

Chapter 4: United States

4.0 Introduction

This chapter critically examines the evolution of counter terrorist financing (CTF) legislation in the United States of America¹ and identifies how its CTF policy has adversely affected the right to a public trial. Whilst little attention by regulatory agencies was paid to terrorist financing prior to September 11 2001,² the terrorist attacks spurred the U.S. into taking action against the funding of terrorism. This action came in the form of a wealth of legislation aimed at starving the flow of funds to terrorists. This chapter focuses on the consequences that these laws have had on the right to a public trial in the U.S and argues that the emergency measures adopted in the wake of September 11 have become institutionalized, as acts of terrorism have become more prevalent.³ The permanence of these once temporary measures in conjunction with any deviation from legal processes and derogation from human rights at times of emergency calls into question the legitimacy of the U.S. CTF legislative framework. The chapter begins by discussing the CTF measures that predate September 11 and it then goes on to examine the monumental legislative shift away from financial crime in the U.S. following the attacks. The chapter looks at the manner in which these laws, in particular the Presidential Executive Order 13,224 and Title III of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001⁴ were swiftly implemented. Next, the chapter identifies and examines the U.S. CTF policy to assess its compatibility with the right to a public trial. The result of this analysis is crucial to ascertain whether this part of the U.S. CTF strategy can be deemed lawful. This chapter also investigates the impact the CTF provisions have had on U.S. based Islamic charities. Finally, the chapter briefly discusses the ability of the U.S. government to suspend certain human rights in particular situations and assesses the impact of such a power.

¹ Hereinafter U.S.

² Hereinafter September 11.

³ Recent attacks include, a car ramming and stabbing at the University of Ohio on November 28 2016, A mass stabbing at a mall in Minnesota on September 17 2016 and a mass shooting at a nightclub in Orlando on June 12 2016.

⁴ Hereinafter USA PATRIOT Act 2001.

4.1 Pre September 11 2001

Before September 11, the financing of terrorism was not considered to be a threat by the U.S.⁵ On September 24 2001 President George Bush announced the ‘Financial War on Terrorism’ stating: “Today, we have launched a strike on the financial foundation of the global terror network”.⁶ The measures taken following this announcement illustrate that the U.S. has made an integral contribution to the instigation and expansion of the ‘Financial War on Terrorism’.⁷ Despite this, it should be noted that, “in the United States – unlike the United Kingdom, where September 11 accelerated a trend already under way – there was an abrupt change of course in respect of terrorist finance”.⁸ Before these terrorist attacks, the countering of terrorist financing was not considered to be of primary importance and thus any CTF regulations were found amongst financial legislation initially designed for a different purpose.⁹ The 9/11 Commission observed that, “the domestic strategy for combating terrorist financing within the United States never had any sense of urgency”.¹⁰ It was not until the al-Qaeda Embassy bombings of Africa in 1998 that the National Security Council even began to investigate the finances of Osama Bin Laden.¹¹ However, whilst combating the financing of terrorism was not considered a priority, the policy of the U.S. towards terror financing can be found in the Trading with the Enemy Act (1917),¹² the International Emergency Economic Powers Act (1977)¹³ and the Anti-terrorism and Effective Death Penalty Act (1996).¹⁴

⁵ J Santolli, The Terrorist Finance Tracking Program: illuminating the shortcomings of the European Union’s antiquated data privacy directive, 2008, *George Washington Law Review*, 40, 553-582 at 555.

⁶ Stated by the President in the Rose Garden as the, Secretary of the Treasury Paul O’Neill and Secretary of State Colin Powell address the media Sept. 24. White House. Available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/images/20010924-4.html>

⁷ These measures include criminalising the funding of terrorism, freezing the assets of suspected terrorists and terrorist supporters and obligating the financial sector to report any suspicious activity by way of Suspicious Activity Reports (SARs).

⁸ L Donohue *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press: Cambridge, 2008) at p.147.

⁹ Such as the IEEPA which was not designed to be applied to US citizens. Also laws loosely dealing with the financing of terrorism were found in money laundering statutes such as the Bank Secrecy Act 1970.

¹⁰ National Commission on Terrorist Attacks Upon the United States *Staff Monograph on Terrorist Financing, Staff Report to the Commission* at 34. Available at: http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf

¹¹ L Donohue *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press: Cambridge, 2008) at p.147.

¹² Hereafter the TEA 1917

¹³ P.L. 95-223, 91 Stat. 1626. Hereafter IEEPA

¹⁴ P.L. 104-132, 110 Stat. 1214.

The TEA 1917 (as amended) granted the President the authority to “investigate, regulate...prevent or prohibit...transactions” in times of extreme emergencies or active hostilities.¹⁵ It was introduced to restrict trade with countries deemed to be hostile to the U.S. The IEEPA 1977 granted the President broad powers, which may be exercised if there is “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States”.¹⁶ If such a threat is found, the President can declare a state of national emergency pursuant to the National Emergencies Act 1976. Importantly, under the IEEPA 1977, the President is then permitted to “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States”.¹⁷ These powers were utilised by President Bill Clinton in 1995, when he issued Executive Order 12,947 entitled ‘Prohibiting Transactions with Terrorists who threaten to disrupt the Middle East Peace Process’.¹⁸ This Presidential Executive Order included a blacklist titled “Specially Designated Terrorists”¹⁹ and contained 12 terrorist organisations that were believed to jeopardize the peace process in the Middle East.²⁰ Eckert remarks that this action marked “the beginning of sanctions to target terrorists, terrorist groups, and their fundraising”.²¹ President Clinton also exercised these powers under the IEEPA 1977 with the implementation of Executive Order 13,009²² and Osama Bin Laden was added to this SDT List.²³ The next legislative measure was

¹⁵ 50 USCS appendix s.3

¹⁶ Title 50, chapter 35, Section 1701, IEEPA

¹⁷ § 1702 (a)(1)(b).

¹⁸ *Prohibiting Transactions With Terrorists Who Threaten to Disrupt the Middle East Peace Process*, Executive Order No. 12,947, 60 Fed.Reg. 5079 (Jan. 23, 1995).

¹⁹ Hereafter SDT’s.

²⁰ Those included on this list are foreign persons who are found to have committed or are at risk of committing acts of violence which threaten the Middle East Peace Process; or are assisting, sponsoring or providing financial material, or technological support for such acts of violence. (31 CFR 595.311 - Specially designated terrorist).

²¹ L Donohue *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press: Cambridge, 2008) at p.212.

²² *Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process*, Exec. Order No. 13,099, 63 Fed.Reg. 45167 (Aug. 20, 1998).

²³ L Donohue *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press: Cambridge, 2008) at p.148.

the Anti-terrorism and Effective Death Penalty Act 1996, which aimed to prevent persons within or outside the U.S. “from providing material support or resources to foreign organizations that engage in terrorist activities”.²⁴ This Act criminalised conduct that “provided material support or resources to a foreign terrorist organisation”.²⁵ Furthermore, it created a criminal offence for a person to enter into a financial transaction “knowing or having reasonable cause to know that a country is designated under the Export Administration Act as a country supporting international terrorism, engages in a financial transaction with the government of that country”.²⁶

Therefore, whilst terrorist financing was beginning to be recognised in the U.S, regulatory attention was still focussed on money laundering and the illegal drugs trade.²⁷ The events of September 11 changed this dramatically and the financing of terrorism became a priority for the government, with a declaration of ‘war on terrorism’.²⁸ On September 24 2001, President Bush declared “We will direct every resource at our command to win the war against terrorists, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence. We will starve the terrorists of funding, turn them against each other, rout them out of their safe hiding places, and bring them to justice”.²⁹

With the spotlight firmly focused on the detection and prevention of terrorist funding, there was a wealth of legislative measures aimed at starving terrorists of their funds. Donohue remarks, “gone was the lethargy that previously marked the administrative

²⁴ Murphy, S. (2000), ‘US designation of foreign terrorist organisation’, *American Journal of International Law*, 9, 365-366, at 365.

²⁵ L Donohue *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press: Cambridge, 2008) at p.149.

²⁶ Anti-terrorism and Effective Death Penalty Act (1996), s. 312. For further information on this, see Penalties for Export Violations, University of Pittsburgh. Available at: <http://www.research.pitt.edu/sites/default/files/u21/8.%20Penalties%20for%20Export%20Violations.pdf> (accessed 17.03.17).

²⁷ Seventh public hearing of the National Commission on Terrorist Attacks Upon the United States, Statement of Robert C. Bonner to the National Commission on Terrorist Attacks Upon The United States January 26, 2004. Also, see, Allen, W. ‘The war against terrorism financing’ (2003) *Journal of Money Laundering Control*, 6(4), 306-310 at 306. Biersteker, T., Eckert, S and Romaniuk, P. ‘International initiatives to combat the financing of terrorism’ in T. Biersteker and S. Eckert (eds), *Countering the financing of terrorism*, (Routledge Cavendish: London, 2008) at 234.

²⁸ Address to the Joint Session of the 107th Congress, Washington D.C. September 20 2001. Available at: https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf at 65.

²⁹ “President Freezes Terrorists’ Assets,” Remarks by the President, Secretary of the Treasury O’Neill and Secretary of State Powell on Executive Order, September 24 2001. Available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010924-4.html> (accessed 07.02.11).

realm”.³⁰ Eckert comments, “harnessing existing authorities and programs, the terrorist designations and asset freezes that had been previously a little known and understood tool of policy-makers, moved center-stage to become the highly touted first front of the Administration’s “war against terrorism.”³¹ These measures were brought to the forefront and the powers held by the government in the area of CTF were swiftly expanded.

On September 24 2001, President Bush utilized the powers under the IEEPA 1977 and implemented Executive Order 13,224 entitled ‘Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism’.³² This Order sought to “block [and freeze] all assets and interests in property of certain terrorists and individuals and entities materially supporting them”.³³ The significance of legislation such as this, preventing the financing of terrorism is not in question here.³⁴ As mentioned in chapter three, the Islamic State of Iraq and Levant (ISIL) poses the principal international terrorist threat and the FATF claim that “ISIL represents a new form of terrorist organisation where funding is central and critical to its activities.”³⁵ As such following and cutting off its funding streams is a positive step but the taking of such action is not without significant criticism. The CTF provisions, as discussed below, provide the U.S. government with unprecedented powers in which to freeze terrorist assets and disrupt terrorist’s financial infrastructures. However, the exercise of such powers can have an adverse impact on human rights, including the right to a public trial. There are three key measures of the U.S. CTF policy are the criminalization of terrorist financing, the

³⁰ L Donohue *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press: Cambridge, 2008) at p.158.

³¹ L Donohue *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press: Cambridge, 2008) at p.214.

³² Executive Order 13,224 of September 23 2001, Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten To Commit, or Support Terrorism. Available at: <http://www.fas.org/irp/offdocs/eo/eo-13224.htm>.

³³ These powers already existed under previous US legislation, “yet the new sanctions also significantly expanded on existing ones”. See B Zagari *The merging of the anti-money laundering and counter-terrorism financial enforcement regimes after September 11, 2001* (2004) 22 Berkley J. Int’l L. 123.

³⁴ “There has been a worldwide consensus that freezing terrorist assets is an effective and important tool in the war against terrorism” (N Nice-Petersen *Justice for the “Designated”: The Process that is due to alleged U.S. financiers of terrorism*, 2005, 93 Geo. L.J. 1387).

³⁵ FATF Report Financing of the Terrorist Organisation Islamic State in Iraq and the Levant, (ISIL) February 2015 at pg. 5. Available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf> (accessed 31.01.17).

freezing of assets and the filing of suspicious activity reports (SARs).³⁶ As is illustrated in other chapters, this approach has been adopted by U.K. and Canada thus providing an opportunity for comparison with reference to the impact that they may have upon the right to a fair trial. Firstly however, it is necessary to discuss the U.S. approach to countering the financing of terrorism.

4.2. U.S. Counter Terrorist Finance Policy

The U.S. policy towards CTF aims to eliminate terrorism by aggressively identifying, disrupting and deterring the funding networks of terrorist organizations.³⁷ However, due to the large number of federal agencies each with its own policy, all striving to achieve this goal, the CTF policy is complex. For instance, Ryder notes³⁸ that the Department of Justice's strategy is divided into four parts³⁹ whilst the Department of Treasury's is divided into six parts.⁴⁰ Whilst this leads to a rather disorganized approach to CTF, the significance of financial intelligence and the freezing of assets are evident in all CTF policies. It is asserted that like its U.K. and Canadian counterparts, U.S. policy has three core elements; the criminalization of terrorist financing, the freezing of terrorist assets and the use of SARs. This chapter now turns to a discussion of the foundation of CTF policy; the criminalization of terrorist financing.⁴¹

³⁶ N Ryder, 'The fight against illicit finance: A critical review of the Labour government's policy,' *Journal of Banking Regulation* (2011) 12, 252–275. N Ryder *Financial Crime in the 21st Century-Law and Policy*, (Edward Elgar, 2011)

³⁷ U.S. Department of Treasury Fact Sheet: Combating the Financing of Terrorism, Disrupting Terrorism at its Core.

³⁸ Ryder, N. (2011) *Financial Crime in the 21st Century, Law and Policy*, (Edward Elgar, 2011) 65-66.

³⁹ This policy aims to criminalise the financing of terrorism and secondly to enforce terrorist crimes on known terrorist organizations and their supporters. Thirdly, it includes the use of financial analysis to identify terrorist organisations and the supporters of such organizations and fourthly aims to freeze and confiscate the assets of terrorist organizations and their supporters. (Department of Justice *United States Attorney's Bulletin: Terrorist Financing Issues* (Department of Justice: Washington DC, 2003), at 8.

⁴⁰ This strategy firstly comprises Presidential Executive Order 13,224 and secondly, the application of UN Security Council Resolutions. Thirdly, it contains the implementation of the PATRIOT Act 2001. Fourthly it includes working with international organisations such as the Financial Action Task Force (FATF). Fifthly, it comprises the implementation of Operation Green Quest and lastly, it promotes the sharing of data between federal regulatory agencies.

⁴¹ Nicholas Ryder, 'Islamophobia or an important weapon? An analysis of the US financial war on terrorism' [2009] 10(4) *Journal of Banking Regulation* 307-320 at 309. Nicholas Ryder, *Financial Crime in the 21st Century* (Edward Elgar 2011) 66.

4.2.1 Criminalization of terrorist financing

The first law in the U.S. to criminalize the funding of terrorism was the Suppression of the Financing of Terrorism Convention Implementation Act 2002.⁴² This legislation implements the United Nations International Convention for the Suppression of the Financing of Terrorism and makes it a criminal offence for a person to “willfully provide or collect funds with the intention that such funds be used, or with the knowledge that such funds are to be used to support terrorist activities”.⁴³ Accordingly, the United States Code of Law contains four terrorist financing offences. The first applies to providing material support or resources with the intention that they are to be used in the execution of certain offences.⁴⁴ The second offence relates to providing material support or resources to foreign terrorist organizations.⁴⁵ This offence stipulates that the accused must be aware that the foreign terrorist organization is designated or that the organization has engaged or engages in terrorist activity. The third offence makes it a crime to provide or collect funds with the knowledge that these funds will be used in full, or part, for the execution of terrorist acts.⁴⁶ The fourth offence criminalizes the concealment or disguise of any funds or resources, which are used, or are intended for use to support a terrorist organisation or to carry out terrorist acts.⁴⁷ Offences such as these in relation to the financing of terrorism are also included under Presidential Executive Order 13,224.⁴⁸ Discussion now moves on to the second prong of U.S. CTF policy; asset freezing.

4.2.2 Asset Freezing

The cornerstone of CTF policy and the authority to freeze assets is Presidential Executive Order 13,224. It is to this legislation and the powers it provides that discussion now turns.

⁴² 18 U.S.C 2331.

⁴³ Title II of P.L. 107-197.

⁴⁴ 18 U.S.C. §2339A.

⁴⁵ 18 U.S.C. §2339B.

⁴⁶ 18 U.S.C. §2339 C (a).

⁴⁷ 18 U.S.C. §2339 C (c).

⁴⁸ Pursuant to this Act, the Department of State may designate individuals and groups as Specially Designated Global Terrorists (SDGTs).

4.2.2.1 Presidential Executive Order 13,224

Presidential Executive Order 13,224 provides the U.S. government with the power to designate and block the assets of non-US citizens and entities who commit or pose a significant risk of committing acts of terrorism.⁴⁹ Selden comments “Executive Order 13,224 was the first step in a multi-pronged effort, utilizing military resources, diplomacy and law enforcement and regulatory agencies, to combat international terrorism”.⁵⁰ Not only does the Order provide the power to designate and block assets, it also authorizes the U.S. government to “block the assets of individuals and entities that provide support, services or assistance to, or otherwise associate with, terrorists and terrorist organizations designated under the Order, as well as their subsidiaries, front organizations, agents, and associates”. Attached to this Order, was, a list of 27 individuals and entities designated as terrorists whose assets were instantly frozen.⁵¹ President Bush stated, “we have developed the international financial equivalent of law enforcement’s most wanted list, and it puts the financial world on notice”.⁵² In line with the U.K. Terrorism Act 2000, this Order is thought to have expanded existing authority in three ways.⁵³ Firstly, it widens the coverage of ‘terrorism’ to encompass global terrorism. Secondly, it increases the category of targeted groups to include those who are associated with designated terrorists. Thirdly, it allows the U.S. government to freeze and block terrorist assets abroad.⁵⁴ Notably, even though the U.S. government is in receipt of these extensive powers, the provisions lack direction on what activities or behaviour are proscribed. This leaves the regulators with a great deal of discretion with which to exercise an authority that can have profound consequences for human rights. Before examining what these consequences are, it is necessary to discuss the administration of these powers.

⁴⁹ Section 1, Executive Order 13224- Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism. Title 31 Part 595 of the U.S. Code of Federal Regulations.

⁵⁰ R. C. Selden, The Executive Protection: Freezing the financial assets of alleged terrorists, the Constitution, and foreign participation in U.S. financial markets [2003] *Fordham Journal of Corporate and Financial Law*, 8: 491-556, at 496-497.

⁵¹ Executive Order 13,224 of September 23 2001, Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten To Commit, or Support Terrorism. Available at: <http://www.fas.org/irp/offdocs/eo/eo-13224.htm>. (accessed 20.02.17).

⁵² *11 September 2001: the response*, Research Paper 01/72, International Affairs and Defence Section, House of Commons Library at 19.

⁵³ This existing authority was provided by the Trading with the Enemy Act (1917), the International Emergency Economic Powers Act (1977) and the Anti-terrorism and Effective Death Penalty Act (1996).

⁵⁴ *11 September 2001: the response*, Research Paper 01/72, International Affairs and Defence Section, House of Commons Library at 18-19.

The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury is responsible for enforcing the laws relating to the freezing of assets and the control of transactions.⁵⁵ No guidance is provided on what evidence is required before action is taken under the provisions; OFAC has discretion. This situation can have serious consequences for those who become the subject of an asset freeze. This powerful sanction can be applied in the absence of any test, which assesses the evidence against an individual. Moreover, any evidence can be classified and therefore not divulged to the designee making any challenge to a listing and asset freeze almost impossible. This contentious issue shall be discussed in more detail later. OFAC are also charged with the publication of the Specially Designated National List (SDN), which contains, “a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries.”⁵⁶ It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country specific”.⁵⁷ The designation process, based on a subjective criterion, involves a number of U.S. agencies including the Departments of Treasury, Department of State, Department of Justice and Homeland Security, the FBI and the intelligence community. Representatives from these agencies regularly meet to examine open-source information as well as confidential information produced for criminal investigations, about persons or entities that commit, threaten to commit or support terrorism. This material is then used by a subset of agencies to develop a file on the entity, which is then reviewed by the larger group. These findings are then forwarded to the National Security Council for a decision on the designation. The Secretary of the Treasury or the Secretary of the Department of State ultimately executes any action. OFAC is charged with implementing the blocking/freezing order. These measures apply to convicted terrorists, suspected terrorists and those who have an association with terrorism.

⁵⁵ U.S. Department of the Treasury, <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>. (accessed 20.02.17). Selden comments that OFAC “spearheaded efforts to freeze the assets of parties designated as terrorists.” R.C. Selden, The Executive Protection: Freezing the financial assets of alleged terrorists, the Constitution, and foreign participation in U.S. financial markets [2003] *Fordham Journal of Corporate and Financial Law*, 8, 491-556 at 497.

⁵⁶ OFAC Specially Designated Nationals and Blocked Persons List. Available at: <http://www.treasury.gov/ofac/downloads/t11sdn.pdf>. (accessed 10.12.16).

⁵⁷ U.S. Department of the Treasury, <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>. (accessed 10.12.16).

As a result of these provisions, “from Sept.11 to January 9, 2002, the assets of 168 alleged terrorists were frozen, totaling approximately \$68,000,000. By February 11, 2002, the frozen assets totaled \$104,000,000”.⁵⁸ Since that time, the U.S. Treasury Department have noted that pursuant to Executive Order 13,224 over 150 terrorist-related accounts and transactions in the U.S. have been blocked and they have designated more than 420 individuals and entities as terrorists or terrorist supporters.⁵⁹ Furthermore, over 40 charities⁶⁰ that were sending money to al Qaeda, HAMAS and other terrorist organizations have been designated.⁶¹ As of December 2009, the assets blocked by the U.S. government totaled \$19,886,207.⁶² This figure had increased to \$37,634,156 by December 2015.⁶³

Designation and the freezing of assets can serve as powerful tools towards countering terrorism. The designation of an individual or entity alerts the public to the designee’s involvement in or support of terrorism and prohibits them from gaining access to the U.S. financial system. The denial of access to their assets prevents the designee’s further support of terrorism. The U.S. Treasury Department proclaims, “designations deny terrorists access to the financial system and shut down channels through which they raise, move and store money. By designating terrorists, we place them in financial handcuffs by restricting where and how they are able to get their hands on funding”.⁶⁴ However, the perceived success of the designation and freezing regime is

⁵⁸ R. C. Selden, The Executive Protection: Freezing the financial assets of alleged terrorists, the Constitution, and foreign participation in U.S. financial markets [2003] *Fordham Journal of Corporate and Financial Law*, 8: 491-556 at 502.

⁵⁹ US Treasury Department, Office of Terrorism and Financial Intelligence – *US Department of Treasury Fact Sheet*. [2006] Washington: US Department of Treasury, at 5.

⁶⁰ The targeting of charities is a contentious issue. Whilst there have been suggestions that charities could be used to fund terrorist organisations such as al-Qaeda, actual evidence of such activity is very rare (Ryder and U Turksen, ‘Islamophobia or an important weapon? An analysis of the US financial war on terrorism’ *Journal of Banking Regulation* [2009] 10, 307–320 at 310). This point shall be discussed in further detail later in the chapter.

⁶¹ US Treasury Department Office of Terrorism and Financial Intelligence – *US Department of Treasury Fact Sheet*’ Washington: US Department of Treasury 2006, 5.

⁶² This figure represents the total number of assets blocked pursuant to Presidential Executive Order’s 12947 and 13224 and 18 U.S.C. §2339B (a) (2) (OFAC Terrorist Assets Report Calendar Year 2009, Twenty-Second Annual Report to the Congress on Assets in the United States Relating to Terrorist Countries and International Terrorism Program Designees- *U.S. Department of Treasury* at pg 6).

⁶³ This figure represents the total amount blocked relating to SDGT, SDT, and FTO Programs . These assets are blocked pursuant to E.O.s 12947 and 13224 and 18 U.S.C. § 2339B(a)(2), other than assets blocked due to an interest of a state owned entity belonging to a state sponsor of terrorism. (Terrorist Assets Report, Calendar Year 2015, Twenty-fourth Annual Report to the Congress on Assets in the United States Relating to Terrorist Countries and International Terrorism Program Designees- *U.S. Department of Treasury* at 9).

⁶⁴ US Treasury Department Office of Terrorism and Financial Intelligence – *US Department of Treasury Fact Sheet*’ (Washington: US Department of Treasury 2006) at 5.

questionable. This is due to the fact that the amount of terrorist's funds in existence is impossible to quantify as Levitt warned, "when it comes to cracking down on terrorist financing, we have barely skimmed the service".⁶⁵ These frozen assets are claimed to be a mere fraction of the funds available to terrorists.⁶⁶ Weiss further comments on the momentum of terrorist asset freezing claiming, "in the months following the attacks [September 11 2001], substantial funds were frozen ... after this initial sweep, the freezing of terrorist assets slowed down considerably".⁶⁷ Despite such opinions, the FATF are complimentary of the U.S. approach to CTF and assert, "the U.S. has built a solid, well-structured system aimed at effectively implementing the UN sanctions under S/RES/1267(1999) and S/RES/1373(2001). The statistics on the frozen terrorist related assets speak for themselves".⁶⁸

Notwithstanding, the apparent success or failure of the designation and asset freezing provisions, other criticisms exist.⁶⁹ The practice of blacklisting suspected terrorists and terrorist supporters has provided the opportunity to implement extensive powers without scrutiny and has allowed for the sidelining of human rights, in particular the right to a public trial. The European Centre for Constitutional and Human Rights claims that the designation process "has been productive-generating new means of aggregating and externalising forms of unaccountable executive power and new methods of circumventing fundamental rights protections in the name of combating terrorism".⁷⁰ Indeed, President George Bush proclaimed, "our country is at war, and our government has the obligation to protect the American people. Anything we do to

⁶⁵ M Levitt 'Stemming the flow of terrorist financing: practical and conceptual challenges' [2003] *The Fletcher Forum of World Affairs* 27(1) 59-70, at 61. The same situation exists in the U.K. and Canada. For further commentary, see chapters 5 and 6.

⁶⁶ M Navias 'Financial warfare as a response to international terrorism' [2002] 73(1) *The Political Quarterly* 61.

⁶⁷ M Weiss *Terrorist Finance: Current efforts and policy issues for congress Report for Congress* (Washington: Congressional Research Service 2004) p.1. For a similar criticism of the U.K. approach, see later in the chapter

⁶⁸ Financial Action Task Force *Third mutual evaluation report on anti-money laundering and combating the financing of terrorism- United States of America* (Financial Action Task Force: Paris, 2006) at 58.

⁶⁹ Recently, Abdul Tawala Ibn Ali Alishtari (otherwise known as Michael Mixon) pleaded guilty to charges of terrorism financing and conspiracy to commit wire fraud. He was sentenced on April 10 2010 to 10 years and one month in a federal prison.

⁷⁰ 'Blacklisted: Targeted sanctions, pre-emptive security and fundamental rights', European Center for Constitutional and Human Rights at 81. Available at: http://www.ecchr.eu/news_details.402/items/new-report-blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights.html. (accessed 08.08.16).

that end, in that effort, any activity we conduct, is within the law”.⁷¹ Furthermore, alongside these powerful sanctions; the President is afforded a large amount of discretion in the application of these powers. This implies that he can “impose economic sanctions in virtually any way he sees fit”⁷² even though Executive Order 13,224 has never been subject to a reasonable degree of checks and balances. Warde stated, “the financial war [on terrorism] has from the start been fraught with dysfunctions, unintended consequences, and collateral damage”.⁷³ An example of ‘collateral damage’ is the adverse impact that provisions such as Executive Order 13,224 have had on the ability of individuals to enjoy certain human rights. For instance, U.S. citizens are, under the U.S. Constitution guaranteed the right not to be arbitrarily deprived of property without due process⁷⁴ and the right to a public trial.⁷⁵ The mechanism by which an individual may be designated as a terrorist and consequently have their assets frozen contravenes these two rights.⁷⁶ The individual concerned is not given notice of a designation and subsequent freezing of funds and has no opportunity to challenge the listing or the blocking order which can continue indefinitely. Such a situation violates the constitutionally ‘guaranteed’ right in the U.S. of the right to a public trial.⁷⁷ This raises doubt as to the lawfulness of these CTF, which shall be discussed later. This chapter turns to a discussion of the third prong of the U.S. CTF policy; reporting requirements.

⁷¹ E Schmitt and Tim Golden, ‘*Pentagon Plans Tighter Control of Interrogation*’ November 8 2005. New York Times, Available at: <http://www.nytimes.com/2005/11/08/politics/08abuse.html> (accessed 08.08.16).

⁷² N Nice-Petersen ‘Justice for the “Designated”’: The Process that is due to alleged U.S. financiers of terrorism, [2005] 93 Georgetown Law Journal 1387.

⁷³ I Warde, *The Price of Fear, al-Qaeda and the truth behind the financial war on terror*, (I.B. Tauris & Co 2007) 182.

⁷⁴ Fifth Amendment to the U.S. Constitution.

⁷⁵ Fourteenth Amendment to the U.S. Constitution.

⁷⁶ Examples of contravention of these human rights can be argued in cases where assets have been frozen without notice and those accused of supporting terrorism have been denied access to a fair trial such as occurred in *People’s Mojahedin Organisation of Iran v United States* 182 F.3d at 17, *United States of America v Benevolence International Foundation, Inc and Enaam M. Arnaout*, Case No. 02 CR 414, *Global Relief Foundation Inc. v O’Neill*, 315 F.3d 748 (7th Cir. 2002), *Holy Land Foundation for Relief and Development v Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003). These cases are discussed later in this chapter.

⁷⁷ See the case of *USA v Marzook, Salah, Ashqar No.* (2006) 03 CR 0978.

4.2.3 Reporting Requirements

The USA PATRIOT Act 2001 includes a comprehensive range of provisions intended to strengthen the CTF regime.⁷⁸ The regulations contained in the Act are aimed at detecting terrorist funds prior to their introduction to the financial system. Like Executive Order 13,224, this Act was promptly implemented as a response to the September 11 attacks. The Council on Foreign Relations stated that, “Congress passed sweeping new anti-money laundering laws in part of the Patriot Act, many of which were quickly and diligently implemented by the Treasury Department”.⁷⁹ As a result of Title III of this Act, also referred to as the International Money Laundering and Anti-terrorist Financing Act of 2001, the reporting obligations of financial and credit institutions have significantly increased.⁸⁰ Whilst these institutions had obligations under the Bank Secrecy Act 1970,⁸¹ these requirements were significantly increased by the USA PATRIOT Act 2001. Under the Act, financial institutions are required to file a SAR where they suspect the transaction is used for the purpose of terrorism.⁸² Importantly, this Act permits the Treasury Department to scrutinise certain transactions and in some cases to disallow them.⁸³ It also extends the currency transaction reporting obligations of the BSA 1970 to include all financial institutions.⁸⁴ The Act further permits the Department of Treasury to require supplementary reports and a higher level of due diligence from financial and deposit taking institutions in areas of “primary money laundering concern”.⁸⁵ This effectively means that the anti-money laundering (AML) model is being extended to apply to CTF. As money laundering and terrorist financing are so different, it is difficult to envisage that the (AML) provisions could be successful in the prevention of the funding of terrorism. This is a point, which shall be discussed in more detail later.

⁷⁸ Title III: International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, USA PATRIOT Act 2001.

⁷⁹ M Greenberg, W Wechsler and L Wolosky *Terrorist financing* (Council on Foreign Relations: New York, 2002) at 13.

⁸⁰ USA Patriot Act 2001, ss. 311 to 330.

⁸¹ And the Money Laundering Control Act 1986 and Anti-Money Laundering Act 1992.

⁸² USA Patriot Act 2001, s. 326.

⁸³ Stevens, P. and Bogle, T. ‘Patriotic acts: Financial institutions, money laundering and the war against terrorism’, [2002] *Annual Review of Banking Law*, 21, 261-290, at 267-268.

⁸⁴ USA Patriot Act, s. 365(a)(1).

⁸⁵ USA Patriot Act, s. 311(a). These jurisdictions currently include, Afghanistan, Bosnia and Herzegovina, Iraq, Lao, Syria, Uganda, Vanuatu and Yemen (FinCen Advisory on the FATF-Identified Jurisdictions with AML/CFT Deficiencies, September 2016, FIN-2016-A004. Available at: <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2016-a004> (accessed 29.01.17).

The National Commission on Terrorist Attacks upon the United States argued that financial institutions “play a critical role in any effort to find terrorists”.⁸⁶ Eckert opines that this duty “enhances the financial footprint of transactions by requiring financial institutions to identify and verify the identity of new customers”.⁸⁷ In short, financial institutions are required to know their customer and to identify transactions, which are not typical to their profile. Any uncharacteristic behaviour should be noted in a SAR. This extension of obligations on financial and credit institutions has led to a greater level of record-keeping, report filing, and internal policing/monitoring requirements.⁸⁸ The significant impact on the number of SARs being filed is clear. For example in 2002, FinCEN⁸⁹ reported 281,373 Suspicious Activity Report filings. By 2015 this figure had increased to 916,709.⁹⁰ However, whilst the growth in SARs may illustrate compliance and increased diligence by financial institutions, the statistics are not a measure of success. Warde argues that the SAR regime has “long been criticized for its cost and inefficiency” due to the modest amount of convictions arising from a large number of SARs.⁹¹ For example, Warde asserts “the exponential growth of Suspicious Activity Reports (SARs) has done little to detect crime, and there is no evidence that a single act of terror had been prevented thanks to such reports”.⁹² Indeed, terrorist attacks continue to be ever present, this is a point, which

⁸⁶ National Commission on Terrorist Attacks Upon the United States, chapter 4 at 61.

⁸⁷ Eckert, S, ‘The US regulatory approach to terrorist financing’, in T. Biersteker and S. Eckert (eds), *Countering the financing of terrorism*, (Routledge 2008) at 209.

⁸⁸ Baldwin Jnr, above n 17, at 118.

⁸⁹ FinCen *The SAR Activity Review- By the Numbers*, Issue 15, January 2011. Available at: www.fincen.gov/news-room/rp/sar_by_number.html

⁹⁰ FinCen SAR Stats Technical Bulletin, October 2015. www.fincen.gov.

⁹¹ I Warde, *The Price of Fear, al-Qaeda and the truth behind the financial war on terror*, (I.B. Tauris & Co 2007) 160. He further notes that “out of 96,900 SARs filed, there were only 932 money laundering convictions (none for terrorist financing) representing a cost of more than \$10 million per conviction; yet the number of reports kept on increasing, jumping to 156,931 in 2000.”

⁹² I Warde, *The Price of Fear, al-Qaeda and the truth behind the financial war on terror*, (I.B. Tauris & Co 2007) 171. Further to this, the increase in reporting requirements may not just prove to be ineffective but counterproductive. For example Lee noted that “the plethora of reporting requirements creates a sort of ‘needle-in-the-haystack’ problem for the authorities” (Lee, R, *Terrorist Financing: The US and International Response Report for Congress* (Washington: Congressional Research Service, 2002) at 22) suggesting that a SAR which does actually relate to terrorist financing is lost amongst many insignificant reports.

may be illustrated by the San Bernardino shootings in California in December 2015⁹³ and the Orlando nightclub shootings in June 2016.⁹⁴

There are few advantages of imposing reporting requirements on financial institutions. If an investigation is already under way then information offered by virtue of a SAR may be helpful in identifying other terrorists or terrorist supporters or useful for identifying emerging trends and patterns in relation to financial crime. But it is unlikely that a financial transaction deemed to be suspicious would lead to the foiling of a terrorist plot. This is due to the fact that there is a high threshold set for reporting requirements in this area. Currently financial institutions are asked to pay particular attention to transactions that are for at least \$5000, \$2000 for money services business.⁹⁵ This implies that transactions for a lower sum will be ignored even though it has been shown that low value financial transactions can be linked to terrorism.⁹⁶

The filing of CTRs has not only increased due to obligations imposed on financial and credit institutions by the USA PATRIOT Act 2001 but also due to the fear of prosecution and/or fine if a report is not made. A side effect of the reporting regime is that these “defensive filings populate our database with reports that have little value, degrade the valuable reports in the database and implicate privacy concerns”.⁹⁷ Such a situation implies that any valid SAR that potentially provides crucial financial intelligence could be lost amongst thousands of pointless SARs. The success of the SAR regimes is extremely debatable and may even imply that too much regulation has been implemented. Warde asserts,

“If true victories of the financial war consists in finding proverbial needles, much of what passes for great strides in the financial war boils down to the creation of new haystacks, or the enlargement of existing ones. Broadening reporting rules, creating

⁹³ The Guardian ‘San Bernardino: couple die in gun battle with police after mass shooting, 3 December 2015. Available at: <https://www.theguardian.com/us-news/2015/dec/02/san-bernardino-california-shooting> (accessed 22.09.16).

⁹⁴ BBC News ‘Orlando nightclub shooting: how the attack unfolded’ 15 June 2016. Available at: <http://www.bbc.co.uk/news/world-us-canada-36511778> (accessed: 22.09.16).

⁹⁵ 31 CFR 1022.320.

⁹⁶ Financial Action Task Force *Third mutual evaluation report on anti-money laundering and combating the financing of terrorism- United States of America* (Financial Action Task Force: Paris, 2006) at 146.

⁹⁷ *The SAR Activity Review, Trends, Tips and Issues*, April 2005, Issue 8 at 3. Available at: http://www.fincen.gov/news_room/rp/files/sar_tti_08.pdf.

new databases, subjecting more companies to reporting requirements and similar initiatives have typically been unveiled with great fanfare and breathless anticipation. Unfortunately, initiatives designed to create haystacks as a way of uncovering needles usually complicates the task”.⁹⁸

Ryder and Turksen further comment that the reporting requirements pursuant to the PATRIOT Act are counterproductive and they go on to suggest that “increasing the level of reporting requirements on financial institutions will not prevent terrorist finance”.⁹⁹ On the basis of this, it would appear to be extremely difficult to contend that the achievements of this regime and the listing and asset freezing regime justifies the sidelining of human rights such as the right to a public trial. However, despite the potentially limited success of the reporting regime, the value of financial intelligence cannot be underestimated. Ryder contends that, “one of the most determined and far reaching financial intelligence measures is the Terrorist Finance Tracking Programme (TFTP)”.¹⁰⁰ This Programme was created shortly after the September 11 attacks by Presidential Executive Order 13,224 and it was initiated to identify, track and pursue terrorists by following their financial trail. On identification of a suspected terrorist, the U.S. Department of Treasury issues subpoenas for terrorist related data to the Society for Worldwide Interbank Financial Telecommunication (SWIFT), a company based in Belgium that manages a worldwide messaging system used to transmit financial transaction information. The U.S. government is then able to conduct targeted searches of the records provided by SWIFT. Santolli notes that SWIFT has approximately 2000 members in 208 countries and it processes between 12m and 15m messages daily.¹⁰¹ The use of this programme to counter terrorism has proven to be successful,¹⁰² yet contentious. The European Union (EU) was concerned about the use of this scheme especially with regard to data privacy but after negotiations with the

⁹⁸ I Warde *The Price of Fear, al-Qaeda and the truth behind the financial war on terror*, (I.B. Tauris & Co 2007) 159.

⁹⁹ N Ryder and U Turksen, ‘Islamophobia or an important weapon? An analysis of the US financial war on terrorism’ [2009] *Journal of Banking Regulation* 10, 307–320 at 311.

¹⁰⁰ N Ryder, *Financial Crime in the 21st Century, Law and Policy*, (Edward Elgar, 2011) at 75.

¹⁰¹ Santolli, J. (2008), ‘The terrorist finance tracking program: illuminating the shortcomings of the European Union’s antiquated data privacy directive’, *George Washington International Review*, **40**, 553-582, at 556.

¹⁰² The Department of Treasury have observed that the SWIFT scheme has “aided in the prevention of many terrorist attacks and in the investigation of many of the most visible and violent terrorist attacks and attempted attacks of the past decade” (Department of Treasury Terrorist financing tracking program questions and answers (Department of Treasury: Washington DC, 2010b) at 2.

U.S., its use was permitted to continue (subject to some conditions)¹⁰³ and in 2010 the U.S. and EU declared that a new agreement had been made on the sharing of financial data in the pursuit of terrorist financing.¹⁰⁴ President Barack Obama noted the effectiveness of the scheme and proclaimed it to be an “indispensable” element of the counterterrorism program in the U.S.¹⁰⁵ Thus, whilst the imposition of reporting requirements can be the first step in adversely impacting the right to a public trial, the importance of financial intelligence to countering terrorism remains significant. The U.S. Department of Treasury claim to have used financial intelligence successfully to disrupt the funding of terrorism. They state, “we now see that al-Qa’ida is under significant financial strain and is struggling to secure steady financing to plan and execute terrorist attacks against the U.S. homeland and Western interests”.¹⁰⁶

The predominant negative impact of the reporting requirements in the U.S., and indeed the U.K. and Canada, on the right to a public trial is the fact that the filing of a SAR may lead to a designation as a terrorist or terrorist supporter and the subsequent denial of an opportunity to challenge this action.¹⁰⁷ The SAR regime, bolstered by the USA PATRIOT Act 2001, merely adds to the human rights violations occurring by way of Executive Order 13,224. The filing of a SAR can lead to the freezing of assets and ultimately the right to a public trial can be impacted on. This is a notion that shall now be discussed in detail in relation to the U.S’ domestic and international human rights obligations.

¹⁰³ U.S. authorities could use the scheme as long as the ‘US agreed to (1) use data obtained through the SWIFT Program exclusively for counterterrorism purposes; (2) delete information unrelated to counterterrorism investigations on an ongoing basis; (3) retain data for no more than five years; (4) permit an EU official to monitor the program; (5) publish the provisions of the agreement in the Federal Register’.

¹⁰⁴ BBC (2010c), ‘US to access Europeans’ bank data in new deal’, 8 July 2010, available at <http://www.bbc.co.uk/news/10552630> (accessed 11.12.14).

¹⁰⁵ The White House (2010), ‘Statement by the President on the U.S. – European Union Agreement on the Terrorist Finance Tracking Program’, 8 July 2010, available at <http://www.whitehouse.gov/the-press-office/statement-president-us-european-union-agreement-terrorist-finance-tracking-program-> (accessed 11 December 2014). Despite this new deal, concerns remain and there have been suggestions made that the US was breaching the trust it had been bestowed and was accessing data which was not authorized (The Guardian, ‘EU threatens to suspend deal with US on tracking terrorists’ funding,’ 24 September 2013, available at <http://www.theguardian.com/world/2013/sep/24/eu-threat-us-data-sharing-terrorist-funding> (accessed 10.12.14).

¹⁰⁶ U.S. Department of the Treasury Fact Sheet: Combating the Financing of Terrorism, Disrupting Terrorism at its Core. Available at: <http://www.treasury.gov/press-center/press-releases/Pages/tg1291.aspx> (accessed 27.11.14).

¹⁰⁷ *USA v Marzook, Salah, Ashqar No.* (2006) 03 CR 0978. Despite even being found guilty of any terrorist related charges, Salah remains on the OFAC’s SDN list (case discussed in more detail later).

4.3. The Impact of Counter Terrorist Finance Legislation upon Human Rights Obligations

The U.S has taken steps towards combating terrorism and terrorist financing since September 11 2001. However, the implementation of broad and extensive provisions with this aim have weakened individual rights and led to questions in relation to the U.S. commitment to human rights. Nonetheless, the U.S. like the U.K. and Canada is a democratic state that claims to have a robust commitment to human rights. Indeed, in its National Security Strategy in 2010, the White House noted the importance of ensuring that individuals are granted their fundamental rights.¹⁰⁸

The Constitution of the United States¹⁰⁹ provides such human rights protections. The U.S. Constitution was implemented in 1789 and the Bill of Rights was added in 1791 providing the first ten amendments to the Constitution. These provisions aim to limit government power and to protect the rights of U.S. citizens and its visitors. It is the supreme law of the U.S. and many of the rights found in the Constitution mirror those rights found in the Universal Declaration of Human Rights (UDHR). The U.S. was influential in the creation of the UDHR in 1948 and also ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992.¹¹⁰ However, despite this commitment, the U.S. has a rather inconsistent human rights record thus far. For example they have been criticised for failing to ratify many major international human rights treaties.¹¹¹ Human Rights Watch asserted that, “The failure of the US to join with other nations in taking on international human rights legal obligations has undercut its international leadership on key issues, limiting its influence, its stature, and its credibility in promoting respect for human rights around the world”.¹¹² While international treaties such as the International Covenant on Economic, Social and

¹⁰⁸ National Security Strategy, The White House, Washington, May 2010 at 5. Available at: http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (accessed 15.08.13).

¹⁰⁹ Hereafter U.S. Constitution.

¹¹⁰ The U.S. ratified this convention on 8 Jun 1992. (International Covenant on Civil and Political Rights, United Nations Treaty Collection, available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=IV~4&chapter=4&lang=en>

¹¹¹ Such as the International Covenant on Economic, Social and Cultural Rights

¹¹² *United States Ratification of International Human Rights Treaties*, Human Rights Watch, July 2009, at pg. 1. Available at: http://www.hrw.org/sites/default/files/related_material/Treaty%20Ratification%20Advocacy%20document%20-%20final%20-%20Aug%202009.pdf (accessed 15.08.13).

Cultural Rights have been signed by the U.S, it is yet to be ratified by them.¹¹³ Indeed in 2001, the U.S. lost its seat on the UN HR Commission.¹¹⁴ Recently, the UN Human Rights Committee has published a report again condemning the U.S. for human rights infringements.¹¹⁵ These human rights violations have occurred in the prevention and detection of terrorism and include racial discrimination, torture and indefinite detention.

However, with regard to CTF laws, the application of designation and asset freezing powers has adversely affected human rights. The movement away from protecting human rights has been justified on the premise that there are exigent circumstances resulting from the terrorist threat. Selden observes, “in times of national emergency, very extraordinary things are not only possible but also legal. In cases involving U.S. citizens and others individuals who are eligible for constitutional protections in these situations, the overall question will be not whether the Executive can act, but rather how far the Executive’s actions can limit or deny constitutional rights”.¹¹⁶ Further to this, Magnusson comments that, “the intensity and scope of the administrations response vividly illustrates that to uphold its national security, the U.S. was more than willing to proceed unilaterally and run roughshod over basic citizenship and human rights”.¹¹⁷ Suggestions such as these are pertinent and lead this discussion on to an analysis of the effect that combating terrorist financing in the U.S. can have on human rights, in particular the right to a public trial.

¹¹³ This is also the status of other international treaties in the U.S. including, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

¹¹⁴ The U.S were voted back onto the commission in 2002.

¹¹⁵ United Nations, *International Covenant on Civil and Political Rights: Concluding observations on the fourth report of the United States of America*, Human Rights Committee, April 2014, CCPR/c/USA/co/4. Available at: <http://www.refworld.org/publisher/HRC/USA/5374afcd4,0.html>

¹¹⁶ R. C. Selden, The Executive protection: freezing the financial assets of alleged terrorists, the constitution, and foreign participation in U.S. financial markets, [2003] *Fordham Journal of Corporate & Financial Law*, 518.

¹¹⁷ A Dobrowolsky, S Rollings-Magnusson and M. G. Doucet in S Rollings Magnusson (eds.) *Anti-Terrorism, Security and Insecurity after 9/11* (Fernwood Publishing 2009) 20.

4.3.1 Right to a Public Trial

One of the fundamental rights protected by the U.S. Constitution, the ICCPR and UDHR is the right a fair trial. The Sixth Amendment to the U.S. Constitution sets fourth rights in relation to criminal prosecutions, and states:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence”.

The importance of ensuring that this right is afforded to an individual is paramount, indeed former U.S. Supreme Court Justice Hugo Black opined “[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law”.¹¹⁸ This protection is further bolstered by the U.S.’ ratification of the ICCPR, which obligates countries that have ratified the Treaty to provide and protect basic human rights, including the right to a public trial. The U.S. ratified this international treaty in 1992 and by virtue of the supremacy clause of the U.S. Constitution,¹¹⁹ the ICCPR along with the U.S. Constitution and federal laws became the “Supreme Law of the Land”.¹²⁰ Article 14 of the ICCPR contains provisions in relation to the right to a public trial. For example, Article 14.3 stipulates “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”. Further to this, Article 10 of the UDHR provides “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. Thus the rights in relation to a fair trial in

¹¹⁸ *Gideon v Wainwright*, 372 U.S. 335 344 (1963). *Powell v Alabama* 287 U.S. 45 (1932).

¹¹⁹ Article VI, U.S. Constitution.

¹²⁰ Article VI, U.S. Constitution. However, it is important to note that the U.S. did not ratify the treaty in its entirety; it did so with 5 reservations, 5 understandings and 4 declarations.

the event of a criminal prosecution are consistent within the U.S. Constitution, the ICCPR and the UDHR.

In the context of CTF laws, the right not to be arbitrarily deprived of one's property without due process and the right to a public trial are inextricably linked. The U.S. government has argued¹²¹ that on suspicion of links to terrorism, it is necessary to immediately block assets, thereby denying the individual concerned a right to be heard before a powerful blocking/freezing order is issued. There is no minimum evidentiary standard or specific criterion that needs to be met before action to designate or freeze assets is taken. A criminal charge or conviction is also not required before a designation is established on the premise that the sanctions are meant to be preventative rather than punitive in nature. However, it is contended that the impact of a designation and asset freeze on an alleged terrorist supporter and their families can be unfair. O'Leary opines that, "Designated entities are publicly stigmatized as 'terrorists', with all of their assets indefinitely frozen. OFAC designations push the bounds of administrative power, blurring into the prosecutorial realm".¹²² The notion that designation and the freezing of assets have a punitive effect is a significant proposal, which shall be looked at in further detail below. A powerful blocking order may be implemented and remain in action without the opportunity to legally challenge the order. When the relevant U.S. authorities take action to proscribe an entity or individual as a terrorist and subsequently freeze their funds, the opportunity to be heard or the right to notice is not afforded to them. Instead, the suspected terrorists' name is added to the SDT List and that person is no longer permitted any access to their funds whilst an investigation is carried out.¹²³ This effectively means that a person is denied access to their funds without learning the details of the case that has or will be made against them. Such a situation potentially violates the Sixth Amendment to the U.S. Constitution, which states that the accused has the right "to be informed of the nature and cause of the accusation".¹²⁴ Selden

¹²¹ Section 10 Executive Order 13,224 states, "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously".

¹²² R. E. O'Leary, 'Improving the Terrorist Finance Sanctions Process', *International Law and Politics*, Vol. 42, 549-590 at 564.

¹²³ Significantly, following criticism from civil rights organisations, the U.S. government have amended Executive Order 13, 224 so that suspected terrorists can use some of their frozen assets to pay their legal fees.

¹²⁴ Sixth Amendment, U.S. Constitution.

argues that the “Executive Branch actions that effectively take the property of U.S. citizens are not constitutionally pure from the prospective of limiting citizens’ rights”.¹²⁵ Gurule further argues that the need to provide notice and a hearing has been affirmed by the U.S. Supreme Court, they stated “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”.¹²⁶

However, the U.S. government may view the successful implementation of CTF laws as more important than fundamental rights.¹²⁷ For instance, the Fifth Amendment to the U.S. Constitution guarantees U.S. citizens the right not to be deprived of life, liberty or property without due process of law. A fundamental tenet of due process is the provision of notice of any proposed action by the authorities. However, if the authorities were to comply with the requirements of due process and provide the suspect with notice, thus giving them the opportunity to move or hide assets, the asset freezing procedure would loose effect and may even render the process useless.¹²⁸ In line with this thinking, the Executive proclaimed in Section 10 of Executive Order 13,224 that notice is not required.¹²⁹ Section 10 provides:

“...I find that because 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. I therefore determine that for these measures to be

¹²⁵ R. C. Selden, The Executive protection: freezing the financial assets of alleged terrorists, the constitution, and foreign participation in U.S. financial markets [2003] *Fordham Journal of Corporate & Financial Law*, 491.

¹²⁶ Comments of the U.S. Supreme Court in *Fuentes v Shevin*, 407 U.S. 67, 80-81 (1972) cited by J Gurule, *Unfunding Terror, The legal response to the financing of global terrorism*, (Edward Elgar Publishing 2008) 204.

¹²⁷ This has not been the case in the U.K. where CTF powers have been deemed to be unlawful due to a lack of procedural protection. See the discussion on *Ahmed and Others v H.M. Treasury* [2008] EWHC 869 in section 5.2.2.1, chapter 5.

¹²⁸ R. C. Selden, The Executive protection: freezing the financial assets of alleged terrorists, the constitution, and foreign participation in U.S. financial markets [2003] *Fordham Journal of Corporate & Financial Law*, 495.

¹²⁹ Selden notes “...depriving a constitutionally recognized person of property without due process is usually a constitutional violation. However, Section 10 of the Order specifically states that notice is not required for actions taken pursuant to the Order.”¹²⁹ (R. C. Selden, The Executive protection: freezing the financial assets of alleged terrorists, the constitution, and foreign participation in U.S. financial markets [2003] *Fordham Journal of Corporate & Financial Law*, 520).

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”.¹³⁰

This provision may illustrate that the U.S. Government values the outcome of asset freezing provisions over human rights, which exist to safeguard citizens from arbitrary legislation. Selden argues that although the effectiveness of CTF laws would be lessened by burdensome limitations including giving notice to suspected parties, he argues that the executive cannot “have absolute power to freeze assets at will”.¹³¹ This is a crucial point as further to the ability to block assets of a terrorist, the Executive has also provided the relevant authorities with the power to block assets “during the pendency of an investigation”¹³² of a suspected terrorist or terrorist supporter. This provision is contained in the PATRIOT Act 2001 and implies that someone’s assets may be frozen even before an investigation has been carried out and a conclusion of wrongdoing has been reached. Any person suspected of wrongdoing with regard to terrorism can become the subject of these comprehensive economic sanctions. Terrorist proscription is carried out based on suspicion and no investigation into evidence is carried out at this point. Yankson comments on this process stating, “at this stage it is inference and intelligence as opposed to evidence and legal examination”.¹³³ Indeed the 9/11 Commission Report refers to the months following the terror attacks as “chaos” in the OFAC offices. In response to the U.S. governments desire to exercise an aggressive response to the terror attacks, a major designation was carried out every few weeks. The 9/11 Report notes, “as a result, Treasury officials acknowledged that some of the evidentiary foundations for the early designations were quite weak”.¹³⁴ Significantly, there is also no restriction on the amount of time that assets can be frozen leading Petersen to conclude that “assets

¹³⁰ Section 10, Presidential Executive Order 13224.

¹³¹ R. C. Selden, The Executive protection: freezing the financial assets of alleged terrorists, the constitution, and foreign participation in U.S. financial markets [2003] *Fordham Journal of Corporate & Financial Law*, 495.

¹³² The blocking of assets pursuant to the IEEPA and Executive Order 13,224, “during the pendency of an investigation” is provided by The PATRIOT Act 2001.

¹³³ S Yankson, Starving terrorists of their financial oxygen: at all costs? [2010] *Journal of Money Laundering Control* 13(3), 282-306.

¹³⁴ National Commission on Terrorist Attacks Upon the United States *Staff Monograph on Terrorist Financing*, Staff Report to the Commission at 79. Available at: http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf

can be frozen for years, even decades”¹³⁵ This can occur even in the absence of any successful conviction for the financial support of terrorism.

The lack of notice afforded to suspects, the absence of an investigation at this point and the power to keep their assets frozen for an indefinite amount of time provides the U.S. authorities with very broad powers. Additionally, there is also the controversial use of classified (or secret) evidence in such proceedings.¹³⁶ The process of an OFAC designation is conducted almost exclusively behind ‘closed doors’ and the subject of this terrorist proscription is not afforded the opportunity to hear the evidence, which has been issued against them.¹³⁷ The use of classified evidence¹³⁸ to justify an asset freeze and designation makes it almost impossible for a designee to mount a defence against allegations of terrorism or terrorist support. As is the case with the U.K., the use of classified evidence leads to questions regarding the constitutionality of asset freezing provisions. An individual can be labeled ‘a terrorist’ or ‘terrorist supporter’ and have their assets frozen without ever learning what the evidence is that led to such action. The use of classified evidence is contentious, indeed George Bush criticised the practice during the 2000 Presidential Campaign, he argued, “[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights”¹³⁹ and has proven in the past to be unreliable.

For instance, in 1996, the Immigration and Naturalization Service (INS) arrested and detained Nassar Ahmed, an Egyptian man, for association with a known terrorist organization by virtue of the Anti Terrorism and Effective Death Penalty Act 1996. Ahmed spent over 3 years in a U.S. prison on the basis of secret evidence, which he or his attorney were never privy to. It was claimed that, based on this undisclosed

¹³⁵ N Nice-Petersen ‘Justice for the “Designated”: The Process that is due to alleged U.S. financiers of terrorism [2005], 93 Georgetown Law Journal 1387.

¹³⁶ Yaroshefsky defines secret evidence as “information of potential evidentiary value not shared with the defendant, and often not shared with defense counsel” (E Yaroshefsky ‘Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts,’ *Hofstra Law Review* [Vol. 34:1063 at pg. 1063-1064).

¹³⁷ This is also the situation in cases in the U.K. and Canada. For further commentary see chapters 5 and 6.

¹³⁸ See the case of *Matter of Ahmed*, A90-674-238 (U.S. Immgr. Ct. June 24, 1999). In matters of immigration law, the use of secret evidence has often been found to be unconstitutional, See the cases of *Kiareldeen v. Reno* 71 F. SupP.2d at 404 and *Rafeedie v. INS*, 880 F.2d at 506.

¹³⁹ The 2000 Campaign; 2nd Presidential Debate between Gov. Bush and Vice President Gore, New York Times October 12 2000.

evidence, Ahmed was a “threat to a national security”.¹⁴⁰ Ahmed challenged the constitutionality of the INS’s actions. When Ahmed’s case¹⁴¹ was finally heard and the secret evidence was declassified, an immigration judge rejected the secret evidence against him as double and triple hearsay. Once Ahmed was given an opportunity to hear the evidence, he was able to successfully refute the charges and was eventually released in November 1999. This case illustrates that the use of secret evidence effectively denies a person the opportunity to mount a potentially effective defence and suggests that the system to appeal against an action by OFAC is inadequate. An appeal is made directly to OFAC but under current OFAC procedures,¹⁴² a designee is not entitled to any type of meeting or hearing to challenge a designation.¹⁴³ There is also no time period set in which OFAC must reply to any challenge, implying that the designation and asset freeze can just continue to apply for an unspecified amount of time. Furthermore any appeal heard in court is highly influenced by the Administrative Procedure Act 1943. This legislation states that the scope of the review of the court is limited to determining whether OFAC’s action was “arbitrary and capricious”.¹⁴⁴ They do not examine whether the decision was based on “substantial evidence”. This significantly limits the impact that an appeal may have upon a designation and renders the process almost worthless. Without investigating whether the evidence supports a designation, the court is only looking at whether OFAC acted within their powers. Thus, there appears to be many inadequacies with the appeals mechanism and investigations that deem a person to be guilty of terrorist financing.

Furthermore, the use of classified evidence leaves no opportunity to mount an effective defence and can mean a person who is innocent of any wrongdoing is punished unnecessarily. The listing and asset freezing process is fallible and mistakes can be easily made.¹⁴⁵ A person or entity may be proscribed as a terrorist or have their assets frozen on very little or no evidence as became the case following the September 11 attacks. For instance, the Global Relief Foundation and the

¹⁴⁰ D. Cole and J. X. Dempsey, ‘Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security’, *The New Press*: New York at 149.

¹⁴¹ *Matter of Ahmed*, A90-674-238 (U.S. Immgr. Ct. June 24, 1999).

¹⁴² Under 31 C.F.R. § 501.807, a designee may submit to OFAC “arguments or evidence that the person believes establishes that insufficient basis exists for the designation.

¹⁴³ 31 C.F.R. § 501.807(d).

¹⁴⁴ S. 10(e) Administrative Procedure Act 1943.

¹⁴⁵ This point can be illustrated by reference to the case of Mohammed Salah (discussed below).

Benevolence International Foundation found themselves the subject of an asset freeze based on the unsubstantiated suggestion that the organizations supported terrorism. No person associated with either of these charities was found guilty of a terrorism related offence. These cases shall be discussed in greater detail later in the chapter. Whilst it is understandable that the blocking orders need to be immediate to be effective, this process does not provide a sufficient amount of time in which to investigate the intricate details of financial transactions thus arriving at a premature and ill informed conclusion.¹⁴⁶ A person or organization believed to be guilty of supporting terrorism will then find themselves the subject of these extensive financial sanctions (and possibly accompanied by criminal proceedings) for a potentially lengthy amount of time. All this can occur and the listed party may later be found to be innocent of any wrongdoing. Aziz supports such a contention suggesting the “designation process is inadequately transparent, creating a high risk of incorrect designations and erroneous deprivations of fundamental interests of liberty and property”.¹⁴⁷ A high profile case in this area is that of Muhammad Salah¹⁴⁸. Salah was an early terrorist designee who had his individual assets frozen without notice in 1998 along with the assets of his organization, the Quranic Literacy Institute. Salah was imprisoned but on completion of extensive scrutiny into his affairs by the FBI Counterterrorism Unit, the investigation was dropped in 2000 for lack of evidence and Salah was released from prison. This inquiry was reviewed following the September 11 attacks and Salah was later indicted on three counts: participation in a thirteen year racketeering conspiracy, material support for terrorism, and obstruction of justice¹⁴⁹. He was eventually brought to trial in October 2006 but one of the counts of the original indictment, providing material support for terrorism, was dropped just before the beginning of the trial. Salah was convicted of a single count of obstruction of justice on 1st February 2007.¹⁵⁰ Despite not being found guilty of any terrorism related

¹⁴⁶ National Commission on Terrorist Attacks Upon the United States *Staff Monograph on Terrorist Financing*, Staff Report to the Commission at 82. Available at: http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf (accessed 03.04.14)

¹⁴⁷ Aziz, Sahar F., The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Combating Terrorism? [2003] *Texas Journal on Civil Liberties and Civil Rights*, Fall 2003 at 4. Available at SSRN: <http://ssrn.com/abstract=1648305>.

¹⁴⁸ *USA v Marzook, Salah, Ashqar No.* (2006) 03 CR 0978.

¹⁴⁹ M.E. Deutsch & E Thompson (2008) Secrets and Lies: The Persecution of Muhammad Salah (Part I), *Journal of Palestine Studies* [2008] Vol. XXXVII, No. 4 38-58 at 41.

¹⁵⁰ Salah was sentenced to 21 months in prison on July 11 2007.

charges, Salah still features on OFAC's SDN List¹⁵¹ and thus his assets remain frozen. This case illustrates the inherent problems with the listing and asset freezing process and illustrates the fundamental need for human rights to be respected. Indeed, the lawyers in Salah's case suggest that, "bedrock constitutional rights to free speech, due process and public trial...were cast aside in pursuit of the administration's goals".¹⁵²

The individual or organization that is designated as a terrorist is not privy to a presentation of the evidence, has no notification of a designation and has no opportunity to present evidence in opposition of the designation. For example, in August 2002, Ahmed Idris Nasreddin was designated for his alleged part in "an extensive financial network providing support to Al-Qaida and other terrorist related organizations."¹⁵³ The UN followed the U.S' lead and promptly designated Nasreddin. This obliged all UN member states to do the same, prohibiting any individuals or entities in those states from having any dealings with him. In 2007, Nasreddin was removed from the U.S. and UN blacklists with no explanation offered. During his five years on the lists, Nasreddin was not convicted or charged with any terrorist or terrorist finance related offence. The Department of Treasury simply said that he "no longer fits the criteria for designation".¹⁵⁴ Cases such as these illustrates a lack of procedural safeguards in the designation and asset freezing regime and such a situation amplifies the risk of error in a process which is susceptible to mistake. Nice-Petersen comments "...without providing blocked U.S. entities sufficient notice or a hearing, the government is allowed to deprive them of all that they have with little explanation or adversarial testing".¹⁵⁵

In the case of *People's Mojahedin Organisation of Iran v United States*,¹⁵⁶ it was argued that the Anti-terrorism and Effective Death Penalty Act 1996 allowed the applicant to be predetermined as a supporter of terrorism without prior notice or an

¹⁵¹ *Specially Designated Persons and Blocked Persons List*, U.S. Department of Treasury, published by OFAC, 02.12.16. Available at: <https://www.treasury.gov/ofac/downloads/sdnlist.pdf> (accessed 07.12.16).

¹⁵² M.E. Deutsch & E Thompson (2008) *Secrets and Lies: The Persecution of Muhammad Salah* (Part I), *Journal of Palestine Studies* [2008] Vol. XXXVII, No. 4 38-58 at 39.

¹⁵³ U.S. Department of Treasury Press Release *The United States and Italy Designate Twenty-Five New Financiers of Terror*, 29/08/02. Available at: <https://www.treasury.gov/press-center/press-releases/Pages/po3380.aspx> (accessed 29.01.17).

¹⁵⁴ J Meyer 'When is a terrorism figure no longer one? Nov 28 2007, Los Angeles Times.

¹⁵⁵ N Nice-Petersen 'Justice for the "Designated": The Process that is due to alleged U.S. financiers of terrorism [2005] *Georgetown Law Journal* 93, 1387.

¹⁵⁶ 182 F.3d at 17.

opportunity to be heard. These contentions as regards constitutionality were however evaded as the Court concluded that the foreign entity lacked a constitutional presence in the U.S. In contrast, in the case of *National Council of Resistance of Iran v Department of State*,¹⁵⁷ the D.C. Circuit found that the organization did have constitutional presence and thus due process rights had been violated. They said: “The fundamental norm of due process jurisprudence requires that before the government can constitutionally deprive a person of the protected liberty or property interest, it must afford him notice and hearing”.¹⁵⁸ In spite of these concerns, the court did not declare the designation process as unconstitutional, they merely referred the case back to the Secretary of State. Significantly however, whilst the Court instructed the Secretary of State to provide notice to an organization of an imminent designation, they noted that this did “not foreclose the possibility of the Secretary, in an appropriate case, demonstrating the necessity of withholding all notice and all opportunity to present evidence until the designation is already made”.¹⁵⁹ This implies that provided that it can be shown to be necessary to take action before notifying the relevant party, then a designation will be considered constitutional.

Notwithstanding the clear violation of the right to a public trial by the application of CTF provisions, it is uncertain as to whether the Sixth Amendment to the U.S. Constitution can be applied in this instance. For example whilst the purpose of the Sixth Amendment is clear, it is doubtful that the freezing of assets would constitute a ‘criminal prosecution’. This situation is comparable to that in the U.K and Canada. Being labelled as a person connected with terrorism deems them guilty and cancels out the presumption of innocence. The ICCPR guarantees that anyone facing a criminal charge is presumed innocent until proven guilty.¹⁶⁰ It can be argued that by applying a designation and subsequent blocking order, the presumption of innocence is removed. The punitive effect of these preventative sanctions means that a designee can be punished without ever being charged with a crime let alone found guilty of such. This implies that a person is effectively punished for their suspected involvement in terrorism.¹⁶¹ Whilst no criminal charge has been made at this point,

¹⁵⁷ 251 F3d 192.

¹⁵⁸ 251 F3d 192 (Dc Cir 2001).

¹⁵⁹ *National Council of Resistance of Iran v. Department of State*, 251 F.3d (D.C. Cir. 2001) at 208.

¹⁶⁰ Article 14.2 ICCPR

¹⁶¹ Fenwick et al agree with such a notion arguing that asset freezing creates “effects equivalent to punishments for criminal offences” (A Tomkins, H Fenwick and L Lazurus ‘Terrorist asset-freezing-

severe consequences can ensue for the designee and their family. Nice-Petersen contends that being branded a SDGT and having assets frozen “can be just as devastating as a criminal penalty, given both the economic ruin and social stigma associated with such a label”.¹⁶² With such a punitive effect deriving from a designation and subsequent asset freeze; it is argued that these sanctions have some of the hallmarks of a criminal charge and possibly even a conviction. Hudson argues:

“[T]he nature and severity of the sanctions should bring the regime within the criminal sphere. The sanctions are imposed on those adjudged to be involved in financing terrorism, a serious criminal activity under both international and national law. Moreover, the severity of the sanctions suggests a punitive element. Sanctions have dire economic consequences because they deny an individual his or her livelihood and remain in place indefinitely. Finally, there is the irreparable stigma of being labeled a terrorist supporter”.¹⁶³

Fitzgerald agrees with such a notion stating that OFAC economic sanctions can be deemed “the economic equivalent of capital punishment”.¹⁶⁴ Interestingly, Nowak argues that the right to a fair trial on a criminal prosecution is considered to start running not only on the introduction of a charge but rather on “the date on which state activities substantially affect the situation of the person concerned”.¹⁶⁵ As regards the asset freezing regime in the U.S, this occurs on the day that the designated party is labeled a terrorist. The considerable detrimental impact of such action was recognized by the ECJ in the high profile case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*.¹⁶⁶ The court held that the denial of an opportunity by the alleged terrorist financiers to view the evidence against them within a reasonable time amounted to a violation of their right to be heard. This case exposed CTF sanctions as incompatible with human rights. To date however, and unlike the U.K, no successful

Continuing flaws in the current scheme’, *International Review of Law, Computers & Technology* [2011] vol. 25, No. 3, 117-128 at 127).

¹⁶² N Nice-Petersen ‘Justice for the “Designated”’: The Process that is due to alleged U.S. financiers of terrorism, 2005, 93 *Georgetown Law Journal* 1387, 1414.

¹⁶³ A Hudson, Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights [2007] *Berkeley Journal of International Law*, Vol. 25, Issue 2 at 218.

¹⁶⁴ P.L. Fitzgerald ‘Drug Kingpins and Blacklists: Compliance Issues with US Economic Sanctions: Part 3 [2001] *Journal of Money laundering Control* Vol.5 No. 2 at 49.

¹⁶⁵ M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd Ed. (Kehl am Rein: Engel, 2005) 318-319.

¹⁶⁶ *Joined Cases C-402/05 and C-415/05*.

challenges in relation to CTF provisions and the right to public trial have been achieved in the U.S. This chapter now goes on to discuss the U.S. government's focus upon terrorist financing and Islamic charities in the wake of September 2001.

4.4 Targeting of charities

In order to successfully illustrate the application of the U.S. CTF policy, and its relationship with human rights, it is necessary to discuss a number of high profile cases in which the U.S. authorities targeted Islamic charities. The attention on these organizations in the wake of the 9/11 attacks was based upon the misconceived opinion that charities in the U.S. were being used to fund terrorist organizations such as al-Qaeda. Crimm comments upon the U.S. governments freezing of assets claiming that based on figures which suggest that "approximately thirty percent of al Qaeda's financial resources were derived from donations solicited in the United States and abroad",¹⁶⁷ their targeting of charities may be justified. Due to such a contention, a number of charities became the subject of the comprehensive economics sanctions provided by Executive Order 13,224 and the PATRIOT Act. Immediately following the 2001 attacks, prominent cases involving charities appeared in the media, which may have demonstrated, to the public the lengths and breadths that the U.S. government was prepared to go to in order to route out terrorist financiers.¹⁶⁸ For instance, the Global Relief Foundation¹⁶⁹ was shut down on December 14 2001 and their assets were promptly blocked pending investigation pursuant to Section 106 of the PATRIOT Act.¹⁷⁰ They were not designated as a SDGT by OFAC until considerably later on October 18 2002. This designation occurred on the grounds that GRF was found to have links with known terrorist organizations and terrorist financiers. OFAC asserted that Global Relief "had long been sending millions of dollars to regions, including Afghanistan, where [O]sama bin Laden and other Islamic terrorists operate".¹⁷¹ Global Relief were not notified of the asset freeze before it took

¹⁶⁷ N.J. Crimm, 'High Alert: The government's war on the financing of terrorism and its implications for donors, domestic charitable organizations, and global philanthropy' [2004] *William & Mary Law Review*. 45 1341.

¹⁶⁸ It should be noted here that none of the charities discussed i.e. the GRF, HLF and BIF featured on a government watch list prior to the September 11 attacks.

¹⁶⁹ Hereafter GRF.

¹⁷⁰ \$600,000 of GRF's assets were blocked.

¹⁷¹ Nina J. Crimm, High Alert: The Government's War on the Financing of Terrorism and Its Implication for Donors, Domestic Charitable Organizations, and Global Philanthropy [2004] *William & Mary Law Review* 45 1341, 1375. Available at: <http://scholarship.law.wm.edu/wmlr/vol45/iss4/3>

place and were not afforded the opportunity to be heard prior to the designation which may represent a violation of due process and the right to a public trial pursuant to the Sixth Amendment of the U.S. Constitution. Gurule comments that, “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”.¹⁷² This process has received significant criticism for its incompatibility with longstanding legal process and human rights. According to Jon Small, Executive Director of the Nonprofit Coordinating Committee of New York, “If the government believes an organization is supporting terrorist activities, it has extensive powers to investigate and prosecute those organizations. It should use those powers and not a blacklist that convicts people without due process”.¹⁷³ In this case, it has been illustrated that even without sufficient evidence to designate a suspected terrorist supporter, OFAC have the power to freeze assets and effectively shut organizations down. Arguably, once this has occurred, the damage has already been done.

The U.S. government also took action against the Holy Land Foundation for Relief and Development¹⁷⁴. On December 4 2001, President Bush declared that the HLF had links with terrorist organisations and consequently a blocking order was issued. This terrorist proscription was based on the belief that HLF was funding the Islamic Resistance Movement, Hamas.¹⁷⁵ It was suggested that donations from faithful Muslims to the HLF, in fulfillment of the religious practice of Zakat for example, were directed towards the funding of terrorism. It is difficult to determine how much of these contributions actually financed terrorism¹⁷⁶ but OFAC froze \$1.9 million dollars in HLF assets.¹⁷⁷ Despite this action, a conviction was not secured and the judge ordered a mistrial. One of the juror’s in the case commented that “there was so

¹⁷² J Gurule, *Unfunding Terror, The legal response to the financing of global terrorism*, (Edward Elgar 2008) 205.

¹⁷³ As noted by Odendahl. T.J. Odendahl (2005) Foundations and their role in antiterrorism enforcement: findings from a recent study and implications for the future, June 9 2005. The Center for Public and Nonprofit Leadership, *Georgetown Public Policy Institute* at 3.

¹⁷⁴ Hereafter HLF

¹⁷⁵ HAMAS had previously been designated as a terrorist organisation (SDT) pursuant to Executive Order 12,947.

¹⁷⁶ M.E. Engel, *Donating “Blood Money”: Fundraising for international terrorism by United States charities and the government’s efforts to constrict the flow* [2004] *Cardozo Journal of International & Comparative Law* 12, 251.

¹⁷⁷ M.E. Engel, *Donating “Blood Money”: Fundraising for international terrorism by United States charities and the government’s efforts to constrict the flow* [2004] *Cardozo Journal of International & Comparative Law* 12, 251.

little evidence” that the case “was strung together with macaroni noodles”.¹⁷⁸ In 2002, HLF challenged the blocking order and seizure carried out by the U.S. government. Their contentions amounted to violations of the Administrative Procedure Act, 1946¹⁷⁹ and the Religious Freedom Restoration Act, 1993¹⁸⁰ and infringements of the U.S. Constitution. HLF claimed that OFAC’s actions were “arbitrary and capricious” under the APA.¹⁸¹ The court dismissed such an assertion affirming that OFAC’s administrative records provided “ample support” for the designation.¹⁸² In response to suggestions that the freezing of HLF’s assets contravened the RFRA, the court ruled that HLF had not proven themselves to be a religious organization, thus failing in their contention. HLF further suggested that they should have been provided with prior notice and an opportunity to be heard before the designation and blocking order took effect. The court disagreed, upholding the fundamental element of surprise required for effective freezing of funds. This had been established in Executive Order 13,224 at the time of its implementation. Further to this there is provision in the IEEPA¹⁸³ that justifies reasonable action by the government in extraordinary circumstances. This provision led the court to rule that due process rights had not been contravened. HLF further argued that OFAC’s blocking order ran contrary to the Takings Clause of the Fifth Amendment. This clause seeks to protect citizens against arbitrary punishment and confiscations of property. This claim was also dismissed by the court that ruled, “the case law is clear that blockings under Executive Orders are temporary deprivations that do not vest the assets in the Government. Therefore, blockings do not, as a matter of law, constitute takings within the meaning of the Fifth Amendment”¹⁸⁴ HLF’s contentions relating to Fourth Amendment violations were also rejected apart from the assertions relating to raids and seizures on HLF offices. The court noted that the FBI had failed to acquire the necessary warrant under the Foreign Intelligence Surveillance Act. Overall however, the U.S. government was

¹⁷⁸ Quoted by L. Eaton, ‘No Conviction in Trial Against Muslim Charity’ New York Times, Oct 22 2007. Available at: <http://www.nytimes.com/2007/10/22/us/22cnd-holyland.html> (accessed 23.06.14).

¹⁷⁹ Hereafter APA.

¹⁸⁰ Hereafter RFRA

¹⁸¹ *Holy Land Foundation for Relief and Development, Appellant, v. Ashcroft, et al.*, Appellees, 333 F.3d 156 (D.C. Cir. 2003)

¹⁸² Ibid.

¹⁸³ The IEEPA is featured in Title 50 , sections 1701-1707 of the United States Code. This Section authorises the President to declare the existence of an ‘unusual and extraordinary threat to the national security, foreign policy or economy of the United States’. In such an event, it authorises the President to ‘block transactions and freeze assets to deal with the threat’.

¹⁸⁴ *Holy Land Foundation for Relief and Development v Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003)

considered to have acted in accordance with counter terrorism legislation and the Constitution.¹⁸⁵ Thus HLF were unsuccessful in gaining Preliminary Injunctive Relief and their assets remained blocked. However, following a retrial in 2008, five directors of the company¹⁸⁶ were convicted of various charges, which included conspiracy to commit money laundering and providing material support to a foreign terrorist. However, in response to the outcome of this case, former U.S. Attorney, Matthew Orwig said “I think the government won when it froze the assets and shut down the organization”.¹⁸⁷ This point of view illustrates that even in the absence of a criminal prosecution, the penalizing impact of an asset freeze is considerable.

In common with the GRF and HLF, the U.S. authorities also targeted the Benevolence International Foundation, an organization providing humanitarian aid.¹⁸⁸ It has been suggested by Engel that this case “represents the most aggressive attempt to date by the government to criminally prosecute terrorist fundraising in the United States by a United States citizen”.¹⁸⁹ The FBI began investigating BIF in the 90s but failed to provide enough evidence to prosecute either BIF or BIF’s founder Enaam Arnaout.¹⁹⁰ However, in the aftermath of September 11, in December 2001, the BIF’s accounts were blocked pending investigation pursuant to s.106 of the PATRIOT Act. This action was taken based on a belief that BIF had links with al Qaeda. At this time however, BIF were not designated as terrorists on OFAC’s list. It was not until almost a year later that BIF were designated as a terrorist organization in the U.S.¹⁹¹ Prior to this designation, BIF sought relief from this blocking order and challenged its compatibility with their Fourth and Fifth Amendment rights. BIF claimed that their Fourth Amendment rights had been violated with unreasonable searches and their Fifth Amendment rights had been contravened by failure to provide notice or an

¹⁸⁵ HLF also suggested that their First Amendments rights of freedom of association and speech had been violated but these contentions were also rejected by the court.

¹⁸⁶ Those convicted in this case were Ghassan Elashi, Shukri Abu-Baker, Mufid Abdulqader, Abdulrahman Odeh, and Mohammad El-Mezain.

¹⁸⁷ A Lippak and L Eaton, ‘Financing Mistrial Adds to U.S. Missteps in Terror Prosecutions,’ New York Times, Oct 24 2007.

¹⁸⁸ Hereafter BIF.

¹⁸⁹ M.E. Engel, *Donating “Blood Money”: Fundraising for international terrorism by United States charities and the government’s efforts to constrict the flow* [2004] Cardozo Journal of International & Comparative Law 12, 251..

¹⁹⁰ *United States of America v Benevolence International Foundation, Inc and Enaam M. Arnaout*, Case No. 02 CR 414.

¹⁹¹ BIF were designated as a terrorist organisation by the UN on November 21 2002.

opportunity to be heard. This case was however voluntarily dismissed as BIF lacked the funds to pursue the challenge.

On October 9 2002, the government filed an indictment against BIFs executive director, Enaam Arnaout.¹⁹² The charges included money laundering, conspiracy to provide material support for terrorism, wire and mail fraud and conspiracy to engage in a racketeering enterprise. In relation to the supporting terrorism charge, U.S. District Judge Suzanne Conlon commented that prosecutors had “failed to connect the dots” and said there was no evidence that Arnaout “identified with or supported” terrorism.¹⁹³ These allegations were dropped as part of a plea bargain and after pleading guilty to the charge of racketeering¹⁹⁴ Arnaout began a ten year sentence in 2003. So despite the immediate and continued freezing of funds, BIF and its staff have not been convicted of any terrorism related charges. This is very significant as it implies that due process and human rights have been disregarded for no reason, as this case, like the others, has not contributed to countering terrorism.¹⁹⁵ It would appear that it is simply a case of prioritizing and as Ferrari claims “clearly the interests of national security trump any financial freedoms traditionally guaranteed to charities”¹⁹⁶ Due process rights, including the right not to be arbitrarily deprived of property without due process and the right to a public trial have been contravened on the premise that it is necessary in the exigent circumstances surrounding the threat of terrorist acts. Whilst it can be argued that the threat of terrorism requires powerful action, it is impossible to argue that human rights and due process infringements can be justified when the outcome of such action is so meager.

¹⁹² *USA v Enaam M. Arnaout* (2002) No. 02 CR 892.

¹⁹³ *U.S. Campaign Produces Few Convictions on Terrorism Charges*. D Eggen and J Tate, June 12 2005, [washingtonpost.com](http://www.washingtonpost.com). Available at: <http://www.washingtonpost.com/wpdyn/content/article/2005/06/11/AR2005061100381.html> (accessed 25.03.14)

¹⁹⁴ Contrary to the Racketeering Influenced Corruption Organisations Act 1970. For further reading, see: A Weiss, ‘From the Bonannos to the Bin Ladens: the Reves operation of management test and the viability of civil RICO suits against financial supporters of terrorism’ [2010] *Columbia Law Review*, May, 110, 1123–1171. S Warneck, ‘A preemptive strike: using RICO and AEDPA to attack the financial strength of international terrorist organisations’ [1998] *Boston University Law Review*, February, 78, 177–227, at 180–181.

¹⁹⁵ In opposition to this opinion, the National Commission on Terrorist Attacks upon the United States note that “the former head of the FBI’s Terrorist Financing Operations Section believes that strong intelligence indicated GRF and BIF were funding terrorism and, although the evidence for a strong criminal terrorism case may have been lacking, the government succeeded in disrupting terrorist fundraising mechanisms” National Commission on Terrorist Attacks upon the United States, *Monograph on Terrorist Financing: Staff Report to the Commission* (Aug. 21, 2004) at 111.

¹⁹⁶ E Ferrari ‘Deep freeze: Islamic charities and the financial war on terror’ [2004] 7 Scholar 205.

The designation of these charities as terrorist organisations may make good headlines but they are accompanied by negative effects that may call the legitimacy of the U.S. government's actions into question. Interestingly, whilst the closure of these charities made headlines, erroneous designations do not. Warde supports such a contention stating, "financial warriors are prompt at adding names and amounts, but are slow at subtracting them when suspects are exonerated of links to terror. As noted by James Bovard, "Federal officials continually bragged of the total amount of terrorist assets frozen. But there were no press releases confessing that much of the money was later returned after no evidence of wrongdoing could be found".¹⁹⁷ An illustration of this is the case concerning al-Barakaat International Foundation. Post 9/11, it was suspected that the organization was transferring funds to be used for terrorism. American Officials claimed that they may have provided as much as \$25 million to al-Qaeda.¹⁹⁸ The U.S. government closed them down in December 2001, describing them as "the money movers, the quartermasters of terror".¹⁹⁹ Roth *et al* note that during the investigation into al-Barakaat, analysts were advised that each entity did not need to be found to be associated with terrorism. It was enough to illustrate that the main entity itself was involved.²⁰⁰ Thus, little evidence led to the closure of the network and subsequently evidence which linked al-barakaat with al-qaeda could not be substantiated the Organisation was subsequently and rather quietly taken off the OFAC SDT List. Commenting on such mistakes by the Treasury, the 9/11 Commission Report states,

"In many cases, we can plainly see that certain nongovernmental organizations (NGOs) or individuals who raise money for Islamic causes...are "linked" to terrorists through common acquaintances, group affiliations, historic relationships, phone communications, or other such contacts. Although sufficient to whet the appetite for action, these suspicious links do not demonstrate that the NGO or individual actually

¹⁹⁷ I Warde, *The Price of Fear, al-Qaeda and the truth behind the financial war on terror*, (I.B. Tauris & Co 2007)159.

¹⁹⁸ National Commission on Terrorist Attacks upon the United States, *Monograph on Terrorist Financing: Staff Report to the Commission* (Aug. 21, 2004) at 80.

¹⁹⁹ National Commission on Terrorist Attacks upon the United States, *Monograph on Terrorist Financing: Staff Report to the Commission* (Aug. 21, 2004) at 80

²⁰⁰ National Commission on Terrorist Attacks upon the United States, *Monograph on Terrorist Financing: Staff Report to the Commission* (Aug. 21, 2004) at 79.

funds terrorists and thus provide frail support for disruptive action, either in the United States or abroad”.²⁰¹

The 9/11 Commission went on to argue that action such as that taken against al-Barakaat was actually taken with the intention of “show[ing] the world community and [U.S.] allies that the United States was serious about pursuing the financial targets”.²⁰² It is however asserted that whatever the intention was behind the U.S. government’s actions, a desire to counter terrorism by targeting terrorist financing cannot justify taking punitive action upon individuals and entities that just may have a link to terrorist organizations. This is especially so in light of the contention that a penalizing designation and asset freeze leads to a breach of the right to public trial.

Further mistake by the U.S. Treasury can be illustrated by the outcome of a case in 2011.²⁰³ In February 2006, OFAC froze all the assets (\$1 million) of a non profit charitable corporation. OFAC believed that KindHearts for Charitable Humanitarian Development Inc²⁰⁴ were providing support to terrorist organization Hamas. Their assets were frozen pending investigation into whether KindHearts should be designated as a SDGT. KindHearts challenged this action and in Federal Court, Chief Justice Carr concluded that the government had acted unconstitutionally. He held that the government must provide the organization with notice of the reasons for the asset freeze and should provide them with a meaningful opportunity to defend themselves. These procedural failures implied that the action taken against KindHearts had been unconstitutional. This case was not resolved until 2011 when a settlement agreement was reached between KindHearts²⁰⁵ and the U.S. Treasury. Despite any admission of wrongdoing by either party, KindHearts was removed from the SDGT List and they were able to distribute their \$1m in assets to humanitarian causes. The U.S. Treasury agreed to pay KindHearts attorney’s fees and the organization was dissolved. Thus no criminal prosecution or indeed even a criminal charge for terrorism had been brought. These cases serve as illustration that CTF provisions in the U.S. are vulnerable to

²⁰¹ National Commission on Terrorist Attacks upon the United States, *Monograph on Terrorist Financing: Staff Report to the Commission* (Aug. 21, 2004) at 9

²⁰² National Commission on Terrorist Attacks upon the United States, *Monograph on Terrorist Financing: Staff Report to the Commission* (Aug. 21, 2004) at 79

²⁰³ *KindHearts for Charitable Humanitarian Development Inc. v Geithner*, 647 F. Supp. 2d 857, 864, 2009.

²⁰⁴ Hereinafter KindHearts.

²⁰⁵ *KindHearts for Charitable Humanitarian Development Inc. v Geithner*, 647 F. Supp. 2d 857, 864, 2009.

mistake and the Treasury is making such errors in the absence of basic due process protections for those involved. Further to this, with a fruitless outcome to actions taken against these charities, it is suggested that the U.S. government is actually devastating charities. Odendahl contends, “No one is arguing that terrorism is not a real and dangerous threat. But, by enforcing elaborate, draconian rules, Washington is doing mightily what it claims to be against: harming charities and the people they serve while doing little to stem terrorism”²⁰⁶ Klass supports such an opinion stating that despite the fact that no terrorist financing convictions with regard to the above cases have been secured, “in each case the blocking action destroyed the organization”.²⁰⁷ With this in mind, it would appear that the devastating impact of CTF measures far outweighs their advantages.

With regard to the closure of many charities including the four mentioned above, Aziz comments: “To many unsuspecting Americans, these events represent success stories on the part of the United States government with respect to the legitimate goal of terrorism prevention. To others, they raise red flags concerning fundamental constitutional rights”.²⁰⁸ These cases also illustrate that the U.S. government are able to issue a blocking order on an organizations assets even without designating them as a supporter of terrorism. Thus, the blocking order can be issued on a reasonable suspicion that the party supports terrorism.²⁰⁹ The 9/11 Commission report expressed concern at the “aggressive approach” adopted by the Administration against U.S. Charities and suggested that civil liberties concerns had been raised.

²⁰⁶ Teresa J. Odendahl, ‘Foundations and their role in antiterrorism enforcement: findings from a recent study and implications for the future, *The Center for Public & Nonprofit Leadership*, [2005] at 4-5. Document available at: http://cpnl.georgetown.edu/doc_pool/Odendahl060905.pdf. (accessed 01.03.12).

²⁰⁷ D Klass, Asset freezing of Islamic charities under the International Economic Emergency Powers Act: A Fourth Amendment analysis, [2007] *Washington & Lee Journal of Civil Rights & Social Justice* 14, 155. Furthermore, it should be noted that the charitable donations made to these organizations have not been put to the charitable use that was expected by the donators implying that many have not been able to fulfil their religious obligations. Such a situation has consequences for citizens right to religion, which is protected by the First Amendment to the U.S. Constitution.

²⁰⁸ Aziz, Sahar F, The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Combating Terrorism? [2003 *Texas Journal on Civil Liberties and Civil Rights*, Fall 2003 at 2. Available at SSRN: <http://ssrn.com/abstract=1648305>.

²⁰⁹ Further to this, it has been suggested that the evidence, which demonstrates charities involvement in terrorist fund raising, is “questionable”. (Teresa J. Odendahl, ‘Foundations and their role in antiterrorism enforcement: findings from a recent study and implications for the future, *The Center for Public & Nonprofit Leadership*, 2005 at 2. Document available at: http://cpnl.georgetown.edu/doc_pool/Odendahl060905.pdf.

One such concern was voiced in the case of *Al-Haramain v U.S. Dept. of Treasury*.²¹⁰ This charity was shut down pending an investigation into alleged funding of terrorism but Al-Haramain challenged the asset freeze and designation as a terrorist supporter. On November 7 2008, Judge King ruled that the Treasury's actions in closing the Al-Haramain Islamic Foundation (AHIF) in Oregon in 2004 violated the organizations Fifth Amendment rights and also had potential implications for their Fourth Amendment rights. The Treasury froze the assets of AHIF in February 2004 "pending investigation" but failed to provide notice to the organization before it designated them as a SDGT later in September 2004. The court ruled that this violated AHIF's Fifth Amendment right which guards against the deprivation of property without the opportunity for due process of law. Significantly, Judge King also ruled that the term "material support" of terrorism in Executive Order 13,224 is unconstitutionally vague. This term is however still in effect pending a final decision by the courts.²¹¹

Commenting on the challenges made regarding the constitutionality of blocking orders, Crimm notes, "...the courts consistently have confirmed the breadth of authority ascribed to the President and his delegates to issue temporary blocking orders under 50 U.S.C. § 1702(a)(1)(B) and have sanctioned limitations on the constitutional rights of domestic organizations in the discrete timeframe of a declared national emergency when national security and the security of U.S. citizens are considered at stake".²¹²

Thus any action taken by the U.S. government has been justified on the extraordinary circumstances surrounding the threat of terrorism post September 11 2001.²¹³

4.5 Derogation from human rights

In response to charges of exceeding executive authority, the U.S. government can claim that they are merely acting in conformity with powers that have been provided

²¹⁰ 585 F.Supp. 2d 1233 (D. Or. 2008)

²¹¹ *Al Haramain v. Treasury*: Successful constitutional challenge to unlimited treasury power to shut down charities, 2009, Charity and Security Network. Document available at: http://www.charityandsecurity.org/litigation/Al_Haramain_v_Treasury_Summary (accessed 12.03.12).

²¹² Nina J. Crimm, High Alert: The Government's War on the Financing of Terrorism and Its Implication for Donors, Domestic Charitable Organizations, and Global Philanthropy [2004] *William. & Mary Law Review* 45, 1341 at 1375. Available at: <http://scholarship.law.wm.edu/wmlr/vol45/iss4/3>

²¹³ It should be noted here that despite the court's findings that the designation process is constitutionally flawed, this procedure is yet to be reformed. This implies that the U.S. government has failed to make the necessary due process amendments in accordance with UNSCR 1904.

in the U.S.²¹⁴ Constitution which come into force in certain crisis situations. In accordance with the National Emergencies Act,²¹⁵ the U.S. declared a state of emergency following September 11 2001 and this was formally noted on 14 September 2001. The declaration of emergency made by George Bush was extended by President Obama on September 10 2009 and then again on September 10 2010. He stated, “The terrorist threat that led to the declaration...of a national emergency continues”.²¹⁶ However, unlike international treaties, U.S. legislation does not expressly permit an abrogation of human rights in a situation of emergency. Alternatively, the U.S. Constitution contains a Suspension Clause, which provides the U.S. government with the power to suspend the writ of habeas corpus.²¹⁷ The Writ of habeas corpus, also known as the ‘Great Writ’ provides that a person has the right to appear before a judge or magistrate to hear the charges against him.

This provision has been described as the U.S. Constitution’s only “express provision for exercise of extraordinary authority”²¹⁸ and may only be employed where public safety may require it in cases of rebellion or invasion.²¹⁹

Whilst the U.S. has not yet submitted any notification of derogation under the ICCPR,²²⁰ they have relied upon the ability to suspend the writ of habeas corpus in combating terrorism. This ability to suspend the right of U.S. citizens to a public trial is relevant to this thesis as it illustrates circumstances in which a person may be held on suspicion of terrorism without access to due process of law. The U.S. government may assert that they have the power to suspend the right to be heard by virtue of Article 1, Section 9 of the U.S. Constitution, which permits the suspension of habeas corpus in certain circumstances. It is arguable that the serious threat of a terrorist attack amounts to a “case of rebellion” where “public safety may require it” and thus

²¹⁴ Governments in the U.K. and Canada are also able to call upon derogation powers such as these.

²¹⁵ National Emergencies Act, 50 U.S.C. 1622(d).

²¹⁶ *Letter from the President on the Continuation of the National Emergency with Respect to Certain Terrorist Attacks*, September 10 2010. Available at: <http://www.whitehouse.gov/the-press-office/2010/09/10/letter-president-continuation-national-emergency-with-respect-certain-te> (accessed 12.03.12).

²¹⁷ The Suspension Clause was utilised in the case of *Toyosaburo Korematsu v. the United States* 323 U.S. 214, No 22 (1944). This landmark case represented the first time that the U.S. Supreme Court had upheld a government decision to use the powers of derogation under Article 1, Section 9 of the U.S. Constitution.

²¹⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²¹⁹ Art. 1 Section 9, U.S. Constitution.

²²⁰ In line with Article 4, ICCPR, if a state is declaring a national emergency then it must be officially proclaimed through a declaration to the U.N. Secretary General.

the government may be within their power to abrogate a suspect's right to go before a judge to hear the case against him. However the reliance on this Suspension Clause in cases involving detention of terror suspects has proved extremely contentious due to its adverse effect upon human rights especially in times of crisis when perhaps the respect of human rights is even more significant. Redish and McNamara contend "The potentially dramatic consequences of such a suspension on the protection of civil liberties during times of emergencies are almost unfathomable".²²¹ Arguably, a situation in which a person's human rights may be suspended makes the right to public trial even more significant. The crucial opportunity to question the U.S. authority's action and to defend one would go some way to ensuring that erroneous designations and deprivation of property is reduced.

In *Hamdi v Rumsfeld*, Justice Scalia remarked "where the exigencies of war [require it], the Constitution's Suspension Clause...allows Congress to relax the usual protections temporarily".²²² However, the use of this suspension clause in detaining terror suspects in Guantanamo Bay has been highly controversial. In *Hamdi v Rumsfeld*, Justice O'Connor dismissed the notion that executive authority should override human rights, asserting "a state of war is not a blank check for the President when it comes to the right of the nation's citizens"²²³ However, by claiming that Guantanamo Bay was outside U.S. territory, the government was successful in preventing enemy combatants from access to U.S. constitutional protections.²²⁴ This position was rectified in *Hamdan v Rumsfeld*,²²⁵ when the court held that President Bush could not detain terror suspects without providing some sort of due process, nor could he detain suspected terrorists without Congressional authorization. Further to

²²¹ M.H Redish & C McNamara, 'Habeas Corpus, Due Process and the Suspension Clause: A study in the foundations of American Constitutionalism' [2010] *Virginia Law Review* Vol. 96:1361-1416 at 1362.

²²² *Hamdi v Rumsfeld*, 542 U.S. 507, 554 (2004). In this case, Hamdi was captured in Afghanistan shortly after 9/11 and detained as an enemy combatant in Guantanamo Bay. He was denied access to a lawyer and to the court system on this basis. Hamdi was later found to hold U.S. citizenship and filed for a writ of habeas corpus. Eight of the nine justices of the court agreed that the Executive does not have the authority to indefinitely detain a person without access to basic due process.

²²³ Justice Sandra Day O'Connor *Hamdi II*, 124 S. Ct. at 2650.

²²⁴ The Military Commissions Act of 2006 was implemented in response to the ruling in this case.

²²⁵ 548 U.S. 557 (2006). In *Hamdan v Rumsfeld*, Ahmed Hamdan was captured in Afghanistan and turned over to the U.S. government where he was detained in Guantanamo Bay and charged with conspiracy to commit terrorism. The U.S. made plans to try him before a Military Commission but Hamdan challenged the lawfulness of this and filed for a writ of habeas corpus. The Supreme Court ruled that special military commissions were illegal under the Geneva Conventions and military justice law.

this, in the landmark case of *Boumediene v Bush*,²²⁶ the Court held that Congress had violated the Suspension Clause by denying someone an adequate judicial remedy for unlawful detention. The ruling in this case that Guantanamo Bay was within U.S. jurisdiction meant that detainees were now afforded the constitutional right to challenge their detention before U.S. courts.

Whilst it would be difficult if not impossible for the U.S. government to claim that the right a public trial could be suspended under the Suspension Clause when investigating terrorist financing, the use of this clause usefully illustrates the length and breadth that the U.S. government is willing to go to in order to counter terrorism. Instead of following international guidelines and officially proclaiming an emergency under Article 4, ICCPR, Yalda and White correctly contend that “the U.S. has justified counter-terrorism measures, including the “hold until clear” policy and interrogation practices at Guantanamo Bay, Abu Ghraib, and Afghanistan, through ideological claims of national security and an “*ad hoc* legalism” evidenced in executive level decision-making, departmental policies, and official congressional testimony”²²⁷

It is contended that such “ad hoc legalism” has also been adopted in reference to the implementation of anti terrorist financing legislation and has seen the relegation of human rights. There is no direct provision in the U.S. Constitution which permits the derogation of human rights in times of emergency and no declaration of a national emergency has been made as required by Article 4 ICCPR. On this basis, it is argued here that the U.S is acting unconstitutionally by depriving suspected terrorists and terrorist supporters of their assets without the opportunity to be heard. The government may even claim that these are necessary temporary measures but after ten years, it is very difficult to validate the use of such excessive measures on this

²²⁶ 553 U.S. 723 (2008). Boumediene was detained by the U.S. government at Guantanamo Bay where he made a petition for a writ of habeas corpus. This case (along with *Al Odah v. United States*) challenged the legality of detention at Guantanamo Bay without due process as well as the compatibility of the Military Commissions Act, 2006 with the U.S. Constitution. Although Guantanamo Bay is in Cuba, it was ruled that the U.S. holds complete jurisdiction and control over this area and therefore the military base is within U.S. legal jurisdiction. Thus human rights afforded by the U.S. Constitution extend to Guantanamo Bay and detained suspects have the right to challenge their incarceration in U.S. courts.

²²⁷ S Rollings Magnusson (eds.) *Anti-Terrorism, Security and Insecurity after 9/11*, (Fernwood 2009) at 68.

basis.²²⁸ Thus, although international provision is in place that permits derogation from human rights in emergency situations, the U.S. Constitution does not allow such a suspension and the U.S. have not availed themselves of the condition under Article 4, ICCPR. As such, it would appear that the lawfulness of their CTF legislation is extremely dubious and represents broad violation of human rights.

4.6 Conclusion

The U.S. has become one of many states to employ extraordinary measures to counter terrorist financing since the September 11 attacks. Indeed, the U.S. has been the principle instigator of such panicked and excessive responses. However, as Rollings-Magnusson correctly identifies “extraordinary powers do not necessarily produce extraordinary results”.²²⁹ Whilst the inherent success of CTF initiatives in the U.S. is impossible to determine, the adverse impact of these provisions are more readily identifiable. Financial institutions have been burdened with heightened reporting requirements and U.S. citizens have needed to become more vigilant as to who they associate with for fear of being linked to terrorism. However, it is the impact on human rights enshrined in the U.S. Constitution that has suffered the most significant consequences. It has been shown that the aftermath of the September 11 attacks encompassed a proliferation of legislation implemented with the aim of starving terrorists of their funds but in doing so the U.S. government has adopted practices which have undermined human rights, in particular the right to a public trial. This chapter has illustrated how citizens have found themselves deprived of their assets for an indefinite amount of time and have been designated as a terrorist without ever having the opportunity to challenge the charge. Indeed some have found themselves in a situation where they are accused of being involved in terrorism and are ultimately never actually charged with any terrorist related crime. This is particularly the case in

²²⁸ Even if it were possible to apply the suspension clause more widely in order to cover terrorist funding investigations, there is an argument that relates to the incompatibility between the Suspension Clause and due process. Whilst the due process of law promises the right to be heard before any deprivation of life, liberty or property, the suspension clause takes away this right and effectively rescinds the opportunity for due process. Redish and McNamara claim that rights contained in an Amendment supersede anything else found in the Constitution. Thus anything regarded as inconsistent with the right to due process found in the Fifth Amendment can as Redish and McNamara state be “rendered unconstitutional” (M.H Redish & C McNamara Habeas Corpus, Due Process and the Suspension Clause: A study in the foundations of American constitutionalism [2010] *Virginia Law Review* Vol. 96:1361-1416 at 1387).

²²⁹ S Rollings Magnusson (eds.) *Anti-Terrorism, Security and Insecurity after 9/11*, (Fernwood 2009) at 86.

relation to those associated with Islamic charities. Thus, asset freezing provisions and designation procedures are fundamentally flawed and are in violation of at least one of the human rights embodied in the U.S. Constitution not to mention international treaties which the U.S. is party to.²³⁰ Further to this, whilst some suspension of human rights is acceptable at times of crisis, the parameters of limitation on rights need to be strictly defined. Furthermore, these limitations on human rights, such as a right to a public trial, should only be temporary and should not be permitted to continue indefinitely. When the suspension of human rights becomes normalised, it is difficult to argue that the measures taken are necessary and proportionate to the negative impact on individual's human rights. If action taken is not considered proportionate and is in violation of the right to a public trial, then the legality of CTF measures is also in question. Actions such as these lead to the conclusion that U.S. CTF legislation is not wholly lawful and is in need of reform. The next chapter discusses the U.K's CTF framework and considers the impact that CTF legislation has had upon the right to a fair trial. Interestingly it will be shown that decisions such as that in *Kadi v Council of the European Union*²³¹ are in direct contrast to challenges in the U.S. which have to date been dismissed.

²³⁰ The U.S. has ratified the ICCPR and has adopted the Universal Declaration of Human Rights.

²³¹ (C-402/05 P) [2008] E.C.R. I-6351