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# Countering Religion or Terrorism: Selective Enforcement of Material Support Laws Against Muslim Charities

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## COUNTERING RELIGION OR TERRORISM: SELECTIVE ENFORCEMENT OF MATERIAL SUPPORT LAWS AGAINST MUSLIM CHARITIES

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The American government's preventive counterterrorism strategy is no secret.<sup>1</sup> Weeks after the 9/11 terrorist attacks, then-Attorney General John Ashcroft declared, "Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street. Let the terrorists among us be warned: If you overstay your visa – even by one day – we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage."<sup>2</sup>

As the government adopted a no-tolerance policy, a fear-stricken public watched as images of nefarious dark-skinned, bearded Muslims flashed across millions of television screens. The message was, if there had ever been any doubt, the 9/11 attacks confirmed that Muslims and Arabs are inherently violent and intent upon destroying the American way of life. Heightened scrutiny of these communities was thus perceived not only as warranted, but also as a rational<sup>3</sup> response to an existential threat to the country.

Ten years later, the 9/11 terrorist attacks appear to have succeeded in transforming the American way of life for the worse.<sup>4</sup> In our hasty passage of the expansive PATRIOT Act, our fears gave way to the government's demand for unfettered discretion to preserve national security at the expense of civil liberties for all Americans. As a consequence, the United States has adopted practices commonly found in police states where government surveillance extends into almost every aspect of life.<sup>5</sup>

Body scans at airports strip us of our privacy. Fusion centers have sprung up across the country to gather and deposit intelligence on average Americans in massive government-monitored databases.<sup>6</sup> Warrantless National Security Letters are used to obtain information about our financial and political lives, despite the absence of any evidence of criminal activity.<sup>7</sup> Police departments have shifted resources from fighting crime to mapping

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*Ten years later, the 9/11 terrorist attacks appear to have succeeded in transforming the American way of life for the worse.*

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communities based on their religion and ethnic origins under the auspices of protecting national security.<sup>8</sup> The overreaching enforcement of broad "material support to terrorism" laws has chilled religiously mandated charitable giving and hampered humanitarian aid operations, thereby eroding the independence of the American nonprofit sector and unduly politicizing humanitarian assistance.<sup>9</sup> And fears of "homegrown terrorism," fueled by irresponsible Congressional rhetoric,<sup>10</sup> have legitimized a bigoted discourse on the country's Muslims to such an extent that some Americans challenge Islam's status as a bona fide religion deserving of constitutional protection.<sup>11</sup>

## ABOUT THE AUTHOR



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At first glance, the preventive paradigm appears facially legitimate. Few would contest the collective public safety interest in stopping terrorism before it occurs. Even so, at what point should the government be permitted to investigate individuals? Does mere political dissent, even if virulently anti-American, or unpopular orthodox religious practices suffice to subject individuals to heightened scrutiny or a loss of liberty? At what point does legitimate counterterrorism become political and religious persecution? The answers determine the type of country we want to live in: a free and just society consistent with the Founding Fathers' vision, or a paranoid society dislodged from its fundamental principles of fairness and the rule of law.

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While post-9/11 preventive counterterrorism policies have adversely impacted various groups of Americans, no group has been as deeply affected as the Muslim community, especially its Arab and South Asian members.<sup>12</sup> Mosque infiltration has become so rampant that congregants assume they are under surveillance as they fulfill their spiritual and religious obligations.<sup>13</sup> Government informants have ensnared numerous seemingly hapless and unsophisticated young men, thereby sowing distrust among Muslims.<sup>14</sup> Aggressive prosecutions of Muslim charities and individuals across the country have embittered communities that feel besieged by their government and distrusted by their non-Muslim compatriots.<sup>15</sup> As most clearly evinced

in the vitriolic discourse surrounding the Park 51 Community Center in lower Manhattan during 2010, selective counterterrorism enforcement has also fueled public bias against Muslims.<sup>16</sup> As a consequence, the vibrancy and development of civil society within these communities is at risk of being significantly stunted.

This article focuses on the use of material support laws in the counterterrorism preventive paradigm and the significant risk they pose to the civil rights and civil liberties of those communities most targeted: Muslim Arabs and South Asians. The wide-reaching and devastating effects of these broadly interpreted material support laws on American Muslim charities and their donors, as well as on the broader American nonprofit sector, has effectively criminalized otherwise legitimate charitable giving, peace-building efforts, and human rights advocacy.

To the extent that these groups are the “miner’s canary”<sup>17</sup> in forecasting the post-9/11 loss of civil rights and liberties for all Americans, their experiences demonstrate the United States’ downward progression away from the Founding Fathers’ vision of a society where individuals can speak, assemble, and practice their faith free of government intervention or persecution.<sup>18</sup>

## USING MATERIAL SUPPORT AS A PREVENTIVE COUNTERTERRORISM TOOL

The linchpin of the preventive counterterrorism paradigm consists of those laws that prohibit providing material support to terrorism. These laws are often the fall-back criminal provisions employed when the government cannot prove terrorism charges. But they are so broad and vaguely worded that they effectively criminalize a myriad of activities that would otherwise be constitutionally protected. Moreover, as the government is not statutorily required to prove that the defendant had a specific intent to support terrorism, it has carte blanche to prosecute a broad range of legitimate activities, such

as charitable giving, peace building, and human rights advocacy. The Department of Justice, with the Supreme Court’s blessing, has consequently criminalized training and advocacy in support of nonviolence on the justification that such activities legitimize a designated group or individual.<sup>19</sup> The government’s standards for what it deems as “legitimizing”<sup>20</sup> are so broad that then-Solicitor General Elena Kagan went so far as to call for prosecuting lawyers for filing an amicus brief on behalf of a terrorist organization.<sup>21</sup>

Similarly, humanitarian aid delivered to noncombatant civilians living under the control of a terrorist organization can be illegal based upon the unproven theory that it frees up resources to redirect toward violence. This untenable theory of liability, also known as the “fungibility” doctrine,<sup>22</sup> punitively denies many innocent beneficiaries abroad of food, water, and shelter. But for their misfortune of being trapped in a conflict zone where one party is designated as terrorist, these civilians would have received much-needed aid from American civil society. Furthermore, Muslim American charities providing the humanitarian aid are punished through government-led smear campaigns<sup>23</sup> and prosecutions.

## DISPROPORTIONATE ENFORCEMENT AGAINST MUSLIM CHARITIES

With few exceptions, the executive branch has exercised its broad discretion to selectively target Muslim charities engaged in seemingly legitimate humanitarian aid.<sup>24</sup> The result is a serious chilling effect on Muslim communities’ willingness to openly partake in political dissent and for Muslim charities to effectively provide international aid using religiously mandated charitable donations to places like Somalia.<sup>25</sup>

Since 9/11, Muslim donors have been scared to make such contributions because they fear prosecution for providing material support to terrorism even though they do not intend to support terrorism. They also fear that their donations will invite government scrutiny and

harassment in the form of tax audits, immigration checks, requests for voluntary FBI interviews, inclusion on watch lists, and surveillance.<sup>26</sup> Indeed, donations to Muslim charities fell precipitously in the years immediately following 9/11.<sup>27</sup> As law enforcement increasingly questions Muslims about such donations during voluntary interviews, immigration benefit proceedings, and at the border, this chilling effect is magnified.<sup>28</sup> Ten years after 9/11, many Muslim charities still struggle to return to pre-9/11 donation levels.<sup>29</sup>

The government's closure and designation as terrorist of three of the largest Muslim American charities in the first three months after the 9/11 attacks sent shockwaves through Muslim communities nationwide.<sup>30</sup> In December 2001 during Ramadan, when Muslim charitable giving is at its yearly peak, the government froze the assets of the Holy Land Foundation for Relief and Development, the Global Relief Foundation, and the Benevolence International Foundation.<sup>31</sup> The subsequent criminal prosecution of their officers, board members, employees, and even contracted fundraisers in the United States alarmed Muslim donors, who reasonably feared that even the most tenuous association with a Muslim charity could lead to ruinous consequences.<sup>32</sup> Currently, seven out of the nine charities shut down as a result of terrorism-related investigation or designation are Muslim charities.<sup>33</sup>

## SHUTTING DOWN CHARITIES BASED ON MERE ALLEGATIONS

Unbeknownst to many, a formal terrorist designation is not necessary to figuratively tar and feather a charity. A mere investigation by the Department of Treasury is enough to trigger the asset-freezing provision of sanctions laws,<sup>34</sup> thus paralyzing the organization. The law does not require the Treasury Department to have probable cause of a violation of the regulations, nor is it required to seek approval from a judge, either before or after the freeze is imposed. The investigation and

resulting freeze have no limits. The ensuing public media coverage then puts the nail in the organization's coffin, as any individual's subsequent association with it is an invitation for government scrutiny, if not prosecution. Before December 2010, such organizations were denied access to their funds to hire a defense lawyer unless the Department of Treasury, the adverse party in any litigation, authorized such expenditures. The department often approved small amounts that were a fraction of the cost of hiring competent counsel.<sup>35</sup>

Despite numerous requests to allow lawyers to represent the accused without a license, new regulations were issued only after the American Civil Liberties Union and Center for Constitutional Rights challenged the existing regulations in connection with the *Al-Aulaqi* suit.<sup>36</sup> Prior to the change, attorneys were permitted to provide uncompensated legal services to designated terrorist organizations without first obtaining a license from OFAC under a very limited set of circumstances.<sup>37</sup> Compensated services were also severely restricted, permitting charities to only fund their legal services through money raised outside the U.S. or, after obtaining a license, money raised by legal defense funds.<sup>38</sup>

The new regulations, issued in December 2010 in response to the *Al-Aulaqi* litigation, finally permitted American lawyers to provide pro bono representation in any proceeding before a court of agency (federal, state, or local), without obtaining a license.<sup>39</sup> The new regulations also permit charities or persons to pay for legal services without obtaining a license if the services involve, among other things, counseling on the requirements of compliance with American law, representation of persons named as defendants in American legal proceedings, and "any other legal services where U.S. law requires access to legal counsel at public expense."<sup>40</sup> However, if the needed legal services are not pro bono and do not fall into the categories of exceptions, the charity or person must still obtain a license.

In addition to the seven shut down Muslim American

charities,<sup>41</sup> another six have found themselves at the center of publicly announced terrorism investigations, raids, and surveillance.<sup>42</sup> Unable to overcome the resulting stigma and blacklisting, two of them have permanently closed without ever being designated as terrorist organizations.<sup>43</sup>

## GUILT WITHOUT PROOF OF WRONGDOING

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Despite the statute's clear meaning, some courts have interpreted material support laws in a way that relieves prosecutors from having to prove that a charity provided donations directly to a designated foreign terrorist organization.

In the *Holy Land Foundation* criminal case, a federal district court in Texas instructed the jury that provision of humanitarian aid to non-governmental groups abroad not designated as terrorist organizations makes American charities and their officers guilty of material support to terrorism if those groups are later shown to be fronts for, or controlled by, a designated terrorist organization.<sup>44</sup> Defendants were convicted based on their donations to local *zakat* committees<sup>45</sup> that provided direct humanitarian aid to impoverished Palestinians in the West Bank and Gaza. The *zakat* committees, which are not designated terrorist organizations, were the indigenous nonprofit organizations with the necessary network to distribute aid. Indeed, the United States Agency for International Development (USAID) and the International Red Cross (IRC) often worked with the same *zakat* committees to deliver aid to Palestinians.<sup>46</sup>

Despite USAID and IRC's similar work in the Palestinian territories, the Holy Land Foundation (HLF) and its Muslim officers were convicted of providing material support to Hamas, a designated terrorist group, on account of donations to the undesignated *zakat* committees. The trial court erroneously instructed the jury that if some individuals in some of the *zakat* committees had some association with Hamas, these

donations constituted prohibited material support to Hamas, even if the American charity lacked knowledge of such associations. Although the government could not prove that HLF's donations were transferred to Hamas or that HLF knew or should have known of some of these committees' alleged ties to Hamas, it was found guilty based on its contribution to the undesignated groups. This tenuous, and arguably unconstitutional, theory of liability ultimately exposes all American humanitarian aid agencies operating in conflict zones where designated terrorist groups exist. That USAID can engage in the same activity without sanction further evinces the politicization of humanitarian aid.

The serious legal implications caused twenty of the United States' largest nonprofits and foundations to file an amicus brief in the *Holy Land Foundation* case asking the Fifth Circuit to interpret the material support statute to require proof of knowledge that a recipient of assistance is a designated group or is controlled by one.<sup>47</sup> Amici argued that the district court's jury instructions denied individuals fair notice of what is prohibited and failed to require proof of individual culpability. If the district court's flawed interpretation is upheld on appeal, they argued, it "would jeopardize the legitimate charitable work of countless foundations and charities throughout the United States."<sup>48</sup> Specifically, the material support statute's reach would expand exponentially such that all organizations engaged in humanitarian assistance would be exposed to prosecution.<sup>49</sup> Ultimately, the chilling effect would devastate their important work and deny beneficiaries humanitarian aid.<sup>50</sup>

Notably, the amici included such large and reputable nonprofit organizations as the Carter Center, the Rockefeller Brothers Fund, the Constitution Project, the Council on Foundations, and the Samuel Rubin Foundation.<sup>51</sup> Their participation demonstrates these laws' broader adverse consequences, notwithstanding their selective enforcement against Muslim groups and individuals. Ultimately, the Department of Treasury and the Department of Justice's refusal to transition from

their current draconian strategy to a transparent and fair process collectively weakens American civil society.

Although material support laws were initially enforced against Muslim communities, aggressive prosecution has since spread to other groups as the government seeks to convince the public that it is actively protecting national security. The 2010 Supreme Court ruling in *Holder v. Humanitarian Law Project* brought to light the broad-reaching adverse implications of the laws prohibiting material support to terrorism. The plaintiffs, a former federal administrative law judge and American-based advocacy groups, sought to train the Kurdistan Workers' Party in Turkey (PKK), a designated foreign terrorist organization.<sup>52</sup> While the PKK engaged in violent activities, the plaintiffs expressly sought to train members on how to use humanitarian and international law to peacefully resolve disputes and petition for humanitarian relief before the United Nations and other representative bodies.<sup>53</sup>

To the dismay of many peace building and humanitarian aid organizations, the Supreme Court found that the law criminalizing the plaintiffs' activities is constitutional.<sup>54</sup> In a stinging dissent, Justice Breyer criticized the majority's failure to differentiate between aiding terrorist groups that engage in violent terrorist acts and those that participate in legitimate democracy-building advocacy that, in effect, decreases terrorism.<sup>55</sup> The ruling criminalized the plaintiffs' efforts to stop the groups' violent activities and promote peaceful advocacy, thereby making it illegal for Americans to teach groups to put down their guns, pick up their pens, invoke international human rights law, and seek redress through international tribunals.

The criminalization of aid and advocacy directly contradicts our nation's stated commitment to international human rights law and sends a message to the world that the United States is not serious about human rights and peaceful conflict resolution. Moreover, the ruling undermines American civil society, for its independent nonprofit sector plays a pivotal role in international peace-building efforts and the provision of humanitarian aid to impoverished civilians trapped

in conflict zones.<sup>56</sup> However, the Court's interpretation of the material support laws now limits international peace-building efforts to highly politicized, and often ineffective, government programs sponsored by the U.S. Department of State or USAID.

Ultimately, this current formulation and interpretation of material support laws undermines our nation's reputation in the international community, our national security interests in minimizing violence and terrorism abroad, and our own civil society.<sup>57</sup>

## COLLATERAL PROSECUTION AND THE SURVEILLANCE OF MUSLIM DONORS

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While few individual donors have been prosecuted for material support arising out of the charities' prosecutions,<sup>58</sup> many have experienced collateral prosecution<sup>59</sup> on account of their donations to charities under investigation or being prosecuted.<sup>60</sup> The resulting fear of collateral adverse consequences is striking and significantly undermines donors' confidence in the government's interest in protecting their fundamental right to religious freedom.<sup>61</sup> Muslim donors worry that once the government becomes aware of their donations to Muslim charities, especially to those engaged in humanitarian relief efforts abroad, they will become targets of investigation and prosecution. They fear that the government uses the donor lists of charities, either designated or under investigation, as a starting point for investigating terrorism, even if they have no individualized evidence of wrongdoing.<sup>62</sup> Hence these lists are suspected of serving as the starting point for fishing expeditions in search of terrorists.

Unlikely a coincidence, major donors have experienced burdensome tax audits, denials of citizenship applications, deportation proceedings, and surveillance.<sup>63</sup> Major donors have also been targeted for interviews regarding their donations and knowledge of Muslim charities' activities locally and nationally.<sup>64</sup>

Complaints about such targeting have been documented by the American Civil Liberties Union (ACLU), the Asian Law Caucus, Muslim Advocates, the Arab American Anti-Discrimination Committee, and other advocacy groups representing these communities.<sup>65</sup> Some of these interviews are involuntary, as they occur at the border when individuals attempt to return from abroad.<sup>66</sup> Others are a result of ubiquitous FBI requests for voluntary interviews, which many community members accept without legal representation as an earnest, but ill-advised, gesture to prove their innocence. The ACLU, for instance, has documented reports of law enforcement targeting Muslim donors in Texas, Michigan, New York, Virginia, Florida, Louisiana, California, Minnesota, Missouri, and Wisconsin through “voluntary” interviews.<sup>67</sup> Many of the interviews resulted in criminal charges for material false statements unrelated to terrorist activities.<sup>68</sup> Such non-terrorist-related charges have confirmed the community’s concerns about selective prosecution due to one’s religious and/or political beliefs.

These fears of increased government scrutiny and surveillance are fueled by a prevalent perception that the Federal Bureau of Investigations (FBI) and local police agents are omnipresent in mosques in cities with large Muslim populations.<sup>69</sup> Muslim congregants have complained to advocacy groups of FBI informants infiltrating their mosques to monitor speech, sermons, and charitable giving within the mosque.<sup>70</sup> For instance, the FBI continued to monitor a mosque in Albany for years after 9/11, despite arresting and deporting the original target of the investigation.<sup>71</sup> Agents even went so far as to install cameras aimed at the mosque’s front and rear entrances with questions of whether the mosque was also bugged going unanswered.<sup>72</sup> Moreover, congregants report being pressured to serve as informants in exchange for relief from heightened governmental scrutiny.<sup>73</sup> Numerous news reports on coercive recruitment tactics and pervasive mosque surveillance reinforce Muslims’ perceptions that the FBI monitors donations given in the mosque.<sup>74</sup> The adverse

effect of this discriminatory targeting of American Muslim charities providing humanitarian aid to Muslim regions abroad does more than just chill religious freedom;<sup>75</sup> it undermines the country’s credibility in its publicized outreach initiative to Muslims and ultimately impedes its foreign policy prerogatives in the Middle East. Moreover, Muslims abroad view such treatment as a litmus test of American sincerity vis-à-vis its various international initiatives, such as democratization projects, the defense of human rights, and the strengthening of civil society. When they see discrimination against Muslims in the United States, they reasonably question the legitimacy of its proclaimed leadership in supporting liberal democratic ideals. Such double-talk, therefore, renders this country irrelevant at best, or obstructionist at worst, in international forums addressing anti-discrimination, human rights, and the rule of law.

## FEASIBLE SOLUTIONS REJECTED BY THE GOVERNMENT

In response to this draconian process, the Charity & Security Network, a broad coalition of highly regarded nonprofit organizations, has urged the Department of Treasury to implement due process protections during the designation and investigation process.<sup>76</sup>

Current law prevents a designated nonprofit organization from meaningfully defending itself.<sup>77</sup> The organization is designated and its assets frozen without notice or opportunity to defend itself before the fact. The absence of a mechanism comparable to the Classified Information Procedures Act used in the criminal context that allows defendants to confront classified evidence prevents the nonprofit organization from reviewing the entire record of evidence used against it for designation. Nor is it permitted to offer evidence in its own defense at the pre-designation or federal appeals phase.<sup>78</sup> Such minimal due process rights undermine the legitimacy of the process. Indeed some question whether designation is more about politics than the law.<sup>79</sup>

Rather than adopt a draconian designation process that assumes guilt without the benefit of the organization's defense, designated groups should be afforded a meaningful opportunity to defend themselves promptly in the wake of an asset freeze. This would require the government to disclose sufficient information regarding its classified case. It should also be obligatory for the government to provide notice of the charges and a statement of the reasons, neither of which is currently required.

Thoughtful solutions by highly skilled attorneys have been proposed on numerous occasions and blithely dismissed by Department of Treasury and White House officials. Officials often cite the ease with which an organization may transfer money abroad to avoid having its assets frozen for illicit acts.<sup>80</sup> While such concerns are reasonable, they too can be addressed without compromising the nonprofit organization's due process rights. An independent conservator could be appointed to oversee the charity's finances pending investigation. This option assures the government that funds will not be transferred abroad out of their jurisdiction and prevents the collective punishment of the entire organization, as well as its donors and beneficiaries, on account of mere allegations. Likewise, its investigations should adopt the same investigative techniques applied to corporations suspected of fraud, where the focus is on individual bad actors rather than the entire corporation. So long as the organization can show that it has acted in good faith and any wrongdoing was a result of a limited number of individuals, it should be spared total liquidation. This more reasonable approach not only protects charitable organizations, but also those of its beneficiaries who are in desperate need of humanitarian assistance.

Additionally, while the new regulations permitting a charity to pay for particular legal services are welcome, there is little justification for the government's continued refusal to allow the undesignated charity access to its funds for those services that are not the focus of the investigation. Especially in the case of large charities,

operations expand into various countries, whereas the government's concerns may be limited to only operations in a particular country or related to a specific project. The government has yet to provide a reasonable explanation, other than its punitive preventive philosophy, for shutting down an entire organization rather than stopping the activity being investigated. Moreover, once the government freezes the funds it refuses all requests to release them to other charitable organizations performing the same work in accordance with the *cy pres* principle.<sup>81</sup> Tellingly, the government would rather keep the funds frozen indefinitely with no regard for the needs of intended beneficiaries. Such contradictions evince the politicization of counterterrorism that, thus far, has most adversely impacted Muslim charities and donors.

At stake is far more than the due process rights of a particular organization and the sustainability of the nonprofit sector – both of which are important in their own right. But equally significant is the legitimacy of the U.S. government's counterterrorism strategy. The material support laws and terrorist designation process has become unduly politicized as shown by overreaching, if not outright abusive, enforcement.

It is long overdue for the government to acknowledge failings of the designation regime and give serious thought to the thoughtful recommendations of the nonprofit sector.<sup>82</sup>

## CONCLUSION

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Ten years after 9/11, the American government's preventative counterterrorism strategy has cost millions of taxpayer dollars, diverted thousands of law enforcement personnel away from preventing non-terrorism-related crimes, and failed to prevent terrorist attacks committed by Muslims and non-Muslims alike. Rather than engage in responsible governance and reassess failed strategies, it continues to employ fear-based narratives to persuade the public to keep pouring billions of dollars into flawed and ineffective national security projects.

Evidence of the failure of counterterrorism strategies is ample. The government has failed to prevent some of the most serious attempted terrorist plots over the past few years. But for a fortuitous technical failure and the rapid response of a Muslim Mauritanian reporting the smoke, thousands of people could have been killed in Times Square. Similarly, the Nigerian Christmas Day bomber would have successfully killed hundreds on an airplane headed for Detroit if his bomb had not failed to ignite. White supremacist James Cummings<sup>83</sup> was actively constructing a lethal dirty bomb at home undetected by the FBI. Only after his wife shot him in self-defense did the government discover his terrorist plot. In other cases, terrorists succeeded in terrorizing the American public without government intervention. Joseph Stack flew an airplane into an IRS building in Austin, Texas, in protest of IRS demands that he pay his taxes.<sup>84</sup> His terrorist attack killed an IRS employee who was a military veteran. Had the attack occurred at a different time of day, hundreds of IRS employees could have been killed. Jared Lee Loughner shot Congresswoman Gabrielle Giffords (D-AZ) and killed six people due to both his mental illness and questionable political objectives.<sup>85</sup>

While countering terrorism is no easy feat, it is remarkable that the government was unable to prevent these attacks after having invested so many resources into counterterrorism, often at the expense of the civil liberties of all Americans. Despite the creation of numerous fusion centers nationwide, the relaxation of surveillance laws,<sup>86</sup> the use of technology to surveil nearly every aspect of life in this country, and the reallocation of thousands of agents to countering terrorism, the government has yet to show results proportionate to the monumental vested resources. In the apt words of David Cole and Jules Lobel, we have become both less safe and less free.<sup>87</sup>

What these strategies accomplish quite well is the stigmatization of more than 6 million Muslims in the United States because of the illegal acts of a handful of Muslims – some of whom are foreign and have no ties

whatsoever to this country. Many American Muslims feel that they live a second-class existence because their houses of worship are more likely than others' to be under surveillance and monitored. Their Internet activity is more likely to be under heightened scrutiny for any signs of political dissent. Their religious practices are under the microscope by purported terrorist experts who cannot tell the difference between orthodox Islamic practices and bona fide terrorist activity.<sup>88</sup> And, Muslim women's religious headwear is perceived as an insignia for terrorist inclinations that justify discriminatory treatment.<sup>89</sup>

Predictably, what started out as a focus on vulnerable religious and racial minorities has now spread to a broader segment of Americans. Laws prohibiting material support to terrorism that were initially applied to Muslim individuals and institutions are increasingly being enforced against various individuals and institutions engaged in humanitarian aid, peace building, and human rights advocacy. Non-Muslim activist groups who have been engaged in legitimate advocacy for decades are now being targeted for investigation and potential prosecution pursuant to material support to terrorism laws.<sup>90</sup> A combination of public apathy about the state of civil liberties, pervasive stereotypes of Muslims as terrorists, and government misinformation about the efficacy of counterterrorism policies has facilitated increased surveillance and investigative authorities commonly found in police states.<sup>91</sup>

Perhaps the most troubling factor in recent national security discourse is the increasingly alarmist and overtly biased collective categorization of Muslims as terrorists. Specifically, Representative Peter King's (R-NY) recent Congressional hearings, characterized as a political circus by some, legitimized America's worst fears.<sup>92</sup> That American Muslims are so distrusted as to warrant hearings focused solely on questioning their loyalty is reminiscent of our nation's collective punishment of Japanese Americans during WWII.

The silver lining in the disconcerting homegrown terrorism debates is the broad coalition of groups

that rejected King's presumptions of collective guilt on Muslims on account of the bad acts of a few. Christian, Jewish, and civil rights groups representing a diversity of demographics challenged the merits of limiting "homegrown terrorism" to terrorism committed only by Muslims.<sup>93</sup>

Unfortunately, insufficient attention was paid to the importance of allowing Muslims, and all Americans in general, to express political dissent openly despite the unpopularity of their views. Instead, Muslim groups and their allies sought to reassure political leaders and a suspicious public of the Muslim Americans' undying loyalty to the nation and their status as "model minorities."<sup>94</sup> Rather than focusing on the right of Americans, including Muslims, to be radical so long as their activities do not violate the law, the Muslim groups and their allies adopted King's narrative to shape Muslim political beliefs and religious practices in accordance with a definition of a citizen who is passive toward their government. Indeed, the homegrown terrorism hearings were a missed opportunity to shift the focus on the fundamental American principle to hold unpopular or controversial views, rather than to prove the innocence of a suspected religious minority.

It is long past time for the government to reassess the successes and failures of its counterterrorism policies over the past ten years. Are we safer, or have we just been lucky? Has the PATRIOT Act made our government better able to prevent terrorism? Is it time for Americans, as members of Congress have proclaimed, to thoughtfully debate the Act's efficacy and whether its infringements on all Americans' civil liberties are warranted?<sup>95</sup> Are we seeking to rationalize our forfeiture of civil liberties by convincing ourselves that our national security policies work, irrespective of the facts on the ground? If we cannot answer these questions with concrete evidence, then we have little to show for the last ten years of significant government expenditure, public anxiety, and the high civil liberties costs imposed on a significant number of Americans.

In light of our nation's checkered civil rights record and ample opportunity to learn from the past, there is simply no excuse for repeating the same mistakes on yet another different and vulnerable minority group. Preventing a terrorist attack need not come at the expense of vilifying a religious minority. Nor should it require sacrificing this country's most fundamental civil rights and liberties.

## ENDNOTES

1 See, e.g., David Cole & Jules Lobel, *LESS SAFE, LESS FREE* 23-33 (2007); Pres. George W. Bush, Commencement Speech at West Point, June 1, 2002, *available at* <http://www.nytimes.com/2002/06/01/international/02PTEX-WEB.html> ("If we wait for threats to fully materialize, we will have waited too long. ... [T]he war on terror will not be won on the defensive."); Att'y Gen. John Ashcroft, Prepared Remarks at the Council on Foreign Relations, Feb. 10, 2003, *available at* [http://www.justice.gov/archive/ag/speeches/2003/021003ag\\_councilonforeignrelation.htm](http://www.justice.gov/archive/ag/speeches/2003/021003ag_councilonforeignrelation.htm) ("In order to fight and to defeat terrorism, the Department of Justice has added a new paradigm to that of prosecution – a paradigm of prevention. ... Our new, international goal of terrorism prevention ... involves anticipation and imagination about emerging scenarios, the puzzle pieces of which have yet to come into alignment.").

2 Att'y Gen. John Ashcroft, Prepared Remarks at the U.S. Mayors Conference, Oct. 25, 2001, *available at* [http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm).

3 See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 767-774 (1990) (arguing that the mainstream, institutionalized discourse defines racism as irrational because it is the "distortion of reason through the prism of myth and ignorance" and it clouds perception "with beliefs rooted in superstition"; hence, selective targeting based on "reason" or "rational" characteristics cannot be racist).

4 See, e.g., Evan Perez, *Rights Are Curtailed for Terror Suspects*, WALL ST. J., Mar. 24, 2011, available at [http://online.wsj.com/article/SB10001424052748704050204576218970652119898.html?mod=WSJ\\_hp\\_LEFTTopStories](http://online.wsj.com/article/SB10001424052748704050204576218970652119898.html?mod=WSJ_hp_LEFTTopStories) (highlighting the Obama administration's new policy curtailing *Miranda* rights for terror suspects that will likely erode *Miranda* rights for all criminal defendants, as the FBI has unfettered discretion to choose against whom to invoke the new policy).

5 See Associated Press, *With CIA Help, NYPD Built Secret Effort to Monitor Mosques*, *Daily Life of Muslim Neighborhoods*, WPOST (Aug. 24, 2011), available at [http://www.washingtonpost.com/national/with-cia-help-nypd-built-secret-effort-to-monitor-mosques-daily-life-of-muslim-neighborhoods/2011/08/24/gIQA87haJ\\_story.html](http://www.washingtonpost.com/national/with-cia-help-nypd-built-secret-effort-to-monitor-mosques-daily-life-of-muslim-neighborhoods/2011/08/24/gIQA87haJ_story.html) (describing the infiltration of undercover agents and paid informants in mosques, coffee shops, and ethnic neighborhoods spying on Muslims in what appear to be fishing expeditions).

6 Fusion centers are state, local, and regional institutions originally created to improve the sharing of anti-terrorism intelligence among different law enforcement agencies. Each individual center emerged and developed independently. For many, the scope of their mission has expanded dramatically, as has the scope of the information they collect and analyze. Participation in the centers has also grown to include not only law enforcement, but other government entities, the military and members of the private sector as well, leading to serious privacy concerns. See Michael German & Jay Stanley, *What's Wrong With Fusion Centers?*, AM. CIVIL LIBERTIES UNION (2007), available at [http://www.aclu.org/files/pdfs/privacy/fusioncenter\\_20071212.pdf](http://www.aclu.org/files/pdfs/privacy/fusioncenter_20071212.pdf).

7 See 18 U.S.C. §§ 2709(b)(1)-(2) (requiring third-party disclosure where information sought is only “*relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities*”) (emphasis added).

8 Despite the persistent economic slowdown, the Department of Justice's budget request for Fiscal-

Year 2011 to “strengthen national security and counter the threat of terrorism” includes over \$300 million in program increases. U.S. Dep't of Justice, *FY 2011 Budget Request*, available at <http://www.justice.gov/jmd/2011factsheets/pdf/national-security-counterterrorism.pdf>. See also U.S. Dep't of Justice, *Domestic Investigations and Operations Guide* 21-38, available at [http://www.muslimadvocates.org/DIOGs\\_Chapter4.pdf](http://www.muslimadvocates.org/DIOGs_Chapter4.pdf) (permitting mapping of communities based on race or ethnicity so long as it does not serve as the sole basis for monitoring specific communities).

9 For extensive information about the adverse impact of material support to terrorism laws on the nonprofit sector, see the Charity and Security Network at [www.charityandsecurity.org](http://www.charityandsecurity.org).

10 See, e.g., Laurie Goodstein, *Police in Los Angeles Step Up Efforts to Gain Muslims' Trust*, N.Y. TIMES, Mar. 9, 2011, available at <http://www.nytimes.com/2011/03/10/us/10muslims.html> (reporting Rep. Peter King “says that American Muslims do not cooperate”); Scott Shane, *For Lawmaker Examining Terror, a Pro-I.R.A. Past*, Mar. 8, 2011, available at <http://www.nytimes.com/2011/03/09/us/politics/09king.html> (reporting Rep. King asserted that “eight-five percent of leaders of American mosques hold extremist views and that Muslims do not cooperate with law enforcement”).

11 See Brief for the U.S. as Amicus Curiae, *Estes v. Rutherford Cnty Reg'l Planning Comm'n*, No. 10cv-1443, at 1 (Tenn. Ch. Ct. Oct. 18, 2010), available at [http://www.justice.gov/crt/about/hce/documents/murfreesboro\\_amicus\\_10-18-10.pdf](http://www.justice.gov/crt/about/hce/documents/murfreesboro_amicus_10-18-10.pdf) (“Plaintiffs have put into controversy whether Islam is a religion and whether a mosque is entitled to treatment as a place of religious assembly for legal purposes.”).

12 For a general description of the distinctions between the Arab, Muslim, Middle Eastern, Sikh, and South Asian communities, see Sahar F. Aziz, *Sticks and Stones, the Words that Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 43-50 (2009).

13 See, e.g., Thomas Watkins, *Suit Claims FBI*

*Violates Muslims' Rights at Mosque*, ABC NEWS, Feb. 23, 2011, available at <http://abcnews.go.com/US/wireStory?id=12977749> (“Plaintiffs in a lawsuit against the FBI said Wednesday that the agency’s use of a paid informant to infiltrate California mosques has left them and other Muslims with an enduring fear that their phones and e-mail are being screened and their physical whereabouts monitored.”); Jerry Markon, *Mosque infiltration feeds Muslims’ distrust of FBI*, WASH. POST, Dec. 5, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403720.html> (reporting on case of mosque infiltrator’s case backfiring); Salvador Hernandez, *Judge: FBI Lied But Documents About Muslims Secret*, ORANGE CTY. REGISTER, available at [http://articles.oregister.com/2011-04-29/news/29491933\\_1\\_fbi-s-documents-islamic-shura-council-muslim](http://articles.oregister.com/2011-04-29/news/29491933_1_fbi-s-documents-islamic-shura-council-muslim) (finding “the FBI Documents connected to surveillance of several Islamic organizations and Muslim leaders will not be released, but a federal judge strongly rebuked the government for lying about the existence of the documents to the federal court.”); *With CIA Help, NYPD Built Secret Effort to Monitor Mosques*, *Daily Life of Muslim Neighborhoods*, *supra* note 5.

14 See, e.g., William Glaberson, *Newburgh Terrorism Case May Establish a Line for Entrapment*, N.Y. TIMES, June 15, 2010, available at <http://www.nytimes.com/2010/06/16/nyregion/16terror.html> (reporting that FBI informant allegedly entrapped four young Muslim men with “promises of a \$250,000 payment and a BMW” into planning to bomb synagogues and shoot down military planes, despite the four men being “so ill-equipped to plan an attack that none had a driver’s license or a car”); Amanda Ripley, *The Fort Dix Conspiracy*, TIME, Dec. 6, 2007, available at <http://www.time.com/time/nation/article/0,8599,1691609,00.html> (reporting on allegations that FBI informant “brainwashed” and tricked six young men accused of plotting to attack Fort Dix) (“[I]f the rumors of entrapment become so corrosive that no one in the Muslim-American community feels safe talking to the FBI, then the government has lost its best potential ally.”).

15 See, e.g., *Blocking Faith, Freezing Charity*, AM. CIVIL LIBERTIES UNION 118-20 (2009), available at <http://www.aclu.org/pdfs/humanrights/blockingfaith.pdf> (discussing alienation of Muslim Americans as a result of government’s actions toward Muslim charities and donors).

16 See, e.g., N.Y. TIMES, *Imam’s Wife Tells of Death Threats*, Oct. 3, 2010, available at <http://www.nytimes.com/2010/10/04/nyregion/04daisy.html?ref=park51> (reporting death threats made against Park 51 imam and his wife).

17 See Lani Guinier & Gerald Torres, *THE MINER’S CANARY 11* (2003) (“Race, for us, is like the miner’s canary. Miners often carried a canary into the mine alongside them. The canary’s more fragile respiratory system would cause it to collapse from noxious gases long before humans were affected, thus alerting the miners to danger. ... Those who are racially marginalized are like the miner’s canary: their distress is the first sign of a danger that threatens us all.”).

18 Notably these rights were initially restricted to white men of property and a certain amount of wealth. They did not apply to women, slaves, native Americans, or to other ethnic groups who came later on, some of whom eventually managed to become “white.” See, e.g., John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

19 See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2709 (2010).

20 See *id.* at 2710 (“It is not difficult to conclude ... that the taint of [the terrorist groups’] violent activities is so great that working in coordination with them or at their command legitimizes and furthers their terrorist means.” *But see id.* at 2736 (Breyer, J. dissent) (“But this ‘legitimacy’ justification cannot by itself warrant suppression of political speech, advocacy, and association. ... [W]ere the law to accept a ‘legitimizing’

effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First Amendment battle would be lost in untold instances where it should be won.”).

21 Elena Kagan, Oral Argument, *Humanitarian Law Project*, No. 08-1498, Feb. 23, 2010 (“[B]ut to the extent that a lawyer drafts an amicus brief for [a terrorist organization] ... then that would indeed be prohibited.”).

22 See *Humanitarian Law Project*, 130 S. Ct. at 2725-26 (“Money is fungible and ‘[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.’ ... But, ‘there is reason to believe that foreign terrorist organizations do not maintain legitimate *financial* firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations.’ ... Thus, ‘[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.’) (citations omitted).

23 See *Blocking Faith*, *supra* note 15, at 42 (noting that government’s freezing of KindHearts assets put the charity out of operation, despite never instituting criminal proceedings or designating KindHearts a terrorist organization); see also Press Release, U.S. Dep’t of Treasury, Treasury Freezes Assets of Organization Tied To Hamas, Feb. 19, 2006, available at <http://www.treasury.gov/press-center/press-releases/Pages/js4058.aspx> (announcing KindHearts’ assets blocked merely *pending investigation* of providing support to terrorism) (emphasis added); *Kindhearts for Charitable Humanitarian Dev’t, Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009) (finding blocking assets pending investigation violated Fourth Amendment).

24 Seven out of the nine United States charities shut down pending terrorism-related investigation or designation are Muslim charities. See *Blocking Faith*, *supra* note 15, at 8.

25 See, e.g., Eric Gorski, *U.S. Muslims Experiencing Anxiety Over Roles*, DENVER POST, Aug. 19, 2011, available

at [http://www.denverpost.com/frontpage/ci\\_18692208](http://www.denverpost.com/frontpage/ci_18692208) (quoting a local imam stating “IRS scrutiny of giving to Islamic charitable organizations had a chilling effect on donations” causing the mosque to shut down).

26 *Id.* at 89; see also *Muslim Charities and the War on Terror*, OMB Watch 5 (2006), available at <http://www.ombwatch.org/files//npadv/PDF/MuslimCharitiesTopTenUpdated.pdf> (“Many in the Muslim community fear that their donations might land them on a list of suspected terrorist sympathizers and supporters, even if they are completely unaware of any wrongdoing or if the charity comes under suspicion years later.”); *With CIA Help, NYPD Built Secret Effort to Monitor Mosques, Daily Life of Muslim Neighborhoods*, *supra* note 5.

27 See *Muslim Charities and the War on Terror*, *supra* note 26, at 5 (“In this climate of fear and suspicion, donations to Muslim charities have declined significantly since last Ramadan. Some Muslim donors are turning to nondenominational groups and local causes, while others are choosing to give anonymous cash donations – a practice that ends up hindering the government’s ability to prevent terrorist financing and demonstrates the extent to which the right to give openly has been compromised.”).

28 See, e.g., *id.* at 69-72, 92, 100; *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home*, Muslim Advocates (2009), available at [http://www.muslimadvocates.org/documents/Unreasonable\\_Intrusions\\_2009.pdf](http://www.muslimadvocates.org/documents/Unreasonable_Intrusions_2009.pdf).

29 See *Blocking Faith*, *supra* note 15, at 92-93 (reporting donation levels down at least fifty percent at many charities and mosques).

30 *Id.* at 7; see also Sahar F. Aziz, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?* 9 TEX. J. C.L. & C.R. 45, 46 (2003).

31 *Blocking Faith*, *supra* note 15, at 7.

32 See, e.g., Kathryn A. Ruff, *Scared to Donate:*

*An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 473 (2006) (“While some of those fears are grounded in the possibility of actually funding terrorism, a greater reason for the drop in religious donations is that many Muslims are afraid of becoming targets of law enforcement and branded as terrorists due to their connections with a charity that comes under investigation.”).

33 The seven Muslim charities are: Al-Haramain Islamic Foundation-USA (Oregon), Benevolence International Foundation (Illinois), Global Relief Foundation (Illinois), Holy Land Foundation for Relief and Development (Texas), Islamic American Relief Agency—USA (Missouri), Goodwill Charitable Organization (Michigan), and KindHearts for Charitable Humanitarian Development (Ohio). See *Blocking Faith*, *supra* note 15, at 11.

34 Aziz, *supra* note 30, at 54 (“The [International Emergency Economic Powers Act’s] asset freezing provision applies to ‘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 . . .,’ as well as to suspect domestic organization, regardless of their affiliation with a specific attack.” (citing 50 U.S.C. § 1701(a)(1)(C) (West 2003))); *Muslim Charities and the War on Terror*, *supra* note 26, at 2 (reporting the executive has “largely unchecked power” to seize a groups materials, assets and property *pending an investigation* into terrorism ties).

35 See, e.g., Brief for Plaintiffs, *KindHearts for Charitable Humanitarian Dev. v. Geithner*, No. cv-2400, at 53-59 (N.D. Ohio Feb. 2, 2009) (arguing that KindHearts has constitutional right to use its funds to pay for its legal defense).

36 See Complaint, *ACLU v. Geithner*, No 1:10-cv-01303 (D.D.C. Aug. 3, 2010) (arguing

37 See *id.* at ¶¶ 21-22 (citing previous versions of 31 C.F.R. §§ 594.101-594.901 and specifically §

594.506(a)). Note that the regulations for designated organizations allow for pro bono legal representation without an OFAC license whereas prior to the Al-Aulaki case, an organization under investigation for designation had obtain an OFAC license in order to retain legal counsel. See *infra* note 39.

38 See, e.g. *KindHearts for Charitable Humanitarian Dev’t, Inc. v. Geithner*, 647 F. Supp. 2d 857, 912-919 (N.D. Ohio 2009) (finding OFAC’s policy restricting use of blocked assets for compensation of legal services reasonable and facially valid but application of policy to KindHearts’ case to be arbitrary and capricious).

39 75 Fed. Reg. 75,904, 75,906 (Dec. 7, 2010) (amending 31 C.F.R. § 594.506); see also *New Treasury Rule Improves Access to Lawyers for Listed Charities*, Charity and Security Network, Dec. 15, 2010, available at [http://www.charityandsecurity.org/news/Treasury\\_Improves\\_Access\\_Lawyers\\_Charities](http://www.charityandsecurity.org/news/Treasury_Improves_Access_Lawyers_Charities); see also *Government Changes Attorney Licensing Regulations in Response to Lawsuit Filed by CCR and ACLU*, American Civil Liberties Union, Dec. 17, 2010, available at <http://www.aclu.org/national-security/government-changes-attorney-licensing-regulations-response-lawsuit-filed-ccr-and-a>.

40 See *New Treasury Rule*, *supra* note 39.

41 See *supra* note 33.

42 The six charities are: KinderUSA (Texas), Life for Relief and Development (Michigan), Al-Mabarrat (Michigan), Child Foundation (Oregon), Help the Needy (New York), and Care International (Massachusetts). See *Blocking Faith*, *supra* note 15, at 12.

43 Help the Needy and Care International have closed. *Id.*

44 See, e.g., Kathryn A. Ruff, *supra* note 32, at 476 (reporting that despite KinderUSA’s attempts to structure its practices to specifically not violate material support laws, it nevertheless stopped soliciting donations due to FBI surveillance, wiretapping, attempts to subvert employees, and the government’s spreading of malicious information).

45 *Zakat*, one of the five pillars of Islam, requires that Muslims donate a certain amount of their annual earnings to charity. In many Muslim countries, this charitable giving is managed by locally controlled committees that collect and distribute the donations. See generally Liz Leslie, *Ramadan and Charity: What Is Zakat?*, Muslim Voices, July 28, 2010, available at <http://muslimvoices.org/ramadan-charity-zakat/>.

46 See Conviction of Holy Land Foundation Raises Questions, Concerns for Nonprofits, Charity and Security Network, Nov. 25, 2008, available at [http://www.charityandsecurity.org/news/Conviction\\_Holy\\_Land\\_Raises\\_Questions\\_Concerns\\_Nonprofits](http://www.charityandsecurity.org/news/Conviction_Holy_Land_Raises_Questions_Concerns_Nonprofits) (“[T]he same zakat committees have received aid from the International Red Cross and the U.S. Agency for International Development.”).

47 Brief for Charities, Foundations, Conflict Resolution Groups and Constitutional Rights Organizations as Amici Curiae Supporting Defendant-Appellants, *United States v. Holy Land Found.*, No. 09-10560 (5th Cir. Oct. 26, 2010); see also Charity and Security Network, *Brief Argues Material Support Conviction Should Require Knowledge of Terror Connection*, Oct. 26, 2010, available at [http://www.charityandsecurity.org/news/Brief\\_Argues\\_Material\\_Support\\_Conviction\\_Should\\_Require\\_Knowledge\\_of\\_Terror\\_Connection](http://www.charityandsecurity.org/news/Brief_Argues_Material_Support_Conviction_Should_Require_Knowledge_of_Terror_Connection).

48 Brief for Charities, Foundations, Conflict Resolution Groups and Constitutional Rights Organizations as Amici Curiae Supporting Defendant-Appellants, *United States v. Holy Land Found.*, No. 09-10560 (5th Cir. Oct. 26, 2010).

49 *Id.*

50 *Id.*

51 *Blocking Faith*, *supra* at note 15, at 7.

52 *Humanitarian Law Project*, 130 S. Ct. at 2708.

53 *Id.* at 2717.

54 See *id.* at 2708, see also Press Release, Constitution Project, *Holder v. Humanitarian Law Project Upholds Broad Application of Material Support Laws to Prohibit Pure Speech That Furthers Lawful*

*Ends*, Const. Project, June 21, 2010, available at [http://www.constitutionproject.org/news/2010/06212010n\\_constitution.php](http://www.constitutionproject.org/news/2010/06212010n_constitution.php); Press Release, Charity and Security Network, *Supreme Court Upholds Ban on Peaceful Conflict Resolution Support To Terrorist Groups*, June 21, 2010, available at [http://www.charityandsecurity.org/news/Supreme\\_Court\\_Ban\\_Peaceful\\_Conflict\\_Resolution\\_Support\\_Terrorist\\_Groups](http://www.charityandsecurity.org/news/Supreme_Court_Ban_Peaceful_Conflict_Resolution_Support_Terrorist_Groups).

55 See *Humanitarian Law Project*, 130 S. Ct. at 2731-2743.

56 See *Muslim Charities and the War on Terror*, *supra* note 26, at 2.

57 Just weeks after the Supreme Court’s ruling undermining the independence of American civil society and human rights advocacy in *Humanitarian Law Project*, Secretary of State Hillary Clinton touted the necessity of a strong civil society as an “essential element[] of a free nation.” See Sec’y of State Hillary Clinton, *Speech at the Community of Democracies, Civil Society: Supporting Democracy in the 21st Century*, July 3, 2010, available at <http://www.state.gov/secretary/rm/2010/07/143952.htm>.

58 But see *Blocking Faith*, *supra* note 15, at 74 (describing well-known case of Palestinian American and former imam of Georgia mosque who pleaded guilty in August 2006 to charges of material support for terrorism for donations made to Holy Land Foundation).

59 Collateral prosecution of American Muslim donors involves arrests or indictments that, while not officially related to the donors’ contributions, are speculated to have been prompted by their donations or charitable giving. See *Blocking Faith*, *supra* note 15, at 73.

60 See *id.* at 73-75.

61 See generally Aziz, *supra* note 30. See also Eric Gorski, *supra* note 25 (quoting a local imam stating “IRS scrutiny of giving to Islamic charitable organizations had a chilling effect on donations” causing the mosque to shut down).

62 See *Blocking Faith*, *supra* note 15, at 69-70 (citing a 2005 investigation by the U.S. Senate Committee

on Finance that reviewed financial records given to the IRS including donor lists of two dozen Muslim charities).

63 *Id.* at 73-74 (highlighting the case of Jesse Maali who was prosecuted for violations of immigration, employment, and tax law after his large donations to Muslim charities came to the attention of federal agents).

64 *Id.* at 69.

65 *Id.* at 69-73.

66 See, e.g., Oralandar Brand Williams, *CAIR says Muslim Americans harassed when crossing border*, DETROIT NEWS, Mar. 25, 2011, available at <http://www.detroitnews.com/article/20110325/METRO/103250392/CAIR-says-Muslim-Americans-harassed-when-crossing-border> (reporting on call for federal investigation into the routine harassment of Arab and Muslim Americans at U.S. border crossings); Council on Am.-Islamic Relations, *The Status of Muslim Civil Rights in the United States: Seeking Full Inclusion* 19, 27 (2009), available at <http://www.cair.com/Portals/0/pdf/CAIR-2009-Civil-Rights-Report.pdf> (noting cases of Muslims stopped at border crossings and detained for hours with no explanations).

67 *Id.* at 69.

68 See, e.g., Islamic Singer Sentenced in False Statements Case, ABC NEWS, Dec. 14, 2010, available at <http://abcnews.go.com/Entertainment/wireStory?id=12398415> (reporting that a prominent Muslim singer, who was also a Holy Land Foundation representative in 1997 and 1998, pleaded guilty to making false statements during immigration process and was ordered deported).

69 See *infra* note 13.

70 *Id.*; see also Mosque shuns FBI informant, AL JAZEERA, Dec. 7, 2010, available at <http://english.aljazeera.net/news/americas/2010/12/201012520148175694.html>; Mosque Infiltration Feeds Muslims' Distrust of FBI, CAIR, Dec. 5, 2010, available at <http://www.cair.com/ArticleDetails.aspx?mid1=674&&ArticleID=26699&&name=n&&currPage=1>.

71 See Petra Bartosiewicz, *To Catch a Terrorist:*

*The FBI Hunts for the Enemy Within*, HARPER'S MAGAZINE, August 2011, available at <http://harpers.org/archive/2011/08/0083545>.

72 See *id.*

73 See, e.g., *Blocking Faith*, *supra* note 15, at 69; Bartosiewicz, *supra* note 72 (reporting FBI offered "cooperation deal" to man accused of assisting in obtaining fraudulent identification documents in exchange for his "rooting out terrorist threats").

74 *Id.* at 75.

75 See, e.g., David Cole, *Guilt by Association Squared: Extending the Bounds of the 'Material Support' Statute*, AM. CONST. SOCIETY, Nov. 8, 2010, available at <http://www.acslaw.org/acsblog/node/17509>.

76 See, e.g., Nonprofit Groups End Talks With Treasury about Ineffectual Guidelines, Charity and Security Network, Dec. 1, 2010, available at [http://www.charityandsecurity.org/news/Nonprofit\\_Groups\\_End\\_Talks\\_With\\_Treasury\\_about\\_Ineffectual\\_Guidelines](http://www.charityandsecurity.org/news/Nonprofit_Groups_End_Talks_With_Treasury_about_Ineffectual_Guidelines).

77 Designated organizations may be Foreign Terrorist Organizations (FTO) listed by the Secretary of State or Specially Designated Global Terrorists (SDGT) listed by the Department of Treasury. See Aziz, *supra* note 30, at 51-55.

78 Charity and Security Network, *Model Policies for Fair Procedures for Listing and Delisting U.S. Charities*, Aug. 3, 2011, available at [http://www.charityandsecurity.org/solutions/model\\_due\\_process\\_procedures\\_charities](http://www.charityandsecurity.org/solutions/model_due_process_procedures_charities). *But see* 31 C.F.R. 501.807 (permitting designated entities to seek administrative reconsideration by federal government after designation and property has been frozen which allows the entity to add evidence to the administrative record considered by a federal court if the designation is appealed). See *generally* Al Haramain Islamic Foundation, Inc. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1250 (D. Or. 2008) (allowing charity to submit rebuttal evidence into the administrative record).

79 E.g., Ron Suskind, *The Price of Loyalty: George W. Bush, the White House, and the Education of Paul*

O'Neill (2004); Julie B. Shapiro, *The Politicization of the Designation of Foreign Terrorist Organizations: The Effect on the Separation of Powers*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 547 (2008).

80 See, e.g., Testimony of Chip Ponce, U.S. Senate Homeland Security and Governmental Affairs Committee, May 10, 2007, available at <http://www.treasury.gov/press-center/press-releases/Pages/hp404.aspx>.

81 See *Principles and Procedures for Release of Frozen Funds for Charitable Purposes*, Charity and Security Network, Jan. 15, 2008, available at [http://www.charityandsecurity.org/Solution/Procedures\\_Release\\_Funds\\_Charity](http://www.charityandsecurity.org/Solution/Procedures_Release_Funds_Charity).

82 For extensive information and in-depth analysis about the issues and proposed solutions, see generally the Charity and Security Network available at [www.charityandsecurity.org](http://www.charityandsecurity.org).

83 See Walter Griffin, *Report: 'Dirty bomb' parts found in slain man's home*, BANGOR DAILY NEWS, Feb. 10, 2009, available at <http://new.bangordailynews.com/2009/02/10/politics/report-dirty-bomb-parts-found-in-slain-mans-home/>.

84 See, e.g., Michael Brick, *Man Crashes Plane Into Texas I.R.S. Office*, N.Y. TIMES, Feb. 18, 2010, available at <http://www.nytimes.com/2010/02/19/us/19crash.html>.

85 See, e.g., David A. Fahrenthold and Clarence Williams, *Tucson shooting suspect Jared Loughner appears to have posted bizarre messages*, WASH. POST, Jan. 9, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/08/AR2011010803961.html> (reporting Loughner "left at trail of bizarred and anti-government messages on the Internet").

86 See, e.g., Pete Yost, *Senate Panel Votes to Extend Surveillance Law*, ASSOCIATED PRESS, Aug. 2, 2011, available at [http://www.google.com/hostednews/ap/article/ALeqM5hMme\\_Csz2MhqEf5YT5fGvWrLW0xA?docId=a8e634f0f45f44918bf683c97eb5d5bea](http://www.google.com/hostednews/ap/article/ALeqM5hMme_Csz2MhqEf5YT5fGvWrLW0xA?docId=a8e634f0f45f44918bf683c97eb5d5bea) ("The 2008 amendments to the Foreign Intelligence Surveillance Act, which were bitterly disputed in Congress, allow the government to obtain from a secret court broad, yearlong

intercept orders that target foreign groups and people overseas, raising the prospect that phone calls and emails between those foreign targets and innocent Americans in this country also will be collected and reviewed.").

87 See Cole & Lobel, *supra* note 1.

88 See, e.g., Meg Stalcup and Joshua Craze, *How We Train Our Cops to Fear Islam*, WASH. MONTHLY, Mar.-Apr. 2011, available at <http://www.washingtonmonthly.com/features/2011/1103.stalcup-craze.html>.

89 Sahar F. Aziz, *Trapped Between Two Patriarchies: The Transition of the Muslim Woman's "Veil" from a Symbol of Subjugation to a Symbol of Terror* (forthcoming).

90 See FBI Infiltrator of Anti-War Group Exposed As More Activists Face Subpoenas, Charity and Security Network, Jan. 18, 2011, available at [http://www.charityandsecurity.org/news/FBI\\_Infiltrator\\_AntiWar\\_Group\\_Exposed\\_Activists\\_Subpoenas](http://www.charityandsecurity.org/news/FBI_Infiltrator_AntiWar_Group_Exposed_Activists_Subpoenas).

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93 See, e.g., ACLU and Broad Coalition Tell Rep. King of Concerns About Muslim "Radicalization" Hearing, Mar. 8, 2011, available at <http://www.aclu.org/free-speech-national-security/aclu-and-broad-coalition-tell-rep-king-concerns-about-muslim-radicaliz>.

94 See Miranda Oshige McGowan and James Lindgren, *Testing the "Model Minority Myth"* 100 Nw. U. L. REV. 331 (2006).

95 See, e.g., Senator Rand Paul's Letter of Opposition to the Patriot Act, Feb. 15, 2011, available at <http://www.randpaul2010.com/2011/02/senator-rand-paul-s-letter-of-opposition-to-the-patriot-act/>.

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## RESEARCH MAKING AN IMPACT

ISPU is an independent, nonpartisan think tank and research organization committed to conducting objective, empirical research and offering expert policy analysis on some of the most pressing issues facing our nation, with an emphasis on those issues related to Muslims in the United States and around the world. Our research aims to increase understanding of American Muslims while tackling the policy issues facing all Americans, and serves as a valuable source of information for various audiences. ISPU scholars, representing numerous disciplines, offer context-specific analysis and recommendations through our publications. The diverse views and opinions of ISPU scholars expressed herein do not necessarily state or reflect the views of ISPU, its staff, or trustees.



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