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THE EXECUTIVE PROTECTION: FREEZING THE FINANCIAL ASSETS OF ALLEGED TERRORISTS, THE CONSTITUTION, AND FOREIGN PARTICIPATION IN U.S. FINANCIAL MARKETS

R. Colgate Selden

INTRODUCTION

Certain aspects of the Executive Branch of the United States of America's ability to freeze the assets of foreigners have been established through International Treaties and U.S. laws but some gaps and uncertainties remain. Executive Branch actions that effectively take the property of U.S. citizens are not constitutionally pure from the perspective of limiting citizens' rights.¹ Many questions exist, but the lack of "really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves" is certain.²

1. See U.S. CONST. amend. V. ("No Person shall . . . be deprived of life, liberty, or property, without due process of law."). Due process as discussed *infra* Part IV(B)(4), includes the right to a hearing and notice of that hearing.

2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). In *Sawyer*, the Court examined the constitutionality of Executive Order 10,340, which directed the Secretary of Commerce to take possession of most of the nation's steel mills in order to prevent a nation-wide strike. *Id.* at 582. The Government argued:

[T]he order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States.

Id. The Court rejected this position, stating that the Order could not "be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces." *Id.* at 587-88. Further, the Court stated that the Order violated the doctrine of Separation of Powers, finding that the Order amounted

On September 11, 2001 ("Sept. 11"), the world witnessed destruction³ wrought by people who for years have been relatively unhindered in pursuit of their terrorist goals.⁴ The members of Al Qaeda who committed this atrocity attended schools in the West, gathered information, acquired plane tickets, and trained in camps outfitted with the tools of war.⁵ All of this plotting, planning, and execution required funding.⁶

Many speculate that Osama Bin Laden ("Bin Laden") provided the seed capital to begin the Al Qaeda terrorist enterprise.⁷ Indeed, without Bin Laden, the Taliban regime may have been temporary.⁸ Bin Laden established a corporation in the mid-1990s comprised of shell companies, whose diverse holdings

to Executive "law making." *Id.* Although Justice Jackson agreed with the majority decision, he noted the lack of legislative, scholarly and judicial authority on the subject. *Id.* at 634-35. Justice Rehnquist, in writing for a unanimous court, quoted these same words by Justice Jackson nearly thirty years later in *Dames & Moore v. Regan* and recognized the lack of judicial discussion on the subject of the Executive Branch's uncertain powers as an anomaly of constitutional jurisprudence. *See Dames & Moore v. Regan*, 453 U.S. 654, 659-61 (1981).

3. *See* Michael Grunwald, *Bush Promises Retribution; Military Put on Highest Alert*, WASH. POST, Sept. 12, 2001, at A1.

4. Al Qaeda and Bin Laden allegedly were involved in prior attacks on the World Trade Center in 1993, the 1998 bombings of U.S. embassies in Tanzania and Nairobi, and the bombing of the U.S.S. Cole in 2000. *See* Dan Eggen & Vernon Loeb, *U.S. Intelligence Points to Bin Laden Network*, WASH. POST, Sept. 12, 2001, at A1. After the 2001 World Trade Center attack, the U.S. Government implemented numerous new programs and initiatives to strike at terrorists. *See* White House, *America Responds to Terrorism*, at <http://www.whitehouse.gov/response> (last visited Nov. 15, 2002).

5. *See* Kate Zernike & Don Van Natta Jr., *A Nation Challenged: The Plot; Hijacker's Meticulous Strategy of Brains, Muscle and Practice*, N.Y. TIMES, Nov. 4, 2001, at A1.

6. *See id.* Investigators estimated the cost of this operation to be nearly \$500,000 US. *Id.*

7. *See* U.S. Department of State, 2001 Patterns of Global Terrorism, 105-06 (May 21, 2002) (stating that Bin Laden founded Al Qaeda in the late 1980s and spent millions of dollars financing its operation), at <http://www.state.gov/s/ct/rls/pgtrpt/2001> (last visited Mar. 20, 2003).

8. *See* Molly Moore & Peter Baker, *Inside Al Qaeda's Secret World; Bin Laden Bought Precious Autonomy*, WASH. POST, Dec. 23, 2001, at A1 (stating that Bin Laden may have provided as much as \$100 Million US to the Taliban over a five year period).

included a currency trading firm, an import-export company, a gem dealing business, a construction firm, and a commodities trading firm.⁹ As the terrorist enterprise spread, it received additional financial backing and the corporation diversified its revenue streams.¹⁰ Both legitimate charities and charitable-front groups in cities around the world collected dollars to funnel back to the enterprise.¹¹

Al Qaeda's shell company achieved results beyond any insider's wildest dreams. Even the CEO, Bin Laden, was amazed at the devastation four aircraft could produce.¹² Perhaps many investors were happily surprised while others were shocked by the developments. Whatever the case, it became time for an involuntary bankruptcy and a quick winding down of operations.¹³ On September 23, 2001, the U.S. Government announced its efforts, in conjunction with other nations, to freeze assets in brokerage and bank accounts around the world which were believed to be sustaining terrorist groups and operations.¹⁴

9. See Robert Clow et al., *Team Set Up to Block Terrorist Funds: Asset Breakers, New Group of Intelligence Agents, and Law Enforcement Officials to Be Headed by U.S. Treasury*, FIN. TIMES (London), Sept. 17, 2001, at 6 (discussing Bin Laden's financial holdings in Africa and the Middle East).

10. See Douglas Farah, *Al Qaeda Gold Moved to Sudan: Iran, U.A.E. Used As Transit Points*, WASH. POST, Sept. 3, 2002, at A1 (stating that Al Qaeda remains heavily involved in the opium and heroin trade in Central Asia).

11. See *Hearing on the Role of Charities and NGOs in the Financing of Terrorist Activities Before the Senate Comm. on Banking, Hous. and Urb. Aff., Subcomm. on Int'l Trade and Fin.*, 107th Cong. (2002) (statement of Matthew A. Levitt, Senior Fellow, Wash. Inst. for Near East Policy) (citing charitable groups, including the Global Relief Foundation and the al-Wafa Humanitarian Organization, that collected funds for Al Qaeda and distributed funds to Al Qaeda operatives); see also Moore & Baker, *supra* note 8, at A1.

12. See Elisabeth Bumiller, *A Nation Challenged: The Video; Bin Laden, On Tape, Boasts of Trade Center Attacks; U.S. Says It Proves His Guilt*, N.Y. TIMES, Dec. 14, 2001, at A1.

13. See Farah, *supra* note 10, at A1 (stating that Al Qaeda has been forced to move financial resources out of "the traditional havens" of investment in Saudi Arabia and United Arab Emirates due to the intense international scrutiny following Sept. 11).

14. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); see also Joshua D. Zelman, *Recent Developments In International Law: Anti-Terrorism Legislation—Part One: An Overview*, 11 J. TRANSNAT'L L. & POL'Y 183, 192–99

The unimpeded flow of currency into U.S. financial markets is vital for capital formation, efficient market operation, and investor confidence.¹⁵ The vibrant U.S. economy is dependent on both businesses regularly tapping into, and individuals investing in, the U.S. markets today for returns tomorrow.¹⁶ The appearance of arbitrary law enforcement, coupled with ambiguous adjudication of controversies, spurs investor fear and uncertainty.¹⁷ The possibility for abuse of the terrorist asset freezing laws or uncertainty over future executive activities may lead hesitant foreign investors to avoid investing through U.S. financial institutions in the future.¹⁸ In the past, the Executive Branch froze the assets of sovereign nations and of individual nationals of these sovereign nations for political reasons.¹⁹

Under the new counter-terrorism initiatives, there is the possibility that non-terrorists, including foreigners and U.S. citizens, may become targets of asset freezing. Fortunately for the U.S., investors have few capital market substitutes because nearly all countries are engaged in the current terrorist asset freeze.²⁰

(2001) (discussing anti-terrorist funding legislation implemented by the European Union and the United Nations General Assembly).

15. See *infra* notes 107, 108 and accompanying text.

16. See *infra* notes 107, 108 and accompanying text.

17. See John Hardy, *Mideast Investors Shift Out of Dollar: Fears of U.S. Asset Freeze Fuel Reduction: An Apparent Contribution to Yen's Recent Rise*, *ASIAN WALL ST. J.*, May 23, 2002.

18. *Id.* (discussing how Middle Eastern investors are investing in other financial markets partly due to fear that there is a greater risk of their assets being frozen in the United States).

19. See Rudolph Lehrer, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in its Economic War on International Terrorism*, 10 *TUL. J. INT'L & COMP. L.* 333, 336-40 (2002) (discussing asset freezes and economic sanctions implemented against specific countries by the Executive Branch in the past).

20. See G.A. Res. 109, U.N. GAOR, 54th Sess., at 3, U.N. Doc. A/Res/54/109 (1999). The Convention for the Suppression of the Financing of Terrorism requires party states to prosecute or extradite those that give or receive funds in the furtherance of terrorist activity and seize funds used to support terrorist activities. *Id.* at art. 4, 8. As of October, 2002, there were 132 signatories and 57 states that were parties to the treaty.

See http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp (last visited Nov. 15, 2002); see also Council Regulation 2580/2001, 2001 O.J. (L 344)

70. Following the attacks of Sept. 11, the European Union passed Council

Although investors may or may not be terrorists, there remains the possibility that innocent investors may fear assets will be frozen without due process. The Executive Branch cannot operate effectively under burdensome limitations, but neither can the Executive have absolute power to freeze assets at will. "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."²¹

I. ACTIONS TAKEN TO FREEZE ASSETS IN RESPONSE TO
SEPTEMBER 11, 2001

A. Government Mechanisms

On Sept. 11, four domestic passenger planes were hijacked, with two planes crashing into the World Trade Center, one into the Pentagon, and one into a field in Pennsylvania.²² Thousands of

Regulation 2580/2001, which provides specific measures for combating terrorism. *Id.* Article 2 specifically provides for the freezing of the funds of all persons who participate, knowingly and intentionally, in acts of terrorism or in preparation thereof. *Id.* at art. 2.

21. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952). Justice Rehnquist, in writing for a unanimous court, quoted these words in *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981). *Id.* Rehnquist concluded that the Court's opinion in *Sawyer* did not focus on the plenary and exclusive powers of the Executive Branch, but rather responded to a claim of virtually unlimited powers for the Executive by stating that "the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances." *Id.*

22. See Grunwald, *supra* note 3, at A1. At 8:48 a.m., American Airlines Flight 11, carrying ninety-two people from Boston to Los Angeles, crashed into the North Tower of the World Trade Center. *Id.* Eighteen minutes later, United Airlines Flight 175, carrying sixty-five passengers from Boston-to-Los Angeles, crashed into the South Tower. *Id.* At roughly 9:40 a.m., American Airlines Flight 77, carrying sixty-four passengers from Dulles to Los Angeles, crashed into the west wing of the Pentagon. *Id.* A fourth plane, United Airlines Flight 93, carrying forty-four passengers from Newark to San Francisco, crashed in Shanksville, Pa. *Id.*

American citizens and other foreign nationals were killed.²³ Immediately, the United States Government began searching for those responsible to bring them to justice and to neutralize their future destructive ability.²⁴

The government was familiar with the Al Qaeda terrorist network, which had orchestrated the bombings of the World Trade Center in 1993, the U.S. embassies in Africa and other attacks on U.S. interests overseas.²⁵ Mechanisms were put in place by the Executive and Legislative Branches to trigger responses by numerous government entities, including the Department of Defense, the Federal Bureau of Investigation ("FBI"), the Department of Justice, the Department of the Treasury ("Treasury Department"), the State Department, and the Securities and Exchange Commission ("SEC"), to thwart potential future threatening activities.²⁶ Executive Order 13,224 was the first step in

23. See Michael Okwu, *Ceremony Closes "Ground Zero" Cleanup*, at <http://www.cnn.com/2002/US/05/30/rec.wtc.cleanup> (last visited Nov. 15, 2002). Authorities put the final death toll from the twin towers' destruction at 2,823. *Id.* The remains of 1,102 victims have been identified. *Id.* Another 189 people were killed in Washington on September 11 when a third hijacked jet crashed into the Pentagon, and 44 more died aboard a fourth jet that crashed into a Pennsylvania field. *Id.*

24. See Grunwald, *supra* note 3, at A1 (discussing the government and military actions immediately following the terrorist attacks).

25. See Eggen & Loeb, *supra* note 4; see also Karen DeYoung & Michael Dobbs, *Bin Laden: Architect of New Global Terrorism*, WASH. POST, Sept. 16, 2001, at A8 (discussing Bin Laden and Al Qaeda's past activities, including the bombing of the U.S. embassies in Kenya and Tanzania in 1998).

26. See Sean Murphy, *Terrorist Attacks on World Trade Center and Pentagon*, 96 AM. J. INT'L L. 237, 242-47 (2002) (discussing the Bush Administration's actions following the Sept. 11 attacks). On Oct. 8, 2001, the President issued Executive Order 13,228, establishing the Office of Homeland Security and the Homeland Security Council, charged with developing and coordinating the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks. See Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 10, 2001). The newly created Homeland Security Council is "responsible for advising and assisting the President with respect to all aspects of homeland security. The Council shall serve as the mechanism for ensuring coordination of homeland security-related activities of executive departments and agencies and effective development and implementation of homeland security policies." *Id.* § 5(a). The Council is composed of the:

President, the Vice President, the Secretary of the Treasury, the Secretary of

a multi-pronged effort, utilizing military resources, diplomacy and law enforcement and regulatory agencies, to combat international terrorism.²⁷

After President George W. Bush ("President Bush") issued Executive Order 13,224, the Treasury Department's Office of Foreign Assets Control ("OFAC") spearheaded efforts to freeze the assets of parties designated as terrorists by President Bush, the Secretary of State, the Secretary of the Treasury and the Attorney General.²⁸ Once the terrorist designation occurred, the group's or

Defense, the Attorney General, the Secretary of Health and Human Services, the Secretary of Transportation, the Director of the Federal Emergency Management Agency, the Director of the Federal Bureau of Investigation, the Director of Central Intelligence, the Assistant to the President for Homeland Security, and such other officers of the executive branch as the President may from time to time designate. The Chief of Staff, the Chief of Staff to the Vice President, the Assistant to the President for National Security Affairs, the Counsel to the President, and the Director of the Office of Management and Budget [may also] attend any Council meeting. The Secretary of State, the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Energy, the Secretary of Labor, the Secretary of Commerce, the Secretary of Veterans Affairs, the Administrator of the Environmental Protection Agency, the Assistant to the President for Economic Policy, and the Assistant to the President for Domestic Policy shall be invited to attend meetings pertaining to their responsibilities. The heads of other executive departments and agencies and other senior officials shall be invited to attend Council meetings when appropriate.

Id. § 5(b).

27. See Press Release, White House, Campaign Against Terrorism: A Coalition Update (Mar. 11, 2002) (discussing the U.S.-led international Coalition's collaborative efforts against terrorism), *available at* <http://www.whitehouse.gov/march11/campaignagainstterrorism.pdf> (last visited Nov. 15, 2002).

28. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), §§ 1, 5. Section 1 states, in pertinent part, that the Executive will freeze any assets which are used "to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to this order or determined to be subject to this order." *Id.* § 1. Section 5 states, in pertinent part:

[T]he Secretary of the Treasury, in the exercise of his discretion and in consultation with the Secretary of State and the Attorney General, may take such other actions than the complete blocking of property or interests in property as the President is authorized to take under IEEPA and UNPA if the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, deems such other actions to be consistent with the national

individual's name was published in the Federal Register and disseminated to financial institutions.²⁹ Upon designation, their assets were frozen immediately without prior notice or process.³⁰ Simultaneously, suspected terrorist offices were raided and evidence seized.³¹ Financial institution regulators jumped into the fray with varying authority to enforce the Order.³²

Financial institutions are required to comply with the Executive Order or become subject to penalties and fines under the International Emergency Economic Powers Act ("IEEPA").³³ Under IEEPA, anyone who willfully violates or attempts to violate its provisions may be subject to criminal fines up to \$50,000 and imprisonment up to 10 years.³⁴ A civil penalty up to \$10,000 may be imposed upon anyone that violates or attempts to violate the statute.³⁵

In addition to financial institutions, the SEC also sought to freeze the assets of suspected terrorists.³⁶ The SEC asked for the

interests of the United States.

Id. § 5.

29. *Id.* § 11.

30. *Id.* § 10 (stating that, due to the speed at which assets can be transferred or moved, "there need be no prior notice of a listing or determination made pursuant to this order . . .").

31. See Philip Shenon, *A Nation Challenged: The Money Trail; U.S.-Based Muslim Charity Raided by NATO in Kosovo*, N.Y. TIMES, Dec. 18, 2001, at B6 (discussing joint F.B.I. and Treasury Department raids on two Muslim charities because of suspected ties to terrorist groups).

32. See Testimony Before the U.S. Senate Judiciary Committee, 107th Cong. (2002) (statement of Jimmy Gurule, Under Secretary of Treasury for Enforcement) (stating that the Department of Treasury's Office of Enforcement and the Treasury's Office of Foreign Assets work in coordination to enforce the Order).

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

34. See 50 U.S.C. § 1705 (2001) (outlining criminal penalties for violations of IEEPA).

35. See *id.* (discussing civil penalties under IEEPA).

36. See Press Release, U.S. Securities and Exchange Commission, Request for Records Search by Securities-Related Entities, Including Brokers, Dealers, Investment Advisers, Investment Companies, Municipal Securities Dealers and Transfer Agents (Sept. 26, 2001) (discussing the steps to take in reporting financial transactions with those individuals and organizations whose assets have been frozen by Executive Order 13,224), available at

help of all securities-related entities “including brokers, dealers, investment advisers, investment companies, municipal securities dealers, and transfer agents” even if unregistered with the commission.³⁷ The SEC listed the designated terrorists in a press release and asked securities entities to notify it by e-mail of any relations with these suspects.³⁸

OFAC, which has authority over the same list of suspected entities as the SEC, requires reporting of asset freezes within ten days by fax.³⁹ However, OFAC requires blocked accounts to be

<http://www.sec.gov/news/press/2001-103.txt> (last visited Nov. 15, 2002). See generally *The Investor's Advocate: How the S.E.C. Protects Investors and Maintains Market Integrity*, at <http://www.sec.gov/about/whatwedo/shtml> (last visited Nov. 15, 2002). The SEC, which is primarily concerned with promoting disclosure of important information, enforcing the securities laws, and protecting investors who interact with these various organizations and individuals, has only civil enforcement authority. *Id.* When President Bush made it illegal to assist in transactions associated with these designated terrorist groups, the SEC could then assist in finding the assets because such action fell squarely under its charter. *Id.*

37. See Press Release, U.S. Securities and Exchange Commission, Request for Records Search by Securities-Related Entities, Including Brokers, Dealers, Investment Advisers, Investment Companies, Municipal Securities Dealers and Transfer Agents (Sept. 26, 2001) (seeking the help of anyone who might have dealt with the terrorists in a financial capacity), available at <http://www.sec.gov/news/press/2001-103.txt> (last visited Nov. 15, 2002).

38. See *id.* (stating the names that President Bush listed in his Executive Order on September 23, 2001).

39. See Press Release, U.S. Department of the Treasury Office of Foreign Assets Control, What You Need to Know About U.S. Sanctions-Terrorism (citing Executive Order 12,947, 60 Fed. Reg. 5079, signed by President Clinton on January 23, 1995), available at <http://www.ustreas.gov/terrorism.html> (last visited Feb. 3, 2002). The Department of the Treasury stated that Exec. Order No. 12,947:

[B]locks the property and interests in property of persons designated by the Secretary of State, in coordination with the Secretary of the Treasury and the Attorney General, who are found (1) to have committed or to pose a significant risk of disrupting the Middle East peace process, or (2) to assist in, sponsor or provide financial, material, or technological support for, or services in support of, such acts of violence. The Order further blocks all property and interests in property subject to U.S. jurisdiction in which there is any interest of persons determined by the Secretary of the Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of any other person designated pursuant to the Order.

“interest-bearing, at rates similar to those currently offered other depositors on deposits of comparable size and maturity” in order to fall within the purview of the statute.⁴⁰ Maturities on blocked accounts may not exceed 90 days.⁴¹ Debits from blocked customer accounts are prohibited, although credits are authorized.⁴² For financial institutions that violate OFAC’s orders, stiff penalties may result.⁴³ Criminal violations of the statutes administered by OFAC can result in corporate and personal fines up to \$1 million and twelve years in jail.⁴⁴ OFAC also has the independent authority to impose civil penalties of up to \$275,000 per count.⁴⁵

After April 24, 2002, the regulated entity members of the National Association of Securities Dealers (“NASD”) had to establish anti-money laundering compliance programs in accordance with the USA Patriot Act (“Patriot Act”).⁴⁶ The NASD promulgated rules under the Patriot Act requiring broker-dealers to “track and report suspicious transactions, . . . institute special due-diligence checks for certain customers and close accounts with foreign shell banks that have no physical presence or operations.”⁴⁷ The NASD also incorporated various Treasury

Id. Under the provisions of Exec. Order No. 12,947, blockings must be reported within ten days by fax to OFAC’s Compliance Programs Division. *Id.*

40. *Id.* (quoting OFAC requirements on blocked accounts).

41. *Id.*

42. *Id.*

43. See Department of the Treasury, Foreign Assets Control Regulations for the Securities Industry (2001) (discussing foreign asset control regulations for the securities industry, including possible penalties, criminal sanctions and other obligations which may be imposed on a firm for illegal purchases, made on margin, which violate OFAC administered sanctions), available at <http://www.ustreas.gov/offices/enforcement/ofac/regulations/facsec.txt> (last modified Jul. 3, 2002).

44. *Id.* (stating specific criminal penalties).

45. *Id.* (stating specific civil penalties).

46. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, § 352, 115 Stat. 272 (2001) (establishing guidelines for anti-money laundering programs).

47. See *NASD’s Board Clears Money-Laundering Rule*, WALL ST. J., Jan. 31, 2002, at A8 (discussing the proposal to implement parts of the USA Patriot Act, which required that financial institutions, including broker-dealers, set up anti-money-laundering compliance programs by April 24, 2002).

Department proposals, such as the reporting of suspicious transactions by broker-dealers, into the new rules.⁴⁸

B. Frozen Assets of Individuals and Groups

In response to Sept. 11, President Bush initially designated twenty-seven groups and individuals as terrorists.⁴⁹ Many previous asset freezes involved terrorists believed to be associated with Hezbollah and Hamas.⁵⁰ From Sept. 11 to January 9, 2002, the

48. See *id.* (discussing regulations for the reporting of suspicious transactions by broker-dealers, including the setting of reporting-threshold amounts).

49. See Karen DeYoung, *Past Efforts to Stop Money Flow Ineffective; Coordination of U.S. Approach May Be Key*, WASH. POST, Sept. 25, 2001, at A8 (explaining that in order to choke off terrorist finances, President Bush lengthened the list of people and organizations whose U.S. assets can be seized and expanded the legal basis for these seizures). See generally 50 U.S.C. § 1701 (2001). The designated terrorists and groups are: Al Qaeda; Abu Sayyaf Group; Armed Islamic Group (GIA); Harakat ul-Mujahidin (HUM); Al-Jihad (Egyptian Islamic Jihad); Islamic Movement of Uzbekistan (IMU); Asbat al-Ansar; Salafist Group for Call and Combat (GSPC); Libyan Islamic Fighting Group; Al-Itihaad al-Islamiya (AIAI); Islamic Army of Aden; Osama Bin Laden; Muhammad Atif (aka, Subhi Abu Sitta, Abu Hafs Al Masri); Sayf al-Adl; Shaykh Sai'id (aka, Mustafa Muhammad Ahmad); Abu Hafs the Mauritanian (aka, Mahfouz Ould al-Walid, Khalid Al-Shanqiti); Ibn Al-Shaykh al-Libi; Abu Zubaydah (aka, Zayn al-Abidin Muhammad Husayn, Tariq); Abd al-Hadi al-Iraqi (aka, Abu Abdallah); Ayman al-Zawahiri; Thirwat Salah Shihata; Tariq Anwar al-Sayyid Ahmad (aka, Fathi, Amr al-Fatih); Muhammad Salah (aka, Nasr Fahmi Nasr Hasanayn); Makhtab Al-Khidamat/Al Kifah; Wafa Humanitarian Organization; Al Rashid Trust; Mamoun Darkazanli Import-Export Company. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

50. See DeYoung, *supra* note 49 (discussing Executive Order No. 12,947, issued by President Clinton in 1995, freezing assets of various terrorist groups). In the interest of protecting the Middle East peace process and the United States, the Order allows for the freezing of assets of various terrorist groups. *Id.* Nearly all the cases brought under this Order have involved the groups Hezbollah and Hamas. *Id.* See generally Elaine Sciolino & Michael R. Gordon, *A Nation Challenged: Holy War; Hezbollah and Hamas Put on Back Burner*, N.Y. TIMES, Oct. 4, 2001, at B6.

Hezbollah has long been active in armed attacks on Israeli military and civilian targets in Southern Lebanon and northern Israel . . . [Hamas's] mission is to thwart peace between Israel and the Palestinians For more than a decade the United States has defined them as the two main anti-Israeli terrorist groups and has branded Iran and Syria as state sponsors of terrorism because of their

assets of 168 alleged terrorists were frozen, totaling approximately \$68,000,000.⁵¹ By February 11, 2002, the frozen assets totaled \$104,000,000.⁵² According to U.S. officials, some of the terrorist entities raise money by convincing donors that their donations will go to orphans and widows, when in actuality the money is diverted to Al Qaeda instead.⁵³ Often, donations are sent to the orphans and widows of suicide bombers and other attackers killed in the "holy war."⁵⁴ The money allows the crusaders peace of mind knowing their families will be cared for after successful missions in which the crusaders and their targets are extinguished.⁵⁵

Despite the laudable goal of the U.S. government, many post and present asset seizures have undermined the faith of foreign investors in U.S. investments. One of the earlier terrorist designees, Mohammed Salah ("Salah"), and his organization, the Quranic Literacy Institute ("Institute") in Chicago, were and still

support of the groups.

Id.

51. See Kurt Eichenwald, *A Nation Challenged: Money Trails; U.S. Freezes Assets of 2 Groups, Saying They Diverted Gifts to Al Qaeda*, N.Y. TIMES, Jan. 10, 2002, at A17 (discussing the Bush administration's freezing of assets of groups with alleged terrorist connections since September 11, 2001, specifically focusing on the Revival of Islamic Heritage Society and the Afghan Support Committee).

52. See Michael M. Phillips & Joel Baglole, *U.S. Prods Allies on Terror-Funds Fight: Treasury Secretary Suggests Other Nations Produce Own Lists of Suspects*, WALL ST. J., Feb. 11, 2002, at A2 (discussing U.S. allies' steps, especially Germany and Russia, to find and seize money used to fund terrorism and noting that 149 governments have combined to block \$104 million in assets).

53. See Richard Cole, *Fraud, Drug Trafficking and Charities in U.S. Help Finance Terrorists*, AP NEWSWIRE, May 22, 1997 (discussing fundraising, both legal and illegal, in the United States by Abu Nidal, PKK, Hamas, Al Fuqra, and Islamic Jihad).

54. See Glen R. Simpson, *Hesitant Agents: Why the FBI Took Nine Years to Shut Group It Tied to Terror*, WALL ST. J., Feb. 27, 2002, at A1 (discussing the investigation into the connections between the Holy Land Foundation and Hamas). Simpson asserts that the F.B.I. knew that the Holy Land Foundation was fundraising for Hamas and that the money raised went to the orphans and widows of suicide bombers, but the F.B.I. was unable to separate what was deemed legitimate fundraising and that which was used to fund terrorist acts. *Id.*

55. See *id.* ("Money raised by the Holy Land Foundation is used by Hamas to support schools and indoctrinate children to grow up into suicide bombers [and] to recruit suicide bombers and support their families.").

are U.S. citizens.⁵⁶ In 1998, the assets of the alleged terrorist and his organization were frozen.⁵⁷ No criminal charges were ever brought by the U.S. and no evidence supporting the asset freeze was ever publicly produced.⁵⁸ As of 2002, Salah drives a taxicab in Chicago and the organization continues to translate the Koran into English.⁵⁹ The general public is unaware if any terrorist activities were supported by the Institute or Salah, or whether the asset freeze thwarted any potential terrorist plots.⁶⁰ Although the Israeli government held Salah on a terrorism charge, he was eventually released from prison.⁶¹ Salah remains without \$100,000 and the Institute without \$1,000,000, all of which remain frozen.⁶²

The Benevolence International Foundation ("Benevolence International") and the Global Relief Organization ("Global Relief") are United States citizen corporations that were recently shut down after Sept. 11.⁶³ After raiding Global Relief's offices in

56. See DeYoung, *supra* note 49 (stating that "the institute continues to translate the Koran, and Salah, according to his attorney, drives a taxi in Chicago.").

57. See *id.* (discussing the current status of the assets of Salah and the Quranic Institute); see also *Hearing on PATRIOT Act Oversight: Investigating Patterns of Terrorist Fundraising: Fund-Raising Methods and Procedures for International Terrorist Organizations Before the House Comm. on Fin. Services, Subcomm. on Oversight and Investigations*, 107th Cong. (2002) (testimony of Steven Emerson, Executive Director, The Investigative Project) (describing the circumstances behind the F.B.I. investigation into the activities of Salah and the Quranic Literacy Institute, as well as the subsequent asset freeze), available at <http://financialservices.house.gov/media/pdf/021202se.pdf> (last visited Nov. 15, 2002).

58. See DeYoung, *supra* note 49 (stating that Salah "was never charged with a crime in this country" and that "U.S. officials have lacked proof" to sustain any criminal charges).

59. See *id.*

60. See *id.* (discussing that federal prosecutors only alleged Salah was funneling money to Hamas and that he is currently a free citizen and the Institute maintains its operations).

61. See *id.* (stating that Salah "served time in Israel on a terrorism charge and has long been considered a senior operative for Hamas . . .").

62. See *id.* (stating that "federal prosecutors seized about \$100,000 from [Salah's] bank account, along with about \$1 million from the Institute . . .").

63. See Philip Shenon, *A Nation Challenged: The Money Trail; U.S.-Based Muslim Charity Raided by NATO in Kosovo*, N.Y. TIMES, Dec. 18, 2001, at B6

Kosovo, the North Atlantic Treaty Organization (“NATO”) released a statement citing the need for action “after receiving credible intelligence information that individuals working for this organization may have been directly involved in supporting worldwide international terrorist activities” and that the group “is allegedly involved in planning attacks against targets in the U.S.A. and Europe.”⁶⁴ The Bush administration also suspected both groups were linked to Al Qaeda.⁶⁵ Hours later, the Treasury Department and FBI raided the home offices of the groups and froze their assets, even though neither agency was willing to provide any evidence linking the groups to terrorists.⁶⁶ One administration official “acknowledged that it was possible that any help given to Al Qaeda [by the charity groups] might have been given unwittingly.”⁶⁷ Last year, Global Relief raised \$5.2 million.⁶⁸ On December 14, 2001, OFAC released a bulletin providing that “[a]ll financial assets and all records of BENEVOLENCE INTERNATIONAL FOUNDATION, INC., wherever located are blocked pending investigation pursuant to Section 106 of the U.S.A. Patriot Act of 2001.”⁶⁹ However, at the time, those entities were not specially designated as terrorists on OFAC’s list.⁷⁰

(reporting on the raids on the Kosovo and U.S. offices of an Illinois-based charity with alleged ties to Osama Bin Laden and Al Qaeda).

64. *Id.* (quoting a statement from N.A.T.O. officials).

65. *See id.* (stating that the investigation “links at least two large Muslim charities based in Illinois to fund-raising for Osama Bin Laden and his Al Qaeda network.”).

66. *See id.* (stating that beyond the initial allegation the two agencies “have been unwilling to reveal any evidence that might link either charity to Al Qaeda.”).

67. *Id.* (quoting a spokeswoman for the Treasury Department).

68. *Id.* (citing figures of Global Relief’s fund-raising activities).

69. Press Release, U.S. Dept. of the Treasury Office of Foreign Assets Control, What You Need to Know About U.S. Sanctions-Terrorism, at <http://www.ustreas.gov/terrorism.html> (last visited Feb. 3, 2002). *See also infra* Part V (C)(4) (discussing § 106 of the U.S.A. Patriot Act). *See also infra* Part V.B. (discussing Presidential Authority in further detail).

70. *See* Press Release, U.S. Dept. of the Treasury Office of Foreign Assets Control, What You Need to Know About U.S. Sanctions-Terrorism (stating that the Secretary of the Treasury, in consultation with the Secretary of State and either the U.S. Attorney General or the Secretary of State, designate individuals as terrorists or specially designated terrorists on OFAC’s “Specially Designated

On January 28, 2002, Global Relief sued the government to unfreeze its assets.⁷¹ Global Relief claimed the asset freeze was “unlawful, unjustified, factually indefensible and unconstitutional.”⁷² The group argued that “the law under which the assets were blocked was designed to be used against foreign-based organizations, while the foundation is based in the United States.”⁷³ The claim was filed in the U.S. District Court in the Northern District of Illinois, under federal question jurisdiction.⁷⁴ The named defendants are Paul H. O’Neill, Secretary of the Treasury; Colin L. Powell, Secretary of State; John Ashcroft, Attorney General; R. Richard Newcomb, Director of U.S. Department of the Treasury; and Robert S. Mueller, III, Director of the FBI.⁷⁵ Benevolence International has also brought suit seeking similar relief.⁷⁶

Other foreign financial groups, such as those operating in the hawala system, have also had assets frozen.⁷⁷ Hawala is an informal

Nationals and Blocked Persons” list (“SDN list”) at which time their assets are frozen amongst other things), at <http://www.ustreas.gov/terrorism.html> (last visited Feb. 3, 2002).

71. See *Muslim Group Sues Over Frozen Assets*, WASH. POST, Jan. 29, 2002, at A2 (describing the lawsuit brought by the U.S.-based Muslim charity group against the U.S. government).

72. *Id.* (describing the U.S. Treasury Department’s action to freeze its assets).

73. *Id.* (discussing the basis for the lawsuit).

74. *Global Relief Found., Inc. v. O’Neill*, 205 F. Supp. 2d 885 (N.D. Ill. 2002).

75. See *id.* The official titles of the named defendants has been added.

76. See Press Release, Benevolence International Foundation (Jan. 30, 2002), available at <http://www.benevolence.org/PressRelease2002.asp> (last visited Nov. 15, 2002). Benevolence International asserts that on December 14, 2001, the F.B.I. searched Benevolence International Foundation’s offices and seized financial records and other property, including computers and employees’ personal belongings. *Id.* On the same day, the F.B.I. searched the home of Benevolence International Foundation’s Chief Executive Officer and seized various personal items belonging to him and his family. *Id.* More relevant to the topic of this Article, the F.B.I. also blocked all of Benevolence International Foundation’s funds, accounts, and business records. *Id.* Benevolence International asserts that the government action violates both their Fourth Amendment right against unreasonable searches and their Fifth Amendment due process rights. *Id.*

77. See Kenneth Dam, *Hunting Down Dirty Cash: The International*

money transfer system which is often used as an alternative to institutional banking.⁷⁸ In these systems,

[A] local hawala contact in one country takes money from a customer and, for a fee, has a hawala associate in another country dispense an equal amount to the intended recipient. The hawala associates periodically settle up with each other, by cash, check or wire transfer. This system makes it impossible for [government] regulators to track the underlying individual transactions.⁷⁹

Al Barakaat was one such hawala whose assets have been frozen and their offices closed.⁸⁰ The administration believed fifteen to twenty million dollars was blocked from Al Qaeda use because of this action.⁸¹ This network skimmed funds from money transfers to Somalia made amongst friends and relatives.⁸² Since the start of 2002, 8,500 hawalas and wire transfer services have registered with the U.S. Government under new transparency regulations.⁸³

The U.S. recently compiled a list of individuals and

Coalition Must Step Up Its Efforts to Stem the Flow of Terrorist Funds or Risk Further Attack, FIN. TIMES (London), Dec. 12, 2001, at 17 (stating that the Al Barakaat hawala network was shut down on November 11, 2001).

78. See Ashish Dewan & Sabrina Saccoccio, *Money-Transfer Systems, Hawala Style*, CBC News Online (Nov. 2001) (stating that hawalas are primarily used in rural areas where people do not have access to banks), at <http://cbc.ca/news/indepth/background/hawala.html> (last visited Nov. 15, 2002).

79. Michael M. Phillips & Ian Johnson, *U.S.-European Divisions Hinder Drive to Block Terrorists' Assets*, WALL ST. J., Apr. 11, 2002, at A1 (explaining the mechanism for the transfer of assets in the hawala system).

80. See Michael M. Phillips, *U.S. Says It Cut Off Up to \$20 Million in Al Qaeda Funds*, WALL ST. J., Jan. 29, 2002, at A22 (noting that the crackdown on Al Barakaat included the closure of eight of the company's U.S. offices and the seizure of \$1.9 million in U.S. assets).

81. See *id.* (noting that the government action disrupted \$300-400 million in annual flows through the hawala networks).

82. See Dam, *supra* note 77, at 17; see also Dewan & Saccoccio, *supra* note 78 (stating that "U.S. officials say sealed court documents prove [that Al-Barakaat and Al Taqua] skim money for Al Qaeda from hawala exchange fees, using these fees to finance weapons and intelligence for terrorists.").

83. See Phillips, *supra* note 80, at A22 (describing the Bush administration's attempt to tighten control over the hawalas and other money-service businesses).

organizations suspected to have ties to Al Qaeda; once designated, the entities become subject to a United Nations (“U.N.”) financial embargo and other sanctions.⁸⁴ As a result of so many high profile seizures, the international community has become increasingly critical of U.S. asset freezing policy. Now some U.N. members are openly questioning the U.S.-led embargoes against suspected terrorists because of the U.S.’s unwillingness to provide evidence or explanations.⁸⁵ France and Sweden have stated that higher evidentiary standards should be met prior to the designation of an entity as a suspected terrorist.⁸⁶ The U.S. responded that it will provide evidence to friendly nations, but “at some point, people are just going to have to trust the United States to do the right thing.”⁸⁷

II. INCREASING FINANCIAL ASSET FLOWS AND COMPETITION

President Bush’s order and the actions of the agencies run counter to making U.S. investments more enticing to foreign investors, as evidenced by recent legislation and regulation. Over the past few years, a spirit of increasing access to the United States economy has taken hold.⁸⁸ Banking laws were repealed to allow banks to enter into securities and insurance activities.⁸⁹ Securities

84. See Colum Lynch, *U.S. Plan to Stop Terrorists Creates Unease in U.N.*, WASH. POST, Feb. 2, 2002, at A19 (noting that three Swedish citizens who were suspected by the U.S. of laundering money—Abdirisak Aden, Abdi Abdulaziz Ali and Yusaf Ahmed Ali—had requested that their names be removed from the list).

85. See *id.* (noting that France and Sudan have asked for more disclosure of evidence before individuals are placed on the U.N. list of suspected terrorists).

86. See *id.*

87. *Id.* (quoting an unnamed official on the Bush administration’s unofficial position on intelligence sharing).

88. See U.S. Department of Commerce, Bureau of Economic Analysis, *Foreign Direct Investment in the United States: Balance of Payments and Direct Investment Position* (noting that capital inflows have more than doubled from 1997 to 2000), at <http://www.bea.doc.gov/bea/di/di1fdibal.htm> (last visited Nov. 15, 2002).

89. See Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999). The Gramm-Leach-Bliley Act repealed the Glass-Steagall Act banning crossover of banks into securities and insurance selling and underwriting activities. *Id.*

regulators enacted rules and regulations with an eye towards enticing more foreign investment in U.S. markets.⁹⁰ These rules allowed companies easy access to capital and allowed investors to choose the best allocation of resources.⁹¹ Essentially, the United States opened its doors to business and all were welcome.

In a Congressional Conference prior to the enactment of the National Securities Markets Improvement Act of 1996, Senator Dodd stated that the intention of the bill was to sustain economic growth by allowing:

[T]he continuing ability of our capital markets and financial services industry to function efficiently and with integrity. If companies find impediments to obtaining capital, they will not grow. If individuals find impediments to their access to securities and other investments, they will not save Furthermore, the American capital markets are the envy of the world. No other Nation enjoys the international reputation of our capital markets and it is necessary for Congress periodically to review and modernize, where necessary, the laws that make our markets and our financial services industry the world's leader.⁹²

Senator Sarbanes added that:

In addition to established businesses, new companies have been raising capital in record amounts. Individual investor confidence in the securities markets, measured by direct investment in securities and investment through mutual funds and pension plans, remains high. The U.S. securities markets

90. See Edward F. Greene & Linda C. Quinn, *Building on the International Convergence of the Global Markets: A Model for Securities Law Reform*, 1281 PLI/CORP. 11, 43 (2001) (discussing the history of SEC regulation of foreign issuers and more recent attempts by the SEC to amend various regulations in order to afford greater flexibility to foreign issuers).

91. *Id.* (discussing the function of the rules promulgated by the SEC); see also Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1, 44 (1999) (discussing the SEC's tailoring of regulations to insure investment by foreign investors in domestic markets and companies).

92. S. CONF. REP. S12093 (1996), available at <http://thomas.loc.gov/cgi-bin/query/D?r104:5::/temp/~r1047e7x6H:e0>: (last visited Feb. 10, 2002).

retain their preeminent position in the world.⁹³

The National Securities Markets Improvement Act also amended the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940 to require the SEC to tailor future rulemaking to promote “efficiency, competition, and capital formation.”⁹⁴

Now both private financial institutions and government agencies have been ordered to look for suspicious activity and report suspects to the authorities.⁹⁵ Foreigners may be subject to asset seizure without notice⁹⁶ and without due process. As a result of the new anti-terrorism funding legislation, companies who otherwise would invest their capital in U.S. markets may now go elsewhere.⁹⁷ The net effect could reduce the ability of U.S. capital

93. *Id.* (discussing the economic considerations which were taken into account in adopting the National Securities Markets Improvement Act).

94. The National Securities Markets Improvement Act of 1996, H.R. 3005, 104th Cong. (1996), available at <http://thomas.loc.gov/cgi-bin/query/c?c104::/temp/~c104DUtMU> (last visited Feb. 10, 2002); see also Rutheford B. Campbell, *The Overwhelming Case for Elimination of the Integration Doctrine Under the Securities Act of 1933*, 89 KY. L.J. 289, 321 (2000-2001) (stating that the National Securities Markets Improvement Act amended section 2 of the 1933 Act to indicate that the 1933 Act was intended both to provide for “protection of investors” and to promote “efficiency, competition, and capital formation”).

95. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, § 352, 115 Stat. 272 (2001). The Act requires financial institutions to develop anti-money laundering systems and establishes minimum levels for compliance with this requirement. *Id.*

96. See Exec. Order No. 13,224, 10, 66 Fed. Reg. 49,079 (Sept. 23, 2001). In light of the threat to national security, the U.S. economy and foreign policy, the Executive Order allows the blockage of property and prohibits transactions with persons noted in the Order and others, who are determined by specified senior government officials, to support terrorism. *Id.*

97. See generally Christopher R. Fenton, *U.S. Policy Towards Foreign Direct Investment Post-September 11: Exon-Florio in the Age of Transnational Security*, 41 COLUM. J. TRANSNAT'L L. 195 (2002) (arguing that the events of September 11 present the Bush administration with the opportunity to fundamentally shift the conceptual baseline employed in the consideration of the term “national security” under the Exon-Florio Amendment). Section 721 of Title VII of the Defense Production Act of 1950, otherwise known as the Exon-Florio

markets to compete internationally, thus contradicting Congress' attempt to increase capital formation in U.S. securities markets.⁹⁸ However, safeguards may be useful in staving off any possibility of far-reaching actions on the part of foreign investors.

Amendment, allows federal government reviews of foreign direct investment for national security concerns. See Exon-Florio Amendment to the 1988 Trade Act, Pub. L. No. 100-418, § 5021, 102 Stat. 1425 (1988) (codified at 50 U.S.C. app. § 2170). Under Exon-Florio, the President has the authority to block or suspend a merger, acquisition or takeover by a foreign entity where there is "credible evidence" that a "foreign interest exercising control might take action that threatens to impair the national security," and other provisions of federal law, excluding the International Economic Emergency Powers Act ("IEEPA") that are inadequate to protect such interests. See Fenton, *supra* note 97, at 199. Fenton states that past presidents have applied Exon-Florio conservatively, officially blocking only one transaction since 1988. *Id.* at 199. However, Fenton states that the war against international terrorism may prompt the adoption of a new conception of national security based on the dangers posed by non-state actors. *Id.* Fenton further argues that such substantial changes in the analytical framework governing the Committee's evaluation of national security considerations relating to proposed mergers, acquisitions and takeovers may generate uncertainty among foreign investors. *Id.* at 247. If the government articulates a shift towards the adoption of a capabilities-based approach to threat assessment, subsequently suggests reinterpretation of enumerated factors, or introduction of new justifications for concern, Exon-Florio could serve as a significant deterrent to foreign direct investment. Fenton further notes that the global economic slowdown and financial disruptions resulting from the terrorist attacks in New York City have already led some executives to question future investment plans in the United States; additional government activity could lead foreign firms to abandon plans to invest in American companies entirely. *Id.* While the Exon-Florio Amendment is not examined further in this Article, the new anti-terrorism legislation discussed *infra* may result in similar uncertainty among foreign investors and serve as a similar disincentive to investment in U.S. securities markets.

98. See Fenton, *supra* note 97, at 248-49 (stating that, in the context of third-party transactions involving allied nations, the consequences could be especially negative as "any signal by the U.S. government that foreign investment, especially from a friendly country, is unwelcome" could decrease investment bound for the United States, as well as the ability of American companies to invest abroad).

III. THE NEED FOR MORE SUBSTANTIAL INVESTOR SAFEGUARDS

A. Efficient Inflows of Investment in the U.S. and Monetary Policy

The efficient free flow of investment within U.S. markets will be difficult to maintain if the government's latitude to freeze assets is not balanced by increased consideration of the constitutionality of such actions. Currently, foreign investment in the United States is a significant part of total nationwide investment.⁹⁹ Much of this capital inflow is due to the comfort foreign investors feel about the security and stability of the U.S. markets and the country as a whole;¹⁰⁰ further, the protections afforded to investors, such as a high level of transparency and mechanisms which limit corruption, add to investor security.¹⁰¹ However, the uncertainty created by

99. Cf. U.S. Department of Commerce, Bureau of Economic Analysis, *Foreign Direct Investment in the United States: Detail for Historical-Cost Position and Related Capital and Income Flows* (2002) (stating that in 2001, direct foreign investment on a historical cost basis in the U.S. is roughly \$1.32 trillion), at <http://www.bea.doc.gov/bea/ARTICLES/2002/09September/0902FDIUS.pdf> (last visited Nov. 15, 2002); see also *infra* notes 102–06 and accompanying text. See generally Elena L. Nguyen, *The International Investment Position of the United States at Yearend 2001* (July 2002) (discussing foreign investment in U.S. markets), available at <http://www.bea.doc.gov/bea/ARTICLES/2002/07July/0702IntINVEST.pdf> (last visited Nov. 15, 2002).

100. *Volcker Speaks: Dollar Retreats Stark Warning on Deficits*, CHI. TRIB., Feb. 27, 1985, at C1.

101. See Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78mm (2001). Issuers meeting the thresholds of sections 12(d) or (g) of the Securities Exchange Act of 1934 must periodically file reports disclosing information requested by the line items of various forms and information deemed material. *Id.* § 78m(a). Corruption is controlled through such rules as 10b-5 promulgated under section 10 of the Securities Exchange Act of 1934 stating:

[I]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (b) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the

summarily seizing assets may smear the strong, fair, reliable, and just image U.S. investment markets currently enjoy.

In 2000, direct investment on a historical cost basis in the U.S. by foreign nations amounted to approximately \$1,238,627,000,000.¹⁰² Total capital inflows into the U.S. during the same year approximated \$281,115,000,000.¹⁰³ In 1995, the U.S. stock market had \$7,980,000,000,000 in total capital.¹⁰⁴ The total foreign investment in the U.S. on a historical basis nearly doubled from 1997 to 2000.¹⁰⁵ Equity capital inflows as a portion of the total capital inflow amounted to approximately \$216,749,000,000 during 2000.¹⁰⁶ This illustrates that the U.S. equity markets are a very substantial draw for capital investment from foreigners.

Foreign investment in the U.S. is extremely important to produce healthy, inflationless economic expansion. Not only did this foreign investment help drive strong returns in U.S. markets, foreign investment also helped to increase U.S. producer output through strong equity valuations and increased capital spending

purchase or sale of any security.

Id. § 78j; see also Derek W. Kaczmarek, *The SEC's Role in the Global Era: How the SEC Will Protect U.S. Investors in Foreign Markets*, 9 IND. J. GLOBAL LEGAL STUD. 529, 533–34 (2002). In discussing the Securities Exchange Act of 1934, Kaczmarek states that “[a]lthough not explicitly stated in the mandate, the SEC is primarily concerned with the protection of U.S. investors, although foreign investors, when trading on U.S. markets, are protected as a byproduct of the actions taken by the SEC to protect U.S. investors.” *Id.*

102. See U.S. Department of Commerce, Bureau of Economic Analysis, *Foreign Direct Investment in the United States: Detail for Historical-Cost Position and Related Capital and Income Flows* (2001), available at <http://www.bea.doc.gov/bea/ARTICLES/2001/09september/0901fdius2k.pdf> (last visited Nov. 15, 2002).

103. *Id.*

104. The National Securities Markets Improvement Act of 1996, H.R. 3005, 104th Cong. (1996), available at <http://thomas.loc.gov/cgi-bin/query/c?c104:/temp/~c104DUtMU> (last visited Feb. 10, 2002).

105. See U.S. Department of Commerce, Bureau of Economic Analysis, *Foreign Direct Investment in the United States: Detail for Historical-Cost Position and Related Capital and Income Flows* (2001) (stating that inflows went from \$681 billion to \$1.238 trillion), available at <http://www.bea.doc.gov/bea/ARTICLES/2001/09september/0901fdius2k.pdf> (last visited Nov. 15, 2002).

106. *Id.*

which matched the growth in consumer demand during the same period.¹⁰⁷ Furthermore, the growing strength of the U.S. Dollar, resulting from excess inflows of foreign currency, helped to keep inflation low by creating higher demand for imports.¹⁰⁸ The higher demand for imports helped to relieve pressures on the supply of domestic goods and services, resulting in an excellent environment from a monetary policy standpoint during the second half of the 1990s.¹⁰⁹ Disrupting the flow of foreign capital through asset seizure could jeopardize the future of this financial environment.

B. Beyond the Capital Markets

The SEC is charged with the duty of making U.S. markets attractive to investors worldwide and thus increasing cash flows through the U.S. capital market.¹¹⁰ Other areas of finance, such as

107. *The Federal Reserve's Semiannual Report on the Economy and Monetary Policy Before the Comm. on Banking and Financial Services, U.S. House of Representatives*, (2000) (statement of Alan Greenspan, Chairman, Federal Reserve Board), available at

<http://www.federalreserve.gov/boarddocs/hh/2000/February/Testimony.htm> (last updated Feb. 17, 2000). "[H]igher stock prices, by lowering the cost of equity capital, have helped to support the boom in capital spending." *Id.* This applies to both personal spending and corporate finance structures. *Id.*

108. *See id.* Greenspan stated:

When productivity-driven wealth increases were spurring demand a few years ago, the effects on resource utilization and inflation pressures were offset in part by the effects of weakening foreign economies and a rising foreign exchange value of the dollar, which depressed exports and encouraged imports. Last year, with the welcome recovery of foreign economies and with the leveling out of the dollar, these factors holding down demand and prices in the United States started to unwind. Strong growth in foreign economic activity is expected to continue this year, and, other things equal, the effect of the previous appreciation of the dollar should wane, augmenting demand on U.S. resources and lessening one source of downward pressure on our prices.

Id. Greenspan, however, failed to explicitly explain the effect of currency trading on the valuation of the dollar. *See id.* Large inflows of foreign currency will inevitably increase supply in the U.S. of these currencies thereby reducing the value of these currencies against the U.S. dollar. *See id.* Furthermore, demand for U.S. dollars abroad to purchase securities denominated in U.S. dollars will also drive up the value of the dollar against other currencies. *See id.*

109. *See id.*

110. SEC ANNUAL REPORT 2001 (2002) (stating that the Securities and

banking, are also important for investors.¹¹¹ Increased liquidity in the cash transfer and payment systems are important concerns for systemic banking safety and soundness.¹¹² Concern over the new anti-terrorism laws, however, may cause foreign resources to instead flow to foreign banks, thereby increasing competition and creating a loss of inflows from foreigners to U.S. affiliated institutions.¹¹³ The net result of these actions may be to lessen another source of capital for domestic lenders.¹¹⁴

C. U.S. Showing Signs of Furthering its Anti-Terrorism Net

Three organizations with no ties to Al Qaeda could be future U.S. targets in the war on terrorism.¹¹⁵ In early February of 2002,

Exchange Commission's "mission has been to administer and enforce the federal securities laws in order to protect investors, and to maintain fair, honest, and efficient markets.").

111. *See id.*

112. *See* Gerald Corrigan, *Are Banks Special?*, FED. RES. BANK MINNEAPOLIS ANN. REP. (1982) (describing the evolution of emerging banking functions with a comparative analysis to other financial institutions), *available at* <http://Woodrow.mpls.frb.fed.us/pubs/ar/ar1982.cfm>.

113. *See* Fenton, *supra* note 97.

114. *See* Corrigan, *supra* note 112 (stating that bank customers typically deposit funds to use the bank as a transaction intermediary and the bank in turn lends a portion of those funds not in use by the depositor to borrowers and concludes that fewer deposits in the U.S. banking system would result in less capital for lending).

115. Walter Pincus, *Tenet Lists Other Groups As Terror Threats*, WASH. POST, Feb. 10, 2002, at A9. In a report to Congress, Central Intelligence Agency Director George Tenet appeared to broaden the Bush administration's definition of international terrorist groups to include organizations that have threatened but not yet acted against U.S. facilities, personnel or interests overseas. *Id.* Specifically:

Tenet named as one threat the Revolutionary Armed Forces of Colombia (FARC), a leftist organization that has not attacked targets inside the United States or Americans abroad. However, he said the FARC "poses a serious threat to U.S. interests in Latin America because it associates us with the government it is fighting against." Another group identified as a possible target in the terrorism war is the Revolutionary People's Liberation Party/Front in Turkey. Tenet said the group "has publicly criticized the United States and our operations in Afghanistan." Intelligence sources added that U.S. intelligence facilities and air bases in Turkey "have been mentioned as being possible terrorist targets." Tenet also identified Islamic Jihad, the Popular Front for the

Central Intelligence Agency Director George Tenet named terrorist organizations that could be the next targets of the U.S. global crackdown.¹¹⁶ But Tenet is not authorized to designate individuals as terrorists under the IEEP asset seizure provision and this action could be the first step towards potential abuse of the new anti-terrorism legislation. According to Tenet, the groups displayed anti-U.S. sentiment and threaten U.S. interests overseas.¹¹⁷ However, many countries, even allied nations, have displayed anti-U.S. sentiment at some point¹¹⁸ and most anything can be interpreted as a threat to the U.S.¹¹⁹ Actions such as these, while not currently abusive, could provide momentum for hesitant foreign investors to back away from U.S. markets and institutions.

IV. APPLICATION AND DEVELOPMENT OF ASSET FREEZING AUTHORITY

A. Executive Order in Response to the Terrorist Attacks

Executive Order 13,224, enacted after Sept. 11, seeks to block property and prohibit transactions with persons who commit, threaten to commit, or support terrorism.¹²⁰ President Bush

Liberation of Palestine and Hamas. These groups traditionally have focused their attacks on Israel. "If these groups feel that U.S. actions are threatening their existence," Tenet said, "they may begin targeting Americans directly."

Id.

116. *See id.* (broadening the definition of terrorist groups to those that have threatened to act against the U.S. and its interests).

117. *See id.*

118. What does anti-U.S. sentiment encompass? For example, a Wall Street Journal article cited recently imposed U.S. tariffs on imported steel caused the European Union to threaten tariffs of its own and incited sharp criticism of Treasury Secretary O'Neill's handling of the subject by other allied nations. *See Phillips & Johnson, supra* note 79.

119. *See id.* What exactly is a threat to the United States? Can the threat be financial or economic in nature? Or, must the threat be related to destruction of physical property or human lives? Does the threat need to be an action or can the threat be verbal in nature? Furthermore, must the threat be imminent, close at hand, or simply possible?

120. *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (blocking property and prohibiting transactions of and with those individuals and

specifically stated:

[G]rave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001, acts recognized and condemned in [United Nation Security Council Resolution] 1368 of September 12, 2001, and [United Nation Security Council Resolution] 1269 of October 19, 1999, and the continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and in furtherance of my proclamation of September 14, 2001, Declaration of National Emergency by Reason of Certain Terrorist Attacks, hereby declare a national emergency to deal with that threat. I also find that because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists. I also find that a need exists for further consultation and cooperation with, and sharing of information by, United States and foreign financial institutions as an additional tool to enable the United States to combat the financing of terrorism.¹²¹

The powers which the President relied upon in making this Executive Order include:

[T]he International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code, and in view of United Nations Security Council Resolution (UNSCR) 1214 of December 8, 1998, UNSCR 1267 of October 15, 1999, UNSCR 1333 of December 19, 2000, and the multilateral sanctions contained therein, and UNSCR 1363 of July 30, 2001,

groups involved in terrorist activities).

121. *Id.* A person, for the purposes of this Order, is defined as an "individual or entity" and an "entity means a partnership, association, corporation, or other organization, group or subgroup" and the term United States person means any United States citizen, permanent resident alien, entity organized under the laws of the United States, or any person in the United States. *Id.* § 3.

establishing a mechanism to monitor the implementation of UNSCR 1333.¹²²

To increase the reach of the Order to the property of more persons, the following relevant provisions are included:

Section 1 . . . all property and interests in property of the following persons that are in the United States or that hereafter come within the United States, or that hereafter come within the possession or control of United States persons are blocked: (a) foreign persons listed in the Annex to this order; (b) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States; (c) persons determined by the [Secretaries] . . . and the Attorney General, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to this order . . . and after such consultation, if any, with foreign authorities . . . [those persons found to] (i) to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism . . . or (ii) to be otherwise associated with those persons listed in the Annex . . . or those persons determined to be subject to . . . this order.¹²³

Next, the following provisions of Section 2 bring certain transactions under the jurisdiction of the Order:

(a) any transaction or dealing by United States persons or within the United States in property or interests in property blocked pursuant to this order is prohibited . . . (b) any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the[se] prohibitions . . . and (c) any conspiracy formed to violate any of the[se] prohibitions. . .¹²⁴

Finally, the President also found certain donations to be

122. *Id.*

123. *Id.* § 1.

124. *Id.* § 2.

prohibited:

I hereby determine that the making of [certain] donations . . . by United States persons to persons determined to be subject to this order would seriously impair my ability to deal with the national emergency . . . and would endanger Armed Forces of the United States that are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances¹²⁵

Hence, the key legal concepts of the Order include: (1) the Declaration of a National Emergency; (2) targeting foreigners and U.S. citizens; and (3) the determination of persons and transactions by the Secretary of State, Secretary of Treasury, and the Attorney General that fall under the Order. Accordingly, neither the Global Relief nor Benevolence International are included in the Annex to the Order or added at any later time.¹²⁶ Presumably, the events triggering the blocking of assets of these two U.S. entities involved their donation of funds to persons designated as terrorists and listed in the Annex.¹²⁷

B. Constitutional Considerations

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. To reach this issue, the first question is whether the subject individual, organization, or nation that is the target of the Executive action has a constitutional presence. The next set of questions involves: (1) whether the Executive is acting in a national emergency or security situation

125. *Id.*

126. *See id.*

127. There may be some question whether these two groups were designated as terrorists under the Executive Order or perhaps their assets were frozen under other criminal laws. For the purposes of this Article, it is assumed that Benevolence International Foundation's and Global Relief Foundation's assets were frozen under the Executive Order.

which permits extraordinary action; (2) whether the Executive is acting in the capacity of head negotiator with foreign nations and individuals in a non-national emergency or security situation; (3) whether the Executive is acting as chief enforcer administering civil and criminal laws enacted by Congress; and finally, (4) whether the Executive is acting solely within the Executive Branch's inherent constitutional authority or whether there was some degree of authorization granted by Congress to supplement the Executive's inherent authority, if any.

When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."¹²⁸ When the President acts in the absence of congressional authorization, he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."¹²⁹ In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or quiescence."¹³⁰ Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."¹³¹

1. Emergency Powers of the Executive and Legislative Branches

The Order's constitutionality is unclear when it is applied to citizens and non-citizens with property in the U.S. This is because

128. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

129. *Id.*

130. *Id.*

131. *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 634).

of the free speech and due process rights involved. Everyday in the United States, U.S. citizens provide funds to those with views opposite to the U.S. Government's, although, funding acts of violence against the U.S. Government and to the detriment of the public safety is altogether a different matter.¹³² Furthermore, depriving a constitutionally recognized person of property without due process is usually a constitutional violation.¹³³ However, Section 10 of the Order specifically states that notice is not required for actions taken pursuant to the Order.

For those persons listed in the Annex to this order or determined to be subject to this order who might have a constitutional presence in the United States, 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 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.¹³⁴

An extreme example of limited freedoms occurred when the Supreme Court upheld the internment of Japanese-Americans during World War II, which left open the possibility for similar action in the future.¹³⁵ In *Korematsu*, the military authorities excluded Japanese from the West Coast area because of the fear of a Japanese invasion and the potential for aid to the Japanese by

132. Cf. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (stating that "imminent lawless action" is not protected under the First Amendment); *United States v. Kosma*, 951 F.2d 549 (3d Cir. 1991) (discussing criminalizing threats against the President).

133. See U.S. CONST. amend. V. ("No Person shall . . . be deprived of life, liberty, or property, without due process of law."). Due process, as discussed *infra*, includes the right to a hearing and notice of that hearing.

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

135. See *Korematsu v. United States*, 323 U.S. 214 (1944). The Court, in this case, applied "the most rigid scrutiny" analysis to an Exclusion Order promulgated by an Executive Order which targeted people of Japanese ancestry. The Court noted that the law must have a definite and close relation to the constitutionally authorized government interest and purpose. *Id.*

U.S. citizens of Japanese descent.¹³⁶ In upholding the constitutionality of the government's action, the Court noted the pressing public necessity, grave imminent danger, and the dire environment of emergency and peril. Furthermore, the Court found the law was proper because it was definite and closely related to the intent of the legislature.¹³⁷ The opinion of the Court ended with the following: "[w]e cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified."¹³⁸ Note, however, that in 1984, reparations were made to the Japanese-Americans who were detained.¹³⁹

Prior to Sept. 11, the idea of such extreme governmental measures to deny fundamental constitutional freedoms would likely have conflicted with the average person's ideals. But after Sept. 11, the mindset may have shifted. The Government may again be forced to take extreme measures if frequent terrorist activities results in increased death tolls and creates fear among the general populace.¹⁴⁰ This, of course, would be the most significant

136. See *id.* at 215–19.

137. See *id.* at 218.

138. *Id.* at 224.

139. See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (overturning the conviction of Korematsu for violating the exclusion order).

140. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, § 352, 115 Stat. 272 (2001). Fortunately Congress addressed the race-based laws issue in § 102 by finding:

(a)(1) Arab Americans, Muslim Americans, and Americans from South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American.

(2) The acts of violence that have been taken against Arab and Muslim Americans since the September 11, 2001, attacks against the United States should be and are condemned by all Americans who value freedom.

(3) The concept of individual responsibility for wrongdoing is sacrosanct in American society, and applies equally to all religious, racial, and ethnic groups.

(4) When American citizens commit acts of violence against those who are, or are perceived to be, of Arab or Muslim descent, they should be punished to the full extent of the law.

(5) Muslim Americans have become so fearful of harassment that many Muslim women are changing the way they dress to avoid becoming targets.

(6) Many Arab Americans and Muslim Americans have acted heroically during the attacks on the United States, including Mohammed Salman Hamdani, a 23-

example of how terrorism diminishes civilization everywhere. Freezing assets is a minor step compared to the ultimate step of depriving liberty depending on degree.

2. Separation of Powers in Foreign Matters

The Separation of Powers in the United States Constitution provides the backdrop against which the Executive Order operates.¹⁴¹ The U.S. Constitution provides that Congress has the power “[t]o regulate Commerce with foreign Nations, . . . [and] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁴² The President, as Chief Executive, puts the laws of the Legislature into action along with other “uncertain” powers.¹⁴³

year old New Yorker of Pakistani descent, who is believed to have gone to the World Trade Center to offer rescue assistance and is now missing.

(b) . . . [I]t is the sense of Congress that—

(1) the civil rights and civil liberties of all Americans, including Arab Americans, Muslim Americans, and Americans from South Asia, must be protected, and that every effort must be taken to preserve their safety;

(2) any acts of violence or discrimination against any Americans be condemned; and

(3) the Nation is called upon to recognize the patriotism of fellow citizens from all ethnic, racial, and religious backgrounds.

Id. § 102.

Thus, the Legislature is not prepared to delegate the sort of power to the Executive Branch exercised against the Japanese in World War II. A reading of this footnote begs one of the major questions of this Article: How much Constitutional protection will Arab Americans and other Americans receive when accused of funding terrorists?

141. See Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 271 (2001) (discussing how the separation of powers is related to the President’s authority to issue executive orders); see also *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) (discussing the general principles underlying the separation of powers).

142. U.S. CONST. art. I, § 8 (granting Congress’s power to regulate commerce with foreign nations).

143. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (discussing the President’s role as chief constitutional officer); see also Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757 (1979)

With respect to foreign entities in the instant matter, it is unlikely that either the President or the Legislature has illegally crossed the constitutional divisions between branches. In this case, Congress delegated the authority, under IEEPA, to the Executive Branch to designate certain entities as terrorists and to freeze their assets.¹⁴⁴ This raises few constitutional problems for the President's Executive Order because the non-delegation doctrine does not come into play in foreign dealings as it does in domestic issues.¹⁴⁵ The U.S. Supreme Court has stated:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims

(discussing the view of maximum Presidential power over execution of the laws).

144. See James J. Salvage, *Executive Use of the International Emergency Economic Powers Act—Evolution Through the Terrorist and Taliban Sanctions*, 10 WTR CURRENTS: INT'L TRADE L.J. 28, 32 (2001) (discussing the scope of authority of the Executive Branch to act under IEEPA); see also Exec. Order No. 12,725, 55 Fed. Reg. 33091 (Aug. 9, 1990) (discussing President Bush's executive order to block and seize the assets of Kuwait and Iraq in preparation of the Persian Gulf War).

145. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936) (discussing the difference in federal power over external affairs and internal affairs); *Goldwater v. Carter*, 444 U.S. 996, 999 (1979) (refusing to review the extent of presidential power to terminate treaty); see also Andrew W. Hayes, *The Boland Amendments and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534, 1536–37 (1988) (discussing the President's balance of power between foreign and domestic affairs); Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 789, 826–27 (1984) (discussing the President's policymaking authority in either domestic or foreign affairs); Judith G. Greenberg, *Legitimizing Administrative Actions: The Experience of the Federal Energy Office*, 51 U. CIN. L. REV. 735, 737–48 (1974) (discussing the legitimacy of administrative action under the non-delegation doctrine).

achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President *a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved*. Moreover, he, not Congress has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.¹⁴⁶

The Court paid deference to the Executive Branch, even though the legislation authorizing the Executive Order may not possess the usual intelligible principles required for most delegations of power.¹⁴⁷ On the other hand, there may be a question as to which branch of government, if any, is constitutionally authorized to take this degree of action. There are certain acts no entity or branch of government can constitutionally undertake to do.¹⁴⁸ There are even fewer actions any entity of government can constitutionally perform if those actions would infringe on the constitutional rights of U.S. citizens or constitutionally protected non-citizens.

146. *Curtiss-Wright Export Corp.*, 299 U.S. at 320 (emphasis added).

147. *See id.* at 321. The court further states:

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action . . . may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration . . . discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed.

Id.

148. Examples of potentially unconstitutional action taken by any entity of government would include: 1) making the practice of any religion in the U.S. illegal; 2) speaking against the U.S. government in any form illegal; or 3) taking property without due process. *See* Fred L. Morrison, *The Liability of Governments for Legislative Acts in the United States of America*, 46 AM. J. COMP. L. 531 (1998) (discussing unconstitutional legislative acts). *But see* U.S. CONST. amend. I (granting freedom of speech, press, religion).

3. The Constitutional Presence of Foreigners

Foreigners who own no property in the United States or in United States financial institutions will not receive due process protections when their assets are frozen abroad unless such protections are granted by Congress.¹⁴⁹ Only foreigners who enter U.S. territory and develop substantial connections with the State will receive constitutional protections.¹⁵⁰ For instance, the Supreme Court awarded an alien due process rights for a contractual business transaction in which two partially constructed ships were confiscated by order of the United States Shipping Board Emergency Fleet Corporation for use in a war effort.¹⁵¹ The Court specifically stated that “alien friends are embraced within the terms of the Fifth Amendment.”¹⁵² The Court based this notion on a Congressional statute recognizing other nation’s citizens’ due process rights at the time of the confiscation.¹⁵³

The Supreme Court has held that, in times of war, foreign nationals of an enemy nation have no due process rights with respect to property taken in accordance with a statutory scheme. “There is no doubt that under the war power . . . the United States, acting under a statute, may vest in itself the property of a national of an enemy nation. Unquestionably to wage war successfully, the

149. See *People’s Mojahedin Org. of Iran v. United States Dept. of State*, 182 F.3d 17, 22 (1999) (stating that “[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise . . .”).

150. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (holding that respondent did not enjoy protection against unreasonable search and seizure because he did not develop substantial connections with the United States).

151. See *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491–92 (1931) (finding that under the Fifth Amendment and Act of June 15, 1917, petitioner was entitled to just compensation for the vessels taken by United States).

152. *Id.* at 491–92 (quoting Justice Hughes).

153. See *id.* at 488–91. The statute the Court referred to reads as follows:

Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction.

28 U.S.C. § 261 (1917).

United States may confiscate enemy property.”¹⁵⁴ With regard to property mistakenly seized from non-enemy aliens, the Supreme Court found that the Constitution only required an opportunity to contest the seizure for non-enemy aliens after the seizure occurred.¹⁵⁵

The answer is less clear when a citizen of a nation not at war with the U.S., who voluntarily engages in contacts with the U.S. but never enters U.S. jurisdiction, claims due process rights. The Supreme Court found that due process rights may begin vesting,¹⁵⁶ but the Executive Branch can eliminate those rights if it wishes.¹⁵⁷ In the interest of foreign policy, the Executive can deny due process and thus any rights a past owner may have to confiscated property.¹⁵⁸ The President’s authority to conduct foreign policy

154. *Silesian-American Corp. v. Clark*, 332 U.S. 469, 475 (1947). Of course, war was never declared in the situation at hand. This lack of declaration, besides having property implications, may also impact prisoners currently held in Cuba (holding the foreigners in Guantanamo Bay also lessens the ability of them to gain a constitutional presence). Prisoners of war possess rights different than those possessed by criminals. If war were declared, higher well-established authorities would trigger allowing the government to unquestionably engage in a wider array of activity. On the other hand, the foot soldiers would be treated more like resources in a larger situation in which they have little knowledge and thus less latitude for penalty assessment would be utilized. As criminals, all of the foot soldiers may be treated as conspirators with first hand knowledge and specific intent and thus they may be assessed a higher penalty. The situation here is unlike any wars of the past where a nation state is involved. Thus a new constitutional framework somewhere in between may need to be established that treats the situation like a war and all of the individuals involved as criminals. The danger arises when it comes time to decide which individuals were involved in the war like situation and which were not. National identities make this task more objective and simpler.

155. *See Stoehr v. Wallace*, 255 U.S. 239, 246 (1921). The Court further explains that if the claimant prevails, the property is returned to him. *Id.* at 246.

156. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). The Court, quoting *Johnson v. Eisentrager*, 339 U.S. 763 (1950), stated “the alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society.” *Verdugo-Urquidez*, 494 U.S. at 269.

157. *Verdugo-Urquidez*, 494 U.S. at 269.

158. *See United States v. Pink*, 315 U.S. 203, 222–23 (1942). Quoting *United States v. Belmont*, 301 U.S. 324 (1937), the Court stated:

The conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; that the propriety of the

supercedes the reach of the Fifth Amendment to aliens outside U.S. territory regardless of enemy status.¹⁵⁹

In the situation at hand, Congress has delegated to the President the authority to:

Investigate . . . 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.*¹⁶⁰

Therefore, the President can constitutionally void the due process rights of any foreigner lacking constitutional presence upon the declaration of a national emergency. Executive Order 13,224 does just that.¹⁶¹ Thus, there are no protections for the

exercise of that power is not open to judicial inquiry; and that recognition of a foreign sovereign conclusively binds the courts and “is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence.”

Id. The Court then went on to say “[t]he powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees,” referring to officially recognizing the Russian government and thus whether due process rights flow to Russian Nationals before the Court. *See id.* at 229. The Court further stated:

That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy, which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the court.

Id. Thus the Court is opining that not only can the President determine who can Constitutionally relate to the U.S. but also how to make that determination. *See id.*

159. *See id.* at 230 (quoting THE FEDERALIST No. 64). “All constitutional acts of power, whether in the executive or in the judicial department have as much legal validity and obligation as if they proceeded from the legislature.” *Id.*

160. 50 U.S.C. § 1702 (2001) (citing the Presidential Authorities provision of the International Emergency Economic Powers Act) (emphasis added).

161. *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). President Bush declared a national emergency to deal with the acts of terrorism

constitutionally absent foreigner's property or free speech.

4. U.S. Citizens and Those with a Constitutional Presence —
National Emergencies, Separation of Powers, Free Speech, and Due
Process

In a national emergency, the constitutional analysis of governmental action against U.S. citizens and non-citizens with a constitutional presence requires balancing the degree of the national emergency against the types of constitutional freedoms abridged.¹⁶² The question then becomes whether the Executive action is tailored to the compelling governmental interest in achieving the action.¹⁶³ Older precedent has involved the deprivation of liberty and the deprivation of the freedom of speech.¹⁶⁴ Thus, the threshold question is not what kind of constitutional freedom is limited, but rather focuses on the individual's constitutional relation to the U.S. and the severity of the situation which precipitated the government action to limit the constitutional freedom.

The following cases give a view of the historical context of the national emergency events which may legally serve to limit constitutional freedoms and factors that may be considered in future Supreme Court determinations, regardless of whether the situations involve denial of free speech or deprivation of property. These cases provide the foundation upon which governmental action, taken to limit a U.S. citizen's constitutional freedoms in a

of Sept. 11 and the threat of future acts of terrorism on the United States. *Id.*

162. See, e.g., Steven J. Bucklin, *Dedication to the Small Town Attorney: To Preserve These Rights: the Constitution and National Emergencies*, 47 S.D. L. REV. 85, 96 (2002) (discussing how the President and his administration are approving limits on constitutional freedoms during a national emergency).

163. See, e.g., Melissa K. Mathews, *Current Public Law and Policy Issues: Restoring the Imperial Presidency: An Examination Of President Bush's New Emergency Powers*, 23 HAMLINE J. PUB. L. & POL'Y 455, 462-80 (discussing the importance of a balance between law enforcement and civil liberties during a national emergency and the protection on the nation of abuse of the President's power).

164. See *infra* note 204 (discussing violations of First Amendment rights where the government does not establish a knowing affiliation with an unlawful organization and an intent to further illegal aims).

national security will be scrutinized. The cases may also give some insight into Global Relief's and Benevolence International's claim (both U.S. citizen corporations) about the violation of their freedom of speech and the taking of their property without due process.

In *New York Times Co. v. United States*, the Government sought to enjoin the New York Times from publishing particular historical facts of the Vietnam War because of national security concerns.¹⁶⁵ In ruling against the Government, the Supreme Court stated that the Government bears a heavy burden in justifying this prior restraint.¹⁶⁶ Important factors the Court considered included the lack of imminent harm, legislative mandate and the lone action by the Executive Branch.¹⁶⁷

The concurring opinions of the Justices enunciated varied considerations that justify free speech limitations. Justices Black and Douglas agreed there was no situation in which the publication of news could ever be enjoined.¹⁶⁸ Justice Brennan wished to require the government to establish that the publication will "inevitably, directly, and immediately cause" a harm akin to "imperiling the safety of a transport...at sea" before an injunction would be granted.¹⁶⁹ Justices Stewart and White stated that the publication of the information has to "surely result in direct, immediate, and irreparable damage to our Nation or its people."¹⁷⁰ Justices Stewart and White did not set forth a standard beyond stating that prior restraints of speech require unusually heavy justification.¹⁷¹ White suggested a very heavy burden, but

165. See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

166. See *id.* at 723 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

167. See *id.* at 715-30.

168. See *id.* at 714-20 (Black, J., concurring). Justice Black stated "I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment." *Id.* at 714-15.

169. *Id.* at 726-27 (Brennan, J., concurring).

170. *Id.* at 730 (Stewart, J., concurring).

171. See *id.* at 731 (White, J., concurring). Justice White stated "I agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints

provided no description of the justification or what that burden might be.¹⁷² White was also worried about the power of the Executive Branch to suppress the freedom of speech and posited that the injunction might be allowed if this were congressional action instead of presidential.¹⁷³ Thus, the Court had serious concerns about the Executive operating alone without the passage of legislation giving the Executive authority to act.¹⁷⁴

On the other hand, Justice Harlan was worried about the separation of powers between the Executive and Judiciary.¹⁷⁵ In his dissent, Harlan noted that foreign affairs and national security issues are in the purview of the President.¹⁷⁶ Harlan concluded that the Judicial Branch should give deference to the President because the Judiciary should not be involved in such matters.¹⁷⁷ But Harlan also desired the Secretary of State, the Secretary of Defense or other similarly concerned head of the Executive Branch to detail why the situation involved national security concerns.¹⁷⁸

Therefore, while the above case does not discuss the removal of property from those with a "constitutional presence," the case provides the backdrop for constitutional law development in this area. The case discusses concerns in national security and national emergency situations when the Government limits constitutional freedoms and due process protection.¹⁷⁹ Many of the Justices, in

in circumstances such as these." *Id.*

172. See *id.* at 731-40; see also Richard T. Kaltenbach, *Fabricated Quotes and the Actual Malice Standard*: *Masson v. New Yorker Magazine*, 41 CATH. U. L. REV. 745, 751 (1992) (discussing Justice White's opinion).

173. See *id.* at 731 (stating that Congressional action may have been allowed).

174. See *id.* (arguing that the Executive needed Congressional approval to act).

175. See *id.* at 756-58 (arguing that the judicial branch has a duty to evaluate Executive decisions that may infringe on the First Amendment and stating that the President cannot act alone in making decisions which may affect fundamental constitutional rights).

176. See *id.* at 757-58 (claiming that the Judicial Branch should not generally meddle into foreign policy decisions made by the Executive and Legislative Branches).

177. See *id.* at 758 (discussing the Executive Branch's enumerated powers).

178. See *id.* (claiming that Senior Executive Officials are more suited to evaluate foreign policy decisions than the judicial branch).

179. *Id.* (discussing the Court's concerns over government imposed limitations

both the majority and dissent, noted that exceptional restraints on free speech may be permissible in order to prevent a breach of national security or some other distinct, immediate and significant emergency.¹⁸⁰ Under this analysis, the congressionally-granted authority relied upon to freeze assets in an emergency situation would likely pass constitutional muster. Furthermore, the Legislature and the Executive crafted their anti-terrorism funding orders in a manner which embraced national security themes and involved senior level cabinet members in the decision-making process likely to alleviate the concerns of jurists such as Justice Harlan.

The *New York Times Co.* case discussed above appears to be the last Supreme Court Opinion to address the deprivation of constitutional freedoms in a national security or emergency situation. In *United States v. Progressive*, however, the District Court of Wisconsin addressed the Government's desire to restrict the publication of how to build a hydrogen bomb.¹⁸¹ This case may be the last case to address this issue in Federal Court and, although not binding on the Supreme Court, it does shed light on the constitutional status of the President's actions based on legislative mandate.

In *Progressive*, unlike *New York Times Co.*, there was a statute authorizing injunctions by the Atomic Energy Commission when disclosure of "restricted data" (including non-classified information) would give the publisher reason to believe that "such data will be utilized to injure the United States or to secure an advantage to any foreign nation."¹⁸² The purpose of the statute was to prevent other nations from becoming nuclear powers.¹⁸³ The

on freedom of speech during national emergencies).

180. See *id.* at 725-41 (citing the majority opinion of Justices Brennan, White, and Stewart); see also *id.* at 748-63 (citing the dissenting opinion of Justice Harlan, Chief Justice Burger, and Justice Blackmun).

181. See *United States v. Progressive, Inc.*, 467 F. Supp. 990, 991 (W.D. Wis. 1979) (addressing the government's desire to restrict a publication detailing instructions to build a hydrogen bomb).

182. *Id.* at 994 (explaining the potential national security hazards involved with the publication of information detailing the methods for constructing a nuclear weapon).

183. See *id.* at 994-95 (outlining the purpose of the Atomic Energy Act).

Secretary of Defense and the Secretary of State expressed the importance of this injunction.¹⁸⁴ Both believed grave, direct, immediate, and irreparable harm to the United States would result from the article's publication.¹⁸⁵

The District Court balanced the risk of harm against the Freedom of Speech. In upholding the injunction, the Court stated that "[a] mistake in ruling against the Progressive will seriously infringe cherished First Amendment rights . . . [while] a mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot."¹⁸⁶ The Court also noted that the case was distinguishable from *New York Times Co.* because *New York Times Co.* involved historical data on events which occurred three to twenty years ago.¹⁸⁷ *New York Times Co.* also involved national embarrassment rather than national security and most importantly, a specific statute or grant of authority to the President was involved in *Progressive*.¹⁸⁸

A broad view of the case and the development of the preceding doctrine reveals the judicial concern over individual rights and the effectiveness of government in emergency situations, along with congressional grants of authority to the Executive.¹⁸⁹ Thus, the government's actions are less likely to prevail if the negative effect on government emergency activities, resulting from the exercise of constitutional rights by the citizenry, is small in magnitude.¹⁹⁰ However, even if the level of financial property ownership is small, that may not necessarily mean the magnitude of

184. *Id.* at 994 (laying out the government's reasons for suppressing publication of the information).

185. *See id.* at 995.

186. *Id.* (claiming that allowing dangerous material, such as information on the construction of an atomic bomb, endangers the American citizenry and arguing that the destruction of American society would also extinguish the constitutional rights at issue in this case).

187. *See id.* at 994 (showing that this case involves a present danger while *New York Times Co.* represented a danger which had already become moot).

188. *See id.* (claiming that this case deals with American security while *New York Times Co.* was simply an attempt by the government to save face).

189. *See id.* (detailing Congressional and Executive power over free speech during a national emergency).

190. *See id.* (contrasting this case with *New York Times Co.*).

the potential negative effect is low. If left to act freely, all of the targets of asset freezing taken in the aggregate¹⁹¹ could provide a level of funding which results in a high magnitude of harm.

Based on past Al Qaeda actions, the potential harm is the deaths of thousands of people rather than the proliferation of nuclear weapons which could have resulted from the *Progressive* decision.¹⁹² On the other hand, the U.S. recently found evidence that the government believes links Al Qaeda to the possible acquisition of atomic weapons.¹⁹³ Also, based on Al Qaeda's track record, the probability of attack remains high so long as the group has members and funding; therefore, it is not a matter of whether Al Qaeda will act again, but rather when they will attack and how great the resulting harm will be.¹⁹⁴

In 1981, the Supreme Court upheld an executive order issued by President Reagan under the authority of IEEPA that nullified judgment awards to U.S. citizens against the Nation of Iran.¹⁹⁵ In that case, which involved a hostage emergency, the Court likened the President's actions to negotiations with a foreign nation.¹⁹⁶

191. See *Wickard v. Filburn*, 317 U.S. 111, 128–33 (1942). The U.S. Supreme Court held that when all of the wheat produced by farmers for personal use is taken in the aggregate, the resultant harm to interstate commerce justifies the enactment of a statute limiting any wheat production by farmers, even though a specific farmer's wheat may never enter interstate commerce. *Id.*

192. See Bumiller, *supra* note 12 (illustrating the desire of Bin Laden to continue his terrorist campaign against the United States and its citizens).

193. See Peter Baker, *Fears Prompt U.S. to Beef Up Nuclear Terror Detection: Pakistani Scientist Who Met Bin Laden Failed Polygraphs, Renewing Suspicion*, WASH. POST, Mar. 3, 2002, at A1. A "dirty bomb" is a conventional explosive device surrounded with radioactive material such that upon explosion, the radioactive material is strewn about. *Id.* Baker states that government officials have found evidence suggesting that Al Qaeda has tried to purchase nuclear weapons. *Id.*

194. The first bombing of the World Trade Center, the bombing of the U.S.S. Cole, the bombing of the U.S. Embassies, the destruction of the World Trade Center, the hijacking of planes, and the bombing of the Pentagon, amongst other activities, speak volumes about the types and growing levels of harm to be expected from this group. See *America Responds to Terrorism*, at <http://www.whitehouse.gov/response> (last visited Nov. 15, 2002).

195. See *Dames & Moore v. Reagan*, 453 U.S. 654 (1981) (illustrating how the Court will defer to the Executive in most foreign relations matters).

196. See *id.* at 688 (equating a hostage negotiation with a foreign country to

President Regan's order is unlike President Bush's order, which seeks to prevent individuals, some of whom are U.S. citizens, from attacking the U.S. The petitioners in the Iran case argued that the executive order nullifying the claims amounted to a taking of property without due process. The Court, however, declined to review the issue, noting that an international tribunal was to hear claims against Iran by U.S. nationals as part of the negotiations.¹⁹⁷

What is also interesting about the present case is the Executive's grant of wide latitude and discretion under IEEPA, because the Court noted that IEEPA was originally intended to allow blocking of a foreign country's assets as a bargaining chip in international negotiations.¹⁹⁸ In the present national emergency situation, the Executive is not only blocking the assets of foreign individuals and U.S. citizens, but also relying heavily on IEEPA to do so. There are no negotiations in the future between these individuals and the President: the Executive simply wishes to stop these individuals from acting. Hence, the current framework utilizing executive orders in a national emergency situation is not well suited to situations involving nationals from numerous countries with financial property in U.S. institutions and thus leaves unanswered the question of the constitutionality of President Bush's actions.

1. The Limitation of Speech

Even if the Supreme Court views the funding of specific activities by Global Relief and Benevolence International as protected, the Executive's action denying this speech may still

foreign policy decisions where the Executive has deferential authority).

197. *See id.* at 688-89 (declining to review whether the President's actions violated the Constitution's Taking Clause).

198. *See id.* at 673 (quoting *Propper v. Clark*, 337 U.S. 472, 493 (1949)). The majority opinion states:

This Court has previously recognized that the congressional purpose in authorizing blocking orders is 'to put control of foreign assets in the hands of the President.' Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country.

Id.

withstand scrutiny. By listing groups as terrorists and blocking anyone from funding those groups, the government has placed a prior restraint on specific types of content of free speech. This restriction on speech is not a curtailment of content neutral speech but of specific speech which requires the highest of protections from government interference.¹⁹⁹ However, if the Executive decides to pursue this type of speech as a criminal matter, then a national emergency declaration is not required.²⁰⁰

This begs the question of whether funding a political group is encompassed by the right to free speech. Some members of Congress believe that limiting campaign contributions is an infringement of this right. The U.S. Supreme Court stated that:

[C]ontributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voice is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.²⁰¹

Therefore, funding a group whose goal is to destroy the United States would be speech in support of that group's political cause. The term political is defined as:

[P]ertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as political theories; of or pertaining to exercise of rights and privileges or the influence by which individuals of a state

199. See *Hess v. Indiana*, 414 U.S. 105 (1973) (holding that speech that is not directed to any person or group of persons and unlikely to produce imminent disorder, is protected under the First Amendment).

200. See *id.* (illustrating that the Court does not require a national emergency for Congress to criminalize specific speech).

201. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985) (holding that campaign contributors exercise their constitutionally protected right to free speech, under First Amendment, contributing to political campaigns).

seek to determine or control its public policy; having to do with organization or action of individuals, parties or interests that seek to control appointment or action of those who manage affairs of a state.²⁰²

There is little doubt that funding a terrorist organization with a political agenda is protected free speech. Therefore, outside of a criminal prosecution, national emergency and congressional authorization would likely have to be present for the Executive action to stand.

Alternatively, the restraint may be considered a criminal enforcement action, which, to be upheld, would require the government to have a compelling interest and demonstrate that the speech was undertaken to knowingly commit unlawful acts.²⁰³ In the current situation, it is not enough for the government to allege that charities provided funding for terrorist groups or that money from the charities actually went to terrorists. “[G]uilt by association alone, without [establishing] that an individual’s association poses the threat feared by the Government,” is an impermissible basis upon which to deny First Amendment rights.²⁰⁴ “The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and a specific intent to further those illegal aims.”²⁰⁵

Requiring the Government to show specific intent is a more difficult burden for the Government to meet.²⁰⁶ The speech

202. BLACK’S LAW DICTIONARY 1158 (6th ed. 1990).

203. See *Watts v. United States*, 394 U.S. 705, 707 (1969) (“The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.”); see also *United States v. Kosma*, 951 F.2d 549, 553–59 (3d Cir. 1991) (discussing criminalizing threats against the President); Cf. *Home Box Office, Inc. v. Fed. Communications Comm’n*, 567 F.2d 9, 49 (D.C. Cir. 1977) (stating that the governmental interest was not sufficiently substantial to justify limiting free speech, and was more intrusive than necessary to further that interest).

204. *Healy v. James*, 408 U.S. 169, 186 (1972) (outlining the need for substantial evidence to link the individual to the threat in order to circumvent First Amendment rights).

205. *Id.* (detailing the government’s burden of proof).

206. See U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and

resulting from the utilization of financial property is the constitutional freedom being deprived. But the Executive Order does not require a showing of intent to freeze assets.²⁰⁷ Thus, the Order may be unconstitutional unless other factors, such as a national emergency and proper congressional authorization, come into play.²⁰⁸ If intent can be proven, then the Executive Order would be unnecessary because criminal enforcement measures could be taken.

5. Due Process Requires the Right to Confront Evidence

The right to due process, with regard to the deprivation of property or restrictions on free speech, means that the individual has the right to a hearing on the issue.²⁰⁹ For those with a constitutional presence, procedural due process typically involves the presentation of witnesses and other evidence by the adversary in an open formal setting.²¹⁰ The defendant then has the

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 defense.

Id.

207. Eichenwald, *supra* note 51 (detailing the government action to freeze Al Qaeda assets).

208. See *Korematsu v. United States*, 323 U.S. 214, 220 (1944) (upholding the government's exclusion of the Japanese from the West Coast area because of the public necessity and grave imminent danger). The Court went on to state that the President acts with the greatest authority when authorized by Congress. See *id.* at 224–25.

209. See *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)). “Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.” *Id.* The Court has allowed outright seizures before notice and hearing in situations involving immediate harm. See *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29, 31 (1928) (involving the seizure of assets in a bank failure). The Court concluded, in this case, due process was not denied, but temporarily delayed. *Id.*

210. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170–72 (1951). Justice Frankfurter's concurring opinion (later cited and affirmed by a majority in cases such as *Fuentes*, 407 U.S. at 81) states:

[T]he heart of the matter is that democracy implies respect for the elementary

opportunity to confront and overcome this evidence²¹¹ and if successful, shift the burden back to the opposition.²¹² Under the new anti-terrorism legislation, there is no due process protection because there is no opportunity for the defendant to confront any classified evidence used to designate an entity as a terrorist.²¹³

As previously noted, a U.S. citizen's constitutional rights may be limited in national emergency situations.²¹⁴ On the other hand, the constitutional right to confront witnesses and other evidence by the accused is basic to freedom. To limit this freedom is to deny access to all other constitutional freedoms, including freedom of speech, right to just compensation for a governmental taking of property, or the right to equal protection.²¹⁵ Thus, this "on-ramp" to constitutional freedom is at least as fundamentally significant as all other freedoms which rely upon its existence.

In a situation where the government is trying to deny a constitutional freedom in a national emergency situation, or to deny liberty in a criminal free speech situation, a right to due process normally exists. Justice White stated:

[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except

rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . [n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Id.

211. See *id.* at 170 (arguing that democracy requires respect for the rights of men and fairness requires the opportunity to confront evidence presented against oneself).

212. See MCCORMICK ON EVIDENCE § 337 (J. Strong 5th ed. 1999) (stating that "the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence.").

213. See *infra* Part IV.C.

214. See *supra* notes 139, 208 and accompanying text (stating that national emergency justified the exclusion of the Japanese from the West Coast).

215. William Van Alstyne, *Cracks in "The New Property:" Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487 (1977) (stating that the Government must sustain the burden of defending any abridgement of freedom from arbitrary adjudicative procedures, even when seeking to subordinate other freedoms, such as speech or privacy).

pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee."²¹⁶

Even "temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection."²¹⁷

Under this interpretation, the right to due process is integral to the right to property, life, and liberty. One may then argue that if liberty and property can be limited by national emergencies in the past, so too can due process protections. But the Court has rejected this proposition, stating that the Legislature, and presumably the Executive, cannot take away this right because it is constitutionally guaranteed.²¹⁸

C. Specific Legislative Authorities Relied upon by Executive Order 13,224

1. United Nations Treaties

The International Convention for the Suppression of the Financing of Terrorism ("Convention")²¹⁹ was ratified by Congress on June 26, 2002 but was signed by the United States in 1999.²²⁰

216. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (holding that the Due Process Clause requires that an employee that has a constitutionally protected property interest in his employment be given some kind of hearing prior to discharge) (quoting *Arnett v. Kennedy*, 416 U.S. 134 (1974)).

217. *Connecticut v. Doe*, 501 U.S. 1, 12 (1991) (holding that a Connecticut statute allowing prejudgment attachment without prior notice or hearing violates due process rights).

218. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905) (holding that legislatures may not pass laws depriving citizens of their due process rights).

219. G.A. Res. 109, U.N. GAOR, 54th Sess., at 3, U.N. Doc. A/Res/54/109 (1999) (adopting the International Convention for the Suppression for the Financing of Terrorism).

220. *See* Press Release, U.S. Department of State, Enactment of

The Convention provides a very broad definition of blockable “funds” and would even reach hawala if proof of a transaction involving terrorists could be found.²²¹ Article 1 provides the definitions for key terms, such as “funds,” while Article 2 defines the covered persons under the Convention:

Article 1

1. “Funds” means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.²²²

Implementing Legislation for UN International Terrorism Conventions (June 25, 2002) (stating the President signed into law enacting legislation for the ratified International Convention for the Suppression for the Financing of Terrorism), at <http://www.state.gov/p/io/rls/rm/2002/11436.htm>.

221. G.A. Res. 109, *supra* note 219, at 3 (defining “funds” for the purposes of the Convention).

222. *See id.*

Article 2

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.²²³

The Convention provides that adopting parties must construct domestic laws and regulations necessary to proportionately punish those responsible for the crimes and make efforts to bring the perpetrators under the adopting nation's jurisdiction.²²⁴ The Convention addresses those who commit terrorist acts as well as those who contribute to the commission of terrorist acts.²²⁵ The agreement also provides mechanisms for asset forfeiture.²²⁶ Article 9 and Article 12 provide teeth to the Convention by allowing the extradition of alleged terrorists and by requiring mutual assistance between states over criminal investigations.²²⁷ Unfortunately,

223. See *id.* art. 2 (defining what acts constitute a violation of the Convention).

224. See *id.* art. 4–5 (stating what measures adopting states must take under the Convention).

225. See *id.* art. 4–6 (further stating implementing measures states must adopt under the Convention).

226. See *id.* art. 6 (requiring each party state to take measures to ensure criminal acts under the Convention are never justified by any reasons).

227. See *id.* art. 9, 12 (requiring a state to refuse to cooperate in the investigation and extradition process under certain circumstance). Article 9(2) provides, in the relevant part:

Article 15 of the Convention significantly lessens the strength of Articles 9 and 12 by stating:

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or *political opinion* or that compliance with the request would cause prejudice to that person's position for any of these reasons.²²⁸

Essentially the Convention provides persuasion for the adopting party to take action against terrorists. Now that it has been adopted, the multilateral treaty buttresses the U.S.'s current asset freezing structure. The United States is one of 132 signatories, and one of the fifty-five parties to the agreement.²²⁹

Other United Nations authorities cited in Executive Order 13,224 include various resolutions aimed at the Taliban. President Bush executed the Order in conformity with various United Nations Security Council resolutions ordering the Taliban to stop cultivating opium and other activities which are used to fund terrorist actions.²³⁰ Later resolutions recognized the growing

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

Article 12(4) provides:

4. Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5.

Id. art. 9.

228. *Id.* art. 15 (emphasis added) (permitting a state to refuse to cooperate in the investigation and extradition processes under certain circumstances).

229. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999 (listing all signatories and party states), *available at* http://untreatat.un.org/ENGLISH/Status/chapter_xviii/treaty11.asp (last visited Nov. 15, 2002).

230. See S.C. Res. 1214, U.N. SCOR, 3952d mtg., U.N. Doc. S/PV. 3952 (1998) (demanding that the Taliban cooperate in creating a fully representative

support of terrorists by the Taliban and called on member states to freeze Taliban funds and assets.²³¹ More recent resolutions called on nations to halt arms sales to the Taliban and freeze the financial assets of Osama Bin Laden and Al Qaeda.²³² The final resolution set out mechanisms to better monitor the deteriorating situation in Afghanistan.²³³

2. Antiterrorism and Effective Death Penalty Act of 1996

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) includes many of the same features as IEEPA, but it is not as broad in application.²³⁴ But compared with IEEPA, AEDPA is more constitutionally infirm. Once designated under AEDPA, the alleged terrorist’s assets are frozen but not those of affiliates or fund contributors as is permissible under the Executive Order.²³⁵ In addition, AEDPA only authorizes the designation of non-citizens as terrorists.²³⁶ Furthermore, the Secretary of State

government in Afghanistan, stop providing sanctuary and training for terrorists, and that the Taliban stop participating in drug trafficking and other terrorist activities).

231. See S.C. Res. 1267, U.N. SCOR, 4051st mtg., U.N. Doc. S/PV. 4051 (1999) (asking all states to deny permission for Taliban aircraft to take off and land in their territory, as well as freeze all Taliban funds until the Taliban turns over Bin Laden).

232. See S.C. Res. 1333, U.N. SCOR, 4251st mtg., U.N. Doc. S/PV. 4251 (2000) (demanding the Taliban to comply with previous resolutions and deciding that member states should prevent the supply, sale and transfer of arms to the Taliban, as well as freeze the assets of Bin Laden and Al Qaeda).

233. See S.C. Res. 1363, U.N. SCOR, 4352d mtg., U.N. Doc. S/PV. 1363 (2001) (requesting the Secretary General to establish a mechanism to monitor the implementation of measures imposed by prior resolutions and to report and make recommendations of any violations of the measures).

234. 8 U.S.C. § 1189 (2001).

235. See *id.* (establishing the designation of foreign terrorist organizations and the procedures to be followed once designation has occurred).

236. See *id.* § 1189(a)(2)(C) (authorizing the freezing of assets of any foreign organization designated as a terrorist organization after proper notification). AEDPA states:

Upon notification under paragraph (2)(A)(i), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either

need not present evidence in the traditional sense. Opposing counsel can request evidence in the matter but it is confined to what the Secretary of State presents in the administrative record.²³⁷ Thus, the Secretary need not present exculpatory or weak evidence to a judge or jury.²³⁸

AEDPA does not require secret evidence, relied upon by the Secretary, be produced to opposing counsel.²³⁹ The statute provides: “[t]he Secretary may consider classified information in making a designation under this subsection. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review.”²⁴⁰ Certain members of Congress and the Judiciary can review this sensitive information.²⁴¹

If someone has due process rights, this person would normally be given the opportunity to confront the evidence against them.²⁴² Under AEDPA, this person does not have such an opportunity. Hence, the statute constitutionally works best from a prosecutorial standpoint if foreigners with little or no connection to the United States are involved and therefore have little or no right to due process.²⁴³ President Bush did not rely on this Act when issuing the

the Secretary of the Treasury, Act of Congress, or order of court.

Id. § 1189(2)(A)(i).

237. *See id.* § 1189(b)(2) (defining the basis of judicial review for the designation as a foreign terrorist organization).

238. *See id.* (stating that judicial review of the designation as a foreign terrorist organization shall be “based solely upon the administrative record . . .”).

239. *See id.*

240. *See id.* § 1189(a)(3)(b) (stating that the Secretary of State may not be required to disclose classified information that was used in the decision to designate an organization as a foreign terrorist organization).

241. *See id.* § 1189(b)(2) (stating that the Government may submit classified information used in the designation process to the Judiciary for ex parte and in camera review).

242. *See supra* notes 209–11 and accompanying text (stating that an individual’s constitutional due process rights require the opportunity to confront the evidence).

243. *See* 8 U.S.C. § 1189 (b) (defining the time period for judicial review of designation as a foreign terrorist organization as well as the basis and scope of the judicial review). The Judicial Review portion of the statute provides:

(1) In general. Not later than 30 days after publication of the designation in the

Executive Order, but President Clinton relied on this statute to freeze assets related to Palestinian terrorist organizations.²⁴⁴ Conceivably, the Act could be used for purposes similar to the current situation.

3. U.S. International Economic Emergency Powers Act

IEEPA has broad application with respect to the types of property involved and the magnitude of rights that can be stripped from property owners.²⁴⁵ More specifically, the affected property is:

Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit.

(2) Basis of review. Review under this subsection shall be based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation.

(3) Scope of review. The Court shall hold unlawful and set aside a designation the court finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

(D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), or

(E) not in accord with the procedures required by law.

Id.

244. See Bill Miller & Thomas W. Lippman, *2 Groups Appeal U.S. Designation As Terrorist Organizations*, WASH. POST, Mar. 14, 1999, at A2 (discussing two groups that have appealed their designation as a foreign terrorist organization and subsequent freezing of assets to the D.C. Circuit of the U.S. Court of Appeals).

245. See 50 U.S.C. § 1702 (2001) (discussing the authority granted to the President if he declares a national emergency based on any unusual and extraordinary threat to the national security, foreign policy or economy of the United States). The statute provides the following:

(a)(1) At the times and to the extent specified in section 202 [50 USCS § 1701], the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involved any interest

[A]ny property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that [the President] determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right title, and interest in any property so confiscated shall vest, when as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the

of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States;

(B) see above in the Executive Order section.

(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right titles, and interest in any property so confiscated shall vest, when as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this title [50 USCS § 1701 et seq.] shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this title, or any regulation, instruction, or direction issued under this title.

Id.

United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.²⁴⁶

The property of U.S. citizens intended for donation, such as food, clothing or medicine, can be frozen if the President determines it would seriously hamper efforts to deal with the declared national emergency or endanger armed forces.²⁴⁷ Thus, the statute's definition of property that can be frozen is so broad that an extensive section is devoted to exclude from its coverage the import and export of property such as films, publications, photographs, artworks and compact disks.²⁴⁸ The statute is somewhat unique in that it brings under its jurisdiction documentation related to the frozen assets,²⁴⁹ which allowed the FBI to raid alleged terrorist offices of the Global Relief once the group was designated as a potential terrorist.²⁵⁰

But in balancing personal rights against sovereign rights, the constitutionality of IEEPA is questionable when applied to U.S. citizens and certain foreign individuals. First, judges may review classified materials through an *in camera* or *ex parte* review, but there is no explicit or implied right to judicial review.²⁵¹ The defendant does not have the ability to confront "classified" evidence.²⁵² Second, there is no specific authority to freeze the financial property of U.S. citizens as there is for freezing the assets of foreign nations and citizens. Third, there is no time limitation

246. *Id.* § 1702(a)(1)(C) (stating the type of property susceptible to seizure under IEEPA).

247. *See id.* § 1702(b)(2) (stating that the type of property which may be seized need not be limited to financial assets).

248. *See id.* § 1702(b)(3) (discussing specific types of property excluded from the scope of the statute).

249. *See id.* § 1702(a)(2) (stating "the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.").

250. *See* Shenon, *supra* note 63 (discussing F.B.I. seizures of documents from suspected terrorist groups, under the auspices of IEEPA).

251. *See* 50 U.S.C. § 1702(c) (2001) (stating "[t]his subsection does not confer or imply any right to judicial review.").

252. *See supra* notes 209–11 (stating that an individual's constitutional due process rights require the opportunity to confront the evidence).

on judicial action.²⁵³

On the other hand, the Executive is required to consult with and notify Congress about actions taken under the authority of the statute.²⁵⁴ If no congressional response occurs, such an action may serve as congressional acquiescence.²⁵⁵ Congressional acquiescence, however, does not necessarily confer constitutional authorization.²⁵⁶ Individuals with a constitutional presence should have the right to due process which includes the right to confront evidence and the right to a timely hearing on the record.²⁵⁷ The questionable constitutionality of IEEPA is central to the President's authority to issue Executive Order 13,224 and any subsequent orders affecting allegedly terrorist controlled assets.

4. USA Patriot Act of 2001

The USA Patriot Act of 2001 (the "Act") provides some useful tools for future asset freezing activities and reduces the burden on the Executive Branch to push the constitutional authority envelope with respect to freezing assets of individuals. Generally, the Act strengthens anti-money laundering procedures and mechanisms with respect to domestic and international financial institutions.²⁵⁸ The Act also explicitly makes knowingly or intentionally providing material support to terrorist activity a

253. See generally 50 U.S.C. §§ 1702–1706 (2001).

254. See *id.* § 1703.

255. See *Dames & Moore v. Regan*, 453 U.S. 654, 657 (1981) (stating that "acquiesced in by Congress, raises [only] a presumption that the President's action has been taken pursuant to Congress' consent.").

256. See *id.*

257. See *supra* notes 209–211 (stating that an individual's constitutional due process rights require the opportunity to confront the evidence).

258. See generally *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001*, Pub. L. No. 107-56, § 352, 115 Stat. 272 (2001); see also Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 447 (2002) (stating that the USA Patriot Act "also aims to stop terrorism by disrupting terrorist financial networks through Title III of the Act, the International Money Laundering and Abatement and Anti-Terrorist Financing Act of 2001 . . . by requiring banks and financial institutions to monitor account activity and to report suspicious transactions . . .").

crime.²⁵⁹ As a result, more assets may be frozen and forfeited through criminal prosecution, with more certainty and protections for the accused than those provided under the Executive Order framework. With criminal enforcement, the usual constitutional protections for the accused, such as due process rights, apply to the seizure of a terrorist's financial assets.²⁶⁰

On the other hand, the Act also amends civil forfeiture laws to allow forfeiture of terrorist assets while criminal cases are pending or if evidence is not strong enough to support the criminal threshold required for conviction.²⁶¹ Most troubling here is §

259. See USA Patriot Act, at Title VIII, § 805; see also 18 U.S.C. § 2339A (2002) as amended. The provision provides:

(a) Offense. Whoever provides material support or resources or conceals or disguises the nature, location, source or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section . . . [broad list of enumerated sections of Title 18 and sections of the Atomic Energy Act] , or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) Definition. In this section, the term "material support or resources" means currency or monetary instruments or financial securities, financial services, lodging training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

Id.

260. See USA Patriot Act, Title VIII, §§ 302(b)(8), 352; see also McCarthy, *supra* note 258, at 452 (stating that, in passing the Patriot Act, Congress still maintains political and judicial checks on executive discretion just as much as a narrow grant of authority).

261. See 18 U.S.C. § 981(a)(1)(G) (2002). As amended by the Patriot Act, the statute provides the following:

(a)(1) The following property, real or personal, is subject to forfeiture to the United States:

(G) All assets, foreign or domestic—

(i) of any individual, entity, or organization engaged in planning or perpetrating any act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of

981(a)(1)(G)(iii), which provides that “all assets, foreign or domestic—(iii) derived from, involved in, or used or intended to be used to commit any act of domestic or international terrorism” against United States interests are subject to forfeiture to the United States.²⁶² For example, a U.S. or a foreign citizen may be subject to asset forfeiture action if the citizen made a donation from his or her U.S. brokerage account to a charity, which unbeknownst to the donor then gave the money to another charity, which in turn provided the money to the family of one of the Sept. 11 hijackers. This citizen would not be required to have any knowledge of the donation’s final destination or any desire to aid this particular family, and yet all of the citizen’s accounts could be frozen.²⁶³ Hence, the Act provides a lot of room for abuse.

However, in an attempt to provide protection for these citizens’ constitutional rights, the Act provides the opportunity to contest the forfeiture of property “under any provision of law relating to the confiscation of assets of suspected international terrorists.”²⁶⁴ The property owner can assert that “the property is not subject to confiscation under such provision of law or the innocent owner provisions of § 983(d) of Title 18, United States Code, apply to the case.”²⁶⁵ Section 983(d) provides an “innocent owner defense” for those defendants who did not have knowledge of their property’s involvement in terrorist activity and who carry the burden of proving lack of this knowledge by a preponderance

influence over any such entity or organization;

(ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing an act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property; or

(iii) derived from, involved in, or used or intended to be used to commit any act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property.

Id.

262. See *id.* § 981(a)(1)(G)(iii).

263. See 18 U.S.C. § 981(a)(1)(G) (2002). Neither section 981(a)(1)(G)(i) nor section 981(a)(1)(G)(iii) require “intent” or “knowledge,” and thus the property of anyone who unintentionally funds an organization with links to targeted terrorist groups may be seized. *Id.*

264. USA Patriot Act, Title III, § 316(a).

265. *Id.*

of the evidence.²⁶⁶ The problem that arises from this legislation is that the evidentiary burden required for the affirmative defense is exceptionally difficult for the average individual to meet.

The Act provides that a court, in considering a claim, may admit evidence that would not normally be allowed by the Federal Rules of Evidence if the court deems it to be "reliable" and if compliance with the Federal Rules of Evidence would jeopardize "national security."²⁶⁷ Thus under the affirmative defense, the prosecution can enter evidence that normally would not be allowed.²⁶⁸ Any benefit gained by asserting the affirmative defense can easily be overcome because the prosecution may refuse to produce potentially exculpatory classified evidence by invoking "national security interests."²⁶⁹ Therefore, room for abuse still exists and the "secret national security evidence issue" will probably continue to cause constitutional controversy for some time. As such, this legislation may simply add window-dressing in the way of constitutional protections and fail to address the uncertainty created by the new anti-terrorist funding legislation.

Furthermore, the Executive Branch might still utilize inherent powers to freeze the assets of terrorists who do not fall within the jurisdiction of the Act. Although the Act reduces the need of the President to utilize plenary executive powers and ambiguous delegations of legislative power to freeze assets, it does nothing to stop the Executive from doing so in the future. Specifically, Executive Order 13,224 does not rely upon the Act. However, the Act provides amendments to IEEPA, which is relied on by the President. IEEPA analysis above took these new provisions into account.²⁷⁰

266. 18 U.S.C. § 983(d) (2002).

267. USA Patriot Act, Title III, § 316(b).

268. See generally Jennifer M. Collins, *And the Walls Came Tumbling Down: Sharing Grand Jury Information With the Intelligence Community Under the USA Patriot Act*, 39 AM. CRIM. L. REV. 1261 (2002) (discussing the changes made by the USA Patriot Act to the Federal Rules of Evidence).

269. See, e.g., *People's Mojahedin Org. of Iran v. United States Dep't. of State*, 182 F.3d 17, 19 (1999) (stating the Court of Appeals could not lay out the facts because they were bound to the record provided by the Secretary of State because of the national security implications).

270. See discussion *supra* Part IV.C.3 and notes 245-71 and accompanying

5. Application of the Legislative Authorities to Executive Order
13,224 and Conclusions

Based on United States legislative authority, international treaties and resolutions, the President issued Executive Order 13,224 on established grounds, with two notable exceptions: (1) portions of the Order calling for freezing the assets of U.S. citizens who have unknowingly provided support to terrorists; and (2) the lack of due process protections, such as confrontation of evidence and right to a formal hearing. In these areas, the President is going beyond the delegation of legislative authority and is operating within the Executive Branch's own exclusive constitutional authority, if such a thing exists. Little protection exists against asset freezes for those foreigners who are designated as terrorists, possess property in the U.S., and whose only contact with the U.S. is their property because of their limited constitutional presence. Even though there may be hope for the non-citizen to utilize affirmative defenses in certain situations, little specific authority would prevent a judge from citing lack of jurisdiction to hear the cases where the foreigner owns financial property in brokerage houses abroad.²⁷¹ In this situation, the non-citizen's legal protection is mainly dependant on the Executive Branch acting in a fair and reasonable way. For the U.S. citizen, there is some hope that a judge will derive protection from the application of the full compliment of constitutional rights.

Most importantly though, designating people as terrorists or terrorist affiliates and freezing their assets, regardless of the constitutionality of the action, provides a level of uncertainty to investors that is morally unjust and may serve to limit investment within the U.S. Professional investors and chief financial officers typically diversify holdings based on a calculus of potential rates of return, various financial variables and other risk factors. What good is this reasoned financial analysis if ownership rights to financial property can be effectively extinguished in a potentially

text.

271. See *People's Mojahedin Org. of Iran*, 182 F.3d at 22 (stating that "[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise . . .").

arbitrary manner, or if the rate of return depends more on the outcome of a court battle than on economic performance?

CONCLUSION

A. Where to Begin?

Are we headed back to hiding cash under the mattress or in the backyard—is anyone ready to return to a barter society? Probably not. It is likely that the current effects of terrorist finance seizures are minimal on U.S. markets. Most people do not want terrorist money supporting their company nor do they want to allow outbound money to go to terrorist organizations. More importantly, the flow of financial oxygen to terrorists must be choked off before the targets can react by moving assets elsewhere. However, capital markets depend on the free flow of efficient allocation cash.²⁷² As such, the terrorist designation authority is a hindrance to our capital system and all capital systems based on Western ideals.

The creation of a formalized equitable asset freezing system with an individualized approach would be more effective than the current blunt nation-based approach to international affairs. A more precise framework that encompasses financial and fairness concerns is needed to alleviate any fears that individuals may have regarding investment in the U.S.

First, a fast track review plan of the Executive Branch's terrorist designations needs to be implemented. Many individuals who have had a large portion of their assets frozen cannot wait for a court trial even if they have a right to one. Mistaken or improper asset freezes decrease the utility of resources for a period of time and reduce potential transactions, as well as destroy the individual's lifestyle and confidence in the market and government. The time period needs to be reduced from years or months to days. Everyone but actual terrorists must feel comfortable operating in the American market and its institutions.

Second, citizens and non-citizens alike must be able to present

272. See *supra* note 92 and accompanying text.

and ask for evidence supporting or undermining their position. The Executive Branch can no longer hide behind the cloak of national security in order to keep facts that may support the defendant's position out of an open forum.²⁷³ The task of identifying terrorists is difficult and thus room for error is large. These asset freezes deal with individuals from around the world and not easily identifiable individuals from certain target nations. Requiring in camera "classified" evidence presentation proceedings is a better solution than simply leaving the decision of whether to review evidence to a court's discretion. A speedy formal hearing within one of the asset freezing agencies may also be appropriate so long as appellate review in federal court is allowed.

Third, foreign individuals, who have had assets frozen and have property in the United States or United States financial institutions should be granted statutory property due process rights the same as a U.S. citizen in the same situation. Judges would then be unable to dismiss cases of foreign individuals for lack of constitutional presence and for fear of treading on the Executive Branch's foreign negotiation authority. The Executive would, however, remain empowered to freeze sovereign assets without fear of judicial interference. The statute could be drafted to prevent subterfuge on the part of sovereign nations attempting to gain due process rights as foreign individuals. These measures would boost foreigner's confidence and certainty in U.S. capital market investment along with the confidence of citizens who have a strong desire to live under and protect the principles of the U.S. Constitution.

Finally, the U.S. government should provide optional safety measures to alleged terrorists for frozen assets that allow market impacts on the assets to proceed with some measure of control. In the case of brokerage accounts vested in publicly traded securities in secondary markets, alleged terrorists should be able to direct the

273. See *People's Mojahedin Org. of Iran*, 182 F.3d at 17. The Court noted the lack of evidence presented by the Secretary of State who argued that the presentation of evidence would compromise national security. *Id.* The Court decided the point was irrelevant when it found the foreigners in question to not possess due process rights. *Id.*

day to day operations of their account minus the ability to withdraw proceeds during the interim. In theory, problems could arise when the owner may have wished to sell a security that eventually becomes worthless during the account's freezing period or the owner likewise had the inclination to legitimately purchase a security that increased in value and could not. Allowing alleged terrorists to purchase and sell securities exceeding a significant level of market capitalization, such as \$10 billion, in established premier secondary markets, such as the New York Stock Exchange or NASDAQ, from a registered broker keeps the assets from moving to terrorist affiliated entities. In the alternative, alleged terrorists should be allowed to convert their account into U.S. Treasury Bills during the inquiry without creating a taxable in event if they are found innocent. These measures would prevent inappropriate account manipulations while providing a degree of fairness until proven guilty.

B. Any New Framework Must Include the Asset Freezing Technique

We need to freeze assets used by the terrorists in order to prevent them from eluding our military and other investigative authorities. As U.S. Secretary of Defense, Donald Rumsfeld said:

[A] terrorist can attack at any time at any place, using any conceivable technique . . . [t]hat means that the only way you can deal with terrorists is to go after them. The only defense against terrorism is offense. It is preemption . . . you may recall that we had 241 Marines killed in the Marine barracks at Beirut airport, where a truck bomb came in—suicide—drove into this building, blew it up, killed 241 Marines. They also hit the embassy and killed folks there. Pretty soon they started draping . . . they put these concrete barriers around buildings . . . so that trucks couldn't get in and blow up the buildings. So the next thing they did, they started firing rocket-propelled grenades over the tops of those barricades. So then pretty soon they started draping the buildings with a wire mesh to bounce off the rocket -propelled grenade. Then of course they started going for soft targets. They started getting people going to and from work. So the point is it is not possible to spend your life—you would have to hide all day long, if you decided the way to live with terrorists was to try to be defensive

against them. You can't do it. Therefore, we must be proactive. We must do a whole host of things . . . And there's no question but that the war on terrorism cannot end there [Afghanistan], because there's just too much to do.²⁷⁴

However, while we must aggressively pursue terrorists, we need to do it with tools based on the principles outlined above that destroy the terrorists, weakens their cause and avoids harming innocents who simply provide lawful and democratic opposition to the government.²⁷⁵ Anyone with property frozen in the U.S. or U.S.-based institutions should have due process rights. Prior notice would be impracticable, but a day in court with presentation of evidence from both sides would be in the best interests of the United States. There is no reason why the United States Government cannot apply free market principles to the terrorist asset situation to ensure that true terrorists are brought to justice and the innocent are merely inconvenienced with de minimis involuntary loss.

274. Secretary Rumsfeld Town-Hall Meeting at Nellis Air Force Base (Feb. 20, 2002), at http://www.defenselink.mil/news/Feb2002/t02202002_t220sdne.html (last visited Mar. 11, 2002).

275. The Declaration of Independence was one of the U.S. citizenry's earlier forays into nonviolent protest against the ruling government of that time. See generally *THE DECLARATION OF INDEPENDENCE* (U.S. 1776).