



Written Statement of  
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On

“Anti-Money Laundering: Blocking Terrorist Financing and its  
Impact on Lawful Charities”

Before the

Subcommittee on Oversight and Investigations

House Committee on Financial Services

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Chairman Moore, Ranking Member Biggert, and Members of the Subcommittee, thank you for inviting me to testify on behalf of the American Civil Liberties Union, its over half a million members and fifty-three affiliates nationwide, about the need for greater transparency and due process in the Treasury Department's enforcement of anti-terrorism financing laws, particularly as it affects charitable organizations working to foster peace, promote human rights and alleviate human suffering around the world. The ACLU is one of the nation's oldest and largest organizations committed to defending the Constitution and Bill of Rights in the courts and before the executive and legislative branches of government. We appreciate the opportunity to express our concerns about an unconstitutionally overbroad statutory and regulatory framework which gives the Treasury Department practically unfettered authority to shutter charities using secret evidence, without independent oversight, probable cause, or effective due process protections to protect against error and abuse.

## **I. Introduction**

We all acknowledge the government's legitimate and compelling interest in protecting the nation from terrorism and in stemming material support that furthers the unlawful, violent acts of terrorist groups. But the Constitution requires precision in pursuing this mission to ensure the government properly distinguishes between confederates of terrorist groups who seek to facilitate their unlawful aims, and individuals and organizations whose legitimate First Amendment expression and advocacy brings them into association with such groups. Unfortunately, at a time when the humanitarian aid and development programs and conflict resolution and human rights training offered by charities and foundations are needed the most, the Treasury Department's capricious, arbitrary and discriminatory enforcement of overbroad U.S. anti-terrorism financing laws have made it far more difficult for nonprofit organizations to provide critical international aid and services.<sup>1</sup> Rather than distributing aid on the basis of where the need and potential for positive impact are greatest, current counterterrorism measures have caused some nonprofits to avoid the very global hotspots that would benefit the most from their work, damaging the international goodwill and promise for stability that these efforts help create.<sup>2</sup> Meanwhile, despite the Treasury Department's frequent claims that charities are a

<sup>1</sup> See, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the "War on Terrorism Financing,"* American Civil Liberties Union, (June 2009)[hereinafter, "*Blocking Faith*"], at: <http://www.aclu.org/human-rights/report-blocking-faith-freezing-charity>

<sup>2</sup> See, Written Statement of Ahilan T. Arulanantham, Staff Attorney, ACLU of Southern California), available at <http://www.aclu.org/safefree/general/17536leg20050510.html>; See also, Ahilan T. Arulanantham, A Hungry Child Knows No Politics: A Proposal for Reform of the Laws Governing Humanitarian Relief and 'Material Support' of Terrorism, American Constitution Society (June 2008), available at <http://www.acslaw.org/files/Arulanantham%20Issue%20Brief.pdf>.

significant source of terrorist funding, the government has actually designated and successfully prosecuted relatively few charities for terrorism-related activities.

The generosity of the American people toward those in need around the world is an asset to U.S. counterterrorism efforts, and our government should not continue squandering it by unfairly castigating the charitable sector as a primary source of terrorist financing when the available evidence belies this notion. The Constitution gives Congress the power and the responsibility to oversee Executive Branch activities to ensure compliance with the law, to improve the efficiency and effectiveness of government operations, and to protect individual rights and liberties.<sup>3</sup> We urge this Subcommittee to thoroughly investigate and evaluate the Treasury Department's anti-terrorism financing efforts to ensure they fairly and effectively target those entities that specifically intend to support the illegal activities of terrorist organizations, while providing enough transparency and due process to allow legitimate aid and services to flow unimpeded.

## **II. An Overbroad Statutory and Regulatory Scheme Shrouded in Excessive Secrecy**

In 1977 Congress enacted the International Emergency Economic Powers Act (IEEPA), amending the Trading With the Enemy Act of 1917 to clarify and limit the President's power to impose economic sanctions on "any foreign country or a national thereof" during times of national crisis.<sup>4</sup> To invoke the authority granted under IEEPA the President must formally declare a national emergency, which requires finding an "unusual and extraordinary" threat to the national security, foreign policy, or the U.S. economy existing wholly or substantially outside the United States. Upon such a declaration, the President may impose economic sanctions and block or prohibit any transaction involving "property in which any foreign country or a national thereof has any interest... subject to the jurisdiction of the United States."<sup>5</sup>

For almost twenty years IEEPA-authorized embargoes and sanctions were imposed only on foreign nations and their citizens, as a tool of foreign policy. In 1995, however, President Bill Clinton extended IEEPA's reach through Executive Order 12,947, for the first time imposing sanctions against certain terrorist organizations, rather than nation-states, thereby blocking all of their property and making it illegal for others to knowingly provide them with any contribution of funds, goods or services.<sup>6</sup> Shortly after the terrorist attacks of September 11, 2001, President George Bush invoked his authority under IEEPA to issue E.O. 13,224, which designated 27 organizations and individuals as "specially designated global terrorists" (SDGTs), and authorized the Secretary of the Treasury and the Secretary of State to name more organizations to the SDGT list.<sup>7</sup> The term "specially designated global terrorist" is not a term defined in any statute, rather it is entirely a creation of E.O. 13,224. Federal regulations promulgated pursuant to the order

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<sup>3</sup> See, Frederick M. Kaiser, Walter J. Oleszek, T.J. Halstead, Morton Rosenberg, and Todd B. Tatelman, CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL OVERSIGHT MANUAL, CRS REPORT FOR CONGRESS, 5 (May 1, 2007)[*hereinafter*, "CONGRESSIONAL OVERSIGHT MANUAL"] available at <http://www.fas.org/sgp/crs/misc/RL30240.pdf>.

<sup>4</sup> 50 U.S.C. §1701-1707.

<sup>5</sup> *Id.*, §1702(a)(1)(B).

<sup>6</sup> Executive Order 12947, 60 Fed. Reg. 5,079 (Jan. 23, 1995).

<sup>7</sup> Executive Order 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

define SDGTs circularly, as anyone “listed in the Annex or designated pursuant to Executive Order 13,224.”<sup>8</sup>

The E.O. confers broad powers to the Secretary of the Treasury, contains vague criteria for designation, and lacks any evidentiary standards. It allows the Secretary of the Treasury to block the assets of any organization or individual he determines is “owned or controlled by,” or acts “for or on behalf of,” or assists in other ways a person or organization on the SDGT list. Further, the E.O. authorizes the designation of individuals “otherwise associated with” SDGTs. This final provision was declared unconstitutional in 2006, because it authorized designation based on mere association, but the Treasury Department subsequently redefined the provision in federal regulations.<sup>9</sup> The consequences of designation include the seizure and freezing of all financial and tangible assets, as well as significant civil and potentially criminal penalties.<sup>10</sup>

IEEPA effectively allows the government to shut down an organization forever, without notice or hearing, on the basis of secret evidence, and without any meaningful judicial review. The Office of Foreign Assets Control (OFAC), which administers the Treasury Department’s IEEPA authorities, is not required to provide notice or a hearing before designation. The legal scheme does not require OFAC to make any statement of reasons for designation, does not require OFAC to comply with any deadlines for providing notice, and does not identify the burden of proof the agency carries. OFAC has taken the position that in order to designate an individual or organization it needs only a reasonable suspicion that the entity provided “financial, material, or technological support for, or financial services to” or is “otherwise associated” with an SDGT, regardless of whether the entity actually intended to support the SDGT.<sup>11</sup> IEEPA and

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<sup>8</sup> See, 31 CFR §594.310 (2007) (defining “specially designated global terrorist” as anyone “listed in the Annex or designated pursuant to Executive Order 13,224”).

<sup>9</sup> See, *Humanitarian Law Project v. U.S. Dept. of the Treasury*, 463, F. Supp. 2d, 1049 (C.D. Cal. 2006); and, 31 CFR §594.316 (2007).

<sup>10</sup> See, 50 U.S.C. §1705. In addition, the Antiterrorism and Effective Death Penalty Act of 1996 (18 USC §2339), passed in the wake of the Oklahoma City bombing, criminalized providing material support to terrorists or terrorist organizations. Title 18 U.S.C. § 2339A makes it a federal crime to knowingly provide material support or resources in preparation for or in carrying out specified crimes of terrorism, and 18 U.S.C. § 2339B outlaws the knowing provision of material support or resources to any group of individuals the secretary of state has designated a foreign terrorist organization (FTO). The Patriot Act expanded the already overbroad definition of “material support and resources” to include “expert advice or assistance,” and increased penalties for violations of the statute. After successful legal challenges, Congress narrowed these provisions in the 2004 Intelligence Reform and Terrorism Prevention Act to require that a person have knowledge that the organization is an FTO, or has engaged or engages in terrorism. However, the statute still does not require the government to prove that the person *specifically intended* for his or her support to advance the terrorist activities of the designated organization. In fact, the government has argued that those who provide support to designated organizations can run afoul of the law even if they oppose the unlawful activities of the designated group, intend their support to be used only for humanitarian purposes and take precautions to ensure that their support is indeed used for these purposes. *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d, 1134, 1142-48, (C.D. Cal. 2005). This broad interpretation of the material support prohibition effectively prevents humanitarian organizations from providing needed relief in many parts of the world where designated groups control schools, orphanages, medical clinics, hospitals and refugee camps. The case is currently before the Supreme Court, and a decision is pending.

<sup>11</sup> See, Opinion and Order, *Al Haramain Islamic Found., Inc. v. U.S. Dep’t. of Treasury et al.*, No. 07-1155-K1 (D. Or. Nov. 6, 2008); and, Defs.’ Mot. to Dismiss at 24-25, *KindHearts for Charitable Humanitarian Dev. v. Geithner*, No. 3:08-CV-2400 (N.D. Ohio Dec. 12, 2008) “OFAC need not find that KindHearts intended to support terrorist

the E.O. do not require judicial review of designations. Where entities have tried to challenge their designation, courts have generally applied a highly deferential Administrative Procedures Act standard to their review of OFAC's actions, which requires finding the agency acted in an "arbitrary and capricious" manner in order to overturn the designation.<sup>12</sup> If a court does review the government's evidence supporting designation, it may do so *in camera* and *ex parte*, which denies the designated entity and its attorneys the opportunity to challenge the evidence against it.

The USA Patriot Act further amended IEEPA to allow the government to block or freeze an entity's assets even without a designation, by simply opening an investigation into whether it should be designated.<sup>13</sup> IEEPA does not specify any standard of suspicion necessary to order a "freeze pending investigation," does not require notice or a meaningful opportunity to contest the allegations, or contain any time limit on the length of the investigation. No criminal charges ever need to be filed in order to effectively shut a charity down for good, and the charity need never be told what evidence or allegations led to its demise.

The laws that authorize the freezing of assets do not set any timeline or limit for the discharge of these funds, such that frozen charitable funds could be held indefinitely. The Treasury Department has denied repeated requests to allow transfer of blocked funds for humanitarian or disaster relief in accordance with the intent of the originators of these funds, charitable donors, even though it has authority to allow transfer of frozen funds.<sup>14</sup>

### **III. Discriminatory Enforcement of Anti-terrorism Financing Laws**

The vague and overbroad material support laws afford federal officials wide discretion in selecting organizations for designation and seizure of their assets, opening the door to discriminatory and arbitrary enforcement of these laws. Of nine U.S.-based charities whose assets have been seized after designation as an SDGT by the Treasury Department, seven are Muslim charities.<sup>15</sup> In addition, at least six U.S.-based Muslim charities have been declared under investigation or raided. These charities have not been designated nor had their assets seized pursuant to a blocking order, but have suffered as a result of publicly announced investigations, law enforcement raids, and intrusive surveillance. To date, only three designated U.S.-based Muslim charities have faced criminal prosecution, and only one has been convicted of terrorism-related charges. Many American Muslim community leaders and members have pointed to the selective and disproportionate enforcement of counterterrorism laws against

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activities, only that KindHearts engaged in affirmative conduct to provide financial support to entities that were funding Hamas."

<sup>12</sup> 5 U.S.C. § 701 *et seq.* See also, *Holy Land Found. For Relief and Dev. V. Ashcroft*, 333 F.3d. 156, at 162 (D.C Cir. 2003), "The district court correctly reviewed the actions of the Treasury Department under the highly deferential 'arbitrary and capricious' standard."

<sup>13</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272.

<sup>14</sup> See, 31 C.F.R. §§501, 597; see also, OMB Watch and Grantmakers Without Borders, *Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve*, p. 38, at: <http://www.ombwatch.org/node/3727>

<sup>15</sup> The two non-Muslim U.S.-based charities OFAC designated are Tamil Rehabilitation Organization-USA and Tamil Foundation.

American Muslim charities as evidence of discriminatory, religion-based targeting of Muslims and their charitable organizations.<sup>16</sup>

Beyond American Muslims' perception of discriminatory targeting of their community, it is clear that the federal government is unequally enforcing terrorism financing laws. The government's markedly different treatment of for-profit organizations that have allegedly violated terrorism financing laws demonstrates this unequal enforcement. For instance, in contrast to the treatment of U.S.-based Muslim charities, Chiquita Brands International was allowed to pay a fine of \$25 million following its payment of \$1.7 million directly to two designated terrorist groups in Colombia between 1997 and 2004.<sup>17</sup> Chiquita admitted to these payments in 2003, but no criminal charges were filed, its assets were never seized or frozen, and Chiquita continues to operate.<sup>18</sup> In another example, OFAC has never designated Halliburton or General Electric, or frozen their assets, despite both companies' conduct of business with Iran, which is designated as a state sponsor of terrorism.<sup>19</sup> Former Assistant Secretary of the Treasury Paul Craig Roberts, who served under President Ronald Reagan, observed, "I think the attack on the Muslim charities was just easy, it was an easy, soft target."<sup>20</sup>

The discriminatory enforcement of these overbroad laws also infringes on religious freedom, as President Barak Obama acknowledged almost a year ago in Cairo, Egypt: "...in the United States, rules on charitable giving have made it harder for Muslims to fulfill their religious obligation."<sup>21</sup> Though he pledged to work with American Muslims to address this problem, the Treasury Department has not modified its enforcement policies or practices.

But it isn't just Muslim charities that are unconstitutionally chilled from engaging in legitimate religious, humanitarian and advocacy activities as a result of the vague and overbroad anti-terrorist financing laws, and their arbitrary enforcement. The Carter Center, Christian Peacemaker Teams, Grassroots International, Human Rights Watch, International Crisis Group, The Institute for Conflict Analysis and Resolution at George Mason University, the Kroc Institute for International Peace Studies at Notre Dame University, Operation USA, and Peace Appeal Foundation joined in an *amicus* brief filed by the ACLU in support of a challenge to the criminal statute prohibiting material support for terrorism.<sup>22</sup> *Amici* argued that as a result of the breadth and vagueness of the material support statute's terms, it was unclear whether legitimate activities such as peace-making, conflict resolution, human rights advocacy, and the provision of

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<sup>16</sup> See "Blocking Faith," *supra*, Note 1.

<sup>17</sup> Edward Iwata and Donna Leinwand, *Chiquita Agrees to Fine for Paying Terrorists*, USA Today, March 15, 2007; Carol D. Leoning, *In Terrorism-Law Case, Chiquita Points to U.S.*, Wash. Post, Aug. 2, 2007; Jordy Yager, *Chiquita Fined for Colombia Payments*, L.A. Times, Sept. 18, 2007.

<sup>18</sup> OMB Watch and Grantmakers Without Borders, *Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve*, p. 38, at: <http://www.ombwatch.org/node/3727>

<sup>19</sup> Lisa Meyers, *Halliburton Operates in Iran Despite Sanctions*, NBC Nightly News, March 8, 2005, at: <http://www.msnbc.msn.com/id/7119752/>

<sup>20</sup> ACLU telephone interview with Paul Craig Roberts, former Assistant Secretary, Department of the Treasury, Panama City Beach, FL, April 9, 2009.

<sup>21</sup> Remarks of President Barak Obama, "On a New Beginning," (June 4, 2009) at: [http://www.whitehouse.gov/the\\_press\\_office/remarks-by-the-president-at-cairo-university-6-04-09/](http://www.whitehouse.gov/the_press_office/remarks-by-the-president-at-cairo-university-6-04-09/)

<sup>22</sup> Amicus Brief of Carter Center, Christian Peacemakers, Human Rights Watch, et al, in support of *Humanitarian Law Project*, *Holder v. Humanitarian Law Project*, et al, No. 08-1498 and 09-89 (Nov. 23, 2009).



aid to needy civilians could expose them to the risk of severe criminal penalties if they involved a group or members of a group that the U.S. government has designated, *or may in the future designate*, as a foreign terrorist organization. Indeed this is no idle concern, as the government has asserted that lawyers could be providing “expert advice or assistance” in violation of the material support statute by filing an *amicus* brief in support of a designated organization.<sup>23</sup>

Such a chilling effect on legitimate aid is counter-productive to U.S. counterterrorism goals. Experts suggest that humanitarian organizations can address risk factors that contribute to violent extremism by alleviating severe poverty, providing health care and education services, fostering sustainable community development, fighting corruption, promoting conflict resolution and encouraging democratic institutions.<sup>24</sup> The 9/11 Commission staff recommended that “a comprehensive U.S. strategy to counter terrorism should include economic policies that encourage development, more open societies, and opportunities for people to improve the lives of their families and to enhance prospects for their children’s futures.”<sup>25</sup>

#### **IV. Constitutional Challenge: Due Process Provides Necessary Transparency**

The ACLU recently challenged the constitutionality of OFAC’s authority to freeze a charity’s funds pending investigation in a case involving the charity, KindHearts for Charitable Humanitarian Development, Inc. KindHearts was established in 2002 - after the government shut down a number of Muslim charities - with the express purpose of providing humanitarian aid abroad and at home in the United States in full compliance with the law. KindHearts directed all of its employees to implement the Treasury Department’s Voluntary Guidelines for U.S.-Based Charities.<sup>26</sup>

In February 2006 OFAC blocked all of KindHearts’ assets without a warrant, notice or a hearing, based simply on OFAC’s assertion that it was investigating whether the charity should be designated as a SDGT. KindHearts repeatedly asked OFAC for the reasons for the freeze and notice of the factual basis for OFAC’s actions. But beyond the general allegation that

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<sup>23</sup> *Humanitarian Law Project v. Mukasey*, 552 F. 3d 916, at 930 (9<sup>th</sup> Cir. 2009). See also, Nina Totenberg, *Supreme Court Examines Limit of Material Support*, National Public Radio, (Feb. 23, 2010) at:

<http://www.npr.org/templates/story/story.php?storyId=124012925>

<sup>24</sup> U.S. Agency for International Development, *Guide to the Drivers of Violent Extremism*, (Feb. 2009) available at: [http://www.msi-inc.com/documents/EXTREMISM\\_DRIVERS\\_PAPER-final.pdf](http://www.msi-inc.com/documents/EXTREMISM_DRIVERS_PAPER-final.pdf); and Thomas Baltazar and Elizabeth Kvitashvili, *The Role of USAID and Development Assistance in Combating Terrorism*, *Military Review* (March-April 2007) at: [http://inside.usaid.gov/DCHA/CMM/documents/USAID\\_and\\_CT\\_Article.pdf](http://inside.usaid.gov/DCHA/CMM/documents/USAID_and_CT_Article.pdf)

<sup>25</sup> National Commission on Terrorist Attacks, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States*, (New York: Norton 2004), p. 379, available at: [http://www.9-11commission.gov/report/911Report\\_Ch12.htm](http://www.9-11commission.gov/report/911Report_Ch12.htm)

<sup>26</sup> OFAC created the *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* in 2006 to assist charities in protecting themselves from unintended diversion of charitable support to terrorist organizations. Both Muslim and non-Muslim charities, foundations and civil rights organizations (including the ACLU) have resoundingly criticized the Guidelines for imposing substantial and inefficient administrative burdens on nonprofit organizations with minimal success in uncovering terrorist diversion attempts, and have called for their withdrawal. Although the Guidelines state they are “voluntary,” some charities and foundations have said they view them as de facto legal requirements because they fear that choosing not to follow them will invite government scrutiny. However, organizations and their donors are not assured that complying with the Guidelines will spare them government investigation or blocking orders.

KindHearts was providing material support to Hamas, OFAC has never made specific charges. On May 25, 2007, OFAC informed KindHearts that it had “provisionally” decided to designate it as an SDGT. There is no specific authority in IEEPA for the government to “provisionally” designate an entity, and to this day, KindHearts has not been designated an SDGT, despite the government’s four year block against its assets.

With its May 25, 2007 letter, OFAC produced 35 documents that it identified as the “unclassified and non privileged documents” upon which it relied in provisionally deciding to designate KindHearts. Most of the documents did not even mention KindHearts, and concerned other entities instead. None of the documents explained the specific charges OFAC was considering against KindHearts, or why OFAC thought the evidence supported a potential designation. OFAC stated it “relied upon other classified and privileged documents obtained to date which are not authorized for disclosure...” Guessing at OFAC’s concerns, KindHearts submitted a 28 page preliminary submission to OFAC, which included 1369 pages of evidence. OFAC never responded, and later claimed it misplaced KindHearts’ submission.

In rulings issued on August 18, 2009 and May 10, 2010, Chief Judge James G. Carr of the U.S. District Court for the Northern District of Ohio, Western Division, held that OFAC’s freeze pending investigation was a seizure under the Fourth Amendment, which required a judicially-authorized warrant based upon probable cause. Going forward, the administration must obtain a warrant based on probable cause before seizing an organization’s assets. Further, Judge Carr called upon Congress to adopt “the appropriate structure” for establishing probable cause standards for freezes pending investigation under IEEPA, which would comply with the Fourth Amendment. Judge Carr also ruled that OFAC violated the Fifth Amendment’s guarantee of due process by failing to provide KindHearts notice of the charges against it or a meaningful opportunity to respond. He held that OFAC must remedy these failures by declassifying or adequately summarizing the classified evidence against KindHearts or by allowing KindHearts’ counsel to view the classified evidence pursuant to security clearances and a protective order.

Enforcing the procedural rights encompassed in the Fourth and Fifth Amendments will produce greater transparency in OFAC actions, and will better protect the religious, political and associational rights guaranteed under the First Amendment. The *KindHearts* decision gives Congress the opportunity to re-evaluate IEEPA in light of OFAC’s secretive, arbitrary and discriminatory enforcement activities, which neither keep us safe nor protect American values.

## **V. The Constitutional Role of Congressional Oversight in Ensuring Public Accountability**

The American people depend upon their elected representatives in Congress to oversee and regulate the government’s activities on their behalf and for their benefit. President Woodrow Wilson described Congress’s obligation to provide a window into government operations for the American people:

It is the duty of a representative body to look diligently into every affair of government and to talk about much of what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.<sup>27</sup>

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<sup>27</sup> Woodrow Wilson, *Congressional Government*, 303, (1885).



To achieve this goal, the Constitution gives Congress ample authority to investigate executive branch activities, including national security programs, and the tools to regulate them. Congress gave the President broad authority under IEEPA to regulate financial transactions in a national emergency, and Congress has the responsibility to ensure this power is used wisely, and in conformance with constitutional requirements.

Unfortunately, the Treasury Department's platitudes about the effectiveness of its anti-terrorism measures have not been borne out by the facts. In a 2004 report on terrorist financing, the 9/11 Commission staff found that the use of IEEPA against U.S. persons or organizations "raises significant civil liberties concerns," noting that IEEPA "allows the government to shut down an organization on the basis of classified evidence, subject only to a deferential after-the-fact judicial review."<sup>28</sup> The staff reported particular unease regarding the power to freeze assets pending investigation, which it described as, "a powerful weapon with potentially dangerous applications," that lets "midlevel government officials" shut down organizations with "no formal process, let alone any adjudication of guilt."<sup>29</sup> Treasury officials acknowledged to the Commission staff that the evidentiary basis for designation decisions were "quite weak" in the post-9/11 period, which led to questionable designations that undermined our international counterterrorism efforts by making other nations "unwilling to freeze assets or otherwise act merely on the basis of a U.S. action."<sup>30</sup> Georgetown University Law Professor Laura Donohue explained that

...the executive's bypassing of judicial mechanisms, in relying on less robust standards, made more likely a wrongful designation – with detrimental consequences for the United States. By 2004, the United Nations recognized the list, largely constructed by the United States, had "begun to lose credibility and operational value" and needed updating... In March 2006 a UN Security Council report expressed concern about the program's effectiveness. The Council of Europe issued a report that said the UN list violated the European Convention on Human Rights: it provided neither any protection against arbitrary decisions, nor did it include mechanisms to ensure that the allegations made by governments were accurate [internal footnotes omitted].<sup>31</sup>

Likewise, a 2005 Government Accountability Office (GAO) study suggested that the shroud of secrecy under which OFAC's exercises its IEEPA authorities raised questions about the effectiveness of these important programs:

The lack of accountability for Treasury's designations and asset blocking program creates uncertainty about the department's progress and achievements. U.S. officials with oversight responsibilities need meaningful and relevant information

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<sup>28</sup> National Commission on Terrorist Attacks Upon the United States, *Monograph on Terrorist Financing: Staff Report to the Commission*, p. 8 (Aug. 21, 2004) available at:

[http://govinfo.library.unt.edu/911/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf)

<sup>29</sup> *Id.*, at 112.

<sup>30</sup> *Id.*, at 79 and 48.

<sup>31</sup> Laura K. Donohue, *The Cost of Counterterrorism: Power, Politics and Liberty*, Cambridge University Press, (2008).

to ascertain the progress, achievements, and weaknesses of U.S. efforts to designate terrorists and dismantle their financial networks as well as hold managers accountable.<sup>32</sup>

GAO found in a 2009 follow-up report that Treasury's Terrorism and Financial Intelligence Office, which manages OFAC, continues to face deficiencies in interagency cooperation and strategic workforce planning, and has yet to develop appropriate performance measures to effectively assess core program activities.<sup>33</sup> OFAC, for instance, does not have a current strategic plan and has implemented inconsistent performance measures, which puts its ability to properly manage its resources to address national security threats at risk.<sup>34</sup> Congress must address these deficiencies that risk both our liberties and our security, by bringing needed transparency to the Treasury Department's procedures through vigorous public oversight and the establishment of effective due process mechanisms that give entities impacted by these broad authorities a meaningful opportunity to defend themselves before a neutral arbiter.

Congress is armed with many tools to compel compliance with its investigations. The Congressional Research Service Congressional Oversight Manual lists six constitutional provisions authorizing Congress to investigate, organize, and manage executive branch activities.<sup>35</sup> And the Supreme Court has interpreted the constitutional grant of legislative power as providing Congress "broad" authority to investigate – both to ensure that the laws it passes are effective, and to gather evidence to inform future legislation.<sup>36</sup> Congress can use these powers to effectively leverage cooperation from the executive branch, and can directly compel compliance with congressional inquiries when necessary, even in matters of national security. "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change," the Supreme Court ruled in 1927, noting that the power to compel is necessary because "experience has taught that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete."<sup>37</sup> We urge this Subcommittee to thoroughly investigate and evaluate the Treasury Department's anti-terrorism financing efforts to ensure

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<sup>32</sup> Government Accountability Office, *Terrorist Financing: Better Strategic Planning Needed to Coordinate U.S. Efforts to Deliver Counter-Terrorism Financing Training and Technical Assistance Abroad*, p. 29 (Oct. 24, 2005) available at: <http://www.gao.gov/new.items/d0619.pdf>

<sup>33</sup> Government Accountability Office, *Combating Illicit Financing: Treasury's Office of Terrorism and Financial Intelligence Could Manage More Effectively to Achieve its Mission*, (Sept. 2009) available at: <http://www.gao.gov/new.items/d09794.pdf>

<sup>34</sup> *Id.*, at 18-23.

<sup>35</sup> Frederick M. Kaiser, Walter J. Oleszek, T.J. Halstead, Morton Rosenberg, and Todd B. Tatelman, CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL OVERSIGHT MANUAL, CRS REPORT FOR CONGRESS, 5 (May 1, 2007), available at <http://www.fas.org/sgp/crs/misc/RL30240.pdf>. Two non-government organizations dedicated to constitutional principles and effective government, the Constitution Project and the Project on Government Oversight, have produced detailed manuals on the authorities and mechanics of congressional oversight investigations. They may be found here: <http://www.constitutionproject.org/newsdetail.asp?id=397>

<sup>36</sup> *Watkins v. U.S.*, 354 U.S. 178, 187 (1957). "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."

<sup>37</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174-175 (1927).

they effectively target those entities that specifically intend to support the illegal activities of terrorist organizations, while providing enough transparency and due process to allow legitimate aid and services to flow unimpeded.

## **VI. Recommendations For Congress**

1. Congress should reform the statutory scheme for designation of persons and entities as SDGTs under IEEPA to establish full due process protections, including:

- Issuing transparent standards governing OFAC designations.
- Creating a higher legal standard for designation.
- Precisely defining the criteria for an individual or entity to be found an SDGT.
- Enacting a narrower statutory definition of SDGT.
- Providing timely notice including a full list of charges and statement of reasons.
- Restricting the use of secret evidence.
- Providing a meaningful opportunity to defend, including the ability to submit evidence and a hearing.
- Providing meaningful judicial review of agency action.
- Creating a statutory basis for challenging designations and asset freezing process.
- Creating an effective redress program for individuals or organizations mistakenly flagged as a designated person.

2. Congress should enact a statutory scheme for the seizure of assets of suspected SDGTs that complies with the Fourth Amendment, as set out in Chief Judge Carr's decisions in the *KindHearts* case, by:

- Implementing a warrant and probable-cause procedure for the seizure of assets of suspected SDGTs.
- Requiring that the Secretary of the Treasury utilize the authority granted under the Civil Asset Forfeiture Reform Act of 2000, in lieu of Executive Order No. 13,224, to seize the assets of suspected SDGTs.

3. Promote greater transparency and accountability in Treasury Department anti-terrorism financing enforcement:

- Require more specific detail in OFAC reports to Congress, so that Congress can determine whether OFAC designations are appropriate and effective, and to ensure constitutional standards are met.
- Conduct regular oversight hearings on anti-terrorism financing policies as applied to the charitable and nonprofit sector.
- Request the GAO conduct an investigation of frozen charitable funds to determine how much is currently blocked, under what authority, whether it was blocked in accordance with judicial warrants based upon probable cause, and what barricades exist to transferring the funds to fulfill the charitable purposes of the donors.

## **VII. Conclusion**

We commend the Subcommittee for holding this hearing to examine how the uneven enforcement of anti-terrorism financing regulations is unnecessarily impeding legitimate charitable and humanitarian work. While the Treasury Department has an important duty to perform in stemming terrorist financing, it must accomplish this obligation without unjustly infringing on the rights of innocent Americans, or chilling free speech and association. Greater transparency and due process will help to ensure the Treasury Department is using its authorities only against true threats to our national security. Thank you for your efforts to increase public awareness of this issue.