
</tr>
<tr>
<td>Religious Organizations</td>
<td>5.4</td>
<td>6</td>
</tr>
<tr>
<td>Individual Remittances</td>
<td>61.7</td>
<td>65</td>
</tr>
<tr>
<td>U.S. Private Capital Flows</td>
<td>69.2</td>
<td>36</td>
</tr>
<tr>
<td>U.S. Total Economic Engagement</td>
<td>192</td>
<td>100</td>
</tr>
</tbody>
</table>

Id. at 14 tbl.1.
Internal Revenue Code § 501(c)(3) corporation status to solicit tax-free contributions.91 Indeed, obtaining § 501(c)(3) status may be the single most important asset a terrorist front organization can obtain. The status attracts donors because it affords a double tax benefit; that is, the donors to the organization can deduct the amount of their donation and the corporation need not pay taxes on any income. More importantly, however, the § 501(c)(3) label is the closest thing to a barometer of legitimacy that exists in the realm of charitable giving in the United States. Such a badge dramatically increases the income of an organization for both a tax benefit reason and because the likelihood of governmental repercussions is low. In fact, even if organizations have not lawfully obtained recognition of their tax-exempt status, they may advertise themselves as having done so because of the dramatic benefit.

While a corporation can obtain § 501(c)(3) status with only a modest showing of what the corporation intends to do, auditing and fact checking by the Internal Revenue Service (IRS) does not effectively verify the legitimacy of the corporation’s representations. Additionally, the IRS does no financial analysis to determine from whom, to whom, and for what the organization is transferring funds.92 Consequently, the IRS relies on self-reporting by charitable corporations, which, if corrupt, can operate for years without any systemic tripwires of detection. Indeed, the IRS’s own standards for disclosure requirements have been prone to attack for lack of specificity, clouding the bright-line rules as to what types of activities must be disclosed to the IRS and what constitutes an accurate description.93 Since the IRS is responsible for regulating these

91. Under the Internal Revenue Code, qualifying corporations are exempt from federal income taxes. I.R.C. § 501(a) (2006). One such exemption applies to entities organized and “operated exclusively for religious, charitable, scientific, . . . literary, or educational purposes,” among others. I.R.C. § 501(c)(3).


93. See, e.g., United States v. Mubayyid, 567 F. Supp. 2d 223, 225-26 (D. Mass. 2008). Organizations operating in or for people in conflict areas should not presumptively be eligible for charitable exemptions for soliciting money that could go to fighting when no other organization would be considered charitable for doing so. Cf. Prince v. Massachusetts, 321 U.S. 158, 171 (1944) (finding no constitutional infirmity in “exclud-
corporations, they retain the responsibility, without legal and financial resources, for policing the accuracy of corporations’ reporting.\textsuperscript{94} While some improvement has been made, the system must be reformed to require frequent audits, provision of financials and transparency into an organization’s bank accounts and transfers, and end-user audits that inform other regulatory systems involving overseas transfers.\textsuperscript{95} Thus, while traditional tax-evasion laws have served as a successful tool to prosecute those who exploit the charitable and nonprofit sector to fund violence, they do not provide a reliable, timely means for detecting fraud and, consequently, are inefficient at stopping the flow of funds beyond deterrence.\textsuperscript{96}

Ostensible charities soliciting funds from Muslim donors have the added nuance that one of the pillars of Islam is to give obligatory annual zakat, or annual tithe.\textsuperscript{97} Muslims around the world often search for recipients who can properly receive zakat funds under Sharia (Islamic Law). Some ostensible charities market themselves as valid recipients of money for the needy and cite to Quranic and scholarly phrases to justify their fundraising. In the context of giving zakat, some Muslims consider the mujahideen to be valid beneficiaries of these donated funds.\textsuperscript{98} This is an empirically observed phenomenon, where many donors specifically denote that they wish their donations to go to jihad or mujahideen in areas of combat.\textsuperscript{99} Such donations are also driven by the theological imperative of a concept sometimes called “economic jihad,” by which individuals who cannot engage in physical jihad can give...
their money instead of their body to receive religious benefit. In indeed, in some parts of the world, zakat is the functional equivalent of a “jihad tax” and is collected by the terrorist groups who “protect” the way of life. Consequently, the vigilance against diversion of humanitarian aid to the Muslim world takes on a theological dimension beyond the average obstacles that complicate the dispersal of funds into weak states with undeveloped infrastructure.

Successful prosecutions and diplomatic efforts have led to a growing consensus that governments have rightly focused their investigative efforts on charities that were believed to be used as fronts to launder money and assets to jihadists who believe that violence will achieve their desired political ends.

III. PUBLIC AID: STRUCTURES FOR INCREASED DEVELOPMENT ASSISTANCE

While there may be a few scholars who quibble with the propriety of foreign aid, it is beyond question that aid can increase the quality of life in other countries. This principle has increasingly shaped the implementation of United States foreign policy over the past few decades. During this same time, the polarization of wealth in the world has increased, resulting in strategic aid distribution, frequently for purposes of achieving certain geopolitical interests. Developing international powers are similarly dispensing foreign aid to demonstrate a hallmark of moral and economic standing. In such an environment, then, it is not entirely surprising that a rise of violence would occur during a period of grossly disproportionate economic growth in which aid has been relatively frugal. The peace dividend from the conclusion of the Cold War has been replaced by the asymmetric threat of terrorism, primarily by those who use the name of religion to fuel pan-national recruitment and operations. During the height of the Cold War, the United States, along with the other Organization for Economic Cooperation and Development (OECD) member states, agreed to target 0.7% of their gross national product for Official Development Assistance. After thirty-five years, we have yet to even approach that target.

103. S.C. Res. 2626 (XXV), ¶ 43, U.N. Doc. A/8124 (Oct. 24, 1970). Despite this target, economically developed countries have managed to provide somewhere between
Increasing public aid to terrorist-centric theaters reduces the attraction of their marketing campaign, degrades the conditions that can give rise to ideological terrorism, and empowers national governments to effectively discourage such nascent within their own borders. By supporting development goals, such as educating governments, building up civil institutions, and buttressing the economic infrastructure, as well as humanitarian goals, such as reducing poverty, increasing food assistance, and providing access to basic medical care, the United States’s interests will slowly, but deeply, be reinforced in the psyche of the citizens of the recipient countries.

At the same time, the governments with whom the United States partners for increased development assistance can be subjected to rigorous standards of transparency and accountability, while still retaining nominal and strategic input into projects—an essential perception to reinforcing the utility of law and government in lawless environments. Moreover, even aside from political and national security interests, humanitarian and developmental aid from the richest country in the world is also a laudable moral objective and is one that captures the spirit of its people.104

U.S. public foreign aid can be divided into several categories: multilateral aid aimed at international entities and programs such as the International Monetary Fund (IMF) and the World Bank, handled by the Treasury Department; economic assistance supporting military and security-related goals, managed by the Department of Defense and the Department of State; and bilateral development assistance, primarily overseen and administered by the U.S. Agency for International Development (USAID), with guidance from the State Department.105

0.2% and 0.4% in development aid, and the quality of this aid has been mitigated by requirements of certain goods and services and catering to other vested mercantile and political interests. The United States, the richest country in the world, while providing among the highest gross amount of aid, has provided among the least amount of development aid of all the OECD nations, approximately 0.2%, as measured as a percentage of its gross national product. See Hudson Institute, supra note 9, at 10; see also Anup Shah, U.S. and Foreign Aid Assistance, http://www.globalissues.org/article/35/us and-foreign-aid-assistance (last updated Apr. 13, 2009) (citing OECD statistics). See also Anup Shah, U.S. and Foreign Aid Assistance, http://www.globalissues.org/article/35/us and-foreign-aid-assistance (last updated Apr. 13, 2009) (citing OECD statistics).

104. Clunan, supra note 12, at 263 (suggesting that the United States must underwrite a Counter Terrorism Financing framework).

The Foreign Assistance Act, enacted in 1961, is the main source of permanent legislation authorizing most bilateral economic assistance.\textsuperscript{106} Under the Foreign Assistance Act, the President may determine the terms and conditions under which assistance is provided. However, most foreign aid money is appropriated by Congress annually through the Foreign Operations Appropriations Bill, which sets out yearly spending limits.\textsuperscript{107} This funding legislation can be adapted pursuant to bilateral assistance programs and foreign-aid appropriations, which are provided through congressional subcommittees of the appropriations panels in both Houses of Congress.\textsuperscript{108}

Most funds aimed at bilateral development assistance are administered by USAID.\textsuperscript{109} USAID is an independent federal government agency, established in 1961 after Congress passed the Foreign Assistance Act mandating the creation of an agency to administer all U.S. development-related programs.\textsuperscript{110} USAID provides economic, development, and humanitarian assistance worldwide in concert with U.S. foreign policy interests, such as the expansion of democracy and free markets.\textsuperscript{111} U.S. development-coordination policy under USAID currently emphasizes five main goals, which stem from a primary U.S. foreign policy objective of encouraging and supporting developing countries in their efforts to build political, economic, and social institutions that will improve their citizens’ quality of living:

(1) the alleviation of the worst physical manifestations of poverty among the world’s poor majority; (2) the promotion of conditions enabling developing countries to achieve self-sustaining economic growth with equitable distribution of benefits; (3) the en-

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\item\textsuperscript{106} Foreign Assistance Act, 22 U.S.C. §§ 2151-2431 (2006); T ARNOFF & NOWELS, supra note 105, at 27.
\item\textsuperscript{107} Id. at 27-28; see also Enhanced Partnership with Pakistan Act of 2009, Pub. L. No. 111-73, 123 Stat. 2060 (2009) (to be codified at 22 U.S.C. §§ 8401-8442) (increasing nonmilitary assistance to Pakistan).
\item\textsuperscript{109} T ARNOFF & NOWELS, supra note 105, at 8. In some cases, bilateral economic aid may be jointly coordinated by USAID and the State Department. Id.
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encouragement of development processes in which individual civil and economic rights are respected and enhanced; (4) the integration of the developing countries into an open and equitable international economic system; and (5) the promotion of good governance through combating corruption and improving transparency and accountability.\textsuperscript{112}

Besides the traditional long-term projects administered by USAID, bilateral development aid has been aimed at global health initiatives, the most prominent of which, in recent years, has been support of the Millennium Development Challenge and for the treatment of HIV/AIDS and other diseases.\textsuperscript{113} Bilateral assistance has also been aimed directly at autonomous federal institutions, such as the Peace Corps, which plays a vital role in implementing foreign-aid programs “in areas like education, youth outreach and community development, the environment and information technology.”\textsuperscript{114} USAID also administers targeted foreign assistance through a special account, the Economic Support Fund, to strategically important regions or specific countries with security needs that are closely tied to American interests.\textsuperscript{115} Such aid can be directed at specific countries, for instance, when unanticipated political, economic, or security conditions arise that are deemed by the President to be in the United States’s national security interest.\textsuperscript{116} The Foreign Assistance Act further empowers the President to authorize aid to foreign countries for antiterrorism assistance\textsuperscript{117} and explicitly prohibits aid to any country determined by the Secretary of State to

\textsuperscript{112} Foreign Assistance Act, 22 U.S.C. § 2151(a).
\textsuperscript{116} See 22 U.S.C. § 2346.
\textsuperscript{117} See id. § 2349aa.
have “repeatedly provided support for international terrorism” or assisted countries that aid terrorist states.\textsuperscript{118} USAID often uses the services of local partners to help disperse the aid. Consequently, reinvesting, revitalizing, and reinventing USAID is crucial to the long-term success of the U.S. counterterrorism strategy.

**IV. DISPERAL OF AID**

One of the greatest challenges in routing aid, public or private, has been its actual dispersal. Since established terrorist organizations frequently provide the most effective humanitarian aid that exists within their domain, wholesale success of sanctions regimes ultimately deprives the neediest populations. The cycle of restriction of funding from the developed economies to terrorist organizations creates reliance on the local government, international intervention, or other locally operating NGOs. If these institutions are weak, they are either co-opted by the terrorist organization or they are depleted of the sum total of the foreign aid through other forms of corruption and inefficiency. Consequently, the neediest people receive less assistance than they would if the terrorist organization were dispersing the aid, and the institutions of civil society, such as a functioning government and commonwealth society, are further undermined, as is the rule of law.

This problem has been called the “charitable backfill” issue; that is, when blocking actions prevent mixed-motive terrorist organizations from discharging their charitable role, there must be some entity that can fill that need. If there isn’t such an entity, the population suffers and the terrorist organizations are empowered within the local populations because their utility and benevolence in historically rendering these services receives bolstered respect. There is no simple solution to this problem, but, at the very least, these consequences must be contemplated within the blacklist-designation process and should be formalized as a nonpublic requirement of that process. In addition, as intelligence information is examined during the designation process, the government must also assess which preferred partners operating in the arena of the putative designee can be vetted and will have the capacity to begin filling the humanitarian void created by designation. Finally, USAID should establish region-specific norms of good corporate governance for those NGOs who wish to partner with USAID. Prior to designation, the data from these efforts must be considered in assessing the

\textsuperscript{118} Id. §§ 2371, 2377.
maturity of the putative back-fill partners, as must an evaluation of what steps can be taken to mitigate the negative impact upon the population.

Through increased international cooperation, the United States and other economically developed countries have embarked on an ambitious mission to modernize financing tools and monitoring of the countries in which terror groups are based. Increasing technical assistance and education missions, both to governmental and financial-services personnel, is essential to create the systems of accountability and tracking necessary to ensure effective distribution of aid.

The common obstacles to effective dispersal of aid parallel those that prevent effective counterterrorism financing efforts in the developing world—poverty, corruption, lack of education, and political competition.\textsuperscript{119} Most of all, effective dispersal requires the rule of law, the ability to enforce it, and the trained expertise across disciplines to be vigilant against terrorist financing.\textsuperscript{120} Effective dispersal will also require substantial development investment to get to this level of sophistication. Where possible, the United States should employ a bias toward developing local government capacity to deliver the aid that the U.S. contracts (or central-authority subsidies) provide. This will empower local civic infrastructure for the day when foreign subsidization is unnecessary. Similarly, by encouraging aid to be utilized for societal development goals rather than basic humanitarian subsistence, when possible, USAID can be associated with longer standing development impact. For example, by investing in infrastructure projects, such as building schools, water treatment plants, and hospitals, the local populations will have long-standing reminders of the value and sincerity of U.S. aid.

A. Corruption

One of the greatest challenges to the effectiveness of any antiterrorism financing regime is the corruption of government officials and of weak governments altogether. There are simply no consensus solutions here.\textsuperscript{121} An uncontroversial starting point, however, is that weak governments must be supported with dispro-

\textsuperscript{119} See Lombardi & Sanchez, supra note 88, at 244-45.
\textsuperscript{120} Id.
\textsuperscript{121} The diaspora and affinity communities are perhaps more attuned to the problems of corruption and waste within troubled areas and should be consulted on techniques to implement aid in troubled areas. Increasing the visibility of the United States’s awareness of this reality, along with the adoption of a nonpatronizing approach
portionate development aid and cultivation of their own domestic social infrastructure. This does not mean that aid should be lavished upon a weak or corrupt government in the hopes that they adopt international norms of behavior. Rather, staggered aid to preferred partners who work with domestic government, rather than for domestic government entities, can build trust, establish benchmarks for efficiency, and develop lasting partnerships between the couriers of aid and the dispensers. Slowly building a domestic governmental capacity for distribution will help to empower the perception of the establishment’s humanitarian role and to legitimate its supremacy to competitor organizations such as terrorist groups.

A talking point with every developing economy should be to encourage adoption of the international norms established by the United Nations Convention Against Corruption (UNCAC) and to report on the progress of implementing measures.\(^\text{122}\) The UNCAC requires, among other things, the adoption of preventative measures, criminalization of abuses, assistance to investigation, repatriation of assets, and provision of technical assistance.\(^\text{123}\) The United States can couple favored-recipient status to the achievement of objective benchmarks of governmental transparency and anticorruption progress.

When U.S. aid is delivered, the same tools used to investigate private, foreign investment can be modified to audit the nonprofit model. One of these tools is the Foreign Corrupt Practices Act.\(^\text{124}\) The threat of accountability for graft, whether channeled private donations or through public-aid grants, extends not only to U.S. employees and contractors but also to the foreign nationals who

to dealing with this issue, could only increase the respect and efficiency for such an aid regime.


123. Id.

124. Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff (2006). “In general, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business.” Dep’t of Justice, Lay-Person’s Guide to FCPA: Foreign Corrupt Practices Act Anti-bribery Provisions, http://www.justice.gov/criminal/fraud/docs/dojdocb.html (last visited Mar. 18, 2010). To the extent that the FCPA can be more tailored to pertain to foreign contractors who are receiving or helping to disperse public aid, a legislative solution may be necessary to clarify the distinction that the FCPA makes between outright bribery and the “cost of doing business.”
steer contracts to their personal interests. The United States can also require good governance principles—such as standards of transparency of productivity and expenditures of funds, regular field auditing, and inspectors deployed commensurately with the amount of aid—in order to police its efficiency in the face of comparable projects.

Programmatically, one of the ways to limit the exposure to corrupt counterparties is to establish a progressive graduation of the award of contracts from low-risk, small outlay projects at the beginning of a relationship to higher-risk, capital-intensive projects once trust and oversight is established. For example, providing development aid in the form of basic education and technical assistance cannot easily be co-opted by local elites or governmental officials. However, such projects educate, build trust, and provide a barometer for aid-givers to measure the competence of would-be partners with modest risk. A similar means to avoid the inefficiencies and waste of corrupt or weak regimes is to solicit project-specific grants and award them conditioned upon oversight and based on international benchmarks of cost and quality. Ultimately, corruption can be countered by encouraging, reinforcing, and rewarding governmental partners who obey the rule of law and meet intuitive benchmarks set by experienced aid providers.

B. Develop Preferred Aid Dispersal Partners

Creating an array of vetted aid distributors can dramatically reduce the “charitable backfill” problem. While giving money to foreign governments may be an attractive quick fix, in practice, the net result is frequently co-option of aid agendas, corruption, and waste. If money stays out of foreign sovereign hands while the foreign voice is heard at the table of prioritization, then the risk of the perversion or waste of aid is reduced, and the equity that they champion is still heard. Consequently, NGOs and private-preferred aid distribution partners must be groomed to fill the humanitarian void created when a mixed-motive terrorist organization’s assets are frozen. Moreover, such potential partners must be identified during the designation process, not afterward.


A tripartite partnership between the international donor of aid (United States/World Bank/IMF), a local governmental agency, and a certified, preferred aid-dispersal NGO may be the solution. Such a relationship can increase the quantity of aid, improve its efficiency, and improve respect for the rule of law. The most challenging part of this proposal, however, is to cultivate vetted private-sector, preferred partners. It is more enforceable to impose conditions on private entities than governments. Each partner must live up to benchmarks and follow core principles of good governance: they must receive graduated dispersals of aid conditioned on demonstration of competence; they must provide for accurate and timely auditing data; they must demonstrate efficacy by peer-reviewed standards; their methods must be replicable (or in unique circumstances, they must be certified by peer review); they must develop methods that are sustainable over time; and they must encourage development of market structures, such as microfinance programs, so that success is measured by how many people no longer require subsistence aid, rather than how many they have served.

The OECD countries, led by the United States, must assist the IMF and World Bank’s system of auditing and feedback to identify and train potential preferred partners. Those organizations that achieve these benchmarks can benefit from an influx of bilateral and multilateral aid, an internationally recognized certification, and a reputation that can compete with those of terrorist organizations that provide charitable aid in these regions. As more aid is funneled into these areas, certified charities who partner with the international community and local governmental agencies can fill the gaps left when a terrorist organization is incapacitated or limited by the freezing of its assets.

Despite a layered gatekeeping at the recruiting, training, implementing, and auditing phases of preferred partners, some loss due to fraud and waste is expected in the most automated and developed grant systems. However, a scaled version of disclosure...
and auditing requirements must accompany foreign aid to terrorist havens in order to assure transparency. As one spigot turns off, the other must turn on, albeit with safeguards to ensure that the stream is not unexpectedly diverted.

V. NEW LEGAL FRAMEWORKS TO CONSIDER

A. A Public Option for Provision of Foreign Aid

As described above, increased regulation and attention has deterred, or has been perceived to deter, the transfer of private aid to needy areas of the world, particularly to countries with large Muslim populations. The deterrence of such aid, while prudent to combat terrorism financing, impacts the long-term perception of the domestic U.S. population as well as the governments, populations, and terrorist groups abroad that would otherwise benefit from the aid. In order to continue to encourage the productive donation of private aid and to increase the overall efficiency of the aid, government can play an important complementary role.

As the current administration considers how to reorganize the U.S. aid distribution structure, it should also consider whether it can be decoupled from other foreign policy objectives. There should be an imperative to reduce the demand for humanitarian aid provided by terrorist organizations. In this vein, the U.S. government can provide another unique customer service as the banker of last resort: it can provide an option to its taxpayers to be willing to transfer money from private citizens to needy areas for the sole purpose of providing humanitarian and development aid—a Humanitarian Assistance Fund.\(^{128}\) By partnering with its own population, the U.S. government can pledge to disperse humanitarian and

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\(^{128}\) An earmarked voluntary donation, including a tax benefit similar to a donation to a § 501(c)(3) organization, could be made through annual tax returns. For further specificity, a schedule providing various recipient options, including some that would satisfy zakat obligations, could be attached. A Muslim-specific, vetted donor vehicle has admirably been proposed by another commentator; however, it is unfairly narrow in scope, is not necessarily a publicly-run option, and encourages anonymity. See Nina J. Crimm, *Muslim-Americans’ Charitable Giving Dilemma: What About a Centralized Terror-Free Donor Advised Fund?*, 13 ROGER WILLIAMS U. L. REV. 375 (2008). My proposal is not designed exclusively to immunize Muslims donations but rather is a balanced, state-run regulatory vehicle that furthers its national security interests and incidentally provides Muslims, and everyone else, an alternative to provide responsible aid to foreign populations. In this sense, it is similar to the taxpayer option of voluntarily contributing to the Treasury in order to reduce the national debt.
development aid as directed to certain needy areas, particularly those with large Muslim populations, in consultation with community-based advisors, such as religious scholars and governmental representatives of the recipient areas. Using either existing NGO-contracted local conduits of aid, through USAID or through local governmental arms, when an American provides private aid through the U.S. government, he can do so without the risk of being indicted for provision of material support to terrorists. In this way, the United States can offer a public option for private aid, a “white list” of one, and may decide to match funds or supplement private aid with public monies.

The benefits to the U.S. government of incorporating private aid in its total aid are obvious: the number of real dollars in aid dramatically increases, the synergies of aid distribution are likely to render aid more efficient, and transparency increases in terms of real-time governmental oversight. Public relations with parts of the world that presently resent the United States are likely to improve, and minority populations will feel greater enfranchisement by proportionally leveraging their power as U.S. taxpayers to further their community objectives. More pragmatically for enforcement and regulatory purposes, however, is that the transparency into the financing process will be immediate and will further the goals of the increased reporting requirements. For American Muslims and other groups who have inadequate vetted options for provision of foreign aid, a safe alternative to the traditional and opaque process of zakat and sadaqah donation may be a welcome option, even if the government does not recognize it as a religiously based donation. While there are admittedly a number of details that would

129. See also the Combined Federal Campaign (CFC), a program offered to federal employees to pool funds for various NGOs in order to streamline the efficiency of distribution. 5 C.F.R. §§ 950.101-.901 (2009).

130. In some countries, zakat is regulated by the government explicitly; in others, it is collected by terrorist organizations. See Aurel Croissant & Daniel Barlow, Terrorism Financing and Government Responses in Southeast Asia, in TERRORISM FINANCING AND STATE RESPONSES, supra note 2, at 203, 209; Moyara de Moraes Ruehsen, Arab Government Responses to the Threat of Terrorist Financing, in TERRORISM FINANCING AND STATE RESPONSES, supra note 2, at 152, 165. This practice, however, is largely influenced by theological guidance of who are the proper collectors and recipients of zakat. For example, governmental collection of zakat is more acceptable if the government is a Muslim government operating pursuant to Sharia. For some schools in Islam, if a non-Muslim government were to collect mandatory alms, it would be perceived as a sin. Consequently, the proposal of this option will compel a public discussion of what zakat reforms, if any, the community will be willing to adopt in order to ensure that money is not going to terrorist organizations.
have to be resolved before implementation of such a program, this paper aims to start that discussion by proposing a construct that reconciles many of the policy and legal issues.

While assuredly the prospect of disclosing certain personal details to the government may be unpalatable to some, to do so on a tax form should only be mildly more invasive, if at all, than disclosing one’s income and the recipient of one’s charitable donations. A constitutional attack on a system where the United States discriminates on behalf of providing bundled donations of foreign aid to specific needy populations, even if portions are earmarked exclusively for overseas Muslims, is not likely to succeed.131

B. Gray Lists

The creation of “white lists,” or lists of organizations that have been vetted and determined to be safe organizations, is often proposed and just as frequently criticized.132 One side argues that such a list would stigmatize and discourage donations to existing organizations whose objectives may not coincide with U.S. national interests, and the other argues that such a list would effectively immunize the organizations from prosecution and would be slow to detect changed circumstances.133 Another alternative is to stop short of a “white list” but to recognize a class of organizations that have adopted required good governance practices without immu-
nizing them from enforcement actions. Such practices would include certifying education and training on essential business practices, adopting fiduciary obligations to their donors and the beneficiaries of their work, subjecting themselves and their officers to rigorous auditing procedures and accountability measures, providing transparent real-time access to their finances and operations, and agreeing a priori to take remedial measures required by the government. If necessary, this would include agreeing to the freezing of assets while the government investigates them.

For example, such a freeze could follow a real-time intelligence report that identifies a particular beneficiary as a newly emerged terrorist threat. In exchange for such rigorous transparency protocols, donors and organizations could take some modicum of solace in knowing that it would be a difficult case indeed to demonstrate criminal intent. Consequently, by encouraging such good governance practices, the government (i.e., the IRS or whichever agency is designated) can create incentives for cooperation with the sanctions regime rather than incentives for avoiding it.

C. Charitable Trustee

When an organization is under investigation, a “charitable trustee” could be appointed as essentially a receiver of a charitable organization, as if the organization were involuntarily entered into bankruptcy. A trustee’s appointment could be conditioned upon a sufficient objective showing that a charitable group’s activities may be acting contrary to U.S. national security interests. This hybrid construct marries the receivership concept of domestic bankruptcy law, which allows for immediate transparency into an organization, with the Committee on Foreign Investment in the United States (CFIUS) process, where national security concerns can be raised by external forces that will subject a charitable organization to the control of the trustee or other suitable sanction, including potentially a blocking order.134 The efficacy of a trustee, whose primary alle-

giance will be to the national security interests of the United States, will be more discerning than blanket blocking orders and will also allow greater transparency and intelligence about a charitable group’s activities than a mere adversarial audit by the IRS. To the extent that a charitable organization has chosen to take advantage of § 501(c)(3) status, just as it bears the risk of audit, it would contractually bear the risk of falling into receivership.

CONCLUSION

Countering the drivers that lead organizations to terrorism as a means to a political end requires a long-term view, a sense of understanding, and a holistic approach to modifying policies and actions that feed the flame of radicalization. While many of these drivers may not be influenced by rational countermeasures, there are many government-based tools that can more effectively mitigate the attractiveness or the perceived necessity of terrorism financing. On a macroscopic level, socioeconomic factors can be manipulated with the influx of wealth, education, goodwill, and opportunity. When bolstered pragmatically, these may be the most effective tools to counter the rhetoric that feeds the radicalization necessary to fuel organized terror.

Encouraging charitable aid and using creative government-brokered systems for deploying such aid will marginalize mixed-motive terrorist organizations and promote goodwill toward U.S. development initiatives. Such initiatives must include promoting the rule of law and empowering local NGO and governmental partners to sustain themselves. By increasing development aid, weak and corrupt states can better satisfy their humanitarian needs and can further delegitimize organizations who insist on keeping terror in their arsenal to achieve their ends. As terrorist organizations are stigmatized by necessary blocking actions and international opprobrium, partnerships of international aid agencies, local governments, and preferred NGO partners can fill the gaps of aid heretofore filled by the terrorist organizations. An environment that fosters constructive ideas rather than adherence to reactive thinking, where basic needs are satisfied through self-reliance rather than reliance upon others, and in which an open and self-determinative government provides a steady hope of progress is hardly one in which terrorism will be a tolerated political tool.