3. Al Qaeda's call to jihad

> [J]ihad is an individual duty when an enemy attacks Muslim countries . . . To kill the Americans and their allies – civilians and military – is an individual duty incumbent upon every Muslim in all countries . . . so that their armies leave all the territory of Islam, defeated, broken, and unable to threaten any Muslim.
>
> Osama bin Laden[1]

The global fight against al Qaeda has been characterized as 'the defining conflict of the early 21st century.'[2] Some observers describe al Qaeda's 'holy war' against America and its allies as representing an 'existential struggle' against non-Islamic societies and values;[3] others, including Osama bin Laden himself, have said it reflects a 'clash of civilizations.'[4] Whatever description is most appropriate, it is clear that al Qaeda is waging a global campaign of terror unfettered by nationality, ethnicity, age, race, or gender. Its operations have targeted thousands of people, military and civilian, in deadly attacks around the world. 'Killing and dying for Allah are viewed as the highest form of sacrifice.'[5] All targets are considered legitimate if seen to be in opposition to al Qaeda's fundamentalist interpretation of Islam. This ideology further rejects compromise, embraces martyrdom and demands complete victory.[6] Effectively, bin Laden's message is this: you are either a believer or a non-believer, a righteous Muslim or an infidel.[7] With this message, bin Laden has inspired a movement that is intent on targeting the 'non-believing' world in the name of Islam.[8]

Al Qaeda is not simply a politically motivated terrorist organization with operational cells scattered throughout worldwide Muslim populations.[9] At its core, it is the standard bearer of a movement designed to ignite a global Islamic uprising. '[B]in Laden is promoting (and at times directing) a "worldwide, religiously inspired, and professionally guided Islamist insurgency." '[10] The network advancing this global insurgency has the will, financial resources, history of violence and access to lethal weapons that causes it to be a serious threat not only to the United States, but the international community. According to one source,

> [w]hat makes [bin Laden] and the Apocalyptic Global Jihad Groups a lethal threat to the Free World's national security is the combination of wealth; fanatical motivational religious ideology; and the command over radical Islamic

> highly ambitious militants, bound up with deep belief in the cause and hideous hatred of the West, of modernity and of all democratic liberal values.[11]

Understanding the motivation and ultimate objectives of this radical Islamist movement is essential to developing and implementing an effective strategy to defeat it, including a comprehensive plan to dismantle its financial infrastructure.

AL QAEDA'S IDEOLOGY: THE RISE OF MODERN JIHADIST-SALAFISM

The ideology of al Qaeda has been described as jihadist-salafism, a movement based on 'a profound "respect for the sacred texts in their most literal form [combined with] an absolute commitment to jihad." '[12] Salafists believe in using violence as a means of establishing a global Islamic state under the control of Muslims and governed by the teachings of the Prophet Muhammad.[13] Osama bin Laden has been the chief spokesperson for the ideology that drives al Qaeda and its network of terror. Al Qaeda's version of jihadist-salafism demands strict adherence to a literal interpretation of the Qur'an and rejects reliance on any other sources for guidance on religious, social, and political issues.[14] This ideology also demands complete dedication to warfare against its enemies, with only victory or martyrdom as acceptable results. Al Qaeda preaches that '[j]ihad is every Muslim's obligation.'[15] For those jihadists inspired by the al Qaeda ideology, any means necessary for accomplishing its ends in the name of Islam are justified. Thus, suicide bombings, torture, beheadings, and the killing of civilians and fellow Muslims are acceptable methods of defending the Islamic faith.[16] And although al Qaeda is a relatively new entity to militant Islamism, its ideology reflects strains of Islamic religious, social and political thought that have been espoused by extreme elements of the Muslim community for centuries.

Taqi al-Din ibn Taymiyya (1262–1328)

The most important theoretical predecessor of the contemporary Islamism that informs al Qaeda's ideology is Taqi al-Din ibn Taymiyya, whom bin Laden frequently references and quotes in his public statements and media interviews.[17] Ibn Taymiyya, the spiritual father of modern radical, revolutionary Islam, was based mainly in Damascus.[18] He lived and wrote during the period of the Mongol invasions and European–Crusader presence in the late 13th and early 14th centuries.[19] The arrival of the Mongols ended

the unifying influence of the caliph in Baghdad and ushered in a period of change in the Muslim world.[20] Ibn Taymiyya believed that the 'weakness that had allowed the defeat was a result of the failure of the Muslim community, or *umma*, to properly follow the injunctions of the early Holy texts.'[21] The Mongols, though converts to Islam, terrorized much of the region and practiced a form of Islam heavily influenced by traditional Mongol customs and religious practices. These practices disgusted ibn Taymiyya, who practiced a rigorous form of Muslim devotion that favored a strictly literal interpretation of the Qur'an.[22] His ideology did not separate religious practice from political and social life. Rather, 'church and state were inextricably linked in ibn Taymiyya's world view, with religion dominating and guiding the state through force and authority to the glory of God and the betterment of the individual believer.'[23]

Ibn Taymiyya had no tolerance for Arab leaders and clerics who he believed had abandoned the true practice of the faith. By forsaking strict adherence to the Qur'an and hadith, Arab regimes lacked the ability to defend the Islamic ummah[24] and restore it to its past glory under a unified caliphate.[25] Instead, their deviation from Islamic religious law, known as Sharia, made them apostates.[26] Ibn Taymiyya maintained that a professing Muslim who did not live by a strict interpretation of the Qur'an and hadith was a *kufr* or non-believer opposed to God and the ummah. He believed that it was the responsibility of all Muslims to resist invaders and also apostate rulers by violent means in the name of jihad or 'holy war.'[27] For him, '[an] apostate has to be killed in all circumstances.'[28] By portraying unorthodox Muslims as apostates, ibn Taymiyya was able to skirt the Sharia prohibition against internal warfare among Muslims in order to justify his call for jihad.[29]

For ibn Taymiyya, jihad was as important to the devotion of each believer as the five pillars of Islam.[30] Traditionally, Islamic jurists understood jihad as an obligation of the community rather than the individual. In the event that Muslim rule was under physical attack, Islamic law required that the ummah wage 'defensive' jihad. This requirement concerned the community and the individual Muslim did not have to fight as long as others carried the banner of jihad.[31] Ibn Taymiyya, however, considered jihad an individual duty; failure to participate was a sin that indicated failure to live by the faith. 'Jihad against the unbelievers (*kufr*) is compulsory, since they are the enemies of Allah and his messenger.'[32] Failure to wage jihad forfeited the ruler's right to govern and demanded he be overthrown by the ummah.[33]

Some commentators maintain that by asserting that '*jihad* against apostates within the realm of Islam is justified, by turning jihad inward . . ., [ibn Taymiyya] plant[ed] the seed of revolutionary violence in the heart of

Islamic thought.'[34] It is certainly true that ibn Taymiyya's teachings heavily influence al Qaeda's ideology. Bin Laden frequently draws upon ibn Taymiyya in his calls for jihad, as he did in his 1996 manifesto *Declaration of War Against the Americans Occupying the Land of the Two Holy Places.* There, bin Laden quoted ibn Taymiyya in support of his call to all Muslims to conduct jihad against the West and 'corrupt' Middle Eastern governments:

> As Ibn Taymiya stated, fighting in defense of Belief is a collective duty; and there is no duty after Belief other than fighting the enemy who is corrupting life and The Religion. . . . Ibn Taymiya then stated that the ultimate aim is to please God, raise His Word, institute His Religion, obey His Messenger and fight the enemy in every respect.[35]

The message advanced by ibn Taymiyya and echoed today by bin Laden is one motivated by religious belief. Essentially, it is the sacred duty of all Muslims to wage war against their secular leaders and non-Muslim enemies around the world.[36]

Muhammad ibn Abd al-Wahhab (1703–92)

Muhammad ibn Abd al-Wahhab, a militant Islamic preacher and founder of Wahhabism, revived ibn Taymiyya's teachings. Al-Wahhab embraced a radical, fundamentalist interpretation of Islam. He believed that Allah's message as transmitted to Muhammad had become obscured over time and called for a strict interpretation of Islam that returned to its sources.[37] He preached that 'all Muslims must rigorously observe all the laws of Islam if a true and just Islamic society was to become a reality.'[38] Al-Wahhab was particularly incensed by intercessionary practices such as the use of shrines and prayer addressed to God by means of the Prophet or saints, which he believed constituted shirk, or polytheism.[39] Al-Wahhab denounced the traditional praise and celebration of the Prophet Muhammad, comparing it to the Christian worship of Jesus. Christian belief in the divinity of Jesus, rejected by Muslims, was viewed by al-Wahhab as denying monotheism and returning to the belief in many gods.[40] Al-Wahhab also condemned dancing, wearing jewelry and playing music, because such practices distracted from religious prayer and worship.[41] He burned many books, arguing that the Qur'an was the ultimate source of knowledge and salvation. Muslims unwilling to accept his views were branded idolaters and apostates, who had fallen into unbelief, and if they did not change their ways they should be killed.[42] Shi'as and Sufis that al-Wahhab judged unorthodox were to be exterminated and their property confiscated, and all

other faiths were to be destroyed.[43] Like ibn Taymiyya, al-Wahhab emphasized the importance of jihad in Islam. He 'extolled the need for armed jihad against all infidels and classified not only Jews and Christians as infidels, but also those Muslims who did not subscribe to Wahhabi beliefs.'[44] He believed that fighting in God's cause should be elevated to a sixth pillar of Islam.[45] Al-Wahhab preached that jihad was the duty of every Muslim, and any Muslim who evaded this duty was a hypocrite and should be killed.[46] To the Wahhabis, death in the cause of jihad would gain them entry to heaven as martyrs.[47]

Al-Wahhab's campaign to reform Islam evoked strong opposition in his birthplace of Najd. In 1744, al-Wahhab took refuge in the village of Dariyah, in a district ruled by Muhammad ibn Saud, leader of the al-Saud clan.[48] In 1747, al-Wahhab and al-Saud formed an alliance based on a power-sharing agreement with the former serving as religious leader and the latter as political ruler.[49] They contracted marriage to cement their alliance and agreed that power should be inherited exclusively by their descendants.[50] The Wahhab–Saud alliance extended its influence into other parts of the Middle East, launching raids into Syria, Iraq, and Kuwait. By 1788, the Wahhabis had managed to control much of the Saudi Arabian Peninsula.[51] However, their domination of the Middle East was short-lived. In 1818, the Ottoman army invaded and destroyed the Wahhabi capital of Dariyah, defeating the Wahhabis.[52] Over the next century, the Wahhabis made repeated attempts to regain control of the Arabian Peninsula, but were repelled by the Ottomans.[53]

When the House of Saud assumed the leadership of Arabia in 1926, Wahhabism was declared to be the dominant creed of the renamed Kingdom of Saudi Arabia.[54] To this day, a *quid pro quo* exists between Wahhabis and the House of Saud in Saudi Arabia: '[T]he Sauds take care of the politics and the Wahhabi clerics take care of the religion.'[55]

The Muslim Brotherhood

Hassan al-Banna (1906–49)

Ibn Taymiyya's and Abd al-Wahhab's ideas were an important component of the jihadist resurgence that began in the early 20th century, as Ottoman hegemony in the Middle East faded and Western influence increased. Out of this resurgence of revolutionary sentiment and jihadist ideology came the Muslim Brotherhood, a radical social and religious reform organization founded by Hassan al-Banna in Egypt in 1928.[56] The Muslim Brotherhood grew in influence at the same time that secular nationalist and socialist movements began to call for reform in Egypt. These reformers all shared a dislike for British colonial rule and were angered by the poverty and

stagnant growth that plagued the country. However, unlike the other reform-minded groups, the Brotherhood proposed a religious solution to the social and economic malaise confronting the country. Their credo reflected the organization's religious focus: 'The Prophet is our leader; *Qur'an* is our law; *jihad* is our way; dying in the way of Allah is our highest hope.'[57] According to al-Banna, the inequity and social injustice faced by the Muslim community were the result of the failure of Muslims to follow the 'straight path' of Islam.[58]

Al-Banna's political and ideological objectives can be summarized as follows:

> (a) to oppose the ascendancy of secular and Western ideas in the Middle East in general and Egypt in particular; . . . (b) the rejection of Western influences means the return to pure Islam (*salaf*), to the precepts revealed by Muhammad during his life and deeds at Mecca and Medina, as the only solution to all the ills that had befallen Muslim societies; (c) rejection of extreme Islamic mysticism (*Sufism*), and all other tendencies and traditions that exist in the Muslim's daily life and are against Islamic teaching and tenets; (d) the moral reform of the individual as a precondition to the Islamization of society, by establishing a government that ruled on the basis of Muslim values and norms.[59]

Al-Banna hoped that the Muslim Brotherhood would inspire a political movement among the Muslim community that would culminate in a newly formed state true to orthodox Islam.

By 1948, the Muslim Brotherhood had dramatically grown in size in Egypt and had branches in 70 countries throughout the Middle East and beyond.[60] At the same time, the organization had become increasingly more violent, establishing a military wing. The Brotherhood began attacking British and Jewish businesses in an effort to accelerate Britain's withdrawal from Egypt and to protest Jewish settlement in Palestine. The group also targeted the Egyptian government, assassinating several government officials, including Egyptian Prime Minister Mahmud Fahmi Nukrashi on December 28, 1948.[61] In 1949, the Egyptian secret police responded to the Brotherhood's violent tactics through a tough crackdown that culminated in the assassination of al-Banna when he was only 43 years old.[62]

Sayyid Qutb (1906–66)

Though the suppression of the Muslim Brotherhood and the death of al-Banna frustrated some of the plans of the organization, the spirit and ideology of the movement had already become entrenched among some Muslim intellectual circles. One of the most important and influential scholars to adopt and advance the Brotherhood's cause was Sayyid Qutb. Qutb is regarded as 'the religious father of the Apocalyptic Global Jihad

Groups, the figure who has most influenced al-Qa'idah leadership's ideology, and the homicide bombings.'[63] While al-Banna was a 'political Islamist' who looked to appropriate the apparatus of the state to implement his political and social goals, Qutb, a radical Sunni Islamist, preferred a more violent and radical course. After having spent three years studying in America, Qutb joined the Muslim Brotherhood in 1951.[64] He returned from the United States convinced that Western society was decadent, sexually depraved and materialistic.[65] Qutb was appalled by what he considered a society infused with immorality and excessive materialism. He called American life 'primitive' and believed its values represented the antithesis of the moral code of virtue available through adherence to Islam.[66]

In 1954, the Muslim Brotherhood was banned in Egypt and Qutb, who had become one of the group's most outspoken members, was imprisoned for his anti-government activities.[67] While incarcerated, he authored his most influential work, *Milestones*, which has been characterized as 'political Islam's Communist Manifesto.'[68] Qutb believed that the Muslim world had become plagued by the problems of poverty, tyranny, immorality, and ignorance, a condition he called *jahiliyya*, the religious term for the period of ignorance prior to the revelations given to the Prophet Mohammed.[69] In *Milestones*, he wrote:

> [T]he Muslim community must be restored to its original form . . . [It is] buried under the debris of the man-made traditions of several generations, and . . . is crushed under the weight of those false laws and customs that are not . . . related to Islamic teachings.[70]

According to Qutb, the reason for Islam's decline was corruption of the Qur'an by the secular governments in the Middle East. His writings advanced certain core principles concerning governance: that 'the oneness and sovereignty of God preclude human rule, which should be violently overturned if necessary; [and] that the only legitimate form of government over Muslims is an Islamic state headed by a caliph.'[71] Much like ibn Taymiyya before him, Qutb maintained that Muslim political leaders who did not strive to live according to the teachings of Islam were *kufr*, unbelievers and hypocrites, and should be deposed. Arab governments, whether democratic, monarchical, or socialist, were based on man-made law and thus incompatible with and contrary to Islam. Because of their apostasy, such governments were the legitimate targets of jihad. Assassination of political leaders was justified as 'one stage in the destruction of the political regimes,' and he declared that 'a society whose legislation does not rest on divine law (Shari'at Allah) is not Muslim.'[72] Qutb called for a 'full revolt against human rulership in all its shapes and forms, systems and arrangements.'[73] There was no middle ground in what Qutb conceived as a struggle between God and Satan.

This was a sweeping call for all Muslims to take up arms in the fight. The righteous purpose of all true Muslims was to destroy the kingdom of man and establish one ruled by Allah. Any Muslim who failed to heed the call to jihad was just one more non-believer worthy of destruction.[74]

In 1954, the Muslim Brotherhood was banned and Qutb was arrested for an attempt to assassinate President Gamal Abdul Nasser.[75] He was released from prison in 1964, and re-arrested in 1965 for plotting to overthrow the government and assassinate public figures.[76] The trial of Qutb and 42 of his followers lasted approximately three months.[77] Qutb was subsequently found guilty of attempting to overthrow the Egyptian government and sentenced to death. He was hanged on August 29, 1966.[78]

Bin Laden's Jihadist Ideology

The Muslim Brotherhood has been extremely influential on bin Laden and the development of al Qaeda's ideology. Prior to joining the anti-Soviet jihad in Afghanistan, bin Laden attended the Management and Economics School at King Abdul Aziz University in Jeddah. He took courses in Islamic studies taught by conservative Islamic scholars Abdullah Azzam and Muhhamed Qutb, the brother of Sayyid Qutb, which deeply influenced bin Laden's religious thinking and political views.[79] These views were further reinforced by his interaction with jihadists in Afghanistan. It was there that bin Laden solidified his dangerous ideology and created the network through which that ideology could be put into action.

It is important to recognize that bin Laden's world-view is set within a theological framework. God comes before all things, and men are called to order their lives according to God's law. This law demands strict adherence to a literalist interpretation of the Qur'an and the hadith. God reveals his truth through Sharia law, and any deviation from it makes the offender an enemy of God and the ummah. According to bin Laden, Sharia must control all aspects of life, including government and politics. Faithful Muslims must not tolerate governments, including democratic regimes, that deviate from Sharia law. Instead, righteous Muslims must overthrow moderate Arab governments in favor of protecting the ummah from the corruption, immorality and ignorance that comes with apostasy. These apostate governments are nothing less than enemies of Islam whose duplicity has fostered a decline in the greatness of Islam. For bin Laden, both the problem and solution are clear:

> [T]he rulers are incapable and treacherous, and . . . they have not followed the right path of Islam but followed their wishes and lusts – this is the reason for the setbacks in the [Islamic] nation's march during the past decades. Therefore, it is

> clear to us that the solution . . . lies in adhering to the religion of God, by which God granted us pride in the past centuries, and installing a strong and faithful leadership that applies the Qur'an among us and raises the true banner of *jihad*.[80]

Bin Laden's jihadist movement sees itself as the defender of the true Islamic faith and way of life. All aspects of life must conform to the jihadist view of Sharia. Compromise between Sharia and human systems such as democracy and socialism (and the laws and rights they create) is forbidden, for that would be compromising God's absolute truth. Instead, all Muslims must follow Sharia, and non-Muslims must not impede the dominance of Sharia law wherever Islam exists or spreads. Likewise, because the jihadist cause is the cause of God's truth, the righteousness of their cause justifies whatever actions jihadists take to advance God's law and defeat their enemies.

For bin Laden, there is an enemy even greater than the apostate Muslim governments. That enemy is the United States and the 'Zionist–Crusader' alliance it leads.[81] In bin Laden's view, the United States seeks the destruction of Islam and is responsible for all warfare involving Muslims around the world. Even in conflicts to which the United States is not an active party, such as those between Israel and Palestine, Russia and Chechen rebels, and India and Kashmiri Muslims, bin Laden accuses America of instigating the bloodshed as part of its campaign to destroy the Muslim ummah.[82] He further points to Kosovo and Bosnia-Herzegovina, where he claims that thousands of Muslims were murdered before the U.S. and Western powers intervened to stop the killing.[83] Bin Laden further condemns the United States for supporting Arab apostate governments that are derided by bin Laden as its agents.[84] To combat the Zionist–Crusader attack on the faith, bin Laden calls for a global defensive jihad against America and its allies.[85]

Bin Laden believes that only by eliminating the influences of American infidels throughout the Muslim world can a true Islamic state be established, restoring the greatness of Islam's golden age. Thus, all Muslims have a sacred duty to wage jihad against the United States by killing Americans, including civilians, anywhere in the world.[86] Moreover, the killing of American civilians may be perpetrated by any means, including by the use of weapons of mass destruction. In fact, bin Laden has declared: 'There is a duty on Muslims to acquire [weapons of mass destruction], and America knows today that Muslims are in possession of such a weapon, by the grace of God Almighty.'[87]

Despite bin Laden's rhetoric against the United States, al Qaeda's fight is not with specific countries or political systems. The United States is merely a figurehead of what bin Laden defines as a global conflict between the righteous Islamic community (which subscribes to his form of jihadist-salafism) and the world's unbelievers and apostates:

> The conflict is partly regional, but it is also a greater struggle between two camps: one camp is America, representing the global *Kufr* [non-believers] and accompanied by all of the apostates. The other camp is the *Ummah* [Islamic nation], headed by its *Mujahideen* [Islamic warriors] brigades.[88]

Any who oppose al Qaeda's interpretation of Islam and support the unbelievers are themselves apostates and enemies of God. In their minds, bin Laden and his followers are ultimately waging a war of religion that can only end with the triumph of the true faith.

AL QAEDA'S STRATEGIC OBJECTIVES

Al Qaeda represents a deadly threat not only to the United States but to the entire international community. In 1998, when asked about the objectives to which bin Laden and al Qaeda aspire, he provided the following response: 'This is our goal, to liberate the lands of Islam from unbelief and to apply the law of God Almighty in it until we meet Him and He is pleased with us.'[89] For bin Laden, the 'lands of Islam' are not confined to the Middle East. The leader of al Qaeda seeks 'to bring back all the historical lands conquered by Muslim dynasties, from the seventh century to the seventeenth century – from India to Spain.'[90] After having liberated all Arab-Muslim lands from the infidels and apostate rulers, bin Laden would impose strict Sharia law to bring about Allah's supreme reign.[91] Bin Laden's mission statement succinctly captures the jihadist-salafism ideology and suggests the 'strategic view of terror' held by the al Qaeda leader and his associates.[92] The tactical measures to achieve al Qaeda's strategic objectives include the infliction of 'inhuman terrorism against the Free World, headed by the United States and Israel, so as to move its public opinion and to bring the retreat of their military forces and civil presence from the Arab-Muslim lands'[93] Through the use of violence and extreme rhetoric, bin Laden provokes aggressive responses from his enemies that can then be used to ignite passions throughout the restive Muslim world in support of an extremist Islamist insurgency.[94] This insurgency will provide the power to 'liberate' Muslims from global unbelief and establish an Islamic state that will properly apply the law of God (as bin Laden interprets it) and restore the faith to its proper place of superiority.

Creating a Strict Islamic State

Al Qaeda's ultimate goal is to unify the world's 1.3 billion Muslims under a theocratic state governed by strict Sharia law.[95] Many jihadists regard the period of the ancient caliphates as the golden age of Islam, and they seek to

restore the Muslim world to its former greatness by installing a new caliphate. Such a system would also ensure orthodox practice of the faith. In bin Laden's view, secular governments are incompatible with and even contrary to Islamic faith because they empower man-made legal systems rather than the 'law of God.'[96] Democracies are equally unacceptable to al Qaeda and considered an assault on God's right to rule. In January 2005, in an apparent effort to intimidate voters from participating in a nationwide election, terrorist leader Abu Musab al-Zarqawi released an audio-recorded statement declaring war on democracy in Iraq. He stated: 'We have declared a bitter war against the principle of democracy and all those who seek to enact it . . . . Those who vote . . . are infidels. And with God as my witness, I have informed them [of our intentions].'[97] Bin Laden has specifically characterized democracy as a rival 'religion' to Islam, and democratic principles such as freedom of speech and freedom of religion have been criticized as 'un-Islamic and tantamount to apostasy punishable by death.'[98]

Al Qaeda intends to establish a strict Islamic state in the 'heart of the Islamic world,' which, according to bin Laden's deputy Ayman al-Zawahiri, is located in Egypt, Iraq, Syria, and Palestine.[99] Al-Zawahiri has stated:

> It has always been my belief that the victory of Islam will never take place until a Muslim state is established in the manner of the Prophet in the heart of the Islamic world, specifically in the Levant, Egypt and the neighboring states of the Peninsula and Iraq; however, the center would be in the Levant and Egypt . . . . It is like a bird whose wings are Egypt and Syria and whose heart is Palestine.[100]

While the exact political contours of this type of strict Islamic government have not been well defined by bin Laden or other senior al Qaeda leaders, they have provided some clues. The only developed example of this type of system in modern times with which al Qaeda has been directly associated was the Taliban regime in Afghanistan from 1996 to 2001.[101] Like Afghanistan under the Taliban, al Qaeda's Islamic state would be motivated by the clear banner of Islam. This Islamic state would be governed by a shura council, or Sharia-based judiciary comprised of religious clerics that would be responsible for ensuring obedience to Sharia law.[102] Only laws and edicts consistent with Islamic law would be enforced, and conduct considered inconsistent with Islamic principles would be prohibited and punished.

Under the Taliban, Afghanistan welcomed jihadists from around the world and provided them sanctuary, training and support as the militants prepared to pursue their objectives elsewhere. A caliphate state envisioned by the likes of al Qaeda would provide similar support for jihad waged beyond its borders. As noted in the *9/11 Commission Report*, according to bin Laden, unless the United States and all other non-Muslim nations

abandon the Middle East, convert to Islam, and end the immorality and godlessness of their society and culture, they will find themselves at war with the Islamic nation.[103] Enemies of non-Muslim governments would find an ally in the new caliphate. In essence, bin Laden's Islamist state would be the ultimate state sponsor of terrorism.

This type of Islamic state may be on the rise in Somalia. In June 2006, Islamic forces, unified under the title of the Islamic Courts Union, took power in Mogadishu and quickly established a strict system based on Sharia law.[104] International observers are concerned that under the leadership of the Islamists, who now call themselves the Conservative Council of Islamic Courts, Somalia will become a breeding ground for jihadi terrorists.[105] These fears were intensified when, within weeks of seizing Mogadishu, the Council of Islamic Courts appointed known terrorist supporter Hassan Dahir Aweys as its new leader.[106] Although the Islamic Courts claim that there is no al Qaeda presence in Somalia, the world community remains on guard for the proliferation of al Qaeda-inspired terrorist activity there. As one Islamist militia commander in Somalia declared, 'Al Qaeda's concept is right and one day they will rule.'[107]

Expelling the American 'Crusaders' from the Lands of Islam

The first step in al Qaeda's plan of achieving a united caliphate state is to expel Americans and their 'Zionist–Crusader alliance' from the lands of Islam. This goal was first articulated by bin Laden in his manifesto published in August 1996, entitled *A Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Places.* At that time, bin Laden's focus was on expelling U.S. military forces stationed in Saudi Arabia following Iraq's invasion of Kuwait. Bin Laden believed that the occupation of Saudi Arabia by American forces was 'the greatest disaster to befall Muslims since the death of the Prophet Mohammed.'[108] In his view, the presence of the 'American Crusaders' desecrated the holy lands and brought shame to an Islamic nation that could not defend itself from the secular regime of Saddam Hussein.

Bin Laden has since revised and expanded this goal, mandating the expulsion of American influence not from Saudi Arabia alone but from the entire Islamic world.[109] Bin Laden has stated, '[I]n our religion it is our duty to make *jihad* . . . so that we drive the Americans away from *all* Muslim countries.'[110] He further vows that 'neither America nor anyone who lives there will enjoy safety until . . . all the infidel armies leave the land of Muhammad.'[111] Bin Laden's broad vision of the 'land of Muhammad' includes Saudi Arabia and every other Middle East country, as well as states conquered by Muslim dynasties located in Central Asia, the

7. Engaging the financial sector to prevent the financing of terrorism

> By requiring financial institutions to concentrate enhanced due diligence and suspicious activity monitoring on terrorist financing and money laundering schemes . . . [anti-money laundering/terrorist financing provisions] enable financial institutions to provide a much more effective first line of defense against money laundering, terrorist financing, and other financial crime.[1]
>
> U.S. Department of the Treasury,
> 2003 National Money Laundering Strategy

USE OF THE TRADITIONAL BANKING SYSTEM TO TRANSFER TERRORIST FUNDS

Terrorist financiers use various methods to collect and transfer funds to support jihadist activities throughout the world. The major methods used to move terror money include the traditional banking system, alternative remittance systems such as hawala, and bulk cash couriers.[2] Contrary to popular belief, terrorists use banks and other financial institutions to transfer funds. Deposit-taking institutions are particularly attractive because they provide an extensive range of financial services. For example, wire transfers offer terrorists many advantages: 'Speed, distance, minimal audit trail, and increased anonymity amid the enormous daily volume of electronic fund transfers are all major benefits.'[3] Additionally, monetary wire transfers are much safer than attempting to smuggle bulk cash across international borders. Physically transporting large quantities of cash by courier runs the risk of border and customs officials confiscating the funds, or having the money stolen by criminals. Also, banks provide wide geographic availability either through their foreign branch offices or through correspondent accounts with foreign banks.[4] Finally, large sums of money can be transferred instantaneously from a bank located in the United States, through bank accounts in the Middle East, to an offshore account in some other foreign country with the push of a button.

Following the 9/11 terror attacks, an investigation by the Federal Bureau of Investigation revealed that many of the al Qaeda hijackers had opened bank accounts at four United States banks.[5] The terrorists were able to open these accounts even though they lacked social security numbers, used

addresses that frequently changed, and had minimal ties to the United States.[6] Money to finance the terrorist plot was transferred from bank accounts in Dubai, United Arab Emirates (U.A.E.) to accounts maintained at Sun Trust Bank, in Venice, Florida. Between July and September 2000, over $100,000 was transferred from terrorist operatives in Dubai, U.A.E to the joint bank account of 9/11 hijackers Mohamed Atta and Marwan al Shehhi at SunTrust Bank.[7] Mohamed Atta was the 'emir' of the terrorist group and flew a commercial aircraft (American Airlines Flight no.11) into the North Tower of the World Trade Center, while al Shehhi piloted the aircraft (United Airlines Flight no.175) that crashed into the adjacent South Tower.[8] According to the FBI, one transaction involved a funds transfer of $70,000 from Ali Abdul Aziz Ali in Dubai, U.A.E., to Atta and al Shehhi, which apparently did not raise any suspicions with bank officials at Sun Trust Bank.[9] Aziz Ali is being held at the detention facility at the U.S. Naval Base at Guantanamo Bay, Cuba, and has been charged by the U.S. Military Commission with complicity in the 9/11 terrorist attacks.[10]

The use of the traditional banking system by the 9/11 hijackers to move terrorist funds is not unique. Corrupt Islamic charitable organizations use the formal banking system to transfer funds to their network of foreign offices located around the world for disbursement to terrorist associates. Some of these charities maintain branch offices in as many as 40 countries globally.[11] A federal indictment filed against the Islamic American Relief Agency (IARA) and several of its former officers and associates revealed that approximately $1,375,000 was transferred from IARA's bank account in the Western District of Missouri to accounts belonging to the Islamic Relief Agency (ISRA) in Amman, Jordan, and Peshawar, Pakistan.[12] The funds transfers to Pakistan were intended for the benefit of a Specially Designated Global Terrorist (SDGT), Gulbuddin Hekmatyar, an Afghan mujahedeen leader, who allegedly participated in and supported terrorist acts by al Qaeda and the Taliban.[13] The funds transferred to the charity's accounts in Amman, Jordan, were then transferred to accounts in Iraq, in violation of economic sanctions imposed against Iraq.[14]

Other Islamic charitable organizations such as the Benevolence International Foundation (BIF) and the Global Relief Foundation (GRF) have used the formal banking system to transfer funds solicited in the United States to their foreign branch offices to support jihadist-related activities.[15] In 2003, Enaam Arnaout, the executive director of BIF, pleaded guilty to racketeering conspiracy, admitting that he fraudulently obtained charitable donations and diverted some of the funds to support fighters in Chechnya and Bosnia-Herzegovina.[16] Another example involves Bank al Taqwa, which was designated an SDGT for providing financial services to members of al Qaeda.[17] According to the U.S. government, al Taqwa is 'an association of

offshore banks and financial management firms that have helped al-Qaeda shift money around the world.'[18] Further, the U.S. government has declared the Commercial Bank of Syria (CBS) a 'primary money laundering concern.' prohibiting financial institutions from establishing, maintaining, or administering correspondent accounts in the United States for the CBS.[19] The CBS was declared a primary money laundering concern because it was used to facilitate and promote money laundering and terrorist financing by terrorists and persons associated with terrorist organizations.[20]

Finally, at least three foreign banks, Arab Bank, National Westminster Bank (NatWest) and Credit Lyonnais, have been sued in private civil actions for knowingly providing financial services to front organizations controlled by HAMAS.[21] In 2004, American and Israeli victims of terrorism filed an $875 million lawsuit in federal court in the Eastern District of New York accusing Arab Bank–New York of providing material support to terrorists by transferring millions of dollars from a government-backed Saudi committee to HAMAS and other Palestinian terrorist groups.[22] Similar civil causes of action have been brought against NatWest Bank of Great Britain and Crédit Lyonnais of France on behalf of American victims of HAMAS attacks.[23] The lawsuits allege that the banks provided financial services to two European non-governmental organizations outlawed by Israel and designated by the Treasury Department as Specially Designated Global Terrorists' (SDGTs).[24]

Arab Bank was assessed a $24 million civil penalty by the Financial Crimes Enforcement Network (FinCEN), an agency of the U.S. Department of the Treasury, for violating the anti-money laundering (AML) and counter-terrorist financing (CTF) program requirements of the Bank Secrecy Act (BSA).[25] Action taken by the FinCEN was motivated by concerns that Arab Bank was used by HAMAS front entities to facilitate terrorist financing. According to FinCEN, Arab Bank's failure to implement an adequate system of internal controls to comply with BSA regulations 'posed heightened risks of money laundering and terrorist financing.'[26]

REGULATORY MEASURES TO PREVENT TERRORISTS FROM ABUSING THE INTERNATIONAL FINANCIAL SYSTEM

International Convention for the Suppression of the Financing of Terrorism (1999)

The international community has adopted various measures to prevent the abuse of the international financial system by terrorists and their front

entities. The International Convention for the Suppression of the Financing of Terrorism (1999) (Terrorist Financing Convention) constitutes recognition by the international community that financial institutions play a critical role in preventing the financing of terrorism.[27] Over 130 States have ratified the Convention, including the United States.[28] The Terrorist Financing Convention imposes important legal obligations on signatory States to prevent banks and other financial institutions from being used to finance terrorism. These international legal duties include adopting domestic measures to criminalize and punish terrorist financing, license or register all money transmitting businesses, detect and control the physical cross-border transportation of currency and bearer negotiable instruments, and develop and implement internal controls to prevent financial institutions from being used to transfer funds to terrorists.[29] For example, article 18(1) imposes a legal duty on State Parties to adopt domestic measures requiring financial institutions to 'know your customer.'[30] Financial institutions are required to develop and utilize efficient measures to identify their customers, as well as 'customers in whose interest accounts are opened.'[31] In other words, banks have a duty to know their customers, as well as the beneficial or real owners of accounts they maintain. For this purpose, article 18(1)(b)(i) of the Convention provides that States Parties shall consider:

> (i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions.[32]

A similar obligation extends to States Parties to enact domestic legislation requiring financial institutions to verify the legal existence of corporations and other legal entities.[33] The objective of the 'know your customer' principle is to ensure that banks are not doing business with criminals, terrorists, and front or fictitious entities controlled by such individuals.

The Terrorist Financing Convention also imposes a duty on States Parties to enact domestic legislation requiring financial institutions to report to the competent authorities 'suspicious transactions' suspected of being involved in criminal activity, including terrorist financing. Under article 18(1)(b)(iii), States Parties shall consider

> Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose.[34]

Subsection (iii) imposes an obligation on States to require financial institutions to monitor transactions handled by the bank and report all complex,

unusual large transactions and those that lack an apparent legitimate purpose. This requirement is intended to prevent banks from being used as a conduit to launder criminal proceeds and facilitate terrorist financing activity. Collectively, these provisions recognize that banks are the first line of defense against money laundering and terrorist financing. The duties imposed by the Terrorist Financing Convention are obligatory, not discretionary. Therefore, States Parties are mandated to enact domestic legislation to require banks to enhance their internal operating policies and procedures to protect the financial services sector from abuse by terrorists and other criminals.

FATF Nine Special Recommendations on Terrorist Financing

In response to the 9/11 terrorist attacks, the Financial Action Task Force (FATF) on Money Laundering, an inter-governmental organization responsible for development and promotion of international standards to detect, prevent, and suppress money laundering, held an extra-plenary session in Washington, D.C. to consider expanding its mandate to address terrorist financing.[35] On October 31, 2001, the FATF issued the Eight Special Recommendations on Terrorist Financing.[36] A ninth special recommendation on terrorist financing was adopted by FATF in 2004.[37] The Nine Special Recommendations on Terrorist Financing, combined with the Forty Recommendations on Money Laundering, represent the international standard for preventing and suppressing the financing of terrorism.[38]

Implementation of the Nine Special Recommendations is essential to establishing an effective counter-terrorist financing regime. The Terrorist Financing Recommendations impose an obligation on countries to:

I. Ratify the UN International Convention for the Suppression of the Financing of Terrorism and implement relevant UN Resolutions against terrorist financing.
II. Criminalize the financing of terrorism.
III. Freeze and confiscate terrorist assets.
IV. Require financial institutions to report suspicious transactions linked to terrorism.
V. Provide the widest possible assistance to other countries' law enforcement and regulatory authorities for terrorist financing investigations.
VI. Extend anti-money laundering requirements to alternative remittance systems.
VII. Require financial institutions to include accurate and meaningful originator information in money transfers.

VIII. Ensure that non-profit organizations cannot be misused to finance terrorism.
IX. Take measures to detect and prevent bulk cash smuggling.[39]

Two of the special recommendations have particular relevance to financial institutions. Special Recommendation IV requires financial institutions to report to the competent authorities transactions suspected of being linked to terrorists or terrorist activities.[40] Additionally, Special Recommendation VII requires financial institutions to include accurate originator information on funds transfers and ensure that financial institutions conduct enhanced scrutiny of suspicious activity for funds transfers that do not contain complete originator information.[41]

Bank Secrecy Act and USA PATRIOT Act

On October 26, 2001, 45 days after the tragic events of September 11, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, known as the USA PATRIOT Act (Patriot Act).[42] The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 (IMLAA) is contained within Title III of the broader anti-terrorism legislation.[43] Title III makes a number of amendments to the anti-money laundering provisions of the Bank Secrecy Act (BSA) intended to promote the prevention, detection, and prosecution of international money laundering and terrorist financing.[44] The IMLAA represents the most significant anti-money laundering legislation for financial institutions since the enactment of the BSA of 1970.

The drafters of the IMLAA were guided by several important principles: (1) enhancing transparency in financial institutions, (2) protecting the international gateways to the U.S. financial system, and (3) 'leveling the playing field' by increasing the vigilance of all financial institutions that serve as the gatekeepers of the financial system.[45] Congress further adopted a risk-based approach, requiring financial institutions to structure internal controls to address high-risk jurisdictions, financial institutions, transactions, and accounts vulnerable to money laundering and terrorist financing.[46]

Anti-money laundering/counter-terrorist financing program

The anti-money laundering (AML) and counter-terrorist financing (CTF) provisions of the USA PATRIOT Act are applicable to all 'financial institutions,' a legal term of art under the BSA. The definition of 'financial institution' found in 31 U.S.C. §§5312(a)(2) and (c)(1), as amended by the Act, is extremely broad. It includes traditional financial institutions such as

banks, savings associations, credit unions, registered broker-dealers, and futures commission merchants.[47] Moreover, a foreign bank qualifies as a 'financial institution' and the duties imposed by the BSA, as amended by the Act, extend to foreign banks with branches or offices in the United States.[48] The definition further extends to non-traditional 'financial institutions,' such as insurance companies, travel agencies, persons engaged in real estate closings and settlements, sellers of vehicles, including automobiles, planes, and boats, and dealers in precious metals, stones or jewels.[49]

The centerpiece of the federal regulatory regime established by the BSA, and amended by the Patriot Act, is the requirement that financial institutions establish, implement, and maintain a program to prevent money laundering and terrorist financing. The BSA requires all financial institutions to establish an AML/CTF program designed to (1) enable compliance with the BSA requirements and (2) prevent financial institutions from being used for money laundering and terrorist financing.[50] Every financial institution is required to establish an AML/CTF program that includes the following minimum requirements: '(A) the development of internal policies, procedures and internal controls, (B) the designation of a compliance officer, (C) an ongoing employee training program, and (D) an independent audit function to test programs.'[51]

Internal policies, procedures and controls The internal policies and procedures should be based upon an assessment of money laundering and terrorist financing risks associated with services offered and customers and geographic areas served.[52] For example, the AML/CTF program should analyze the extent to which the bank customer conducts financial transactions in jurisdictions that have been identified as vulnerable to terrorism or money laundering. The risk-based program should also consider whether certain customers and accounts, such as correspondent accounts, pose a heightened risk of money laundering and terrorist financing. The plan should further establish written procedures to comply with the BSA requirements of filing currency transaction reports (CTRs) and suspicious activity reports (SARs). The BSA requires banks to monitor all accounts for possible money laundering and terrorist financing, and file reports if a customer engages in currency transactions totalling more than $10,000 (CTR), or if a transaction is suspected of being involved in criminal activity (SAR).[53] The SAR filing requirements impose an obligation on financial institutions to report transactions that the institution 'knows, suspects, or has reason to suspect' are connected to criminal activity.[54] A transaction is suspicious if it

(i) involves funds derived from illegal activities or is conducted to disguise funds derived from illegal activities;

(ii) is designed to evade the reporting or record-keeping requirements of the BSA (e.g., structuring transactions to avoid currency transaction reporting); or

(iii) has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.[55]

Some financial institutions are further required to file a SAR if there is reason to suspect that the transaction was intended to facilitate criminal activity, including acts of terrorism.[56] Banks must file SARs involving or aggregating at least $5,000.[57]

A bank must file a SAR no later than 30 calendar days after the date of the initial detection of facts that may constitute a basis for filing a SAR.[58] If no suspect is identified on the date of the detection of the incident requiring the filing, a bank may delay filing a SAR for an additional 30 days to identify a suspect. However, under no circumstances is reporting to be delayed more than 60 calendar days after the date of initial detection of a reportable transaction. When submitting a SAR, bank employees must provide a detailed description of why the transaction was unusual, irregular or suspicious in the narrative section of the form filed with FinCEN.[59]

The AML/CTF plan should include written procedures for filing suspicious activity reports with FinCEN. For example, if an employee identifies indicators that a transaction may involve money laundering or terrorist financing, procedures should outline what steps should be taken to attempt to verify the suspicions. If concerns remain, written procedures should detail what action should be taken by the bank employee, including refusing to enter into or complete a transaction that appears designed to further illegal activity.

The SAR filing requirement is particularly relevant to preventing banks and other financial institutions from being used to facilitate terrorist financing. The Bank Secrecy Act Anti-Money Laundering Examination Manual has identified several 'red flags' of potentially suspicious activity that may indicate terrorist financing.[60] For example, regarding charitable organizations, financial transactions for which there is no logical economic purpose, or no link between the stated activity of the charity and the other parties in the transaction, may indicate terrorist financing.[61] Likewise, funds sent to or received via international transfers involving high-risk countries for terrorism, as well as funds transfers in amounts indicating an intention to avoid triggering BSA reporting requirements, may constitute evidence of terrorist financing activity.[62] Financial transactions that are consistent with 'red flags' of terrorist financing should be closely monitored by bank

employees, and SARs should be filed with FinCEN as well. In 2007, depository institutions filed approximately 325,000 SARs with FinCEN.[63]

Essential to any effective AML/CTF program is the principle of 'know your customer' (KYC), which 'has been the backbone of anti-money laundering and counter terrorist financing measures' by financial services providers.[64] Under the BSA, financial institutions, including foreign banks with U.S. branches, are required to implement reasonable procedures for identification and verification of customers opening an account. At a minimum, financial institutions are required to implement procedures for

> (A) verifying the identity of any person seeking to open an account to the extent reasonable and practicable; (B) maintaining records of information used to verify a person's identity, including name, address, and other identifying information; and (C) consulting lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency to determine whether a person seeking to open an account appears on any such list.[65]

Section 5318(l)(2) imposes the minimum requirements for identification and verification of customers opening an account. However, with respect to high-risk customers and accounts, the KYC policy and the requirement to file SARs impose an obligation on financial institutions to have an understanding of the customer's business and normal bank account patterns. More specifically, financial institutions should have knowledge of the volume and amount of transactions expected to flow through the customer's account during a specific time period. Once a baseline of financial transaction activity is determined, bank officials can better decide whether transactions inconsistent with that pattern are suspicious and should be reported to FinCEN. For example, if an Islamic charity opens a bank account representing itself as a charitable organization for Muslim refugees in Africa, but funds are being dispersed to accounts in Pakistan, such transactions would be inconsistent with the charity's stated purpose. Moreover, Pakistan is a high-risk country for terrorism and both al Qaeda and the Taliban operate along the Pakistan–Afghanistan border. Because the purpose of the charity is to provide humanitarian relief to refugees in Africa, funds transfers to Pakistan, a high-risk country for terrorism, would be suspicious and should be reported to FinCEN. However, in the absence of adequate KYC policies and procedures, these transactions would never be identified and reported to FinCEN as possibly indicating terrorist financing activity. Effective monitoring of suspicious transactions is dependent on effective KYC policies and procedures.

Designation of a BSA compliance officer Financial institutions are required to designate an individual responsible for coordinating and

monitoring daily compliance with the BSA. The compliance officer is responsible for ensuring that (1) the program is being implemented effectively, (2) the program is updated as necessary to reflect the changes in the risk assessment, as well as further guidance by the Treasury Department, and (3) appropriate personnel are trained in accordance with the BSA regulations and requirements.[66] These responsibilities are substantial and appointing someone to the position on a part-time basis or assigning such individual other significant duties unrelated to BSA compliance could violate the BSA requirement.[67]

Education and training The AML/CTF program must ensure that employees are trained in the BSA requirements, including KYC and recognizing 'red flags' of money laundering and terrorist financing. Employees should be trained to detect these and other types of suspicious transactions. Bank employees should also receive periodic training updates and refresher training on money laundering and terrorist financing patterns and trends. Employees should be adequately trained on steps to be taken if a suspicious transaction is detected, including who should be contacted and whether the transaction should be temporarily blocked pending further examination.

Independent audit function A financial institution is required to conduct periodic independent testing of its AML/CTF program to ensure that it is functioning effectively. According to FinCEN, the testing may be accomplished by employees or the financial institution or unaffiliated service providers so long as those same individuals are not involved in the operation or oversight of the program.[68] Finally, the AML/CTF program is required to be approved by senior bank management.

Due diligence and enhanced due diligence for U.S. 'private banking accounts' and 'correspondent accounts' involving foreign persons

Title III of the USA PATRIOT Act requires all covered financial institutions to apply *due diligence* standards, and, in some cases, *enhanced due diligence* standards, with regard to 'private banking accounts' and 'correspondent accounts,' established, maintained, administered, or managed in the United States for foreign persons, to detect and report money laundering and terrorist financing through those accounts.[69] The term 'private banking account' means an account that (i) requires a minimum aggregate deposits of funds or other assets of not less than $1 million; (ii) is established on behalf of one or more individuals who have a direct or beneficial ownership interest in the account; and (iii) is assigned to, administered or managed by, an officer, employee, or agent of a financial institution acting as a liaison between the financial institution and the direct or beneficial owner of the account.[70]

If a private banking account is maintained for a non-U.S. person, the financial institution is required to take reasonable steps 'to ascertain the identity of the nominal and beneficial owners of, and the source of funds deposited into, such account' and to report any suspicious transactions to FinCEN.[71] If the private banking account is requested or maintained by, or on behalf of 'a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure,' the financial institution must conduct *enhanced* due diligence reasonably designed to detect and report suspicious transactions that may involve the proceeds of foreign corruption.[72]

Financial institutions must conduct 'enhanced due diligence' on correspondent accounts requested or maintained by, or on behalf of, a foreign bank designated a 'high risk' under the statute.[73] High-risk banks include those (i) operating under an offshore banking license,[74] (ii) licensed in a jurisdiction found to be non-cooperative with international anti-money laundering standards by an inter-governmental organization of which the United States is a member, such as the FATF, and with which the United States concurs, or (iii) licensed in a jurisdiction designated by the Secretary of the Treasury as a 'primary money laundering concern,' pursuant to 31 U.S.C. §5318A.[75]

The *enhanced due diligence* policies, procedures and controls, at a minimum, require that financial institutions in the United States take reasonable steps

> (i) to ascertain for any such foreign bank, the shares of which are not publicly traded, the identity of each of the owners of the foreign bank, and the nature and extent of the ownership interest of each such owner;
> (ii) to conduct enhanced scrutiny of such account to guard against money laundering and report any suspicious transactions . . . ; and
> (iii) to ascertain whether such foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.[76]

The last requirement imposes a duty on financial institutions not only to 'know your customer,' but also to know your customer's customer. In other words, financial institutions are required to ascertain whether their foreign bank customers provide correspondent accounts to other foreign banks and whether those banks are shell banks or otherwise high-risk banks.[77]

Title III of the Act also prohibits 'covered financial institutions' from establishing, maintaining, administering, or managing a correspondent account in the United States for a foreign 'shell bank.'[78] A shell bank is

'a foreign bank that does not have a physical presence in any country.'[79] The lack of transparency makes shell banks ideal vehicles for money laundering, terrorist financing, and other illicit financial activity.[80] The financial institutions prohibited from maintaining a correspondent account with a foreign shell bank include: an insured bank; a commercial bank or trust company; private banker; an agency or branch of a foreign bank in the United States; any credit union; a thrift institution; and broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.[81] A covered financial institution is also prohibited from providing *indirect* services to foreign shell banks. Such institutions are required to take reasonable steps to verify that any correspondent account they maintain for a foreign bank is not being used by that foreign bank to provide banking services to a foreign shell bank.[82]

Foreign bank records

Section 319(b) of the Patriot Act, codified at 31 U.S.C. §5318(k)(3), permits federal law enforcement authorities access to foreign bank records that may show whether the foreign bank is being used to transfer money overseas to facilitate terrorist activities.[83] Section 5318(k)(3)(A)(i) authorizes the Secretary of the Treasury and the Attorney General to issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States, and to request records related to such correspondent account, including records maintained *outside* of the United States relating to funds deposited into the foreign bank.[84] The financial institution that maintains a correspondent account for a foreign bank is required to maintain records identifying the owners of such foreign bank and the names and addresses of a person who resides in the United States who is authorized to accept service of legal process for records regarding the correspondent account.[85] Additionally, foreign banks must designate a registered agent in the U.S. to accept service of such subpoenas.[86]

Failure to comply with a summons or subpoena for foreign bank records could result in termination of the correspondent relationship. Under the statute, a covered financial institution is required to terminate any correspondent relationship with a foreign bank not later than ten business days after receipt of written notice from the Secretary of the Treasury or the Attorney General that the foreign bank has failed either to comply with the written request for documents or to initiate federal court proceedings to contest the summons or subpoena.[87] Finally, failure to terminate a correspondent relationship could result in the financial institution being held liable for a civil penalty of up to $10,000 per day until such banking relationship is terminated.[88]

Prior to the enactment of the Patriot Act, obtaining foreign bank records was a difficult task. Foreign banks would resist subpoenas for foreign bank records, claiming they were maintained abroad and the U.S. subpoena did not have extraterritorial application. Pursuant to section 319(b), foreign banks are now required to produce the requested records or suffer termination of the correspondent relationship with the U.S. bank.

Information sharing requirements

Enhanced coordination and information sharing between federal law enforcement and financial institutions are essential to successfully combating terrorist financing. The USA Patriot Act provides authority to enhance the flow of information relevant to money laundering and terrorist financing between the Federal government and financial institutions, and among financial institutions themselves.[89] Section 314 of the Act requires the Treasury Secretary to adopt regulations encouraging financial institutions to share information with law enforcement officials regarding individuals, entities, and organizations 'reasonably suspected . . . of engaging in terrorist acts or money laundering activities.'[90] According to FinCEN, section 314(a) 'enable[s] federal law enforcement agencies, through FinCEN, to reach out to more than 45,000 points of contact at more than 27,000 financial institutions to locate accounts and transactions of persons that may be involved in terrorism or money laundering.'[91] The statute also permits financial institutions, upon notice to the Treasury Department, to voluntarily share information with each other about individuals and organizations reasonably suspected of terrorist activity or money laundering.[92]

In September 2002, FinCEN adopted a final rule specifying the procedures for sharing information under section 314(a). Upon a request from federal law enforcement, FinCEN sends requests to designated contacts within financial institutions across the country. Upon receiving such a request, the financial institutions must query their records for data matches, including 'accounts maintained by the named subject during the preceding 12 months and transactions conducted within the last 6 months.'[93] Financial institutions have two weeks from the date of the section 314(a) request to respond.[94] However, it should be noted that section 314(a) provides lead information only and is not a substitute for a subpoena or other legal process. To obtain documents from a financial institution that has reported a match, the law enforcement agency must comply with relevant legal standards.[95]

Finally, while established prior to the enactment of the Patriot Act, information sharing is further facilitated by the Egmont Group, a global network of financial intelligence units (FIUs).[96] There are currently 101 countries whose FIUs comprise the Egmont Group.[97] The common purpose of every

'committed, or . . . pose[s] a significant risk of committing, acts of terrorism that threaten . . . the national security, foreign policy, or economy of the United States.'[30]

While the primary focus of the inter-agency working group is to determine whether the potential designee is directly or indirectly financing terrorism or poses a significant risk of committing acts of terrorism, the decision to recommend designating the individual or entity as an SDGT often involves resolving agency conflicts of interests. For example, despite compelling evidence of the proposed designee's role in providing financial support to terrorist groups, public designation might compromise an ongoing criminal investigation or jeopardize a covert intelligence operation. Placing the suspected terrorist financier's name on the Treasury list might disclose intelligence agency methods and operations, or jeopardize sensitive State Department negotiations or relations between the U.S. and some other foreign country. In such a case, the members of the working group would weigh and scrutinize the costs and benefits of public designation against important and competing agency interests. In an effort to resolve the inter-agency conflict, a decision to designate an individual might be postponed temporarily and reconsidered at a later date. In other cases, countervailing agency considerations might altogether trump the decision to publicly designate an individual. In this regard, members of the working group wield enormous discretion whether or not to designate someone, analogous to that of a criminal prosecutor.[31]

A subset of the inter-agency working group is responsible for developing a background file or 'statement of the case' which is reviewed by the larger group. These files are reviewed by Department of Justice attorneys for legal sufficiency under E.O. 13224. The final determination on the designation is then forwarded for decision to the National Security Council, which convenes a meeting of deputy agency heads. Upon their recommendation, the Secretary of the Treasury or the Secretary of the Department of State designates an individual or entity.

Pursuant to a delegation of authority from the Secretary of the Treasury, the Office of Foreign Assets Control (OFAC), an agency within the U.S. Department of the Treasury, takes appropriate action to block the assets of the individual or entity in the United States.[32] OFAC issues notification of the blocking order to U.S. financial institutions, directing them to block the assets of the designated parties. Notice of the designations is published in the Federal Register. OFAC also adds the individual or entity to its list of SDGTs, and posts a notice of these additions on the OFAC website. Once the designation is made public, U.S. financial institutions are required to check the names on the Treasury list to determine whether the financial services provider is administering accounts for any of the designated

individuals or entities. If so, the financial institution is required to freeze any funds held in those accounts.[33] Furthermore, all transactions involving property in which any of the listed individuals and entities has any interest are prohibited without specific authorization from OFAC. Simply stated, persons in the United States are forbidden from doing any business with the SDGTs, isolating them from the U.S. financial system.

The Secretary of the Treasury also may block the property and interests in property of persons or entities during the pendency of an investigation. The USA PATRIOT Act amended IEEPA, 50 U.S.C. §1702, to explicitly authorize blocking actions 'during the pendency of an investigation.'[34] Finally, rules and regulations governing the blocking actions have been promulgated by OFAC.[35]

Licensing

Not all transactions with an SDGT are banned or are criminal. E.O. 13224 §7 confers on the Secretary of the Treasury the authority to promulgate rules and regulations to carry out the purposes of the Order.[36] However, the Secretary may re-delegate this authority to other officers and agencies of the U.S. government.[37] Pursuant to a delegation of authority from the Secretary of the Treasury, OFAC has promulgated general regulations governing the global terrorism sanctions program. These regulations authorize OFAC to issue both 'general' and 'specific' licenses permitting certain types of transactions otherwise subject to the prohibitions contained in E.O. 13224.[38] The purpose of issuing a license is to ameliorate the harsh effects of OFAC blocking actions, which freeze funds and prohibit transactions with designated persons.

OFAC has issued several general licenses authorizing transactions in property in which HAMAS has an interest.[39] In October 2001, HAMAS was designated an SDGT, resulting in the blocking of any property and interests in property of HAMAS. These restrictions prohibit U.S. persons from engaging in any transactions in property or interests in property of HAMAS. After parliamentary elections in the West Bank and Gaza, HAMAS members formed the majority party within the Palestinian Legislative Council. As a result of these elections, OFAC determined that HAMAS has a property interest in the transactions of the Palestinian Authority. Accordingly, pursuant to E.O. 13324 and relevant regulations, U.S. persons are prohibited from engaging in transactions with the Palestinian Authority unless authorized by OFAC. Consistent with U.S. foreign policy, OFAC issued seven general licenses authorizing U.S. persons to engage in certain transactions in which the Palestinian Authority may have an interest. One of those general licenses authorized in-kind

donations of medicine by U.S. non-governmental organizations to the Palestinian Authority Ministry of Health, provided that such donations were strictly for distribution in the West Bank or Gaza and not intended for resale. OFAC expanded this license to all U.S. non-governmental organizations to make donations to the Ministry of Health of medical services and medical devices, which include medical supplies.[40] OFAC has also issued general licenses for the provision of legal services,[41] non-scheduled emergency medical services,[42] transactions related to telecommunications,[43] and transactions incident to the receipt or transmission of mail between U.S. persons and persons whose property or interests in property are blocked.[44]

OFAC regulations also permit a designated or blocked individual or entity to seek a 'specific license' to engage in any transaction involving blocked property.[45] A person seeking a specific license to engage in transactions otherwise prohibited by the Order must file an application for a license with the OFAC authorizing such transaction.[46] Granting an application for a specific license is discretionary with OFAC. In one reported case, OFAC exercised its discretion quite liberally, granting the Global Relief Foundation, Inc., a U.S.-based Islamic charity, licenses to access blocked funds to pay for legal fees, establishment of a legal defense fund, salaries, payroll taxes, health insurance, rent, utilities, and payment of other continuing expenses.[47] At the same time, the denial of a license is not final and a party may refile an application with OFAC at a later date.

De-Listing Process

Pursuant to a delegation of authority by the Secretary of the Treasury, OFAC has promulgated regulations to allow a person to seek 'administrative reconsideration' of a designation or blocking action.[48] A person may seek a review of his designation or blocking on two grounds. First, a blocked person may submit evidence establishing that an insufficient basis exists for the designation.[49] Second, a person may seek to have his designation rescinded, asserting that the circumstances resulting in the designation no longer apply.[50] In determining whether to remove the petitioner's name from the OFAC list on these latter grounds, the basic consideration is whether the petitioner has made a demonstrable break with the designated entity. To that end, the designated person might offer proof of his resignation from any position with the designated firm or organization or from any agency relationship with the listed entity, which would negate the basis for the designation.[51] For example, if a person was designated an SDGT because he served on the board of directors of an Islamic charity suspected of funneling money to terrorists, the designee might petition for de-listing

claiming that he lacked knowledge that charitable donations were being used to finance terrorist activities and, upon learning of such activity, he resigned his position on the board of directors and severed all ties with the designated charity.

After receiving a removal petition, OFAC may seek clarifying, corroborating, or additional information from the petitioner and engage in other research and investigation to establish, or refute, petitioner's claim. Removals have nearly always been cases where the petitioner claimed that he was no longer engaged in the activity that qualified him for designation under the E.O.[52] An exchange of correspondence, additional fact-finding, and meetings usually occur before OFAC decides whether there is a basis for removal. Finally, after conducting its review of the request for reconsideration, regulations require OFAC to submit a written decision to the blocked person.[53]

One problem that banks face in following blocking orders is that many times those designated have common names that belong to multiple account holders. To resolve this problem, E.O. 13224 allows a party to challenge blocked funds on the basis of mistaken identity. When funds at a financial institution are blocked pursuant to E.O. 13224 and a party to the transaction believes the funds have been blocked due to mistaken identity, that party may request the release of the funds.[54] The party must submit a written request to OFAC to release the funds.[55] After a review of all applicable submissions, the Director of OFAC determines whether to release the funds.[56]

LEGAL CHALLENGES

Persons designated as SDGTs under E.O. 13224 have challenged their designations in federal court, seeking to 'unfreeze' any blocked assets, by alleging violations of the First, Fourth and Fifth Amendments of the Constitution, the Religious Freedom Restoration Act (RFRA), and the Administrative Procedure Act (APA). However, the courts have been extremely deferential to the U.S. Government, rejecting the legal arguments advanced by the plaintiffs and upholding the OFAC designations in almost every case. In short, the courts have not erected any serious legal hurdles to the designations and blocking orders issued pursuant to E.O. 13224.

The APA 'Arbitrary and Capricious' Standard

A person designated an SDGT bears a heavy burden to overturn his designation on the grounds of insufficient evidence. Under the APA, an

agency's actions may be set aside only if deemed 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'[57] The court does not undertake its own fact-finding. Instead, the court must review the administrative record as assembled by the agency to determine whether the agency's decision was supported by a rational basis.[58] The review is highly deferential to the agency. Therefore, if OFAC's blocking actions were not arbitrary and capricious and were supported by a rational basis, the designations must be affirmed.[59]

In *Holy Land Foundation for Relief and Development v. Ashcroft*, the D.C. Circuit Court of Appeals affirmed the district court's ruling that OFAC's determination that the Holy Land Foundation for Relief and Development (HLF), a purported Islamic charity which acts for or on behalf of HAMAS, was supported by substantial evidence in the administrative record and was not arbitrary and capricious.[60] In December 2001, OFAC designated HLF as a specially designated terrorist (SDT)[61] and SDGT and blocked all of its assets pursuant to E.O. 12947, E.O. 13224 and the IEEPA.[62] The Treasury Department contended that HLF, a non-profit corporation organized in 1989, with headquarters in Richardson, Texas, was the principal fund-raiser for HAMAS in the United States.[63] Specifically, the government alleged that between 1992 and 1999 HLF contributed approximately $1.4 million to eight HAMAS-controlled charity committees, and between 1992 and 2001 HLF gave approximately $5 million to seven other HAMAS-controlled charitable organizations.[64] Further, Treasury maintained that HLF funds were used by HAMAS to support schools that encourage children to become suicide bombers and to recruit suicide bombers by offering financial support to their surviving family members.[65] HLF denied the allegations and argued that the blocking order violates the APA, as well as the First, Fourth and Fifth Amendments of the Constitution, and the RFRA.[66]

The district court found that the administrative record contained evidence that

> (1) HLF has had financial connections to Hamas since its creation in 1989; (2) HLF leaders have been actively involved in various meetings with Hamas leaders; (3) HLF funds Hamas-controlled charitable organizations; (4) HLF provides financial support to the orphans and families of Hamas martyrs and prisoners; (5) HLF's Jerusalem office acted on behalf of Hamas; and (6) FBI informants reliably reported that HLF funds Hamas.[67]

The D.C. Circuit Court of Appeals affirmed, stating that the 'Treasury's decision to designate HLF as an SDGT was based on ample evidence in a massive administrative record.'[68]

In *Islamic American Relief Agency v. Unidentified FBI Agents*, the U.S. District Court for the District of Columbia rejected a similar legal

challenge.[69] The Islamic American Relief Agency (IARA) challenged OFAC's designation of it as an SDGT and the blocking of its accounts, funds and assets in the United States. OFAC maintained that IARA was formerly affiliated with the precursor to al Qaeda, Maktab Al-Khidamat (MAK), which was co-founded and financed by Osama bin Laden.[70] Information available to Treasury revealed that the overseas branches of IARA provided hundreds of thousands of dollars to bin Laden in 1999.[71] Finally, as early as 2003, information to the U.S. showed that IARA was responsible for moving funds to the Palestinian territories for use in terrorist attacks by HAMAS.[72]

IARA claimed that the administrative record lacked any evidence demonstrating that it had funded terrorist activities or that it knowingly interacted with known terrorists or terrorist organizations prior to its designation as an SDGT.[73] The court observed that the arbitrary and capricious standard is highly deferential to the agency. 'If the agency's reasons and policy choices . . . conform to "certain minimal standards of rationality" . . . the [decision] is reasonable and must be upheld.'[74] While recognizing that the plaintiff was disadvantaged because it was unable to review and analyze the entire administrative record, but rather was limited to those portions that are not classified, the court held that upon careful review of the entire record, OFAC's decision to block IARA's assets was not arbitrary and capricious but was supported by substantial evidence in the record.[75] Such a deferential standard makes it difficult for plaintiffs to challenge designations.

Fifth Amendment Due Process Concerns

Pre-deprivation procedures

The Executive Order specifically provides for designation and blocking of assets in the absence of prior notice and a hearing. The Order states:

> [B]ecause of the ability to transfer funds or assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual . . . [F]or these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to this order.[76]

OFAC blocking orders have been challenged on the grounds that, in the absence of pre-designation notice and a hearing, the blocking actions violate due process. However, the courts have uniformly rejected plaintiffs' due process claims.

The Due Process Clause of the Fifth Amendment guarantees that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.'[77] The due process clause generally requires the government to

afford notice and a meaningful opportunity to be heard before depriving a person of his property.[78] The requirement of notice and a hearing is not meant to protect persons from deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.[79] The U.S. Supreme Court has noted: 'The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment–to minimize substantively unfair or mistaken deprivations of property.'[80] However, when exigent circumstances are present and the government demonstrates a 'pressing need for prompt action,' postponement of notice and a hearing until after the seizure does not deny due process.[81] In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Supreme Court outlined a three-part test for determining whether pre-deprivation notice and a hearing are required.[82] Immediate seizure is appropriate if (1) 'the seizure has been directly necessary to secure an important governmental or general public interest;' (2) 'there has been a special need for very prompt action;' and (3) 'the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.'[83]

In *Holy Land Foundation for Relief and Development v. Ashcroft,* HLF argued that its designation as an SDT and SDGT, resulting in the blocking of its assets, violated its procedural due process rights.[84] The court dismissed plaintiff's due process challenge, finding that the *Calero-Toledo* standard had been satisfied. First, the court found that the OFAC designation and blocking order advanced an important government interest by combating terrorism and cutting off its funding.[85] Second, prompt action by the Government was necessary to prevent transfer of the funds subject to the blocking order. The court properly observed that '[m]oney is fungible, and any delay or pre-blocking notice would afford a designated entity the opportunity to transfer, spend, or conceal its assets, thereby making the IEEPA sanctions program virtually meaningless.'[86] Third and finally, the court posited that 'government officials, and not private parties, initiated the blocking action. . . [p]ursuant to the IEEPA and two Executive Orders that specifically authorized such action in limited circumstances.'[87]

In *Islamic American Relief Agency v. Unidentified FBI Agents,* the court once again rejected the argument that due process entitled plaintiff notice and a hearing prior to OFAC issuing a blocking order by applying the three-part test enunciated in *Calero-Toledo*.[88] The court further dismissed IARA's reliance on *National Council of Resistance of Iran (NCRI) v. Department of State*,[89] where the District of Columbia Circuit Court held that notice and a hearing must be afforded prior to designating an entity as a 'foreign

terrorist organization' under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The *IARA* court distinguished *NCRI*, finding that it does not control cases where the designation was pursuant to IEEPA and action under the statute flows from a Presidentially declared national emergency.[90] The court reasoned that *NCRI* did 'not foreclose the possibility [that the government], in an appropriate case, [could] demonstrat[e] the necessity of withholding all notice and all opportunity to present evidence until the designation [was] already made.'[91] Ultimately, the *IARA* court found that protecting the public from a terrorist attack and preventing the transfer of assets subject to the blocking order constituted extraordinary circumstances, implicating important national security and foreign policy goals, and justifying immediate blocking of plaintiff's property.[92]

In *Global Relief Foundation, Inc. v. O'Neill*, the court reached the same result, dismissing plaintiff's due process challenge.[93] The Global Relief Foundation (GRF) began operating in 1992 as a non-profit corporation chartered and headquartered in Illinois. According to the Treasury Department, GRF is the largest U.S.-based Islamic charitable organization, raising over $3 million annually.[94] OFAC maintained that GRF acted 'for or on behalf of' terrorist organizations, including al Qaeda. In rejecting GRF's constitutional challenge, the court reasoned that, due to the exigencies of national security and foreign policy considerations, the Executive Branch historically has not provided pre-deprivation notice under the IEEPA sanctions programs.[95] 'Because of the Executive's need for speed in these matters, and the need to prevent the flight of assets and destruction of records, the President and his designees cannot provide pre-deprivation notice under these circumstances.'[96] According to the court, pre-deprivation notice would afford GRF an opportunity to remove assets out of the United States, which would be antithetical to the objectives of the IEEPA sanctions programs.[97]

Denial of access to classified information

The IEEPA expressly authorizes *ex parte* and *in camera* review of classified information in 'any judicial review of a determination made under this section [that] . . . was based on classified information.'[98] Plaintiffs have challenged OFAC designations and blocking orders claiming that disclosure of classified information only to the court *ex parte* and *in camera* violates due process. The courts have been uniformly unsympathetic to plaintiffs' plight, dismissing their due process claims. In *Holy Land Foundation for Relief and Development v. Ashcroft,* the D.C. Circuit held that denying HLF access to classified evidence did not violate due process.[99] A designation, the court stated, may be based on a broad range of evidence, including classified information to which the plaintiff has not had access.[100]

In support of its holding, the D.C. Circuit relied on its earlier ruling in *People's Mojahedin Organization of Iran v. Department of State*, where the court rejected a claim that use of classified information disclosed only to the court *ex parte* and *in camera* in the designation of a foreign terrorist organization under AEDPA offended due process.[101] The court justified withholding from plaintiffs classified information used in the designation of a foreign terrorist organization, emphasizing the primacy of the Executive in controlling and exercising responsibility over access to classified information and the Executive's 'compelling interest' in withholding national security information from suspected terrorists and other enemy aliens.[102] The *HLF* court found the reasoning in *People's Mojahedin Organization of Iran* equally applicable to a designation under E.O. 13224. According to the court, '[t]hat the designation comes under an Executive Order issued under a different statutory scheme makes no difference.'[103]

In *Global Relief Foundation, Inc. v. O'Neill*, the court reached the same conclusion, finding that GRF's due process rights were not violated because the designation was based on classified information.[104] The district court applied a balancing test, balancing the nature of the government's interest against the plaintiff's interest in challenging an erroneous deprivation of property. Deciding in favor of the government, the court stated that '[a]lthough Global Relief does have a substantial interest in being able to study and respond to the evidence against it, . . . the defendants ha[d] demonstrated a compelling state interest in national security which outweigh[ed] Global Relief's interest in this case.'[105]

The district court further rejected a related argument advanced by GRF. The court held that the Confrontation Clause of the Sixth Amendment, guaranteeing a defendant in a criminal prosecution the right to confront the witnesses against him, did not apply to IEEPA blocking actions. The Sixth Amendment is not applicable because GRF was not charged in a criminal prosecution or facing criminal sanctions.[106]

The Seventh Circuit affirmed the district court's rulings in GRF. The court observed that IEEPA authorizes the use of classified evidence that may be considered *ex parte* and *in camera* by the reviewing court. It further noted that *ex parte* and *in camera* review of classified information is not unprecedented and has been upheld by the courts. For example, *ex parte* consideration is common in criminal cases where the identity of the informant might otherwise be revealed,[107] and *ex parte* judicial review of classified information under the Foreign Intelligence Surveillance Act is constitutionally proper.[108] Finally, the court declared that '[t]he Constitution would indeed be a suicide pact if the only way to curtail enemies' access to assets were to reveal information that might cost lives.'[109]

Unconstitutional vagueness

Plaintiffs have realized limited success in challenging provisions of E.O. 13224 on constitutional vagueness grounds. A challenge to a statute on vagueness grounds requires the court to consider whether the statute is sufficiently clear so as not to cause persons of 'common intelligence . . . necessarily [to] guess at its meaning and [to] differ as to its application.'[110] A statute is unconstitutionally vague if it (1) fails to provide the kind of notice that will enable ordinary people to understand what conduct is prohibited; (2) authorizes and encourages arbitrary and discriminatory enforcement; or (3) has a chilling effect on activities protected by the First Amendment.[111]

In *Humanitarian Law Project v. United States Department of Treasury*, the plaintiffs raised numerous challenges to the E.O.[112] First, the Humanitarian Law Project (HLP) maintained that the E.O.'s ban on 'services' is unconstitutionally vague. HLP argued that the term 'services' was broadly defined under the Regulations, giving OFAC unfettered authority to designate a person or group as an SDGT.[113] The district court disagreed, finding that, while the Regulations' definition of 'services' may not be exact, it does not permit subjective standards of enforcement. The court stated that 'the word "services" is, by and large, a word of common understanding and one that could not be used for selective or subjective enforcement.'[114]

Second, HLP claimed that the E.O.'s ban on 'services' is unconstitutionally overbroad because it punishes a substantial amount of protected free speech.[115] The court found this argument unpersuasive as well. The E.O.'s ban on 'services,' the court stated, 'is content-neutral and serves the legitimate purpose of deterring groups and individuals from providing services to foreign terrorist organizations.'[116] Furthermore, the court found that the E.O.'s application to protected speech is not substantial relative to the scope of its plainly legitimate applications.[117]

Next, HLP challenged the term 'specially designated global terrorist,' as used in both the E.O. and the OFAC regulations.[118] HLP argued that neither the E.O. nor the Regulations define the term or set criteria for designating an individual or group as a 'specially designated global terrorist.'[119] The district court found HLP's challenge to the E.O.'s use of the term 'specially designated global terrorist' lacked merit.[120] The court stated that HLP's argument overlooked the limited circumstances under which the IEEPA affords the Executive the power to impose economic sanctions. Before the Executive may take any action under the IEEPA, he or she must first declare a national emergency. Furthermore, any action taken by the Executive must relate to that identified emergency.[121] The court stated that the E.O. provides adequate criteria for designating an individual or group as an SDGT.[122] For example, the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, may designate a

person as an SDGT if that person has committed, or poses a significant risk of committing, acts of terrorism that 'threaten the security of United States nationals or national security, foreign policy, or [the] economy of the United States.'[123] Additionally, the Secretary of the Treasury may designate a person as an SDGT if that person is 'owned or controlled by, or . . . act[s] for or on behalf of' other SDGTs.[124] Finally, a person may be designated as an SDGT if the Secretary of the Treasury determines that the person has assisted in, has sponsored, or 'has provided "financial, material, or technological support for, or financial or other services to or in support of," acts of terrorism or other SDGTs.'[125] The criteria set forth in the E.O. and Regulations ensures that the designating authorities are not afforded 'unfettered discretion' in designating individuals or groups as SDGTs.[126] Therefore, the court rejected HLP's constitutional challenge to the term 'specially designated global terrorist.'

HLP, however, was successful in challenging one other provision of the E.O. The E.O. authorizes the Secretary of the Treasury to designate an individual or group if the secretary finds the given person to be 'otherwise associated with' an SDGT.[127] HLP argued that this provision was unconstitutionally vague because it contains no identifiable criteria for designating individuals and groups for being 'otherwise associated with' an SDGT.[128] The court concurred, finding that the term 'otherwise associated with' is not susceptible to a clear meaning.[129] Moreover, the provision is not defined in the E.O. and contains no definable criteria for designating individuals and groups as SDGTs. The term is therefore vulnerable to subjective interpretation, giving the Government unfettered discretion in enforcing it. Thus, the court held the 'otherwise associated with' provision is unconstitutionally vague on its face.[130]

The court also found that the 'otherwise associated with' provision is unconstitutionally overbroad because it punishes mere association with an SDGT. The court posited: '[T]he First Amendment protects a citizen's right to associate with a political organization; even if that association includes ties with groups that advocate illegal conduct or engage in illegal acts, the power of the Government to penalize association is narrowly circumscribed.'[131] Guilt by association is an impermissible basis upon which to limit or deny a person's First Amendment rights. The court was particularly concerned by the absence of any language in the provision purporting to limit its application to those instances of association involving activity that furthers or advances an organization's illegal goals.[132] Thus, the court barred the Government from enforcing E.O. 13224, §1(d)(ii), against any person or entity by blocking its assets or subjecting it to designation as an SDGT for being 'otherwise associated with' a terrorist or terrorist organization.[133]

In response to the ruling in *Humanitarian Law Project,* OFAC amended the regulations implementing E.O. 13224. A new section 594.316 was added to subpart C, defining a person 'otherwise associated with.' Under the new provision, the term 'to be otherwise associated with' means:

> (a) To own or control; or
> (b) To attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to persons whose property and interests in property are blocked pursuant to section 594.201(a)(1), (a)(2) or (a)(4)(i).[134]

Whether the new regulation defining the term 'otherwise associated with' would withstand a constitutional challenge on void for vagueness grounds was quickly decided by the court.

In *Humanitarian Law Project v. U.S. Department of Treasury*, the district court granted the Government's motion for reconsideration, holding that the new regulation (31 C.F.R. §594.316) defining 'otherwise associated with' remedied the constitutional defects of E.O. §1(d)(ii).[135] The court stated that it had already found that the Secretary's authority to designate a person who is 'owned or controlled by, or . . . act[s] for or on behalf of' other SDGTs (E.O. §1(c)), or someone who has provided 'financial, material, or technological support for, or financial or other services to or in support of' acts of terrorism or other SDGTs (E.O. §1(d)(i)), was not vague and did not violate Fifth Amendment due process requirements.[136] Additionally, the meaning of the phrase 'to attempt, or to conspire,' the court stated, is 'sufficiently clear so as not to cause persons "of common intelligence . . . necessarily [to] guess at its meaning and [to] differ as to its application."'[137] Thus, 'to attempt, or to conspire' is not unconstitutionally vague.

The court also held that the phrase 'to attempt, or to conspire' is not unconstitutionally broad. The court reasoned that 'to attempt, or to conspire' does not punish mere association or a substantial amount of protected conduct.[138] Thus, the injunction issued against enforcement of E.O. 13224, §1(d)(ii), prohibiting OFAC from designating an individual or group under the 'otherwise associated with' provision, was no longer warranted and was lifted by the court.[139]

Fifth Amendment Takings Clause

Blocking orders issued pursuant to E.O. 13224 have been attacked as an uncompensated taking, in violation of the Takings Clause of the Fifth Amendment.[140] The courts have consistently rejected these claims, reasoning that the blocking actions under E.O. 13224 are temporary deprivations that do not vest the assets in the Government.[141] Therefore, the blocking of

terrorist-related funds does not, as a matter of law, constitute takings within the meaning of the Fifth Amendment. However, at least one court left open the possibility of revisiting the matter on the basis of a long-term blocking order. In the *Holy Land Foundation for Relief and Development v. Ashcroft*, the court stated: 'Plaintiff may . . . some day have a credible argument that the long-term blocking order has ripened into a vesting of property in the United States.'[142] However, because HLF's assets had only been blocked for eight months, the court found it premature to determine that the temporary deprivation is equivalent to vesting.[143]

In *Islamic American Relief Agency v. Unidentified Agents,* the court also dismissed plaintiff's argument that the blocking of its assets violated the Takings Clause of the Fifth Amendment. The district court held that it lacked subject matter jurisdiction over the plaintiff's Fifth Amendment claim, stating that the matter should have been 'brought before the United States Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. §1491.'[144] Moreover, agreeing with the ruling in the *Holy Land Foundation for Relief and Development,* the court held that a blocking order under E.O. 13224 is not, as a matter of law, a takings within the meaning of the Fifth Amendment.[145]

First Amendment Claims

The federal courts have been unreceptive to plaintiffs' claims that OFAC designations and blocking orders violate their First Amendment rights to freedom of association and speech. The Supreme Court has recognized that the act of contributing money to an organization implicates the right of freedom of association.[146] The Court has also recognized that regulation of association is constitutional if it was closely drawn to further a sufficiently important government interest.[147] In *United States v. Al-Arian,* the district court upheld the constitutionality of the OFAC designation.[148] The court concluded that 'stopping the spread of terrorism is not just a sufficiently important governmental interest, but is a compelling governmental interest.'[149] The court further found that combating the spread of global terrorism by preventing the financing and support of foreign terrorist organizations is closely drawn to further this interest.[150]

In *Holy Land Foundation for Relief and Development v. Ashcroft,* HLF asserted that the Government violated its First Amendment right to freedom of speech by prohibiting it from making any humanitarian donations.[151] The court applied a heightened intermediate scrutiny standard to whether a prohibition on fund-raising and contribution is constitutional under the First Amendment. In denying HLF's free speech challenge to the E.O., the court applied a four-part test set forth by the United States

Supreme Court in *United States v. O'Brien* for determining whether the Government's restriction passes intermediate scrutiny.[152] Under the intermediate scrutiny standard, the government restriction is lawful if

> (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[153]

The HLF court found that the E.O. and blocking order clearly meet these requirements. First, the President was authorized to issue the Executive Order pursuant to the IEEPA. Moreover, the IEEPA and the E.O. grant OFAC the authority to designate HLF and designate its assets.[154] Second, the E.O. and OFAC's actions promote an important and substantial government interest of preventing the financing of terrorism.[155] Third, the Government's interest in preventing terrorist attacks is unrelated to suppressing free speech. The court posited: '[T]he Government has merely restricted HLF's ability to provide financial support to Hamas. It has not restricted HLF's ability to express its viewpoints, even if these views include endorsement of Hamas.'[156] Fourth and finally, the incidental restriction is no greater than necessary to advance the Government's counter-terrorist financing interest.[157] 'Money is fungible, and the Government has no other, narrower, means of ensuring that even charitable contributions to a terrorist organization are actually used for legitimate purposes.'[158] Accordingly, the court held that the Government's restriction was 'narrowly enough tailored to only further its interest in stopping the flow of American dollars to Hamas.'[159]

The D.C. Circuit affirmed the district court's rulings, finding that neither HLF's First Amendment right of free speech or freedom of association had been violated. The court posited: '[T]here is no First Amendment right nor any other constitutional right to support terrorists.'[160] Other courts that have considered similar First Amendment challenges to OFAC designations and blocking orders have reached the same result.[161]

Fourth Amendment Claims

The courts have consistently rejected plaintiffs' argument that OFAC blocking actions constitute an unreasonable seizure under the Fourth Amendment. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

11. Private causes of action: using the civil justice system to hold terrorist financiers accountable

> The only way to imperil the flow of money and discourage the financing of terrorist acts is to impose liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts.[1]
>
> *Boim v. Quranic Literacy Institute* (7th Cir. 2002)

INTRODUCTION

Since the September 11, 2001 terror attacks, one of the U.S. Government's top goals in the Global War on Terror has been to deprive the terrorists of funding and dismantle their financial networks.[2] To accomplish these objectives, the Administration has emphasized criminal enforcement actions and freezing the assets of suspected terrorists and their financial supporters.[3] However, civil tort actions that seek large monetary damages provide an invaluable supplement to the criminal justice process and administrative blocking orders. Private lawsuits brought by the victims of terrorism can have a deterrent effect against the donors, corrupt charities, front organizations, financial institutions, and foreign states that provide financial support and services to terrorist organizations.[4] While the prospect of large civil monetary judgments may have little or no deterrent value for radical jihadists, the same may not be true of individual donors, charitable organizations and financial institutions that lend financial support or direction to foreign terrorist organizations (FTOs).[5] Such individuals and organizations are more likely to have substantial assets in the United States.[6] Attachment of those assets pursuant to a civil judgment could make it unprofitable to provide financial assistance to terrorist groups. Less ardent donors may be deterred from wittingly financing terrorist organizations for fear of having their assets attached to enforce a civil monetary judgment. In the case of corrupt Islamic charities, a civil judgment for aiding and abetting international terrorism could result in the attachment of the charities' assets to fulfill the judgment, bankrupting them and effectively putting them out of business.[7]

'Such civil actions could further deter terrorist groups from maintaining assets in the United States, from benefiting from investments in the United States and from soliciting funds from within the United States.'[8] A civil judgment for knowingly providing banking and administrative services to a terrorist organization could also expose financial institutions to significant operational and legal risks.[9] Merely being linked to a terrorist group could cause irreparable damage to the reputation of the particular financial institution, discouraging investors from doing business with the bank.[10] Additionally, successful civil lawsuits brought by terrorism victims against a foreign state sponsor of terrorism could further damage its reputation in the international community. Moreover, civil judgments 'condemn the terrorists or their sponsors as outlaws, and they may make it much more difficult for terrorists to finance their activities by exposing their assets to attachment.'[11] Finally, and more important yet, civil actions, which proceed against the assets of the financial sponsors of terrorism, can reduce the ability of terrorists to carry out their deadly attacks.[12]

There are numerous advantages in bringing civil actions for acts of terrorism. Because civil litigation requires a lower burden of proof, civil suits may be superior to pursuing criminal prosecution. In a civil action, plaintiffs are required to prove liability by a preponderance of the evidence, rather than the heightened criminal justice standard of guilt beyond a reasonable doubt. A criminal jury verdict also requires the jurors to unanimously agree on the defendant's guilt. A civil judgment may be based on less than a unanimous verdict. Additionally, plaintiffs benefit from more liberal discovery rules in civil causes of action. Finally, the government will likely prioritize its resources, focusing on the actual perpetrators of terrorist acts. As a result, the government's resources will limit its ability to pursue all individuals and organizations engaged in secondary conduct, such as providing financial support and services to a foreign terrorist organization.[13] The resources of 'private attorneys general' may be needed to regulate such secondary conduct. As one commentator observed: '[T]he time has come for private citizens to enter the battle on civil grounds through lawsuits aimed at crippling terrorist organizations at their [financial] foundation.'[14]

Unfortunately, enforcement of civil judgments against the state sponsors of terrorism is often hampered and obstructed by the U.S. government. In numerous anti-terrorism civil lawsuits, the government has intervened to quash writs of attachment to prevent prevailing plaintiffs from attaching assets to enforce their civil judgments against foreign state sponsors of terrorism.[15] Thus, for example, in order to enforce civil judgments against Iraq and Iran the plaintiffs victims of terrorism must succeed on two legal fronts. First, the plaintiffs must prevail on the merits of their tort claims against the foreign state defendants for aiding and abetting acts of terrorism. Second,

after winning a judgment against these foreign governments, the plaintiffs must overcome the U.S. government's efforts to prevent them from satisfying their judgments. The difficulty in satisfying these legal judgments has serious deleterious effects. The legal expenses required to litigate these matters against the vast legal resources of the U.S. government, with no assurance that the plaintiffs will prevail, may discourage victims of terrorism from filing similar causes of action in future cases. Further, U.S. government intervention in such cases undermines the deterrent value of such lawsuits against the state sponsors of terrorism. Regrettably, the legal judgments in these civil tort actions often are reduced to no more than a pyrrhic moral victory. Finally, U.S. intervention in such lawsuits deprives the victims of terrorism of just compensation for their injuries. The victims of terrorism should not have to battle both the foreign state sponsors of terrorism and the U.S. government to recover damages awarded for the loss of loved ones and the suffering endured from acts of terrorism. In the absence of compelling reasons for doing so, the U.S. government should not be permitted to intervene in such cases and deny plaintiffs reasonable compensation.

SUING NON-STATE SPONSORS OF TERRORISM

Civil damages for acts of terrorism are authorized by the Antiterrorism Act of 1991 (ATA).[16] Plaintiffs may file suit pursuant to 18 U.S.C. §2333(a), enacted as part of the ATA, which provides:

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.[17]

In order to state a claim for civil damages under §2333(a), plaintiffs must allege that they were injured 'by reason of' a crime that constitutes an act of 'international terrorism.' Section 2331(1) defines 'international terrorism' as activities that

> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
> (B) appear to be intended–
> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and

> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.[18]

The legislative history of the ATA reveals an intent 'to fill a gap in the law by establishing a civil counterpart to the existing criminal statutes.'[19] The statute was intended to deter and punish acts of international terrorism by holding terrorists and their facilitators accountable 'where it hurts them most: at their lifeline, their funds.'[20] The statute 'would allow victims to pursue renegade terrorist organizations, their leaders, and the resources that keep them in business, their money.'[21] Additionally, Congress intended to 'remove[ ] the jurisdictional hurdles in the courts confronting victims [of terrorism] and [to] empower[ ] victims with all the weapons available in civil litigation.'[22] The ATA was intended 'to codify general common law tort principles and to extend civil liability for acts of international terrorism to the full reaches of traditional tort law.'[23] One of the most significant features of the statute is the provision of treble damages, court costs, and reasonable attorney's fees.[24] That is, a successful plaintiff is entitled to triple his actual compensatory damages, and the losing party must pay his legal fees and court costs. Finally, the ATA is not limited to the actual perpetrators of international terrorism.[25] Instead, liability may be imposed 'at any point along the causal chain of terrorism.'[26] Thus, the financial supporters of terrorism may be held civilly liable for the harm caused by the terrorist attacks.

At the same time, the ATA imposes certain limitations. First, civil actions under section 2333(a) are limited to U.S. nationals.[27] Foreign nationals may not sue under the ATA. Second, a 1992 amendment to the ATA bars any actions under its provisions against a 'foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority.'[28] The ATA also excludes lawsuits for injury or loss by reason of an act of war, which could raise legal problems regarding causes of action arising from the armed conflict in Iraq and Afghanistan and the broader global war on terrorism.[29] Finally, the U.S. Attorney General may seek to stay any civil action brought under section 2333, or limit or stay discovery if the court finds that the civil action would substantially interfere with a criminal prosecution or national security operations.[30]

Suing Corrupt Islamic Charities and Terrorist Front Organizations

In *Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development*,[31] the seminal case on the application of the ATA, the

court held that Muslim charities and front organizations that provide financial support to terrorist groups may be held civilly liable under 18 U.S.C. §§2331 and 2333.[32] In *Boim*, the parents of David Boim, a 17-year-old American citizen studying in Israel, brought a claim under 18 U.S.C. §2333 for the death of their son. In 1996, the Boims were living in Israel, where David was studying at a yeshiva. On the fatal day, David and several of his classmates were waiting at a bus stop near Beit El, a small West Bank village north of Jerusalem, when a car pulled off the road and stopped approximately ten feet away from the students.[33] One or more of the occupants of the vehicle opened fire at the crowd, striking David in the head. David's two assailants were later identified as members of HAMAS, a Palestinian terrorist organization committed to the destruction of Israel and the establishment of a fundamentalist Palestinian state.[34] Both men were apprehended by the Palestinian Authority in 1997, and then released pending trial.[35] One of the individuals killed himself in a suicide bombing at a shopping mall in Jerusalem later that same year. The other person was tried by a Palestinian Authority Tribunal and convicted of participating in the Boim killing.[36]

Pursuant to section 2333, the Boims sued a variety of individuals and organizations for their son's death, including Muhammad Abdul Hamid Khalil Salah (Salah), the American Muslim Society (AMS), the Quranic Literacy Institute (QLI), and the Holy Land Foundation for Relief and Development (HLF).[37] Salah was allegedly an active member of HAMAS and served as the leader of HAMAS's military wing in the U.S.[38] AMS is a now defunct organization, incorporated in the U.S., that allegedly provided financial support to HAMAS through HLF. QLI is an Illinois not-for-profit corporation that purportedly translated and published sacred Islamic texts.[39] The HLF, a not-for-profit California corporation with offices in Texas, Illinois and Jerusalem, is a charity whose alleged mission is to provide humanitarian relief and aid to Palestinians affected by the Second Intifada.[40] The Boims maintained that QLI, HLF, and AMS were financial fronts for HAMAS.[41] More specifically, they claimed that the defendants raised millions of dollars in the U.S. and channeled the funds to finance HAMAS's terrorist activities in the Middle East.[42] The money raised by HLF and QLI was allegedly laundered and transferred to HAMAS using complex financial transactions, fictitious front companies, and Swiss bank accounts in order to finance terrorist activities.[43] The essential theory of the *Boim* case was that, while two HAMAS terrorists actually murdered David Boim, the assailants were financially aided and abetted by HLF, QLI, AMS, and other entities and individuals.[44] The Boims sought $100 million in compensatory damages and $100 million in punitive damages, plus court costs and attorney's fees, and requested treble damages under the statute.[45]

The Boims alleged liability on three independent theories. First, the plaintiffs argued that mere provision of funds to HAMAS, without more, constitutes an act of international terrorism under 18 U.S.C. §2331.[46] Second, plaintiffs asserted that providing material support and resources to a designated foreign terrorist organization, in violation of 18 U.S.C. §§2339A and 2339B, falls within the definition of 'international terrorism' for purposes of 18 U.S.C. §2331.[47] Finally, plaintiffs claimed that defendants may be held civilly liable under §2331 for aiding and abetting international terrorism.[48]

Funding *simpliciter*

The first issue centered on whether the simple provision of funds to HAMAS by QLI and HLF constitutes an act of 'international terrorism' because it 'involve[s] violent acts or acts dangerous to human life.'[49] The Boims likened payments to HAMAS to murder for hire, reasoning that the payment 'involves' violent acts by bringing about the killing and providing an incentive for someone else to commit it.[50] While the court agreed that Congress intended sections 2331 and 2333 to 'reach beyond those persons who themselves commit the violent act that directly causes the injury,' it held that merely giving money to a terrorist organization without knowledge and intent to further its criminal actions does not constitute an act of 'international terrorism' under 18 U.S.C. §2331.[51] The court stated that '[t]o hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability.'[52] The court could find nothing in the language of the ATA statute or history to support that construction. In addition to proving knowledge and intent, the court stated that plaintiffs must show that murder was a reasonably foreseeable result of making a donation.[53]

Providing material support to terrorists and terrorist organizations

In their second theory of liability, the Boims argued that the provision of material support to an FTO constitutes an act of 'international terrorism' under §2333.[54] Section 2339A makes it a crime to provide material support or resources knowing or intending that they be used in the commission of specified violent acts.[55] Section 2339B criminalizes knowingly providing material support or resources to an organization that the United States has designated a foreign terrorist organization pursuant to 8 U.S.C. §1189(a).[56] Thus, if the provision of financial support meets the requirements for criminal liability under 18 U.S.C. §2339A or §2339B, plaintiffs contended that funding a terrorist organization may support a civil claim under §2333.

The court agreed, observing that, when Congress passed §§2339A and 2339B, it intended that persons who provide material support to the

sole cause of the plaintiff's injury; the conduct need only be one of the causes.'[73] Finally, the court emphasized that liability under §2333 does not require proof that the defendant's conduct was the predominant or primary cause of the injury. For example, 'a careful showing that many small donations collectively resulted in a cache of funds that in turn enabled a series of terrorist acts would permit a factfinder reasonably to infer a causal connection between the contribution made by a single donor and one of the terrorist acts made possible by that donor and others like him, even if a single donation would not by itself have been enough to cause that terrorist act.'[74] Thus, minor acts of support could be sufficient to render the donor liable for the injuries subsequently inflicted by the terrorists.[75]

Suing Banks that Provide Financial Services to Terrorist Organizations

Bank case studies

Arab Bank The ATA has been used to support civil causes of action against three foreign banks that allegedly provided financial and administrative services to agents of terrorist organizations. In *Linde v. Arab Bank, PLC (Arab Bank I)*,[76] American victims of terrorist attacks in Israel brought a complaint seeking more than $1 billion in damages against Arab Bank for knowingly providing banking and administrative services to Palestinian terrorist organizations that sponsored suicide bombings and other murderous attacks on innocent civilians in Israel.[77] Arab Bank is a Jordanian bank headquartered in Amman, Jordan, with a federally licensed branch office in the state of New York.[78] The Bank is a major international financial institution with over $32 billion in assets.[79] It has been characterized as a 'pillar of the Middle East economy' and the 'de facto treasurer for the Palestinian Authority.'[80]

The civil complaint alleged that Arab Bank administered accounts for various Islamic charities that operated as fund-raising front organizations for Palestinian terrorist groups. Specifically, plaintiffs alleged that, following the collapse of the peace negotiations between the State of Israel and the Palestinian Authority, Palestinian terrorist groups – including HAMAS, the Palestinian Islamic Jihad (PIJ), and the Al Aqsa Martyrs Brigade (AAMB) – launched the Al Aqsa Intifada, also known as the 'Second Intifada.'[81] The objectives of the Second Intifada were to intimidate and coerce the civilian population of Israel and to influence the policy of the Israeli government to withdraw from the Occupied Territories, meaning the West Bank and the Gaza Strip.[82] The terrorists utilized suicide bombers to launch thousands of attacks, which claimed more than 8,000 casualties, including over 1,000 civilian deaths, to accomplish their political goals.[83]

The complaint further identified several Islamic charities operating as front organizations for HAMAS, raising and channeling funds to support its terrorist activities. These Muslim charities included: the Al-Ansar Charity, Ramalla Charitable Committee, Tulkarem Charitable Committee, the Islamic Association, Al Mujama Al-Islami, Nablus Charitable Committee, Jenin Charitable Committee, and Islamic Charity Society of Hebron.[84] Although these charities hold themselves out as legitimate charitable organizations and collect money in the name of humanitarian causes, plaintiffs maintained that they in fact raised and channeled large sums of money to support the terrorist activities of HAMAS and other terrorist organizations.[85] The complaint further alleged that several of the charities held bank accounts at Arab Bank through which the Bank provided them with financial services, including receiving deposits and processing wire transfers.[86]

The most damning allegations involved Arab Bank's involvement with the Saudi Committee for the Support of the Al Quds Intifada (Saudi Committee). Shortly after the commencement of the Second Intifada, the Saudi Committee was established as a private charity registered in Saudi Arabia.[87] According to the plaintiffs, the Saudi Committee was established for the purpose of raising money for the families of the suicide bombers participating in the Palestinian terror campaign.[88] The Saudi Committee furnished a 'comprehensive insurance death benefit' and 'universal death and dismemberment plan,' consisting of a payment of $5,316.06 to the families of the 'martyrs' killed. or wounded in or imprisoned for perpetrating terrorist attacks.[89] Plaintiffs alleged that the death benefits plan operated, in effect, as a reward for perpetrators of suicide attacks. The Saudi Committee set up accounts at various financial institutions in the Middle East, primarily among them Arab Bank, to raise funds for the families of so-called martyrs of HAMAS and other Palestinian terrorist groups.[90] Public and private donations were deposited into these accounts.

Plaintiffs further claimed that Arab Bank administered the financial infrastructure by which the Saudi Committee distributed the death benefit payments to the families of the Palestinian terrorists.[91] Once the Saudi Committee prepared the list of eligible martyrs and prisoners, the names were provided to Arab Bank.[92] In consultation with the Saudi Committee and representatives of HAMAS, Arab Bank finalized the list and maintained a database of persons eligible to receive death benefits.[93] The Saudi Committee opened an account at Arab Bank in the beneficiary's name and then deposited a certain amount of U.S. dollars or Saudi riyals into the account.[94] Because Saudi riyals cannot be conveniently converted to Israeli currency, Arab Bank facilitated that conversion by routing those funds through its New York branch, where they were converted to U.S. dollars