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ASSET FREEZING OF ISLAMIC CHARITIES UNDER THE INTERNATIONAL ECONOMIC EMERGENCY POWERS ACT: A FOURTH AMENDMENT ANALYSIS

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**ASSET FREEZING OF ISLAMIC CHARITIES
UNDER THE INTERNATIONAL ECONOMIC
EMERGENCY POWERS ACT:
A FOURTH AMENDMENT ANALYSIS**

David Klass^{*}

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I. Introduction

At 12:01 a.m. this morning, a major thrust of our war on terrorism began with the stroke of a pen. Today, we have launched a strike on the financial foundation of the global terror network Just to show you how insidious these terrorists are, they oftentimes use nice-sounding non-governmental organizations as fronts for their activities If you do business with terrorists, if you support or sponsor them, you will not do business with the United States of America.¹

With that, on September 23, 2001, President Bush signed into law Executive Order 13,224,² giving the Treasury Department's Office of Foreign Assets Control ("OFAC") broad authority to designate individuals and organizations as "Specially Designated Global Terrorists" ("SDGTs"). Along with the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act")³ and the International Economic Emergency Powers Act ("IEEPA"),⁴ OFAC now has vast power and discretion to not only designate individuals as terrorists or terrorist supporters, but also to block the assets of any designated individual or organization pending investigation.⁵ So began the Bush Administration's campaign to fight terrorism through the destruction of terrorists' financial networks.

Unfortunately, this "strike" at the "foundation" of the global terrorist financial network has produced meager results, and has done so through an

¹ President George W. Bush, *quoted in* Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 378 (2006).

² Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 155 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, & 50 U.S.C.).

⁴ 50 U.S.C. §§ 1701-07 (2000).

⁵ *Id.*

unconstitutional procedure of blocking private assets without providing any Fourth Amendment safeguards against unreasonable seizures. Very little funding to al-Qaeda comes from the United States.⁶ To be sure, what financing does come from the United States must be stopped, but the point is that the Bush Administration has repeatedly hyped "successes" in its "War on Terror" either where they do not exist or where they have come about through unconstitutional means.

OFAC's power to block assets during the pendency of an investigation is one example of such a quasi-success, sloppily and incompetently attained. Blocking orders under the IEEPA are essentially "freezes": a way to control targeted property. Title to the blocked property remains with the target, but the exercise of powers and privileges normally associated with ownership is prohibited without authorization from OFAC. Blocking immediately imposes an across-the-board prohibition against transfers or dealings of any kind with regard to the property.⁷ After 9/11, the Bush Administration set high goals for OFAC, seeking one major designation of a terrorist group per month and smaller designations consistently.⁸ The result at OFAC was "chaos."⁹ Aside from the institutional incompetence of OFAC to cope with its new responsibilities,¹⁰ Treasury officials themselves "acknowledged that some of the evidentiary foundations for the early designations were quite weak."¹¹

Islamic charities have been one of the prime targets of OFAC blocking orders. The Financial Action Task Force, a thirty-three-member group consisting of countries and organizations, concluded that after 9/11, charities are "particularly vulnerable" to terrorist groups using them for

⁶ See JOHN ROTH, DOUGLAS GREENBURG & SERENA WILLE, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING, STAFF REPORT TO THE COMM'N 4, 24 (2004) [hereinafter MONOGRAPH] ("The United States is not, and has not been, a substantial source of al Qaeda funding, although some funds raised in the United States may have made their way to al Qaeda and its affiliated groups.").

⁷ United States Department of the Treasury, Office of Foreign Assets Control, *Frequently Asked Questions*, <http://www.treasury.gov/offices/enforcement/ofac/faq/answer.shtml#1> (last visited May 7, 2007) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

⁸ See MONOGRAPH, *supra* note 6, at 79 ("The goal set at the policy levels of the White House and Treasury was to conduct a public and aggressive series of designations to show the world community and our allies that the United States was serious about pursuing the financial targets. It entailed a major designation every four weeks, accompanied by derivative designations throughout the month.").

⁹ *Id.* ("The post-9/11 period at OFAC was 'chaos.'").

¹⁰ See David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1381-83 (2007) (arguing that OFAC has been inexpert at designating entities as terrorists since 9/11).

¹¹ MONOGRAPH, *supra* note 6, at 79.

money-laundering purposes.¹² At least six Islamic charities have been suspected of being conduits for terrorist financing schemes, and have had their assets blocked pending an OFAC investigation into possible criminal support for terrorist financing.¹³ These organizations have all been destroyed by the blocking orders, yet none of the organizations have been convicted.¹⁴

The focus of this Note is not on the ultimate guilt or innocence of the organizations in question; rather, it is on the procedures used to obtain needed results. This Note argues that the blocking actions have had severe procedural flaws, and therefore have been unconstitutional seizures under the Fourth Amendment.

This Note first describes the statutory framework that controls OFAC's asset freezes.¹⁵ Second, this Note presents the cases of the charities and organizations that have had their assets frozen after 9/11: the organizations, the investigations into the organizations, the asset freezes themselves, and the resulting legal challenges and general aftermath.¹⁶ Third, this Note analyzes Fourth Amendment case law.¹⁷ The Fourth Amendment analysis begins by analyzing what constitutes a "seizure" under the Fourth Amendment.¹⁸ This Note then determines that asset freezes under the IEEPA constitute seizures under the Fourth Amendment,¹⁹ providing a straightforward constitutional analysis of why asset freezes under the IEEPA constitute seizures,²⁰ a comparison to a similar asset freeze in the securities regulation context,²¹ and a refutation of various courts' Fourth Amendment analysis in OFAC asset freezing cases after 9/11.²² Fourth, this Note analyzes whether the asset freezes, without findings of probable cause or even reasonable suspicion, nonetheless are "reasonable" under the Fourth Amendment.²³ After laying out the constitutional framework,²⁴ this Note

¹² See Victoria B. Bjorklund, Jennifer I. Reynoso & Abbey Hazlett, *Terrorism and Money Laundering: Illegal Purposes and Activities*, 25 PACE L. REV. 233, 239–40 (citing FINANCIAL ACTION TASK FORCE, FINANCIAL ACTION TASK FORCE ANNUAL REPORT, 2001–2002 (2002)) (discussing FATF's findings).

¹³ See *infra* Part II.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part I.

¹⁶ See *infra* Part II.

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part III.A.

¹⁹ See *infra* Part III.B.

²⁰ See *infra* Part III.B.1.

²¹ See *infra* Part III.B.2.

²² See *infra* Part III.B.3.

²³ See *infra* Part III.C.

²⁴ See *infra* Part III.C.1.

determines that asset freezes under the IEEPA and by OFAC have thus far been unreasonable, and therefore unconstitutional, and suggests what is required to make the freezes reasonable under the Fourth Amendment.²⁵

II. Statutory Framework

The Executive has long used economic sanctions as a tool of foreign policy. The modern framework began in 1917, when Congress enacted the Trading with the Enemy Act of 1917 ("TWEA")²⁶ on the verge of entering World War I. The thrust of the TWEA was to prohibit certain financial transactions with enemies of the United States during wartime, including transfers of property.²⁷ Congress later amended the TWEA to allow the president to impose economic sanctions during peacetime if the president declared a national emergency.²⁸

In 1977, Congress passed the IEEPA to replace the TWEA.²⁹ The IEEPA provides that the president can declare a national emergency "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States."³⁰ Under the IEEPA, the president can:

Investigate, *block during the pendency of an investigation*, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by

²⁵ See *infra* Part III.C.2.

²⁶ Trading with the Enemy Act of 1917, Pub. L. No. 65-91, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-44 (2000)).

²⁷ *Id.* § 5(b); see also Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1356 (2004) (describing the President's powers under the TWEA).

²⁸ Act of March 9, 1933, Pub. L. No. 73-1, ch. 1, § 2, 48 Stat. 1 (1933) (codified as amended at 50 U.S.C. app. §§ 1-44 (2000)).

²⁹ International Economic Emergency Powers Act, Pub. L. No. 95-223, § 101, 91 Stat. 1625 (1997) (codified as amended at 50 U.S.C. app. § 5(b)(1) (2004)).

³⁰ *Id.* at 50 U.S.C. § 1701(a).

any person, or with respect to any property, subject to the jurisdiction of the United States.³¹

In October 2001, Congress amended the IEEPA by passing the USA PATRIOT Act.³² The USA PATRIOT Act, among other things, amended the IEEPA to authorize the president to block assets "during the pendency of an investigation."³³

In 1995, President Bill Clinton issued Executive Order 12,947 pursuant to his authority under the IEEPA.³⁴ That order declared a national emergency with respect to the Middle East peace process, and designated Hamas, a Palestinian organization, a "Specially Designated Terrorist" ("SDT"), and blocked its property and interests in property within the jurisdiction of the United States.³⁵ The order also allowed for further designations as SDTs as needed in the future; once an organization was designated, Executive authority under the Act could be exerted against that organization.³⁶

Shortly after 9/11, President Bush issued Executive Order 13,224 pursuant to his authority under the IEEPA.³⁷ The order declared a national emergency respecting the "grave acts of terrorism . . . and the continuing and immediate threat of further attacks on United States nationals or the United States."³⁸ Executive Order 13,224 further authorizes the Secretary of the Treasury to designate organizations and people as "Specially Designated Global Terrorists" ("SDGT").³⁹ Importantly, once an organization or person has been designated an SDGT, the Executive Order authorizes the Treasury Secretary to "employ all powers granted to the President by IEEPA," including blocking assets pending investigation.⁴⁰ Further, the Executive Order states:

³¹ *Id.* § 1702(a)(1)(B) (emphasis added).

³² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, & 50 U.S.C.).

³³ 50 U.S.C. § 1702(a)(1)(B).

³⁴ Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

³⁵ *Id.*

³⁶ *Id.* at 5079-80.

³⁷ Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 49,081.

Because of the ability to transfer funds or assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to this order.⁴¹

Neither the IEEPA nor the Executive Orders specify what evidence is needed to issue a blocking order—apparently, it is within OFAC's discretion.

III. *The Charity Cases*

Since September 11, 2001, OFAC has acted pursuant to the IEEPA and Executive Order 13,224 to block the assets of six fairly major charities—Global Relief Foundation, Benevolence International Foundation, Holy Land Foundation, Islamic American Relief Agency, Al-Haramain Islamic Foundation, and KindHearts—as well as a major money remittance system used by Somali immigrants, Al-Barakaat. In each case, no formal legal determination of probable cause or even reasonable suspicion was found, let alone a warrant issued. The government has not been able to convict any of the organizations presented below with a crime; the closest it has come is a guilty plea by one of Benevolence International Foundation's leaders.⁴² Regardless, in each case the blocking action destroyed the organization. This section analyzes the charity cases: the organizations, the investigations, the blocking actions, the court decisions, and the outcomes.

A. *Global Relief Foundation*

Global Relief Foundation ("GRF") was an Islamic charity based out of Bridgeville, Illinois, which began operations in 1992.⁴³ GRF described itself as an organization whose mission was to do charitable work around the world for Muslims.⁴⁴ Some of this alleged charitable work included support

⁴¹ *Id.*

⁴² See MONOGRAPH, *supra* note 6, at 108 (discussing the criminal case).

⁴³ See *Global Relief Found., Inc. v. O'Neill*, 207 F. Supp. 2d 779, 785 (N.D. Ill. 2002) (stating that GRF is chartered in Illinois and began operating in 1992).

⁴⁴ See MONOGRAPH, *supra* note 6, at 89 ("GRF described itself as a nongovernmental organization (NGO) that provided humanitarian relief aid to Muslims through overseas offices around the world . . .").

for hospitals and clinics, relief for earthquake and drought victims, and aid to refugees.⁴⁵ Much of GRF's work was focused on providing relief "in strife-torn regions such as Bosnia, Kashmir, Afghanistan, Lebanon, and Chechnya."⁴⁶ The charity was quite large, claiming to be "the largest U.S.-based Islamic charitable organization 'with respect to the geographic scope of its relief programs.'"⁴⁷ It began its operations in 1992 with \$700,000 cash, and by 2000 it was receiving \$5,000,000 in annual contributions.⁴⁸

The FBI began investigating GRF's possible ties to terrorist groups in the mid 1990s,⁴⁹ and by 1999 concluded that GRF was a "jihadist organization" and had ties with al-Qaeda.⁵⁰ Nevertheless, before 9/11 the FBI believed that bringing a criminal case against GRF would be impossible: they had no direct evidence of involvement in terrorist groups, they believed the United States Attorney's Office did not have the expertise to bring a terrorism case, and in early 2001 their warrants under the Foreign Intelligence Surveillance Act ("FISA") were not renewed.⁵¹ After 9/11 the investigation picked up again with a renewal of FISA warrants and the instatement of Patrick Fitzgerald, who had prior experience regarding terrorism cases, as the new U.S. Attorney for Chicago.⁵²

OFAC became involved in December 2001 in order to designate GRF as an SDGT under the IEEPA.⁵³ Aside from the probable public pressure to see results in its "war on terror," the CIA believed, dubiously, that GRF

⁴⁵ See Nicole Nice-Petersen, Note, *Justice for the "Designated": The Process that is Due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L.J. 1387, 1400 (2005) (stating that GRF "has supported clinics, trade schools, and hospitals . . . [and has] provided aid to victims of earthquakes . . . , droughts . . . and to distressed refugees . . .").

⁴⁶ MONOGRAPH, *supra* note 6, at 89.

⁴⁷ *Global Relief Found., Inc.*, 207 F. Supp. 2d at 785 (quoting Complaint at ¶ 12, *Global Relief Found., Inc.*, v. O'Neill, 207 F. Supp. 2d 779 (N.D. Ill. 2002) (No. 02-C-674)).

⁴⁸ MONOGRAPH, *supra* note 6, at 89 ("GRF began operating with \$700,000 in cash. By 2000, it reported more than \$5 million in annual contributions.").

⁴⁹ *See id.* ("GRF came to the attention of the FBI's Chicago Division in the mid-1990s . . .").

⁵⁰ *See id.* at 90 ("By late 1999, the Chicago case agents were comfortable in their conclusion that GRF was a jihadist organization and that its executive director had connections to both AGIA and what they called the 'Islamic Army organization of international terrorist financier Usama Bin Ladin.' They believed that multiple sources of evidence supported these conclusions.").

⁵¹ *See id.* at 93-94 (noting that the FBI agents in Chicago did not think they could bring a criminal case because: "[t]hey had much smoke but no real fire—they had no direct evidence of serious criminal activity"; "they did not think that the U.S. Attorney's Office had sufficient expertise in [international terrorism] cases"; and "in late spring or early summer 2001 . . . the FISA warrants were not extended.").

⁵² *See id.* at 98 (stating that FISA warrants were renewed and noting the prior experience of Patrick Fitzgerald, the new U.S. Attorney).

⁵³ *See id.* at 99 ("OFAC dispatched two analysts to Chicago in early December 2001 to review the FBI files and begin putting together the evidentiary packages that would support designations.").

might be involved in a plot involving weapons of mass destruction.⁵⁴ The General Counsel of Treasury, who was coordinating the effort, told OFAC that it needed to act immediately.⁵⁵ Because OFAC did not have enough evidence to designate GRF as an SDGT under the IEEPA (let alone to proceed on criminal charges), OFAC used its power under the IEEPA to freeze GRF's assets pending investigation.⁵⁶ "Only a single piece of paper, signed by the director of OFAC, was required."⁵⁷ The blocking order effectively shut down GRF as an organization.⁵⁸ There were no formal findings of fact, no judicial determination of any kind, and no finding of probable cause or even of reasonable suspicion.

In court proceedings, OFAC claimed that "it acted on the basis of substantial classified and unclassified information related to Global Relief's possible connections with terrorist organizations."⁵⁹ OFAC appears to have had some evidence linking GRF to terrorist groups and individuals, even if such evidence might not have been sufficient to meet probable cause or to proceed with a criminal case:

OFAC's internal documents supporting the designation spelled out its ties to al Qaeda leaders, including (1) evidence that GRF provided \$20,000 to a suspected al Qaeda fund-raiser in November 2001; (2) the phone contacts between GRF's executive director and the mujahideen leader associated with al Qaeda leadership; (3) the phone contacts linking GRF to Wadi al Hage, [Osama bin Laden's] personal secretary, who was convicted in the United States for his role in the 1998 embassy bombings; and (4) funds that GRF received from Mohammed Galeb Kalaje Zouaydi, a suspected al Qaeda financier in Europe who was arrested in Spain in 2002.

⁵⁴ *See id.* (stating that the CIA believed GRF might be "involved in a plot to attack the United States with weapons of mass destruction").

⁵⁵ *See id.* ("OFAC received word from the General Counsel of Treasury, who was coordinating the interagency effort against terrorist financing, that it needed to designate BIF and GRF immediately.").

⁵⁶ *See id.* (stating that OFAC had not "developed the evidence necessary for a designation under IEEPA" and that on December 14, 2001 it used its powers under the IEEPA to freeze GRF's assets).

⁵⁷ *Id.* Although, OFAC contends that "in practice, an interagency group discusses and agrees to any designation." *Id.* at 102 n.88.

⁵⁸ *See id.* ("OFAC announced this action on December 14, 2001, thereby effectively shutting down [GRF] in the United States while gaining additional time to develop the evidentiary packages necessary for permanent designations.").

⁵⁹ *Global Relief Found., Inc. v. O'Neill*, 207 F. Supp. 2d 779, 786 (N.D. Ill. 2002).

OFAC's unclassified Statement of the Case laid out the extensive evidence indicating GRF's role in supporting jihad. This evidence included the pictures of sophisticated communications equipment the FBI had found in the trash, photographs of jihadists both alive and dead, and documents establishing GRF's enthusiastic support for armed jihad. For example, a GRF pamphlet from 1995 stated, "God equated martyrdom through JIHAD with supplying funds for the JIHAD effort. All contributions should be mailed to: GRF." Another GRF publication stated that charitable funds "are disbursed for equipping the raiders, for the purchase of ammunition and food, and for [the mujahideen's] transportation so that they can raise God the Almighty's word[;] . . . it is likely the most important . . . disbursement of Zakat [a charity requirement of Islam] in our times is on the jihad for God's cause[.]"⁶⁰

In the notice that OFAC issued freezing GRF's assets, however, there was no mention of how GRF violated the IEEPA and the Executive Order.⁶¹ Furthermore, whether this evidence would have amounted to probable cause, or even reasonable suspicion, will never be known, because OFAC did not—nor did it need to under the IEEPA—go to a judge for a warrant to freeze GRF's assets.

GRF denied that they had any links to terrorism,⁶² and subsequently filed suit in federal court to unfreeze its assets and return items seized during a search of GRF's office.⁶³ The organization, however, did not argue that the blocking order was an unconstitutional seizure in violation of the Fourth Amendment, even though it argued that OFAC's actions were illegal under a slew of statutory and constitutional claims.⁶⁴ What is particularly striking is that GRF argued that the search and seizure of their corporate office and one of their executive's residence violated the Fourth Amendment, yet failed to

⁶⁰ MONOGRAPH, *supra* note 6, at 106.

⁶¹ See Nice-Petersen, *supra* note 45, at 1400 ("In the government's blocking notice, it stated only that it had 'reason to believe [GRF] may be engaged in activities that violate [the] [IEEPA].'" (citing Letter from U.S. Department of the Treasury to Global Relief Foundation, Inc., Blocking Notice and Requirement to Furnish Information (Dec. 14, 2001)).

⁶² See MONOGRAPH, *supra* note 6, at 100 (stating that the charity "aggressively denied any connection to terrorism").

⁶³ *Global Relief Found., Inc.*, 207 F. Supp. 2d at 786–87 ("Global Relief filed a petition for declaratory judgment and injunctive relief . . . [and] requested that the defendants be ordered to 'unfreeze' its assets and return its items seized during the search of the organization's office and the executive director's residence.").

⁶⁴ See *id.* at 787–809 (analyzing GRF's arguments relating to the Ex Post Facto Clause, the Fifth Amendment, and the First Amendment, among others).

make the same claim regarding the asset freeze.⁶⁵ For this Note's purposes, the government attempted, while addressing a different legal argument,⁶⁶ to distinguish "blocking" from "seizing" by arguing that Congress believed blocking assets were not seizures because seizures were akin to vesting of title and forfeiture, while blockings were merely freezes.⁶⁷ The government argued:

[T]he legislative history [of the IEEPA] demonstrates the difference between "blocking" and "seizing" property; Congress considered a "seizure" to be equivalent to a "vesting" or "forfeiture" of the property, with ownership passing to the government, while a "blocking" merely permitted the agency to hold or "freeze" the property, but not take title to it. In this case, OFAC has not taken title to [GRF's] property For these same reasons, [GRF's] Fourth Amendment claim against OFAC should be rejected as well.⁶⁸

What is interesting about this excerpt is that GRF did not make a Fourth Amendment claim regarding the freezing of its assets. Perhaps the government was being sloppy, or perhaps the government was wary about its authority under the Fourth Amendment to implement the freeze. Regardless, the court decided against GRF on every single other claim it raised.⁶⁹

Despite investigating GRF for years, despite evidence from the search and seizure of GRF's offices and property, and despite having a FISA search warrant, the government has not brought any criminal charges against GRF or its executives.⁷⁰ The government's case was weak, but the government was able to shut down GRF anyway through the prolonged asset freeze.

⁶⁵ See *id.* at 807 ("Global Relief . . . argues that defendants unconstitutionally searched its offices and seized its property in violation of the Fourth Amendment.").

⁶⁶ The government was addressing whether OFAC had power to freeze GRF's assets under the Executive Order and IEEPA. Defendants' Motion to Dismiss or For Summary Judgment at 16 n.19, *Global Relief Found., Inc., v. O'Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002).

⁶⁷ See *id.* (arguing for a difference between blocking and seizing according to legislative history).

⁶⁸ *Id.* (citations omitted) (emphasis added).

⁶⁹ See *Global Relief Found., Inc.*, 207 F. Supp. 2d at 809 (concluding that GRF was unlikely to succeed on the merits on any claim and therefore the motion for injunctive relief must fail). GRF raised an appeal to the Seventh Circuit, but not on Fourth Amendment grounds, and the Seventh Circuit affirmed the district court. See *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002) (upholding the district court's judgment).

⁷⁰ See MONOGRAPH, *supra* note 6, at 110 ("[T]he government has to date filed no criminal charges against GRF or its leadership . . .").

B. *Benevolence International Foundation*

The story of Benevolence International Foundation ("BIF") is almost identical. Three Saudis incorporated BIF in Illinois in early 1992.⁷¹ One of the Saudis, Sheikh Adel Abdul Jalil Batterjee, had given money to the mujahideen, led by bin Laden, in Afghanistan in their fight against the Soviets.⁷² Enaam Arnaout took over as executive director from Batterjee in 1993, although the government has alleged that Batterjee continued to play a role in BIF through communications with Arnaout.⁷³ The government contended that Arnaout was also a supporter of jihad and had ties with bin Laden.⁷⁴ According to the memorandum filed in support of the plaintiff's preliminary injunction, BIF's alleged purpose was to provide "humanitarian aid in many of the neediest areas of the world, including Afghanistan, Azerbaijan, Bosnia, China, Daghestan, Injushetia, Pakistan, and Tajikistan."⁷⁵ Part of that aid included support of hospitals in Tajikistan and Daghestan, and support of "refugees" in Chechnya.⁷⁶ However the money was actually spent, BIF received "more than \$15 million in donations between 1995 and 2000."⁷⁷

As with GRF, the FBI had trouble investigating BIF before 9/11. As the 9/11 Commission reported:⁷⁸

Overall, [the] BIF investigation was in the same position as the GRF investigation on 9/11: the agents believed BIF had substantial ties to al Qaeda, was supporting jihad, and was sending a great deal of

⁷¹ See *id.* at 94 (stating that BIF incorporated in Illinois in March 1992 and was founded by three Saudis).

⁷² See *id.* (maintaining that in 1987 Batterjee founded a group providing support to the mujahideen fights in Afghanistan as well as aid to the war's refugees, and that bin Laden was one of the mujahideen's leaders).

⁷³ See *id.* at 94–95 (asserting that Arnaout took over in 1993 and that Batterjee remained in contact with Arnaout).

⁷⁴ See *id.* at 95 (linking Arnaout with bin Laden and the jihadist movement).

⁷⁵ Memorandum in Support of Plaintiff Benevolence International Foundation's Motion for Preliminary Injunction at 4, *Benevolence Int'l Found. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (No. 02-C-0763) (contending that it provided relief in the countries listed); see also *Benevolence Int'l Found.*, 200 F. Supp. 2d at 936 (stating that BIF alleged to provide relief to the named countries).

⁷⁶ See Memorandum in Support of Plaintiff Benevolence International Foundation's Motion for Preliminary Injunction at 5–6, *Benevolence Int'l Found. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (No. 02-C-0763) (arguing that BIF had provided aid to hospitals in Tajikistan and Daghestan and that it had provided relief to Chechen "refugees").

⁷⁷ MONOGRAPH, *supra* note 6, at 95.

⁷⁸ See *id.* at 97 (arguing that the FBI was having trouble finding out specifically where BIF's money was going, despite having information regarding a connection between BIF and terrorist groups).

money overseas, but they could not trace the money directly to its ultimate destination overseas. Although they had access to considerable information, the agents believed they still could not come close to proving a criminal case against Arnaout or BIF.⁷⁹

Again, as with GRF, in December 2001 the General Counsel of Treasury demanded that BIF needed to be designated an SDGT immediately, even though OFAC did not have adequate evidence to bring a criminal case.⁸⁰ OFAC therefore froze BIF's assets on December 14, 2001, the same day it froze GRF's assets.⁸¹

Soon thereafter, BIF brought suit against the government.⁸² Among various legal arguments, BIF contended that OFAC's blocking order violated the Fourth Amendment.⁸³ Specifically, BIF argued that the asset freeze was a "meaningful interference" with their possessory interests in their property, and that lacking probable cause, the seizure was presumptively unconstitutional.⁸⁴ BIF further argued that the seizure was unreasonable because "the blocking order forbids BIF to make any use of its property, is of potentially unlimited duration, [and] has never been approved by any judicial officer"⁸⁵

The court, however, never reached this claim because the court stayed the proceeding pending the outcome of the criminal proceedings against Arnaout.⁸⁶ As it happened, the FBI had received a break in their case in March 2002, when a search was conducted in BIF's Bosnian office.⁸⁷

This search yielded compelling evidence of links between BIF's leaders, including Arnaout, and Usama Bin Ladin and other al Qaeda

⁷⁹ *Id.*

⁸⁰ *See id.* at 99 (describing the immediate background to OFAC's freeze of BIF's assets).

⁸¹ *See, e.g., id.* (stating that OFAC blocked BIF's assets on that date); *Benevolence Int'l Found. v. Ashcroft*, 200 F. Supp. 2d 935, 936 (N.D. Ill. 2002) ("On December 14, 2001, the Department of Treasury's Office of Foreign Assets Control . . . issued BIF a notice stating that . . . Treasury was blocking all BIF's funds, accounts and business records pending further investigation, pursuant to IEPPA.").

⁸² *See Benevolence Int'l Found.*, 200 F. Supp. 2d at 935 (bringing an action against the government for violating its constitutional rights in searching its property and blocking its funds).

⁸³ *See Memorandum in Support of Plaintiff Benevolence International Foundation's Motion for Preliminary Injunction* at 43, *Benevolence Int'l Found. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (No. 02-C-0763) (arguing that the blocking of BIF's property constitutes an illegal seizure).

⁸⁴ *See id.* (claiming that the blocking of BIF's property was an unconstitutional seizure).

⁸⁵ *Id.* at 44.

⁸⁶ *See Benevolence Int'l Found.*, 200 F. Supp. 2d at 941 (staying the civil proceeding until the conclusion of the criminal proceeding).

⁸⁷ *See MONOGRAPH, supra* note 6, at 102 (describing the search in Bosnia).

leaders, going back to the 1980s. The material seized included many documents never before seen by U.S. officials, such as the actual minutes of al Qaeda meetings, the al Qaeda oath, al Qaeda organizational charts, and the "Golden Chain" list of wealthy donors to the Afghan mujahideen, as well as letters between Arnaut and Bin Ladin, dating to the late 1980s.⁸⁸

The government soon indicted Arnaut, who subsequently pled guilty to a racketeering charge related to support for Chechen "rebels."⁸⁹ Although the government did not have enough evidence to try a criminal case against BIF itself, OFAC nonetheless designated BIF an SDGT on November 19, 2002, and the United Nations followed suit shortly thereafter, listing BIF as affiliated with al-Qaeda.⁹⁰ Specifically, OFAC supported its designation with the following unclassified evidence:

OFAC drew links between BIF and Bin Ladin by noting (1) in 1998, BIF provided direct logistical support for an al Qaeda member and Bin Ladin lieutenant, Mamdouh Mahmud Salim, to travel to Bosnia-Herzegovina; (2) telephone records linked BIF to Mohammed Loay Bayazid, who had been implicated in al Qaeda's effort to obtain enriched uranium; (3) in the early 1990s, BIF produced videotapes that eulogized dead fighters, including two al Qaeda members; and (4) in the late 1990s, a member of al Qaeda's Shura Council served as an officer in BIF's Chechnya office. OFAC cited a number of ways in which BIF's activities differed from its ostensible purpose (e.g., it altered its books to make support for an injured Bosnian fighter appear as aid to an orphan), the purchase of equipment for Chechen fighters, and the newspaper article the FBI agents had found in the trash, in which someone had highlighted the weaknesses in the U.S. defenses against bioterrorism.⁹¹

While there was a lot of evidence suggesting BIF's ties to terrorist groups, little evidence actually tied BIF's funds to support for terrorism or to the commission of any recognized crime. BIF was shut down anyway.

⁸⁸ *Id.* at 102-03.

⁸⁹ *See id.* at 108 (discussing the criminal case).

⁹⁰ *See id.* at 105 (discussing OFAC's designation of BIF).

⁹¹ *Id.* at 106.

C. Holy Land Foundation

Holy Land Foundation For Global Relief and Development ("HLF") was founded in 1989 in Texas as a 501(c)(3) charitable organization, providing charitable services in the West Bank, Gaza, Bosnia, Chechnya and elsewhere.⁹² HLF had a large operating budget of around \$12 million per year, and, according to one activist in the Muslim-American community, "[t]o the average Muslim living in the US, HLF was a trusted name."⁹³

The controversy with HLF centered on its connection, if any, to Hamas.⁹⁴ Both Presidents Bill Clinton and George W. Bush designated Hamas a terrorist organization under the IEEPA.⁹⁵ As the district court summarized, the administrative record developed by the government included evidence that:

- (1) HLF has had financial connections to Hamas since its creation in 1989;⁹⁶
- (2) HLF leaders have been actively involved in various meetings with Hamas leaders;⁹⁷
- (3) HLF funds Hamas-controlled charitable organizations;⁹⁸
- (4) HLF provides financial support to the

⁹² Internal Revenue Code section 501(c)(3) provides an exemption from federal income tax for non-profit organizations operated, for example, solely for religious, charitable, scientific, testing for public safety, literary, or educational purposes. I.R.C. § 501(c)(3) (2008). See, e.g., Nice-Peterson, *supra* note 45 at 1396–97 (explaining the background of HLF); Laila Al-Marayati, *American Muslim Charities: Easy Targets in the War on Terror*, 25 PACE L. REV. 321, 324 (2005) (discussing the case against HLF).

⁹³ Al-Marayati, *supra* note 92, at 324.

⁹⁴ See, e.g., *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002) (discussing HLF's alleged ties to Hamas); Al-Marayati, *supra* note 92, at 325 ("The case around HLF is mainly built around allegations related to financing charitable works that had supposed links to members of Hamas."). It must also be noted that HLF did not dispute that Hamas is a terrorist organization in court. See *id.* at 64 n.2 ("The parties do not dispute that Hamas is a terrorist organization.").

⁹⁵ See *Holy Land Found.*, 219 F. Supp. 2d at 63 (stating that Hamas was designated a "specially designated terrorist" under Executive Order 12,947 by President Clinton in January 1995); see also Frederick Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 494 (2005) (commenting on the HLF case).

⁹⁶ See *Holy Land Found.*, 219 F. Supp. 2d at 69–70 (specifying evidence that HLF fundraised for Hamas, evidence that Hamas leaders gave HLF \$210,000 (which was noted on HLF's tax return), and evidence that HLF paid for Hamas leaders' visits to the United States in the early 1990s).

⁹⁷ See *id.* at 70 (detailing evidence of two meetings between "five senior Hamas officials and three senior HLF leaders" in the early 1990s).

⁹⁸ See *id.* at 70–71 (specifying evidence that HLF gave over \$1 million to Hamas-controlled zakat committees) In a footnote, the district court noted:

The record contains evidence that the political, as opposed to military, activities of Hamas include a broad network of charitable organizations including zakat

orphans and families of Hamas martyrs and prisoners;⁹⁹ (5) HLF's Jerusalem office acted on behalf of Hamas;¹⁰⁰ and (6) FBI informants reliably reported that HLF funds Hamas.¹⁰¹

Based on this evidence, OFAC, on December 4, 2001, designated HLF an SDGT and issued a blocking order of HLF's assets.¹⁰²

Shortly thereafter, HLF challenged its designation and the blocking of its assets in court, bringing various statutory and constitutional claims.¹⁰³ Included in those claims was a Fourth Amendment claim arguing that the government had violated HLF's Fourth Amendment rights against unreasonable seizures by blocking HLF's assets.¹⁰⁴ The government contended that the freezing of assets did not constitute a seizure.¹⁰⁵ In summarily dismissing HLF's Fourth Amendment claim regarding the freeze, the court stated that case law was clear that "blocking of this nature does not constitute a seizure."¹⁰⁶ The court cited one circuit court opinion and four district court opinions for the proposition that freezing assets under the IEEPA does not constitute a seizure.¹⁰⁷ The court first cited *Tran Qui Than v. Regan*,¹⁰⁸ a Ninth Circuit opinion which held that blocking orders under the TWEA do not constitute takings under the Fifth Amendment because the blocking is temporary and title does not vest in the government.¹⁰⁹ Second,

committees, hospitals, schools, and institutions . . . [I]t is not always possible to distinguish the "innocent" activity of the charity associations and the funding of covert, subversive and terrorist activity. To that end, both President Bush and President Clinton have designated all of Hamas as a terrorist organization, and determined that even charitable contributions to Hamas impair the ability to deal with the national emergency.

Id. at 71 n.20 (citations and quotations omitted).

⁹⁹ See *id.* at 71–72 (describing evidence, obtained by the Israeli government, of orphan sponsorship forms in which "in nearly every case, the applicant's parent or guardian was either jailed by the Israeli government for security reasons or martyred"). HLF disputed the meaning of the term "martyr," arguing that it had a broad meaning of anyone who has died in "Palestine" other than by natural causes. See *id.* at 72 (noting HLF's interpretation of "martyr").

¹⁰⁰ See *Holy Land Found.*, 219 F. Supp. 2d at 73 (specifying evidence that the Israeli government shut down HLF's Jerusalem office in 1995 because it was allegedly supporting and funneling money to families of Hamas members).

¹⁰¹ See *id.* at 69, 73 (establishing evidence of eight unidentified FBI informants).

¹⁰² See, e.g., *id.* at 62 (noting the factual background of the case).

¹⁰³ See *id.* at 62–85 (analyzing HLF's various claims).

¹⁰⁴ See *id.* at 78–80 (discussing Fourth Amendment claim).

¹⁰⁵ *Id.* at 78.

¹⁰⁶ *Id.* at 79.

¹⁰⁷ See *id.* (discussing Fourth Amendment claim).

¹⁰⁸ *Tran Qui Than v. Regan*, 658 F.2d 1296 (9th Cir. 1981).

¹⁰⁹ See *id.* at 1304 (concluding that the Fifth Amendment is not violated).

the court cited a footnote in *D.C. Precision, Inc. v. United States*¹¹⁰ for the rule that assets blocked under the IEEPA do not constitute takings under the Fifth Amendment because the assets are not "seized or appropriated by the government," but are only "temporarily" blocked.¹¹¹ Third, the court cited *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas v. Newcomb*¹¹² for the proposition that blockings do not constitute forfeitures.¹¹³ Fourth, the court cited *IPT Co. v. United States Department of Treasury*,¹¹⁴ which held, on the facts of the specific case, that the freezing of assets under the IEEPA did not constitute an unconstitutional taking.¹¹⁵ Finally, the court cited *Can v. United States*,¹¹⁶ which found that under the TWEA blocking does not constitute a vesting, and as such does not constitute a seizure or taking.¹¹⁷ The court's analysis mimicked almost jot for jot the government's argument in *Global Relief Foundation* concerning the interpretation of the IEEPA regarding the Fourth Amendment.¹¹⁸

HLF appealed to the circuit court, but the circuit court affirmed on other grounds.¹¹⁹ In 2004, the government finally charged HLF and some of its executives with terrorism-related charges.¹²⁰ In October 2007, however,

¹¹⁰ *D.C. Precision, Inc. v. United States*, 73 F. Supp. 2d 338 (S.D.N.Y. 1999).

¹¹¹ *Id.* at 343 n.1.

¹¹² *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas v. Newcomb*, No. 98-0949, slip op. at 23–24 (D.D.C. Mar 29, 1999).

¹¹³ *See Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 79 (D.D.C. 2002) (discussing the Fourth Amendment claim).

¹¹⁴ *IPT Co. v. U.S. Dept. of Treasury*, No. 92 Civ. 5542, 1994 WL 613371, at *1 (S.D.N.Y. Nov. 4, 1994).

¹¹⁵ *See id.* at *5 ("[T]he Court finds this application of the blocking order to plaintiff is not a taking *at this time*." (emphasis added)).

¹¹⁶ *Can v. United States*, 820 F. Supp. 106 (S.D.N.Y. 1993).

¹¹⁷ *See id.* at 109 ("The assets at issue here have never been seized, although the blocking order has remained in effect for eighteen years. 'The blocking of the assets,' however, 'does not affect the interest, right or title to them which [plaintiffs] may possess.' Although 'blocking involves a deprivation of the enjoyment of a property interest . . . , [t]hat deprivation is temporary . . . and is not equivalent to vesting.'" (citations omitted)).

¹¹⁸ *See supra* note 66 for the government's analysis.

¹¹⁹ *See Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (affirming the district court's decision).

¹²⁰ *See, e.g.,* Nice-Petersen, *supra* note 45, at 1400 (stating that the government criminally charged HLF and seven of its officials); *United States v. Holy Land Found. for Relief and Dev.*, 445 F.3d 771, 777 (5th Cir. 2006) (summarizing the factual history of the case). Additionally, the parents of a United States teenager, who was killed by Hamas at a bus stop in the West Bank, won a \$156 million verdict against HLF for its role in funding Hamas. *See Hamas Victim's Family Get \$156M*, BBC, http://news.bbc.co.uk/2/hi/middle_east/4080499.stm (last visited Oct. 24, 2007) (discussing court verdict).

the trial ended in a mistrial for some charges and in acquittals for other charges.¹²¹

D. Islamic American Relief Agency

The Islamic American Relief Agency ("IARA-USA") was created as the Islamic African Relief Agency in 1985 in Columbia, Missouri.¹²² The organization "provided charitable and humanitarian aid to refugees, orphans, victims of human and natural disasters, and other poor and needy persons and entities through the world,"¹²³ concentrating its efforts on Africa.¹²⁴

The focus of controversy stems from IARA-USA's possible ties to terrorist organizations located in Sudan.¹²⁵ The founder of the Islamic African Relief Agency, Mohammed El-Bashir, emigrated from Sudan in the 1980s.¹²⁶ At the time El-Bashir founded his organization in the United States, there already existed an organization called Islamic African Relief Agency (IARA) in Sudan.¹²⁷ While IARA-USA maintained that the two organizations were entirely separate and distinct,¹²⁸ the government presented evidence that IARA-USA considered itself a subsidiary branch of the Sudan-based IARA.¹²⁹ Accordingly, OFAC designated IARA, including IARA-USA, an SDGT on October 13, 2004, and blocked the assets of

¹²¹ See, e.g., Leslie Eaton, *U.S. Prosecution of Muslim Group Ends in Mistrial*, N.Y. TIMES, Oct. 22, 2007, at A1 (relating the result of the trial against Holy Land Foundation and its leading officers); Peter Whoriskey, *Mistrial Declared In Islamic Charity Case: Jurors Find No Proof That Donations Indirectly Aided Militant Hamas*, WASH. POST, Oct. 23, 2007, at A3 (same).

¹²² See *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 39–40 (D.D.C. 2005) (giving the factual background of the charity). The organization later changed its name to the Islamic American Relief Agency. See *id.* (discussing the facts of the case).

¹²³ *Id.* at 40.

¹²⁴ See Appellant's Final Brief on Appeal at 4, *Islamic Am. Relief Agency v. Gonzalez*, 477 F.3d 728 (D.C. Cir. 2007) (No. 05-5447) (listing countries to which it provided support to).

¹²⁵ See, e.g., Brief for the Appellees, at 6–9, *Islamic Am. Relief Agency v. Gonzalez*, 477 F.3d 728 (D.C. Cir. 2007) (No. 05-5447) (arguing that IARA had ties with a Sudanese terrorist organization).

¹²⁶ See Appellant's Final Brief on Appeal, *supra* note 124, at 4 ("Plaintiff's original founding member, Mohammed El-Bashir, came to America from Sudan in the early 80's.").

¹²⁷ See *Islamic Am. Relief Agency*, 394 F. Supp. 2d at 40 (discussing the factual background of the case).

¹²⁸ See Appellant's Final Brief on Appeal, *supra* note 124, at 4–6 (noting that IARA had its own board of directors and officers and that its tax statements made no reference to the Sudanese organization).

¹²⁹ See Brief for the Appellees, *supra* note 125, at 6–9 (arguing that IARA consistently referred to itself as the Sudanese organization's "United States Affiliate" and that Sudanese organization identified IARA "as its affiliate in the United States").

IARA-USA and five of its officials.¹³⁰ It appears that most of the government's evidence linking IARA to terrorism was labeled classified.¹³¹

IARA-USA challenged its designation and blocking order in court.¹³² Among other claims, it raised a Fourth Amendment challenge to the government's blocking order.¹³³ IARA-USA cited two cases for its Fourth Amendment argument.¹³⁴ First, in *United States v Daccarett*,¹³⁵ the court held that, in a civil forfeiture case where the assets in question were first frozen and then transferred to the clerk of court for *in rem* jurisdiction, probable cause was needed to lawfully effect the seizure under the Fourth Amendment.¹³⁶ Second, in *United States ex rel. Rahman v. Oncology Associates*,¹³⁷ the court argued that a freezing of assets pending further order, in order to satisfy a judgment, pursuant to Federal Rule of Civil Procedure 64, was similar enough to seizure by attachment to warrant being called a seizure, and therefore protected by the Fourth Amendment.¹³⁸

The government made two arguments.¹³⁹ First, the government argued that the court in *Holy Land Foundation* already correctly upheld the government's actions against the Fourth Amendment in identical circumstances.¹⁴⁰ Second, the government argued that freezing of assets implicated the President's authority in foreign policy and national security, and thus was entitled to great deference.¹⁴¹ Specifically, the government argued that the blocking order was not subject to the warrant requirement because warrants are not generally needed when the President exercises his foreign affairs powers.¹⁴² The government then contended that, absent a

¹³⁰ See *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 40 (D.D.C. 2005) (giving the factual background of the case).

¹³¹ See Appellant's Final Brief on Appeal, *supra* note 124, at 10–14 (deleting those pages as classified).

¹³² See *Islamic Am. Relief Agency*, 394 F. Supp. 2d at 44 (analyzing IARA-USA's claims).

¹³³ See *id.* at 47–48 (analyzing the Fourth Amendment claim).

¹³⁴ See Plaintiff's Answer to Defendants' Motion to Dismiss and for Summary Judgment at 47, *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34 (D.D.C. 2005) (No. 04-2264) (listing two cases to support its Fourth Amendment claim).

¹³⁵ *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993).

¹³⁶ See *id.* at 49–50 (concluding Fourth Amendment requirements are present).

¹³⁷ *United States ex rel. Rahman v. Oncology Associates*, 198 F.3d 489 (4th Cir. 1999).

¹³⁸ See *id.* at 500 (analyzing plaintiff's Fourth Amendment claim).

¹³⁹ See Defendants' Motion to Dismiss and for Summary Judgment at 38–39, *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34 (D.D.C. 2005) (No. 04-2264) (arguing that the Fourth Amendment is satisfied).

¹⁴⁰ See *id.* at 39 (discussing *Holy Land Foundation*).

¹⁴¹ See *id.* at 39–46 (analyzing the blocking order's Fourth Amendment implications).

¹⁴² See *id.* at 42 (detailing the warrant requirement in the context of the national security).

warrant requirement, the Fourth Amendment only required that a reasonableness standard be satisfied, and, given the paramount and compelling importance of national security, the temporary blocking orders were reasonable and therefore constitutional.¹⁴³

The court ruled in favor of the government, disposing of the Fourth Amendment argument in a single paragraph that appears to have been based exclusively on *Holy Land Foundation's* analysis.¹⁴⁴ IARA-USA later appealed the case, but the circuit court affirmed on unrelated grounds.¹⁴⁵

E. Other Cases

1. Al-Haramain Islamic Foundation

Al-Haramain Islamic Foundation ("Al-Haramain") was an organization incorporated in Ashland, Oregon.¹⁴⁶ Al-Haramain was affiliated with, and supported by, an organization of the same name based out of Saudi Arabia.¹⁴⁷ For years, the United States had tried to shut down Al-Haramain because of suspected links to al-Qaeda.¹⁴⁸ In February 2004, OFAC froze Al-Haramain's Oregon assets.¹⁴⁹ Al-Haramain brought suit, alleging that OFAC had frozen Al-Haramain's assets based on illegal electronic surveillance.¹⁵⁰ The case is still pending, and the court has yet to issue a fuller, unclassified factual record.

¹⁴³ See *id.* at 42–46 (discussing the Fourth Amendment's reasonableness requirement in connection with the blocking order).

¹⁴⁴ See *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 48 (D.D.C. 2005) (citing *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002) for its entire analysis of the Fourth Amendment).

¹⁴⁵ See *Islamic Am. Relief Agency v. Gonzalez*, 477 F.3d 728 (D.C. Cir. 2007) (affirming district court on other grounds).

¹⁴⁶ See Complaint at 3, *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006) (No. 06-274-KI) (stating the alleged facts).

¹⁴⁷ See *id.* (stating the alleged facts).

¹⁴⁸ See, e.g., Matthew Rosenberg, Associated Press, *Al Qaeda Skimming Charity Money*, CBS NEWS, June 7, 2004, <http://www.cbsnews.com/stories/2004/06/07/terror/main621621.shtml> (last visited May 12, 2007) (detailing recent moves by the United States to shut down the organization) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Fact Sheet: Designations of Somalia and Bosnia-Herzegovina Branches of Al-Haramain Islamic Foundation*, U.S. DEPT. OF TREASURY (Mar. 11, 2002), <http://www.fas.org/irp/news/2002/03/dot031102fact.html> (announcing blocking of Somali and Bosnian offices of Al-Haramain) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

¹⁴⁹ See *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1218 (D. Or. 2006) (stating the alleged facts).

¹⁵⁰ See *id.* (describing Al-Haramain's claims).

2. KindHearts

KindHearts was a charity based out of Toledo, Ohio, and had formed in the aftermath of the GRF and HLF closings.¹⁵¹ On February 19, 2006, OFAC blocked its assets, claiming that KindHearts supported Hamas.¹⁵² The charity claimed that it was particularly surprised by OFAC actions because the Senate Finance Committee had allegedly investigated and recently cleared KindHearts of any wrongdoing.¹⁵³

3. Al-Barakaat

Al-Barakaat was an alternative remittance system that allowed people across the world to send money to Somalia.¹⁵⁴ The system was fairly similar to a *hawala* (an informal financial transmittal network for Muslims), and allowed Somali emigrants to send money back home despite Somalia's lack of a formal banking system.¹⁵⁵ Prior to 2001, the FBI came to believe that al-Barakaat had financed terrorist organizations, including al-Qaeda.¹⁵⁶ No actions against al-Barakaat occurred until after 9/11, however, when in November 2001, OFAC blocked its assets and federal agents raided eight of its offices around the country.¹⁵⁷ The FBI was unable to build a criminal case against al-Barakaat because "the transactions themselves revealed

¹⁵¹ See Associated Press, *U.S. Blocks Accounts Of Ohio Islamic Charity: KindHearts Tied to Hamas, Treasury Says*, WASH. POST, Feb. 20, 2005, at A5, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/19/AR2006021900916.html> (describing the charity) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

¹⁵² See *id.* (describing OFAC blocking order); *Treasury Freezes Assets of Organization Tied to Hamas*, U.S. DEPT. OF TREASURY (Feb. 19, 2006), <http://www.treas.gov/press/releases/js4058.htm> (last visited May 12, 2007) (announcing OFAC action).

¹⁵³ See *Statement by KindHearts*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (Feb. 23, 2006), available at http://archives2006.ghazali.net/html/another_muslim_charity.html (last visited Jan. 17, 2008) ("KindHearts had no prior notice to the Government action and was surprised since only a few months ago the Senate Finance Committee, chaired by Chuck Grassley, Republican from Iowa, had cleared KindHearts, and 21 other Muslim organizations, from any wrongdoing."). However, a statement by Grassley in 2005 contradicted this statement: "The fact that the Committee has taken no public action based on the review of these documents does not mean that these groups have been 'cleared' by the Committee." Memorandum from Chuck Grassley, U.S. Senate Committee on Finance (Dec. 6, 2005), available at <http://www.senate.gov/~finance/press/Gpress/2005/prg120605a.pdf>.

¹⁵⁴ See MONOGRAPH, *supra* note 6, at 67 (describing al-Barakaat).

¹⁵⁵ See *id.* at 67–69 (describing al-Barakaat).

¹⁵⁶ See *id.* at 70–71 (describing the early FBI investigation).

¹⁵⁷ See *id.* at 80 (describing November raids).

neither who the recipient of the money was nor what happened to the money once it arrived."¹⁵⁸ No lawsuit was ever brought.¹⁵⁹

IV. Fourth Amendment Analysis

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*¹⁶⁰

OFAC blocking actions are probably unconstitutional under the Fourth Amendment. First, blocking or freezing assets under the IEEPA constitutes a Fourth Amendment seizure. After laying out the test of a Fourth Amendment seizure in Part A, this Note applies the rule to the IEEPA blocking order context in Part B, providing a straightforward application of Supreme Court precedent to the IEEPA blocking order context, a comparison to seizures in the securities asset freeze context, and a refutation of courts' Fourth Amendment analysis in the charity cases. Second, blocking or freezing assets under the IEEPA constitutes an unreasonable seizure under the Fourth Amendment, and is therefore unconstitutional. Supreme Court precedent has, under extremely limited circumstances, allowed for temporary seizures based upon reasonable suspicion, which is less than probable cause.¹⁶¹ As analyzed in Part C.2, however, the blocking orders that OFAC has issued pursuant to the IEEPA have gone well past the limits provided by the Supreme Court, and therefore are probably unconstitutional. This section concludes by suggesting procedures which may be reasonable in this context, such that the asset freezes comply with the Fourth Amendment.

¹⁵⁸ *Id.* at 69.

¹⁵⁹ For a thorough analysis of al-Barakaat and the government investigation into it, see *id.* at 67-86.

¹⁶⁰ U.S. CONST. amend. IV.

¹⁶¹ See *infra* Part C.1.

A. What Constitutes a Seizure

The Court has stated that the word "seizure," since the founding of United States, has meant a "taking possession."¹⁶² At common law, seizure "connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control."¹⁶³ What constitutes physical control depends "upon the nature of the thing seized."¹⁶⁴ Notably, control can be actual or constructive.¹⁶⁵ Regarding seizures of property under the common law, "a governmental agent who does not acquire actual physical possession of an item of personal property might be considered to have dominion and control—constructive possession—over the item by preventing it from being moved, transported or accessible to other persons."¹⁶⁶ Of course, while common law seizure in many ways provides the cornerstone of Fourth Amendment analysis, the definition of common law seizure is not coterminous with the definition of seizure under the Fourth Amendment. Indeed, the Fourth Amendment's definition of seizure is broader than the common law's definition.¹⁶⁷

Actual control is a fairly straightforward concept, and it should be clear in most cases where actual control is exercised whether a seizure occurs. What constitutes constructive control is more problematic. The Supreme Court has divided its Fourth Amendment seizure analysis into seizures of the person and seizures of property.¹⁶⁸ The Supreme Court first defined constructive control within the context of seizures of the person. In *Terry v. Ohio*,¹⁶⁹ the Court concluded that "[o]nly when the officer, by means

¹⁶² *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (citing dictionaries from 1828 and 1921).

¹⁶³ *Id.*

¹⁶⁴ *Pelham v. Rose*, 76 U.S. (9 Wall.) 103, 106 (1869) ("[B]y the seizure of a thing is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized.")

¹⁶⁵ *See id.* (noting that possession can be actual or constructive); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 703–04 (2d ed. 1986) (discussing actual and constructive possession).

¹⁶⁶ Steven G. Davison, *Warrantless Investigative Seizures of Real and Tangible Personal Property by Law Enforcement Officers*, 25 AM. CRIM. L. REV. 577, 594 (1988).

¹⁶⁷ *See Hodari D.*, 499 U.S. at 627 n.3 ("*Katz v. United States* unequivocally rejects the notion that the common law of arrest defines the limits of the term 'seizure' in the Fourth Amendment What *Katz* stands for is the proposition that items which could not be subject to seizure at common law (e.g., telephone conversations) can be seized under the Fourth Amendment.") (citations and quotations omitted).

¹⁶⁸ *See, e.g.*, *United States v. Place*, 462 U.S. 696, 708–09 (1983) (comparing of the degree of intrusion imposed by seizures of the person and seizures of property).

¹⁶⁹ *Terry v. Ohio*, 392 U.S. 1 (1968).

of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."¹⁷⁰ Thus, seizure of the person in the arrest situation "requires *either* physical force . . . or, where that is absent, *submission* to the assertion of authority."¹⁷¹ The Court's seizure of property jurisprudence is similar. The Court has defined a seizure of property as a "meaningful interference with an individual's possessory interest in that property."¹⁷² Indeed, the Court specifically linked its definition of a seizure of property to a seizure of a person.¹⁷³ As with the definition of seizure of the person, the Court's definition of seizure of property stems from the common law.¹⁷⁴

The focus of inquiry regarding whether a seizure has occurred is the restraint on the protected interest, and not the government's actions as such: [T]he government's actions are only incidental, albeit necessary, requirements. Seizures of property implicate an individual's possessory interest in the property.¹⁷⁵ The "meaningful interference" test for seizures of property thus focuses on the *effect* of the government's action on the individual's possessory interest. Therefore, constructive control encapsulates not the extent of the *government's* interest in the property but only the extent of the government's interference with the *individual's* interest in the property. Thus, constructive control expresses a negative rather than positive power. For example, regarding seizures of the person, the Court in *California v. Hodari D.*,¹⁷⁶ stated, "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, *even when it is ultimately unsuccessful.*"¹⁷⁷ Thus, when a policeman lays his hand on an individual, the Court has held that is a seizure. It is quite obvious that the fact of touching the individual does not necessarily place the individual within the actual control or dominion of the policeman. However, a person will not feel free to leave (even though he

¹⁷⁰ *Id.* at 20 n.16.

¹⁷¹ *Hodari D.*, 499 U.S. at 626.

¹⁷² *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

¹⁷³ *See id.* at 113 n.5 ("While the concept of a 'seizure' of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment—meaningful interference, however brief, with an individual's freedom of movement.").

¹⁷⁴ *See id.* at 121 (stating that the assertion of dominion and control over property constitutes a seizure within the meaning of the Fourth Amendment).

¹⁷⁵ *See id.* at 113 ("A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property.").

¹⁷⁶ *California v. Hodari D.*, 499 U.S. 621, 624 (1991).

¹⁷⁷ *Id.* at 626 (emphasis added).

might physically be able to), thereby constituting constructive control, and thus a seizure. Similarly, within the context of seizures of property, the Court in *United States v. Place*¹⁷⁸ held the detention of luggage for ninety minutes constituted a seizure,¹⁷⁹ but the policemen in *Place* did not have the authority to perform a search of the luggage. Constructive control thus expresses a negative power: [T]he power of the government to negate an individual's interest, either in his own liberty or in his possession of property.

Therefore, seizures may, and often do, last only temporarily. How long the seizure lasts may very well go to the meaningfulness of the interference with the individual's possessory interest,¹⁸⁰ but the mere fact that a seizure is temporary has no bearing itself upon the analysis. The Supreme Court has stated repeatedly that temporary meaningful interferences with property constitute seizures. For example, in *Terry v. Ohio*, a temporary frisking of an individual on a street after the initiation of physical contact by the officer constituted a seizure.¹⁸¹ In *United States v. Place*, a ninety-minute detention of a traveler's luggage constituted a seizure within the meaning of the Fourth Amendment.¹⁸² Indeed, the *Place* Court also assumed temporary seizures constituted cognizable Fourth Amendment seizures when it analyzed the reasonableness requirement in light of the length of the seizure.¹⁸³ Thus, the length of the interference does not bear on whether a seizure has occurred. It does not matter how long the meaningful interference lasts, only whether there is a meaningful interference.¹⁸⁴

¹⁷⁸ *United States v. Place*, 462 U.S. 696, 707 (1983).

¹⁷⁹ *See id.* at 707 ("There is no doubt that the agents made a 'seizure' of Place's luggage for purposes of the Fourth Amendment . . ."); *see also Soldal v. Cook County* 506 U.S. 56, 63 (1992) ("[T]aking custody of Place's suitcase was deemed an unlawful seizure for it unreasonably infringed 'the suspect's possessory interest in his luggage.'").

¹⁸⁰ *Cf. id.* at 709 ("Although we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry*, *Adams*, and *Brignoni-Ponce*, . . . the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.").

¹⁸¹ *Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

¹⁸² *United States v. Place*, 462 U.S. at 707 ("There is no doubt that the agents made a 'seizure' of Place's luggage for purposes of the Fourth Amendment . . .").

¹⁸³ *Id.* at 709 ("Although we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry*, *Adams*, and *Brignoni-Ponce*, . . . the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.").

¹⁸⁴ *See also Davison, supra* note 166, at 593 ("In reaching [the holding in *Jacobsen*], the majority . . . did not refer to how long a period of time the DEA agents asserted dominion and control

B. Blocking or Freezing of Assets under the IEEPA as Seizures

1. A Straightforward Constitutional Analysis

A constitutional analysis clearly compels the conclusion that asset freezes or blockings under the IEEPA of Islamic charities constitute seizures within the meaning of the Fourth Amendment. The basic test is whether there has been a "meaningful interference with an individual's possessory interest in that property."¹⁸⁵ Undoubtedly, within the meaning of the Fourth Amendment, a charity or organization is protected as a "person." Moreover, the assets seized in these situations constitute property, and the charities have interests in the property that can only be described as possessory. The only question, then, is whether the asset freezes are "meaningful interferences" with the charities' property. It should be clear that the freezes or blockings of assets constitute interferences with the charities' possessory interests: blockings, by their very nature, interfere with the charities' right to transfer or otherwise use their assets; the assets are truly "frozen."¹⁸⁶ As the assets are frozen, so must be the charities' interest in them. The Executive thus has constructive control of the assets.¹⁸⁷

The *Place* Court considered a mere ninety-minute detention of an individual's luggage to be a meaningful interference with the individual's possessory interest in the luggage.¹⁸⁸ Regarding the asset freezes of Islamic charities, the 9/11 Commission concluded: "IEEPA's provision allowing blocking 'during the pendency of an investigation' is a powerful weapon with potentially dangerous applications when applied to domestic institutions. *This provision lets the government shut down an organization . .*

Consequently, this part of the *Jacobsen* decision might be interpreted as holding that a seizure occurs when a government official asserts dominion and control over an item of personal property for even a brief period of time."); *Whren v. United States*, 517 U.S. 806, 809–10 (1996) (concluding that temporary detention of an individual, "even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of" the Fourth Amendment).

¹⁸⁵ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

¹⁸⁶ *See supra* Part III.A.

¹⁸⁷ *Cf. Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 753 (7th Cir. 2002) (arguing that the IEEPA "is designed to give the President means to *control* assets that could be used by enemy aliens") (emphasis added); *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981) (stating that "the congressional purpose in authorizing blockings orders [under the TWEA] is 'to put control of foreign assets in the hands of the President'") (quoting *Propper v. Clark*, 337 U.S. 472, 493 (1949)).

¹⁸⁸ *United States v. Place*, 462 U.S. 696, 707 (1983) ("There is no doubt that the agents made a 'seizure' of *Place's* luggage for purposes of the Fourth Amendment . . .").

. .¹⁸⁹ Indeed, all of the charities subject to OFAC asset freezes were effectively shut down by the freezes and ceased to operate even when OFAC could not bring any actual charges of wrongdoing against the charities.¹⁹⁰ This is not surprising: Shutting down the charities pending an investigation is actually the goal of the temporary asset freezes.¹⁹¹ If a ninety-minute detention of an individual's luggage constitutes a meaningful interference, surely a "temporary" asset freeze, which has no limit on its time duration, must also constitute a meaningful interference of a possessory interest. Regarding the charity cases outlined above, the seizures lasted for months, if not years, while the government investigated possible wrongdoing.¹⁹² Therefore, asset freezes or blockings of Islamic charities clearly constitute meaningful interferences with the charities' possessory interest in their property, and are thus seizures within the meaning of the Fourth Amendment.

2. *Asset Freezes in the Securities Context*

Using asset freezes to prevent transfer of funds is not confined to the IEEPA. The Securities and Exchange Commission ("SEC") has used asset freezes pending its own investigations of individuals under investigation.¹⁹³ The SEC will take injunctive action—usually through temporary restraining orders or preliminary injunctions—to ensure that the assets will not disappear and will be available for remedies at the conclusion of the enforcement action.¹⁹⁴ Similar to the blocking of assets under the IEEPA, an

¹⁸⁹ MONOGRAPH, *supra* note 6, at 112 (emphasis added).

¹⁹⁰ See *supra* Part II.

¹⁹¹ Cf. Press Release, U.S. Department of the Treasury, Office of Public Affairs, Response to Inquiries from Arab American and American Muslim Communities for Guidance on Charitable Best Practices (Nov. 7 2002), <http://www.treasury.gov/press/releases/po3607.htm> (stating that the goal of freezing assets is "to prevent financial resources from getting into the hands of terrorist organizations") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

¹⁹² This is deduced from the dates of the initial freezing orders of OFAC and dates of the courts' opinions in the cases.

¹⁹³ See, e.g., *Colello v. SEC*, 908 F. Supp. 738 (C.D. Cal. 1995) (analyzing SEC's pursuit of an injunction freezing individual's assets); *SEC v. Healthsouth Corp.*, 261 F. Supp. 2d 1298 (N.D. Al. 2003) (analyzing SEC's pursuit of an injunction freezing corporate officer's assets).

¹⁹⁴ See Harold S. Bloomenthal & Samuel Wolff, *Introduction to International Law Enforcement—Asset Freezes*, 3F SEC. & FED. CORP. LAW § 27:314 (2d ed. 2006) (describing the SEC's asset freezing actions and their purposes); J. William Hicks, *Freeze of Defendant's Assets*, 17 CIVIL LIABILITIES: ENFORCEMENT & LITIG., § 2:45 (2006) (describing the SEC's asset freezing actions and their purposes).

SEC "freeze order is [intended to be] a temporary remedy that seeks to preserve the status quo while other determinations are made."¹⁹⁵

One court held that the freezing of assets by the SEC are seizures under the Fourth Amendment.¹⁹⁶ In *Colello v. S.E.C.*,¹⁹⁷ the Swiss government, at the request of the SEC, froze the Swiss assets of an individual who was under investigation by the SEC.¹⁹⁸ Under a treaty between the United States and Switzerland, the freezing could take place based upon reasonable suspicion, a standard less exacting than probable cause.¹⁹⁹ In analyzing whether the freeze constituted a seizure, the court cited the "meaningful interference" test and concluded that the freeze constituted a seizure.²⁰⁰ It is noteworthy that the government did not dispute that the asset freeze was a seizure: "Both the [Securities and Exchange] Commission and [the Department of] Justice agree that the asset freeze was in fact a 'seizure.'"²⁰¹ Any theoretical or practical difference between asset freezes in the SEC enforcement context and asset freezes in the IEEPA enforcement context are, at best, allusive and illusive.

3. *Rebutting the IEEPA Case Law on the Fourth Amendment*

Provided this context, the courts' holdings concerning the Fourth Amendment in the charity cases are not only astonishing, but astounding. The district court's analysis in *Holy Land Foundation*²⁰² is the leading judicial opinion on the topic. The only other case to analyze asset freezes under the IEEPA in the Islamic charity context is *Islamic American Relief Agency*,²⁰³ but that court's analysis rested entirely on *Holy Land Foundation*'s analysis.

The district court in *Holy Land Foundation* first made a congressional authority argument.²⁰⁴ The government argued, and the district court

¹⁹⁵ Hicks, *supra* note 194, § 2:45.

¹⁹⁶ See *Colello*, 908 F. Supp. at 755 (holding that an SEC-initiated asset freeze violated a corporate officer's Fourth Amendment rights).

¹⁹⁷ *Colello v. SEC*, 908 F. Supp. 738 (C.D. Cal. 1995).

¹⁹⁸ *Id.* at 742 (describing the factual background).

¹⁹⁹ *Id.* at 744 (describing the treaty).

²⁰⁰ *Id.* at 753, 755 (citing *Jacobsen* and holding the freeze to be a seizure).

²⁰¹ *Id.* The government instead argued that the seizure was reasonable. See *id.* ("The Government argues that the seizure was reasonable and therefore not a violation of the Fourth Amendment.").

²⁰² *Holy Land Found. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002).

²⁰³ *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34 (D.D.C. 2002).

²⁰⁴ See *Holy Land Found.*, 219 F. Supp. 2d at 78 (arguing that the IEEPA authorized OFAC to block HLF's property).

concluded, that the "Government plainly had the authority to issue the blocking order pursuant to the IEEPA and the Executive Orders" ²⁰⁵ The government made this same type of argument in *Global Relief Foundation*, ²⁰⁶ arguing that the statutory language and legislative history differentiated between "blocking" and "seizing" property:

Although [GRF] claims the legislative history shows that the President cannot seize records under IEEPA, the statutory language makes it clear that Congress explicitly allowed for the unrelated act of freezing or blocking records. In any event, the legislative history [of the IEEPA] demonstrates the difference between "blocking" and "seizing" property; Congress considered a "seizure" to be equivalent to a "vesting" or "forfeiture" of the property, with ownership passing to the government, while a "blocking" merely permitted the agency to hold or "freeze" the property, but not take title to it For these same reasons, Plaintiff's Fourth Amendment claim against OFAC should be rejected as well. ²⁰⁷

For purposes of this Note, it is not disputed that the statutory language and legislative history of the IEEPA differentiate between "blocking" and "seizing" property. Regardless, that is irrelevant to the constitutional analysis: Congress cannot abrogate the Fourth Amendment through legislation. ²⁰⁸ Nor does Congress have final authority to define constitutional terms such as seizure. ²⁰⁹ Congressional intent is therefore useful in determining the extent of OFAC's authority under the IEEPA, but it has no bearing in determining whether OFAC's actions square with the Constitution. ²¹⁰

²⁰⁵ *Id.*

²⁰⁶ *Global Relief Found., Inc. v. O'Neill*, 205 F. Supp. 2d 885 (N.D. Ill. 2002).

²⁰⁷ Defendants' Motion to Dismiss or For Summary Judgment, *supra* note 66, at 16 n.19 (citations omitted).

²⁰⁸ *Cf. Marbury v. Madison*, 5 U.S. 137, 178–80 (1803) ("So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case [A] law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.").

²⁰⁹ *Cf. id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

²¹⁰ *Id.* In this light, the government makes a compelling argument that OFAC has the authority to freeze or block assets, but it has no authority to vest assets through forfeiture.

The court in *Holy Land Foundation* also relied on case law for its conclusion that blockings do not constitute seizures.²¹¹ The court first cited *Tran Qui Than v. Regan*,²¹² which argued, "[t]he blocking of the assets [under the TWEA] . . . does not affect the interest, right or title to them which [the owner] may possess. The blocking action merely suspends indefinitely the right to transfer those funds."²¹³ Later in the opinion, however, the *Tran* court stated that "blocking involves a deprivation of the enjoyment of a property interest."²¹⁴ As it turns out, neither of these seemingly contradictory statements is particularly relevant to Fourth Amendment seizure analysis. The first statement is in a section of the opinion analyzing whether the plaintiff is a member of the designated class that has a cause of action under the TWEA.²¹⁵ Such an analysis obviously has little to do with Fourth Amendment jurisprudence. The second statement is in a section analyzing whether the blocking constitutes a taking under the Takings Clause of the Fifth Amendment.²¹⁶ The constitutional analyses for Fourth Amendment seizures and Fifth Amendment takings, however, are different and distinct.²¹⁷ Perhaps the most important difference between the two analyses for this Note's purpose is that under the Fifth Amendment the property must vest in the government,²¹⁸ but under the Fourth Amendment

²¹¹ See *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 78–79 (D.D.C. 2002) ("Further, the case law is clear that a blocking of this nature does not constitute a seizure.").

²¹² 658 F.2d 1296 (9th Cir. 1981).

²¹³ *Id.* at 1301 (citation omitted).

²¹⁴ *Id.* at 1304.

²¹⁵ See *id.* at 1300–01. The *Tran* court stated:

The district court reviewed the action of the Secretary, acting through the office of Foreign Assets Control, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq. Than contends that this was in error. He asserts that the Secretary's decision should have been reviewed under § 9(a) of the TWEA, 50 U.S.C.App. § 9(a). Than's assertion is incorrect. Section 9(a) of the [TWEA] authorizes "[a]ny person not an enemy or ally of enemy claiming *any interest, right, or title* in any money or other property which may have been *conveyed, transferred, assigned, delivered or paid* to the [United States Government] or seized by [it]' to seek return of the property through an administrative proceeding or through a suit in federal district court.

Id. (emphasis added).

²¹⁶ See *id.* at 1304 (analyzing a takings claim).

²¹⁷ See, e.g., *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (concluding that a seizure of property occurs when there is a "meaningful interference with an individual's possessory interest in that property"); *Tran Qui Than v. Regan*, 658 F.2d 1296, 1304 (9th Cir. 1981) (discussing the requirement that vesting occur for there to be a taking).

²¹⁸ See, e.g., *Tran*, 658 F.2d at 1304 ("describing the difference between blocking and vesting").

seizures can be temporary.²¹⁹ Specifically, in cases raising takings claims under the TWEA or IEEPA, courts often have held that blocking orders do not constitute vesting because they are temporary.²²⁰ As argued above though, seizures under the Fourth Amendment can be temporary. Therefore, whether a Fifth Amendment taking occurs is irrelevant to whether a Fourth Amendment seizure occurs. Thus, *Tran* does not provide any support for the *Holy Land Foundation* court's Fourth Amendment analysis because *Tran* does not discuss the Fourth Amendment *at all*.

Three of the other four cases the *Holy Land Foundation* court cites also do not discuss the Fourth Amendment, but instead discuss the Takings Clause.²²¹ Because they do not present any different analysis than *Tran*, they will not be repeated here. The final case cited by the court in *Holy Land Foundation* is *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas v. Newcomb*,²²² an unreported case, and, as it turns out, an irrelevant one. That case stands for the basic proposition that blocking does not constitute a forfeiture.²²³ Seizures under the Fourth Amendment, however, involve *any* "meaningful interference" with an individual's possessory interest in property—the interference clearly need not amount to a forfeiture to satisfy this test.²²⁴ In short, none of the cases cited in *Holy Land Foundation* lead to the conclusion, let alone support the idea, that asset freezes under the IEEPA constitute seizures under the Fourth Amendment. The courts' analyses in these cases have been simply wrong.

²¹⁹ See *supra* Part III.B.1.

²²⁰ See, e.g., *Tran*, 658 F.2d at 1304 ("We recognize that blocking involves a deprivation of the enjoyment of a property interest. That deprivation is temporary, however, and is not equivalent to vesting. Vesting occurs when title to assets is transferred to the government; blocking does not transfer title but rather prohibits temporarily, transactions involving those assets.").

²²¹ See *D.C. Precision Inc. v. United States*, 73 F. Supp. 2d 338, 343 n.1 (S.D.N.Y. 1999) ("However, to the extent that D.C. Precision plans to pursue a taking claim, the court holds that the claim is meritless. Assets blocked under the Executive Orders are not seized or appropriated by the government. Rather, blocking temporarily prohibits transactions involving those assets."); *IPT Co. v. U.S. Dept. of Treasury*, 1994 WL 613371, at *5–6 (S.D.N.Y. 1994) ("This Court holds that defendant's blocking is not a taking as title to the property has not vested in the Government."); *Can v. United States*, 820 F. Supp. 106, 109 (S.D.N.Y. 1993) (citing *Than* for the argument that because a blocking order is temporary, it is not equivalent to a vesting).

²²² *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas v. Newcomb*, No. 98–0949 (D.D.C. Mar. 29, 1999).

²²³ See *id.* at 13–14 (arguing that blocking does not constitute a forfeiture).

²²⁴ Cf., e.g., *United States v. Place*, 462 U.S. 696, 707 (1983) (holding that detention (i.e. not forfeiture) of a piece of luggage for ninety minutes constituted a seizure under the Fourth Amendment).

C. *The Reasonableness of the Asset Freezes*

1. *The Constitutional Framework*

The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and, "no Warrants shall issue, but upon probable cause."²²⁵ The Supreme Court has interpreted these clauses to mean that, in the "ordinary case," "a seizure of personal property [is] *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized."²²⁶ Warrants are generally required because they ensure that searches and seizures are reasonable.²²⁷ While the warrant requirement is the general rule, "reasonableness is still the ultimate standard."²²⁸ The Court, therefore, has carved out limited exceptions to the warrant requirement. Exceptions to the warrant requirement are permissible "if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present."²²⁹ Exigent circumstances may exist when there are "special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like."²³⁰ In most such exceptions, probable cause is still required.²³¹

The Court, however, has also carved out exceptions, based upon exigent circumstances, to the probable cause requirement that allow for searches based only on "reasonable suspicion." The main case allowing reasonable suspicion to be the standard is *Terry v. Ohio*, which held that temporary seizures of the person in a stop and frisk situation on the street

²²⁵ U.S. CONST. amend. IV.

²²⁶ *United States v. Place*, 462 U.S. 696, 701 (1983).

²²⁷ *See Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 539 (1967) ("The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest.").

²²⁸ *Id.*

²²⁹ *Place*, 462 U.S. at 701 (citing *Arkansas v. Sanders*, 442 U.S. 753, 761 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).

²³⁰ *Illinois v. McArthur*, 531 U.S. 326, 330 (2001).

²³¹ *See WAYNE R. LAFAVE & JEROLD H. ISRAEL*, 1 CRIMINAL PROCEDURE § 3.3 (1984) ("[I]t is clear that such an arrest or search is unreasonable if not based upon probable cause."); *cf. Arizona v. Hicks*, 480 U.S. 321, 327 (1987) ("Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require, i.e., the standard of probable cause.").

could be based on only reasonable suspicion.²³² The Court set out a balancing test, weighing the government's interest against the constitutionally protected interest of the individual.²³³ If the balance weighed in the government's favor, the government must have reasonable suspicion, which the court defined: "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."²³⁴ Regarding the facts at hand, the Court determined the exigent circumstances of the case—that officers on the beat often need to act quickly—which historically had not, and practically could not, be "subjected to the warrant procedure," weighed in favor of the reasonableness of the intrusion.²³⁵ The Court cautioned, however, that "whenever practicable, [police must] obtain advance judicial approval of searches and seizures through the warrant procedure."²³⁶ Thus, the *Terry* exception was limited to narrow circumstances.

The Supreme Court expanded the *Terry* exception regarding temporary seizures of the person to temporary seizures of property in *United States v. Place*.²³⁷ As the *Place* Court stated the balancing test:

We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the government interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.²³⁸

Regarding the government's interests in the case, the court concluded the public had a "compelling interest" in detecting drug traffickers and that, because "of the inherently transient nature of drug courier activity at

²³² See *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (concluding that only reasonable suspicion is necessary in such circumstances).

²³³ See *id.* at 20–21 (describing the balancing test).

²³⁴ *Id.* at 21.

²³⁵ *Id.* at 20.

²³⁶ *Id.*

²³⁷ See *United States v. Place*, 462 U.S. 696, 702 (1983) (extending the principles of *Terry* to a situation in which luggage was detained for ninety minutes).

²³⁸ *Id.* at 703.

airports,"²³⁹ the police's interest in temporarily detaining luggage was "substantial."²⁴⁰ The Court has elsewhere considered the seriousness of the offense in determining whether the government's interest is substantial.²⁴¹ Regarding the extent of the individual's interest, the court concluded:

[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation.²⁴²

The Court declined to set a time limit on such seizures, preferring instead to "allow authorities to graduate their responses to the demands of any particular situation."²⁴³ The Court concluded that, on the facts before it, the ninety minute detention was unreasonable because of the length of the detention and the lack of due diligence of the police in pursuing the investigation.²⁴⁴ As a whole, then, under the balancing test the Court looks to the totality of the circumstances²⁴⁵ and engages in a fact-specific inquiry.²⁴⁶

2. *What Reasonableness Requires for IEEPA Blocking Orders*

Under the IEEPA, OFAC can block the assets of an organization during the pendency of an investigation without a warrant, probable cause, or

²³⁹ *Id.* at 704–05.

²⁴⁰ *See id.* (discussing the degree of governmental interest in allowing police to search subjects at airports without probable cause).

²⁴¹ *See Recent Cases, Tenth Circuit Applies Reasonable Suspicion Standard to Stops for Minor Traffic Infractions: United States v. Callarman*, 116 HARV. L. REV. 697, 702 (2002) (citations omitted) ("Court precedent makes clear that the government interest varies with the seriousness of the suspected offense and implies that such interest may be sufficiently substantial to justify a departure from the probable cause requirement . . .").

²⁴² *Place*, 462 U.S. at 709.

²⁴³ *Id.* at 710.

²⁴⁴ *See id.* (concluding that the seizure was unreasonable under the circumstances).

²⁴⁵ *See United States v. Knights*, 534 U.S. 112, 118 (2001) (noting the Court's general Fourth Amendment analysis as engaging in a totality of the circumstances approach).

²⁴⁶ *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("In applying this test [of reasonableness] we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.").

reasonable suspicion.²⁴⁷ Because there is no current standard for blocking assets pursuant to the IEEPA, the current procedure is patently unconstitutional. To comply with constitutional demands, OFAC will likely have to initially base its blocking order on at least reasonable suspicion. While the Supreme Court might not require probable cause and/or a warrant to initially block the assets in question, at the very least a warrant will need to be sought and issued within a narrow time frame to keep the blocking order in place.

To dispense with the warrant requirement, exigent circumstances need to be present.²⁴⁸ There are two possible ways exigent circumstances could be applied in the context of freezing orders under the IEEPA: first, the broad power of the President over national security and foreign affairs might create exigent circumstances such that reasonable suspicion can justify all blocking orders under the IEEPA; second, exigent circumstances might exist if there is specific evidence that there is an immediate possibility that the funds might vanish or be dispersed to terrorist groups. That is, the first possibility posits that in the IEEPA context, exigent circumstances *always* exist, and the second possibility posits that exigent circumstances *only exist if an immediate danger can be shown*.

Using the balancing test of *Place*,²⁴⁹ exigent circumstances should not always, *per se*, exist for IEEPA blocking orders. The President's foreign affairs and national security powers provide the basis that exigent circumstances would always exist for IEEPA blocking orders. As the government argued in *Islamic American Relief Agency*, "IEEPA blocking occurs only in circumstances of an 'unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States,' with respect to which the President has formally declared a 'national emergency.'"²⁵⁰ It is undeniable that blocking orders under the IEEPA

²⁴⁷ Cf. International Economic Emergency Powers Act, Pub. L. No. 95-223, § 101, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. § 1702(a)(1)(B) (2004)) (authorizing the President to "block during the pendency of an investigation" assets of suspected parties, but providing no standard of evidence upon which to base those actions).

²⁴⁸ See, e.g., *United States v. Place*, 462 U.S. 696, 701 (1983) (permitting warrantless temporary seizures if "the exigencies of the circumstances" so demand).

²⁴⁹ See *id.* at 703 ("We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.").

²⁵⁰ Defendants' Motion to Dismiss and for Summary Judgment, *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 42 (D.D.C. 2005) (citing 50 U.S.C. § 1701(a) (1977)).

implicate the President's national security powers,²⁵¹ and that such powers provide compelling government interests.²⁵² Furthermore, courts generally defer to the government's assessment of national security and foreign policy issues, such that if the government can make the claim that exigent circumstances always inhere in the IEEPA context, the courts should be deferential to that analysis.²⁵³

That said, such a compelling interest probably does not by itself create exigent circumstances that justify departing from the warrant requirement or probable cause. FISA presents a useful comparison. Under FISA, if the government wants to obtain a wiretap for electronic surveillance it must go to the Foreign Intelligence Surveillance Court ("FISC") to establish probable cause and obtain a warrant.²⁵⁴ First, under FISA, the same compelling governmental interests are present as with IEEPA blocking orders; probable cause, and not reasonable suspicion, is still required.²⁵⁵ On this basis, blocking orders under the IEEPA should be subject to similar constraints. Second, FISA was amended to give the FISC jurisdiction over physical search requests as well.²⁵⁶ Indeed, in *Global Relief Fund*, the government actually used FISA warrants to search the charity's offices.²⁵⁷ This directly contradicts the idea that exigent circumstances are present in the terrorist financing context: [I]t makes little sense for the President's national security powers to create *carte blanche* for warrantless asset freezes but for the same powers in the same exact context not to create *carte blanche* for warrantless physical searches and wiretaps. Third, FISA allows emergency warrantless searches to occur, provided the government seeks a warrant within seventy-two hours of the search.²⁵⁸ The point is that probable cause and warrants are the general rule under FISA. Thus, the probable cause requirements of FISA belie any notion that exigent circumstances are inherent in presidential authority over foreign affairs in the IEEPA context. Rather, the seventy-two

²⁵¹ Cf. *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (analyzing the President's powers under the TWEA and IEEPA).

²⁵² Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (stating that executive action taken pursuant to the President's inherent authority and authorization from Congress create a strong presumption of legitimacy).

²⁵³ Cf. *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters related to foreign policy and national security are rarely proper subjects for judicial intervention.").

²⁵⁴ See 50 U.S.C. § 1804 (2006) (providing guidelines for obtaining a warrant for electronic surveillance of foreign intelligence).

²⁵⁵ *Id.*

²⁵⁶ 50 U.S.C. § 1804(a).

²⁵⁷ See *Global Relief Found., Inc. v. O'Neill*, 205 F. Supp. 2d 885, 886 (N.D. Ill. 2002) (discussing the factual background of the case).

²⁵⁸ 50 U.S.C. § 1805(f).

hour exception in FISA supports the conclusion that exigent circumstances only exist when there is a specific emergency, and do not always, *per se*, exist in the foreign affairs context.

The compelling governmental interest of national security also does not inherently present the same immediacy and danger concerns that are present in Supreme Court precedent. *Terry v. Ohio* allowed reasonable suspicion because of the need for officer safety and quick decision-making while on the beat,²⁵⁹ and *United States v. Place* allowed reasonable suspicion because of the highly mobile nature of drug trafficking at airports.²⁶⁰ Federal circuit courts have also held warrantless searches under the TWEA to be constitutional, but these opinions stressed the urgent situation of World War II and, importantly, applied to foreign entities, not domestic organizations.²⁶¹ On the other hand, there is nothing inherent in running a front organization for terrorist financing that creates such a need for immediacy in blocking assets. Indeed, it makes sense that such organizations would want to appear to be as much like regular charities as possible, and not turn around its assets as soon as they come in.

Finally, the government argued in *Islamic American Relief Agency* that courts have upheld the President's inherent authority to conduct foreign surveillance and intelligence without a warrant.²⁶² The cases the government cites concern foreign intelligence gathering, however, and not criminal investigations of citizens and domestic organizations.²⁶³ The primary

²⁵⁹ See *Terry v. Ohio*, 392 U.S. 1, 20 (1968) ("But we deal here with an entire rubric of police conduct—*necessarily swift action* predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.") (emphasis added).

²⁶⁰ See *United States v. Place*, 462 U.S. 696, 704 (1983) ("The context of a particular law enforcement practice, of course, may affect the determination whether a brief intrusion on Fourth Amendment interests on less than probable cause is essential to effective criminal investigation."). The Court went on to state: "[b]ecause of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops of persons at airports on reasonable suspicion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels." *Id.*

²⁶¹ See, e.g., *Now v. United States*, 148 F.2d 696, 698–99 (5th Cir. 1945) ("With such searches in the sudden emergency of war necessary to be made throughout the country will all the speed and efficiency, under the urgent orders of the President and Secretary of the Treasury, we hold the search and seizure, though without a warrant, was not unreasonable . . .").

²⁶² See *Islamic Am. Relief Agency*, 394 F. Supp. 2d at 44. (analyzing searches and seizures).

²⁶³ See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980) ("Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the 'probable cause' to demonstrate that the government in fact needs to recover that information from one particular source.").

distinction is that in foreign intelligence surveillance operations, courts are not competent to determine whether probable cause exists, but in criminal cases, determination of probable cause is standard issue.²⁶⁴ Indeed, the blocking orders are issued under the IEEPA "during the pendency of an investigation."²⁶⁵ The investigation at issue is examining whether the organization is providing material support to terrorist groups, with the goal of bringing criminal charges against the organization.²⁶⁶ Courts are surely competent to assess the basis of a blocking order under probable cause because courts must assess and preside over a criminal trial of the same evidence and the same crime. The foreign intelligence exception is therefore incongruous and inapplicable to IEEPA blocking orders.

On the other hand, an organization's interest in the use of its assets is compelling. Blocking or freezing an organization's assets is a severe intrusion upon the organization. Blocking assets effectively shuts down the organization while the blocking order is in place.²⁶⁷ Of all the organizations on which OFAC has placed blocking orders, none has recovered or continued in existence.²⁶⁸ It is hard to imagine a more profound or severe effect on an organization than what a blocking order imposes. Furthermore, the blocking orders that OFAC has issued to date contradict *Place's* emphasis on the need for the intrusion to be "brief" and "limited."²⁶⁹ The

²⁶⁴ See *id.* at 915 ("[A]s the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted 'primarily' for foreign intelligence reasons."). The court continued:

We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution. We thus reject the government's assertion that, if surveillance is to any degree directed at gathering foreign intelligence, the executive may ignore the warrant requirement of the Fourth Amendment.

Id.

²⁶⁵ 50 U.S.C. § 1702(a)(1)(B) (Supp. IV 2000) (emphasis added).

²⁶⁶ See, e.g., 18 U.S.C. § 2339B (2000) (making it unlawful to give material support to terrorist entities).

²⁶⁷ See MONOGRAPH, *supra* note 6, at 112 ("IEEPA's provision allowing blocking 'during the pendency of an investigation' is a powerful weapon with potentially dangerous applications when applied to domestic institutions. This provision lets the government shut down an organization without any formal determination of wrongdoing.").

²⁶⁸ See *supra* Part II (analyzing the charity cases).

²⁶⁹ See *United States v. Place*, 462 U.S. 696, 704 (1983) (describing the balancing test).

duration of the interference is critical to the analysis.²⁷⁰ In *Place*, the Supreme Court held that a ninety-minute seizure was too long and severe an interference to be allowable on reasonable suspicion.²⁷¹ In contrast, the blocking orders that OFAC has issued to date have lasted for months and years.²⁷² Such blocking orders hardly can be said to be "minimally intrusive."²⁷³ Thus, balancing the organization's interest with the government's generalized interest in national security, it seems clear that exigent circumstances do not inhere in the IEEPA context, and, thus, probable cause and a warrant must be the general rule.

Because determining whether reasonable suspicion is constitutionally adequate requires a balancing test based on the totality of the evidence²⁷⁴ and the facts of the individual case,²⁷⁵ exigent circumstances might exist in some cases such that IEEPA blocking orders could be issued upon only reasonable suspicion. The Supreme Court in both *Terry* and *Place* stressed the immediacy of the situation in its analysis: *Terry* allowed reasonable suspicion because of the need for officer safety and quick decision-making while on the beat,²⁷⁶ and *Place* allowed reasonable suspicion because of the highly mobile nature of drug trafficking at airports.²⁷⁷ If the government has "specific and articulable"²⁷⁸ evidence that immediate action is necessary—such as evidence that the organization is about to turn over its assets to terrorists or otherwise make the assets untraceable—these exigent

²⁷⁰ See *id.* at 709 ("[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.").

²⁷¹ See *id.* ("The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause.").

²⁷² See *supra* note 191 (determining the duration of the blocking order from the dates of the initial freezing order and the dates of the courts' opinions in the cases).

²⁷³ *Place*, 462 U.S. at 709.

²⁷⁴ See *United States v. Knights*, 534 U.S. 112, 118 (2001) (noting the Court's general Fourth Amendment analysis as engaging in a totality of the circumstances approach).

²⁷⁵ See *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("In applying this test [of reasonableness] we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.").

²⁷⁶ See *Terry v. Ohio*, 392 U.S. 1, 20 (1968) ("But we deal here with an entire rubric of police conduct—*necessarily swift action* predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.") (emphasis added).

²⁷⁷ See *Place*, 462 U.S. at 704 (discussing the "inherently transient nature" of drug trafficking and its effect on the probable cause requirement for a "brief intrusion on Fourth Amendment interests").

²⁷⁸ See *id.* at 703 ("[W]here the authorities possess specific and articulable facts warranting a reasonable belief that a traveler's luggage contains narcotics, the governmental interest in seizing the luggage briefly to pursue further investigation is substantial.").

circumstances are likely to justify blocking the organization's assets based upon reasonable suspicion. In these situations, the government's interests are paramount.

The organizations' interests in the use of their property, however, also are compelling. Whether a blocking order based only on reasonable suspicion will be reasonable—and thus constitutional—will depend upon the length of the blocking order. *Terry* stops are quick affairs, lasting only a few minutes,²⁷⁹ and the Court in *Place* held that a ninety-minute seizure was too long based on the facts of the case.²⁸⁰ It is arguable, however, that national security interests are simply more compelling than standard criminal law enforcement interests.

Perhaps the most useful basis to gauge the reasonableness of seizures is to compare IEEPA blocking orders to emergency searches and wiretaps taken under FISA, insofar as the Supreme Court has not placed any limits on the length of time seizures can be based upon reasonable suspicion and still be held reasonable. Under FISA, the government can forego a warrant in emergency situations, but must apply for one with the FISC within seventy-two hours of the warrantless search.²⁸¹ In emergency situations, allowing warrantless blocking orders based upon reasonable suspicion to last up to three days would correlate well with seizures, as the context is much the same.²⁸²

Furthermore, the government used a FISA warrant when it searched GRF's offices.²⁸³ If the government can obtain probable cause to search an organization's offices, it should be able to use the same evidence to support probable cause to freeze the organization's assets. As a practical matter, the government likely will want to block the organization's assets and search its offices at the same time because if OFAC has notified an organization that its assets have been frozen, the organization, if actually committing a crime, might attempt to destroy evidence in its offices. Indeed, the government has done exactly this: [F]or example, the government blocked GRF's and BIF's

²⁷⁹ See *id.* at 709 n.10 (citing MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(1) (1975)) (suggesting *Terry* stops be limited to twenty minutes).

²⁸⁰ See *id.* at 710 (holding that the seizure was impermissible based on the facts of the case).

²⁸¹ See 50 U.S.C. § 1805(f) (Supp. IV 2000) (authorizing emergency employment of electronic surveillance with an application for a warrant within 72 hours).

²⁸² The time limit for asset freezes upon less than probable cause likely would have to be less than three days, however, because the individual's interest in using his assets is much greater than his interest in privacy to be free from wiretaps; the balancing test would favor heavily a shorter time span for asset freezes.

²⁸³ See *Global Relief Found., Inc. v. O'Neill*, 205 F. Supp. 2d 885, 886 (N.D. Ill. 2002) (discussing the factual background of the case).

assets on December 14, 2001, and conducted raids of both charities' offices the same day.²⁸⁴ In fact, the FBI had not planned to raid BIF's domestic offices, but decided to do so at the last minute because "FBI personnel learned that some of the targets of the investigations *may be destroying documents*."²⁸⁵ This is likely to occur, if for no other reason, because OFAC cannot seem to prevent press leaks that tip organizations and news media of the impending actions.²⁸⁶ If the government is likely to coordinate its measures, such that asset freezes occur at the same time as physical searches, it is fanciful that the two actions should be allowed based on different and incongruent standards of proof.

In sum, OFAC's blocking orders to date have been unconstitutional because there have been no formal findings of probable cause or reasonable suspicion. If reasonable suspicion is a permissible standard, due to exigent circumstances in the IEEPA context, the length of the blocking orders would have to be strictly limited. While under FISA the permissible time limit is three days in emergencies, the time limit would have to be shorter for IEEPA blocking orders. Balancing the interests at stake, the severity of the interference is much greater in the blocking order context than the interference of wiretaps under FISA, even though the government's interest is much the same. This Note therefore recommends that no longer than twenty-four hours pass between the initial blocking order based upon reasonable suspicion and a warrant obtained on the basis of probable cause.²⁸⁷ Such a procedure should present little difficulty for the government to carry out its interests because probable cause is needed for the physical searches of the charities' offices and the government will likely want these actions to occur concurrently.

²⁸⁴ See MONOGRAPH, *supra* note 6, at 99–100 (describing OFAC's blocking orders and the FBI's raids on the two charities).

²⁸⁵ *Id.* at 100 (emphasis added).

²⁸⁶ See *id.* at 100 n.90 ("Press leaks plagued almost every OFAC blocking action that took place in the United States. The process had extremely poor operational security. In a number of instances, agents arrived at locations to execute blocking orders and seize businesses only to find television news camera crews waiting for them.").

²⁸⁷ The 9/11 Commission came to a similar conclusion: "[S]erious consideration should be given to placing a strict and short limit on the duration of such a temporary blocking. A 'temporary' designation lasting 10 or 11 months, as in the BIF and GRF cases, becomes hard to justify." MONOGRAPH, *supra* note 6, at 112.

V. Conclusion

Investigating and destroying financial networks that fund terrorist groups is a necessary front in the "War on Terror." This is no easy task, however. As has been demonstrated in the charity cases discussed above, the government has been able to gather much evidence linking these groups to terrorist entities, but has been unable to collect evidence tying the charities' funds directly to terrorists.²⁸⁸ The money trail in such cases can be incredibly difficult to trace, making a criminal case next to impossible.²⁸⁹

Since 9/11, Congress has given the President tools to combat the inherent problem of tackling terrorist financing. Specifically, Congress amended the IEEPA in the USA PATRIOT Act to allow the President to "block during the pendency of an investigation" the assets of designated terrorists.²⁹⁰ As the 9/11 Commission stated, this grant of authority was meant to be a "powerful weapon" to destroy terrorist financing networks.²⁹¹

The powerful nature of this weapon, along with problems of gathering evidence, necessitates that blocking actions against individuals and organizations proceed with caution and in accordance with constitutional requirements. Thus far, OFAC has failed to meet the requirements of the Fourth Amendment in its blocking actions.

It is important that OFAC rectify its procedures to comply with constitutional demands. As demonstrated in Part II, the charities that have been subject to blocking orders to date had very troubling links to designated terrorist organizations. While it must indeed be incredibly frustrating for the government to know that something is not quite right with an organization, mere links to terrorists do not constitute a crime. Probable cause must, in the usual case, be surmounted to block an individual's or an organization's assets pending an investigation of criminal conduct.

To require probable cause in all but the most extreme circumstances is not only good jurisprudence, but also good policy. Probable cause prevents executive discretion that could be used arbitrarily and capriciously to harm the civil liberties of individuals and groups: Probable cause provides the accountability that helps sustain our democracy. With few, if any,

²⁸⁸ See MONOGRAPH, *supra* note 6, at 110–11 (discussing the evidence linking BIF and GRF to terrorist groups, but noting that little evidence has been uncovered of the charities' funds actually going to terrorists).

²⁸⁹ *Id.*

²⁹⁰ 50 U.S.C. § 1702(a)(1)(B) (Supp. IV 2000).

²⁹¹ MONOGRAPH, *supra* note 6, at 112.

procedural safeguards, the blocking action authority under the IEEPA as it currently stands may allow "the President to selectively blacklist disfavored political groups."²⁹² Standardless discretion raises the same fears as the early Cold War era: "[G]enerating official lists of proscribed organizations without clear substantive guidelines or meaningful procedural safeguards."²⁹³

It should be remembered that "the total political will, prosecutorial and investigative talent, and resources of the U.S. government have so far failed to secure a single terrorist-related conviction" under the current regime.²⁹⁴ The answer to this problem is not to discard cherished constitutional safeguards, but to find new legal and constitutional ways to unearth terrorist financing. In the meantime, it would do the judiciary good not to sacrifice civil liberties in the name of national security. "The struggle to establish civil liberties against the backdrop of these security threats, while difficult, promises to build bulwarks of liberty that can endure the fears and frenzy of sudden danger—bulwarks to help guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile."²⁹⁵ The government has shut down six charities without any formal determination of wrongdoing. That is simply unacceptable.

²⁹² David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 27 (2003).

²⁹³ *Id.*

²⁹⁴ MONOGRAPH, *supra* note 6, at 13.

²⁹⁵ William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, Speech at the Law School of Hebrew University, Jerusalem, Israel (Dec. 22, 1987).

