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COMBATTING MONEY LAUNDERING AND INTERNATIONAL TERRORISM: DOES THE USA PATRIOT ACT REQUIRE THE JUDICIAL SYSTEM TO ABANDON FUNDAMENTAL DUE PROCESS IN THE NAME OF HOMELAND SECURITY?

JOAN M. O'SULLIVAN-BUTLER

Q: If al Qaeda incorporates in Delaware then its assets cannot be blocked?

A: The people involved are not al Qaeda.

— Exchange between U.S. Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit and Frank Simmons, the attorney for Global Relief Foundation during oral argument.¹

According to findings by the International Monetary Fund, it is estimated that money laundering amounts to between approximately two to five percent of global gross domestic product or about \$600 billion per year.² In the aftermath of the events of September 11, 2001, it has become increasingly apparent that “money laundering, and the defects in financial transparency on which money launderers rely, are critical to financing of global terrorism and the provision of funds for terrorist attacks.”³ The immediate response to the terrorist attacks of September 11th within the United States was a wave of legislation, including the USA PATRIOT Act (“the Act”), which reshaped national security policies while simultaneously restricting traditional civil liberties.⁴ Among the many terrorism-related provisions of the Act, the executive branch was given authority to freeze the assets of organizations – in which there is a foreign interest suspected

1. Andrew Buchanan, *Government Defends Use of Secret Evidence Against Islamic Charity*, SAN DIEGO UNION-TRIBUNE, October 29, 2002, available at <http://www.signonsandiego.com/news/nation/terror/20021029-1411-attacks-secretevidence.html> (last visited Feb. 14, 2004).

2. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act* § 302(a)(1), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended at 31 U.S.C. § 5311 (2001)).

3. See *id.* § 302(a)(2).

4. See John W. Whitehead & Steven H. Aden, “*Forfeiting Enduring Freedom’ for ‘Homeland Security’*”: *A Constitutional Analysis of the USA PATRIOT Act and the Justice Department’s Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1083 (2002).

of funding terrorist organizations – through the use of an asset blocking order pending a further investigation.⁵ The Act further permits the use of classified information which will be subjected to only *ex parte*, *in camera* inspection by the judge presiding over a challenge to such an action as a means of supporting the government’s actions in freezing such assets.⁶

While the use of secret evidence is normally something to be avoided, federal law currently allows its use in exceptional cases. Asset-blocking cases such as *Global Relief Foundation, Inc. v. O’Neil et al.*, the government has argued, represent precisely some of those “exceptional circumstances” when secret evidence must be permitted.⁷ Furthermore, the government argues: “[t]he ongoing efforts to identify foreign terrorists and their supporters depends in part on the use of intelligence that, if disclosed, could cause grave damage to the national security of the United States.”⁸ Recently, however, the use of this secret evidence has been challenged by the parties affected by such blocking orders as an unconstitutional action that frequently leaves their own attorneys “working in the dark” and unable to effectively challenge the government’s allegations.⁹

Further, recent efforts by some members of Congress to make the USA PATRIOT Act permanent, and even increase the government’s powers of domestic intelligence gathering, surveillance and prosecution are a source of concern within both the government and the private sector.¹⁰ The PATRIOT II, or the “Domestic Security Enhancement Act of 2003” as

5. See Buchanan, *supra* note 1.

6. See Whitehead & Aden, *supra* note 4, at 1128.

7. See Buchanan, *supra* note 1.

8. See *id.*

9. See *id.*

10. See Christian Bourge, *Analysts Worry about Patriot Act II*, WASH. TIMES, March 10, 2003, available at <http://www.upi.com/view.cfm?StoryID=20030310-074202-1742r> (last visited Feb. 23, 2004); Eric Lichtblau, *Republicans Want Terror Law Made Permanent*, N.Y. TIMES, April 9, 2003, available at http://www.ccmeop.org/2003_articles/Civil%20Liberties/040803_republicans_want_terror_law_made.htm (last visited Feb. 23, 2004). The proposed legislation includes a provision which expands the definition of foreign power under the Foreign Intelligence Surveillance Act (FISA) to include individuals unaffiliated with a particular terrorist group who engage in terrorism. As a result, the law would then permit investigations of “lone wolf” terrorists or “ sleeper cells” which may not currently be authorized under FISA. See *Domestic Security Enhancement Act of 2003: Section-By-Section Analysis*, at 1, available at <http://www.pbs.org/now/politics/patriot2-hi.pdf> (last visited Feb. 24, 2004). The legislation would also require the court to permit the government to automatically make *in camera ex parte* applications to the court particularly for the use of *ex parte* evidence when classified information is involved. See *id.* However, perhaps the most contentious provision in the legislation would: (1) permit the government to collect DNA from suspected terrorists or other individuals involved in terrorists investigations; and (2) provide the government with the power to revoke the citizenship of naturalized citizens suspected of terrorist activities or providing “material support” to terrorists. See Bourge, *supra* note 10.

the draft legislation is more formally known, would make permanent many of the provisions of the USA PATRIOT Act which were initially subject to a sunset provision in 2005 when the legislation was initially approved.¹¹ However, many congressional Democrats and civil rights activists alike have indicated their increasing frustration with the lack of information from the Justice Department on whether or not those powers have been abused.¹²

The main question, therefore, in light of the terrorist attacks of September 11th and the U.S. government's attempt to combat money laundering as a source of potential terrorist funding, is whether the government's use of secret evidence to justify a challenged blocking order represents a violation of the fundamental due process rights of the aggrieved party. In an attempt to evaluate this issue, the remainder of this essay is divided into four Parts. Part I provides an overview of the connection between money laundering and terrorism. Part II describes the statutory history and legislative background to the money laundering provisions of the USA PATRIOT Act, as well as how the Act's provisions raise due process concerns in the context of judicial proceedings challenging a blocking order issued by the U.S. government. Part III examines the rapidly developing body of legal precedent emerging from recent challenges to such blocking orders and the Government's efforts to enforce such orders through the submission of "confidential and sensitive" evidence on an *ex parte, in camera* basis. Part IV examines the legal and public policy arguments, both in favor of and against the continued use of such *ex parte, in camera* evidence as a part of judicial proceedings challenging blocking orders as well as some of the potential ramifications of such a course of action. What emerges from this analysis is the determination that while the provisions of the Act relating to the *ex parte, in camera* submission of evidence supporting the government's allegations are alarming at first glance, the ultimate goal of cracking down on money laundering as an increasingly potent source of terrorist financing can only

11. See Bourge, *supra* note 10.

12. See *id.* For instance, it is well-documented that after Congress passed the USA PATRIOT Act, the use of FISA warrants has increased exponentially. See Anita Ramasastry, *Recent Oregon Ruling on Secret Warrants May Set Troublesome Precedent*, available at <http://www.cnn.com/2003/LAW/03/18/findlaw.analysis.ramasastry.warrant> (last visited Feb. 19, 2004). This increase has been perceived to be the result of changes enacted by the PATRIOT Act which requires the government to pass a much more lenient test prior to the issuance of a FISA warrant. See *id.* Prior to the PATRIOT Act, the law required that "the purpose" of a secret FISA warrant must be counterintelligence. See *id.* Now, however, intelligence gathering can be merely "a significant purpose" of the issuance of such a warrant. See *id.* Some critics contend that this amendment opens the way to the issuance of "dual purpose" warrants as an end run around the Fourth Amendment in the regular law enforcement context while the public remains largely in the dark about every aspect of FISA warrants. See *id.*

be supported by broad enforcement capabilities held in check by the unbiased members of the judiciary.

I. THE MONEY LAUNDERING AND TERRORISM CONNECTION

In the United States, money laundering is defined as a series of legitimate or illegitimate financial transactions used to disguise the source of illicit funds.¹³ Money laundering includes the use of legitimate funds to facilitate a criminal activity, such as terrorism.¹⁴ The volume of global money laundering is estimated at roughly \$590 billion to \$1.5 trillion per year.¹⁵ The primary source of these laundered funds worldwide is drug trafficking and financial crimes, such as bank fraud and credit card fraud.¹⁶ Money laundering also supports a wide array of other criminal activities such as terrorism and arms trafficking.¹⁷ As an activity that involves such a staggering amount of money, money laundering poses a significant threat to national security and poses major foreign policy risks. The potentially hazardous effects of money laundering include the facilitation of official corruption, the distortion of markets and the destabilization of the economies of developing countries.¹⁸

Money laundering that occurs in connection with terrorism poses unique challenges. First, it should be noted that there are several similarities between terrorist groups and organized crime. The Financial Action Task Force (FATF), the leading international anti-money laundering organization, recently reported that terrorist organizations rely on the same sources of funding that organized crime groups utilize, such as drug trafficking, fraud, extortion and kidnapping, and likewise utilize similar methods to launder funds, such as nominee accounts, shell companies and numbered bank accounts.¹⁹

However, there are also some important distinctions between terrorist groups and individuals involved in organized crime. Terrorists do not generally pursue financial goals. Terrorists do not consider the generation of revenue as one of their main goals and usually do not attempt to launder

13. See Robert E. Sims, *Money Laundering and Corruption: Enforcement After September 11th*, 2002 A.B.A. SEC. INT'L L. & PRACTICE § I.

14. See *id.*

15. See *id.* § I-D.

16. See *id.* § I-E.

17. See *id.* § I-B.

18. See *id.* § I-D.

19. See Nicole M. Healy, *The Impact of September 11th on Anti-Money Laundering Efforts, and the European Union and the Commonwealth Gatekeeper Initiatives*, 36 INT'L LAW. 733, 733 (2000).

substantial sums of money or engage in traditionally suspicious transactions.²⁰ For example, the terrorists who carried out the World Trade Center attacks required only approximately \$500,000 in funding.²¹ Furthermore, the efforts to fund those individuals involved only one transaction that generated a suspicious activity report.²²

Funds used for terrorism are difficult to detect for a number of reasons. First, terrorists frequently utilize underground banking systems available in certain countries.²³ Second, the funds used to support these individuals are not large amounts of money and may include superficially legitimate sources of funding such as charitable organizations and legitimate businesses.²⁴ The Federal Bureau of Investigation ("FBI") has identified the funding of terrorist organizations such as Al Qaeda and Hamas through charitable organizations as a "significant challenge to law enforcement" and has therefore made such organizations a prime focus of terrorist financial investigations.²⁵ According to the Federal Bureau of Investigation, such organizations offer terrorists "logistical support in the form of cover employment, false documentation, travel facilitation, and training."²⁶ As many critics of the PATRIOT Act point out, the "line is often blurred" between terrorist fund-raising and legitimate fund-raising.²⁷ Nevertheless, even those efforts which appear on the surface to "help the poor" may fall squarely into the realm of logistical support for terrorist activity.²⁸ As a result, any successful attempt to combat money laundering as a source of terrorist funding necessarily requires broader enforcement capabilities than those efforts used to combat typical money laundering schemes.

20. See Sims, *supra* note 13, § I-E.

21. *Id.*

22. *Id.*

23. *Id.* at 733.

24. See *Financing Patterns Associated with Al Qaeda: Statement for the Record Before the House Committee on Financial Services, Subcommittee on Oversight and Investigations*, Feb. 12, 2002 (statement of Dennis M. Lormel, Chief, Financial Crimes Section, Federal Bureau of Investigation), available at <http://www.fbi.gov/congress/congress02/lormel021202.htm> (last visited 2/23/04).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

II. USA PATRIOT ACT: STATUTORY FRAMEWORK AND LEGISLATIVE HISTORY

Current efforts to combat money laundering and terrorist funding are best understood in the context of historical development of the presidential powers over foreign affairs.

A. EARLY HISTORY AND THE TRADING WITH THE ENEMY ACT

The source of the President's power over foreign affairs, and hence the ability to combat global money laundering, is a long-standing issue since no explicit presidential foreign affairs power is written in the Constitution.²⁹ Instead, the power over foreign affairs is deemed to be an inherent power of the President in his role of Commander in Chief.³⁰ In an effort to strengthen the President's foreign affairs powers, the United States Congress enacted legislation empowering the President with broad authority to deal with foreign sovereigns in times of war and national emergency.³¹ This early legislation was the Trading with the Enemy Act ("TWEA") as enacted in 1917 and amended in 1933.³² The TWEA granted the President authority to "investigate, regulate . . . prevent or prohibit . . . transactions" in times of war or national emergency.³³ The TWEA employed the use of economic sanctions as its primary tool to deal with foreign affairs.

Of the several early cases addressing the President's foreign affairs power, perhaps the most famous is *United States v. Curtiss-Wright Export Corporation*.³⁴ In *Curtiss-Wright*, a joint Congressional resolution authorizing the President to ban the sale of arms to countries engaged in a Bolivian conflict was challenged as an unconstitutionally broad delegation of legislative power to the president.³⁵ In upholding the resolution, the court reasoned that:

It is quite apparent that if, in the maintenance of our international

29. See, e.g. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (discussing enumerated and implied presidential powers regarding foreign affairs).

30. *Id.*

31. 50 U.S.C. § 1701 (1977).

32. Trading With the Enemy Act of 1917, 50 U.S.C. §§ 1-44 (1917).

33. *Dames & Moore v. Regan*, 453 U.S. 654, 669-670 (1981) (citing to 50 U.S.C. § 1702 (a)(1) (1977)).

34. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

35. See *id.* at 313-15.

relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.³⁶

However, as the need for more extensive foreign policy powers increased, in times of peace as well as in times of war, the need for more in depth legislation to address the scope of the President's authority became apparent.

B. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

In 1977, Congress amended the TWEA and enacted the International Emergency Economic Powers Act ("IEEPA") to delineate the President's exercise of emergency economic powers in response to both wartime and peacetime crises.³⁷ The TWEA specifically governed "the President's authority to regulate international economic transactions during wars or national emergencies."³⁸ The 1977 legislation granted the President broad emergency powers in wartime under the TWEA, and granted similar although not identical emergency economic powers in peacetime national emergencies under the IEEPA.³⁹ More specifically, following the declaration of a national emergency, the IEEPA provides the President with the authorization to:

[I]nvestigate . . . regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.⁴⁰

In essence, the IEEPA granted the President nearly complete but temporary authority to control the actions of any economic actor subject to the jurisdiction of the United States in the event of a national emergency.

36. *Id.* at 320.

37. International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1702 (2003).

38. See S. Rep. No. 95-466, at *2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4540 - 41.

39. See *id.* at *4.

40. See 50 U.S.C. §1702(a)(1)(B) (2001).

C. POST-SEPTEMBER 11 ACTION: EXECUTIVE ORDER 13224

On September 24, 2002, President George W. Bush issued Executive Order 13224, declaring a national emergency with respect to the “grave acts of terrorism and threats of terrorism committed by foreign terrorists . . . and the immediate threat of further attacks on United States nationals or the United States.”⁴¹ The Executive Order specifically noted that “because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists.”⁴² More importantly, however:

[B]ecause 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. . . . [F]or 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.⁴³

Executive Order 13224 was not the first executive order directed towards combating money laundering as a source of terrorist funding. For instance, on January 25, 1995, President Clinton issued Executive Order 12947 in an effort to crack down on funding to the Islamic Resistance movement, more commonly known as “*Hamas*.”⁴⁴ That Order blocked all property and interests in property of the terrorist organization and persons designated in the Order.⁴⁵ The Order also permitted the Secretary of the Treasury to designate additional individuals if they are found to be “owned or controlled by, or to act for or on behalf of” an entity designated in the Order.⁴⁶

However, Executive Order 13224 represents the broadest definition of what constitutes the money laundering used to fund terrorist efforts. Under the Executive Order, the President invoked the IEEPA to name twenty-seven terrorists, terrorist organizations and their supporters, and froze their assets that were in the United States, that would be coming into the United States, or that were in the “possession or control” of U.S. persons.⁴⁷ The order also authorized the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to designate individuals or

41. See Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

42. *Id.*

43. *Id.*

44. See Exec. Order No. 12947, 60 Fed. Reg. 5,079, 5,081 (Jan. 23, 1995).

45. See *id.* at 5,079.

46. *Id.*

47. See Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

entities whose property or property interests should be blocked because they “act for or on behalf of” or are “owned or controlled by” designated terrorists or they “assist in, sponsor, or provide . . . support for” or are associated with them.⁴⁸ The order thereby expanded the definition of what actions constitute money laundering used to fund terrorist efforts to include any act which could be broadly construed to constitute assisting, sponsoring, or providing support for terrorist groups.⁴⁹ This broad definition of what constitutes money laundering used to fund terrorist efforts also carried over to the enactment of the USA PATRIOT Act.

D. THE USA PATRIOT ACT

In a more formal response to the terrorist attacks of September 11, 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, also known as the USA PATRIOT Act.⁵⁰ Passed in October 2001, the USA PATRIOT Act significantly expands the President’s power under the IEEPA.⁵¹ Previously, an individual or entity whose assets had been blocked could follow a procedure through which they were entitled to seek reconsideration of the blocking order if the party believed the order had been issued in error.⁵² However, the USA PATRIOT Act provides that in cases of judicial review of a blocking order entered pursuant to the IEEPA, any classified information upon which the order was based “may be submitted to the reviewing court *ex parte* and *in camera*.”⁵³

The new statutory framework enacted after September 11th focuses not only on the blocking of questionable assets, but also on the global problem of money laundering and how money laundering schemes are used by terrorists and their supporters. Due to the “pervasiveness and expansiveness of the financial foundation of foreign terrorists,” Executive Order 13224 instructed the executive agencies of the United States to utilize all legal means to stem the flow of money supporting terrorist organizations throughout the world.⁵⁴

The statutory framework of the USA PATRIOT Act provides further

48. *See id.* at 49,079-80.

49. *See id.*

50. *See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

51. *Global Relief Foundation, Inc. v. O’Neill*, 207 F. Supp. 2d 779, 791 (N.D. Ill. 2002).

52. *See* International Emergency Economic Powers Act § 203, 50 U.S.C. § 1702 (1977); *Id.* at 791.

53. USA PATRIOT Act § 106(2), 50 U.S.C. § 1702(c) (2003).

54. *See* Exec. Order No. 13224, 66 Fed. Reg. 49079, 49079-80 (Sept. 23, 2001).

support for this firm mandate and makes significant changes in the fight against money laundering. Title III of the USA PATRIOT Act, the “International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001” was signed into law on October 26, 2001.⁵⁵ The purpose of Title III is to “increase the strength of United States measures to prevent, detect, and prosecute international money laundering and the financing of terrorism.”⁵⁶ Title III requires the Secretary of the Treasury to implement numerous changes and triggers new compliance requirements for financial institutions, large corporations, charities, non-governmental organizations and even attorneys.⁵⁷ In particular, Title III sets new conditions to do business in the United States for foreign financial institutions with assets in the United States.⁵⁸

Title III of the USA PATRIOT Act represents Congress’ focus on the necessity of developing strategies to fight domestic and international money laundering, and in doing so expands the ability of law enforcement authorities to fight money laundering.⁵⁹ For the first time, the law gives the Central Intelligence Agency (“CIA”) access to Suspicious Activity Reports (“SARs”), including those involving bank accounts of U.S. citizens.⁶⁰ Congress was particularly concerned with weaker foreign countries that allow the use of anonymous offshore banking facilities and the illicit movement of funds that are normally used in organized crime, smuggling,

55. See USA PATRIOT Act, Pub. L. No. 107-56, §§ 301-77, 115 Stat. 272, 295-343 (2001).

56. See USA PATRIOT Act § 302(b)(1), 31 U.S.C. § 5311(b)(1) (2003).

57. Sims, *supra* note 13, at *4. For instance, Title III of the USA PATRIOT Act requires a reassessment of existing compliance programs for both financial and non-banking institutions. *Id.* at *6. Corporations and government entities such as General Electric, Boeing, General Motors, and the U.S. Postal Service are implementing “Know Your Customer” procedures requiring all employees to be in compliance with money laundering laws, to look for suspicious activities and to take reasonable steps to ensure that the businesses do not accept forms of payment identified as a means of laundering money. *Id.*

The new anti-money laundering laws present challenges to attorneys and the legal profession. See Edward J. Krauland & Stephane Lagonico, *Lawyers and Anti-Money-Laundering: The Gatekeeper Initiative*, 31:4 INT’L L. NEWS 1, (2002). The Financial Action Task Force (FATF) which consists of twenty-nine countries and two international organizations, established what is known as the “Gatekeeper Initiative” which provides steps that attorneys should take in connection with business and financial transactions in order to prevent money laundering. *Id.* The requirements of the Gatekeeper Initiative could seriously impact the legal profession and the existence of attorney-client privilege by requiring mandatory reporting obligations enforced by criminal penalties and a “no-tipping rule.” *Id.* This reporting requirement could result in over reporting of innocent conduct to government authorities, or of attorneys refusing to take bona fide clients for fear of undefined risks. *Id.*

58. See USA PATRIOT Act §§ 312(a), 313(a), 31 U.S.C. § 5318(j) (2001).

59. See Sims, *supra* note 13, at *5.

60. See *id.*

and terrorism.⁶¹ Congress was also concerned with the use of private and correspondent banking services to move illicit funds.⁶²

Title III addresses Congress' concerns by expanding the U.S. anti-money laundering laws in three main areas. First, the law expands the list of crimes that may be used to serve as predicate offenses for money laundering crimes. Predicate offenses now include: additional Racketeer Influenced and Corrupt Organizations Act (RICO) predicate offenses,⁶³ foreign crimes, including all crimes of violence, foreign public corruption, and offenses for which the United States would be required to extradite the offender,⁶⁴ operation of an illegal money remission business;⁶⁵ and bulk cash smuggling in amounts greater than \$10,000 into or out of the United States.⁶⁶

Second, the Act focuses attention on U.S. financial institutions which are now required to take "special measures" when dealing with foreign countries or institutions that are considered to be of primary money laundering concern.⁶⁷ U.S. financial institutions are now required to strictly regulate the relationships between U.S. institutions and foreign banks and individuals and to develop compliance programs to enable such action to take place.⁶⁸ Title III further requires banks to conduct enhanced due diligence measures for private banking and correspondence accounts⁶⁹ and prohibits United States banks from maintaining correspondent accounts with foreign "shell banks."⁷⁰

Finally, the Act expands the procedural tools that can be used by federal courts and law enforcement in prosecuting money-laundering crimes. In particular, the 2001 Money Laundering Act expands the federal government's authority for asset forfeiture.⁷¹ A new provision, Title 18, Section 981, expands the federal government's forfeiture authority by

61. USA PATRIOT Act §§ 302(a)(4), (5), 31 U.S.C. §§ 5311(a)(4), (5) (2003).

62. USA PATRIOT Act §§ 302(a)(6), (7), 31 U.S.C. §§ 5311(a)(6), (7) (2003).

63. *See* 18 U.S.C. § 1956 (c)(7)(A) (2003).

64. USA PATRIOT Act § 315, 18 U.S.C. § 1956(c)(7)(B) (2003).

65. *See* USA PATRIOT Act § 373, 18 U.S.C. § 1960 (2003).

66. USA PATRIOT Act § 371, U.S.C. § 5332 (2003).

67. USA PATRIOT Act § 311(b), 31 U.S.C. § 5318A(b) (2003). The special measures include the record keeping and reporting of certain financial transactions. *See id.*

68. *See* John Gibeaut, *Show the Money: The Anti-Terrorism Laws Target Money Laundering, Forcing Banks to be More Vigilant and Compliance Officers to Take on More Tasks*, 88 A.B.A. J. 47, Jan. 2002, at 48. *See also* USA PATRIOT Act § 312(a)(1), 31 U.S.C. 5318(i)(1) (2003).

69. *Id.*

70. USA PATRIOT Act § 313, 31 U.S.C. § 5318(j) (2003). Shell banks, which owe their existence to the internet age, are banks that have no physical presence anywhere, and are not subject to regulation by any country. *Id.*

71. Healy, *supra* note 19, at 736.

allowing the civil forfeiture of any person, entity or any property engaged in terrorism.⁷² Specifically the provision authorizes the forfeiture of any property “affording any person a source of influence over such entity or organization” where the assets or property were “acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting or concealing” an act of terrorism against U.S. persons or property, or which were “derived from, involved in, or used or intended to be used” to commit such acts.⁷³ The government can also forfeit the property of an individual convicted of an international terrorism offense and the proceeds or instrumentalities used to commit the predicate money laundering offense.⁷⁴

Although the changes to the U.S. money laundering laws are significant, Title III may not fully address some of the most difficult issues in the fight against money laundering, namely informal financial transactions. Since September 11th, the role of informal financial transactions and their significance on the funding of terrorism has received major attention. One of the major areas under scrutiny is the use of charitable organizations as a way to launder money and fund terrorist groups.⁷⁵ The Bush Administration has consistently expanded the scope of its Executive Orders to include charitable organizations and other controversial targets.⁷⁶ The plethora of charitable organizations and other groups with contacts in the Middle East and third world countries, both those attempting to provide genuine humanitarian aid and those with less noble motives, create enormous potential for mistaken identities which could lead to mistaken seizures and asset blocking under the new laws. As a result, a number of organizations have raised questions about whether the new laws violate an affected party’s fundamental due process rights.

72. *Id.*

73. USA PATRIOT Act § 806, 18 U.S.C. § 981(a)(1)(G) (2003).

74. *See* 28 U.S.C. § 2461(c) (2003). Title III also expands the government’s procedural authority. The Attorney General or the Secretary of the Treasury may issue a summons to obtain foreign bank records by serving the institution’s designated representative in the United States. USA PATRIOT Act § 319(b), 31 U.S.C. § 5318(k)(3)(A) (2003). By filing a civil action against the equal amount deposited in the corresponding United States bank account, the government can seek to forfeit funds deposited in an overseas bank. 18 U.S.C. § 981(k)(1)(A) (2003). Congress expanded the venue for money laundering claims under Title 18 to permit claims to be brought in any district where the defendant participated in moving the funds. 18 U.S.C. § 1956(i) (2003). Jurisdiction is expanded to anywhere a financial transaction occurred in the United States, where a U.S. court issues a forfeiture order or where the foreign individual converts the funds or maintains a bank account in the United States. USA PATRIOT Act § 317, 18 U.S.C. § 1956(b)(2) (2003).

75. *See* Sims, *supra* note 13, at *2.

76. *Id.* at *5.

III. DUE PROCESS AND THE USA PATRIOT ACT IN ACTION

Lawsuits filed by three such organizations are particularly instructive regarding the constitutionality of the government's use of secret evidence in terrorist-funding cases. In December 2001, the Treasury Department froze the assets of two Chicago-based charities, Global Relief Foundation and Benevolence International Foundation, due to their suspected terrorist links.⁷⁷ Notably, unlike other individuals who were officially designated as supporters of terrorism and then subjected to financial sanctions, the assets of both Global Relief Foundation and Benevolence International Foundation were frozen pending the government's investigation of their potential terrorist links.⁷⁸ The Treasury Department similarly froze the assets of Holy Land Foundation for Relief and Development based on the group's alleged support of Hamas, a Palestinian militant organization.⁷⁹ As discussed more fully below, all three groups subsequently denied any terrorist ties and filed federal lawsuits challenging the constitutionality of the government's actions.

A. *Holy Land Foundation for Relief and Development v. Ashcroft, et al.*

On March 11, 2002, Holy Land Foundation for Relief and Development ("Holy Land") filed a suit against John Ashcroft, in his official capacity as Attorney General of the United States of America, and several other high-ranking government officials challenging the government's designation of Holy Land as a terrorist organization.⁸⁰ The lawsuit also challenged the blocking of Holy Land's assets by the government as unconstitutional.⁸¹ Holy Land was started in 1989 as a non-profit charitable corporation with its headquarters in Richardson, Texas. Shukri Abu Baker, Holy Land's Chief Executive Officer and co-founder, has dedicated the organization that provides humanitarian aid throughout the world, with its primary focus as the provision of aid to the Palestinian population in the West Bank and Gaza areas.⁸²

77. Geoff Dougherty & Laurie Cohen, *U.S. Using New Law on Secret Evidence*, CHICAGO TRIBUNE, March 15, 2002, available at <http://www.chicagotribune.com/news/nationworld/chi-0203150268mar15.story> (last visited Feb. 14, 2004).

78. *Id.*

79. *Id.*

80. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.C.C. 2002). Holy Land filed suit not only against John Ashcroft, but also the United States Department of Justice, Secretary of the Treasury, Paul H. O'Neil, the United States Department of the Treasury, Secretary of State, Colin Powell, and the United States Department of State. *Id.* at 62.

81. *Id.*

82. *Id.* at 64.

On December 4, 2001, the United States Department of the Treasury's Office of Foreign Asset Control ("OFAC") named Holy Land as a specially designated terrorist organization and blocked all of Holy Land's assets pursuant to the IEEPA.⁸³ Holy Land was so designated because of acts the organization had undertaken "for or on behalf of" Hamas, a radical Palestinian group.⁸⁴ The evidence on the record demonstrated that Holy Land had early financial connections to Hamas, that Holy Land met with Hamas leaders, funded Hamas controlled entities, and provided support to orphans of Hamas and to families of Hamas martyrs and prisoners.⁸⁵ In addition, unidentified FBI informant reports showed that Holy Land funded Hamas.⁸⁶

Holy Land subsequently filed a lawsuit against the government seeking to enjoin the government from continuing to block or otherwise interfere with the organization's access to, or disposition of, its assets.⁸⁷ Holy Land alleged that the blocking of its assets violated the Administrative Procedure Act ("APA"), the First, Fourth and Fifth Amendments to the United States Constitution, and the Religious Freedom Restoration Act ("RFRA").⁸⁸ Holy Land also alleged that the evidence submitted by the government did not support OFAC's determination.⁸⁹ On May 31, 2002, the government moved for summary judgment on the APA claim and moved to dismiss the remaining constitutional and RFRA claims.⁹⁰ The government also filed a motion to submit classified evidence *in camera* and *ex parte* in support of their motions.⁹¹ On August 8, 2002, the court ruled in favor of the government on all claims.⁹² Since that date, Holy Land has been effectively shut down and ceased its operations.⁹³

83. *Id.*

84. *Id.*

85. *Id.* at 69.

86. *Id.*

87. *Id.* at 64.

88. *Id.*

89. *Id.* at 65.

90. *Id.* at 64.

91. *Id.* at 64 n.3.

92. *Id.* at 62.

93. See, e.g., *Holy Land Found. for Relief & Dev.*, 219 F. Supp. 2d at 64 ("Pursuant to the designation, OFAC issued a 'Blocking Notice' freezing all of HLF's funds, accounts and real property. At that time, OFAC also removed from HLF headquarters, all documents, computers and furniture. Pursuant to the Blocking Notice, all transactions involving property in which HLF has any interest are prohibited without specific authorization from OFAC.").

B. Global Relief Foundation, Inc. v. O'Neill, et al.

Global Relief Foundation, Inc. (“Global Relief”) is an Islamic humanitarian relief organization and a domestic, non-profit corporation headquartered in Illinois that began operating in 1992.⁹⁴ Global Relief claims it is also the largest U.S.-based Islamic charitable organization with active programs in distributing food, funding schools and orphanages, and providing medical service throughout the Middle East and Europe.⁹⁵ Over ninety percent of Global Relief’s donations are sent overseas to fund charitable activities.⁹⁶ In order to distribute the humanitarian aid abroad, Global Relief has established offices in Belgium, Azerbaijan, and Pakistan.⁹⁷

Shortly after the attacks of September 11, 2001, then-acting Deputy Attorney General Larry D. Thompson authorized the search of Global Relief’s Illinois office and the residence of its executive director, Mohammed Chehade.⁹⁸ On December 14, 2001, the FBI’s Chicago Division Joint Terrorism Task Force searched Global Relief’s offices and the executive director’s home.⁹⁹ The items seized in these searches included records, computers, cellular phones, a credit card imprinter, receipts, palm pilots, and both U.S. and foreign currency.¹⁰⁰

Simultaneously on December 14, 2001, the Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) issued a “Blocking Notice and Requirement to Furnish Information” with respect to Global Relief pursuant to the International Emergency Economic Powers Act (“IEEPA”).¹⁰¹ The notice blocked the funds, accounts and business records of Global Relief pending the FBI’s further investigation into the possible relationship that Global Relief may have to the World Trade Center attacks and the Al Qaeda network.¹⁰² OFAC asserted that its actions were based on substantial amounts of classified and unclassified information relating to Global Relief’s possible connections with terrorist cells.¹⁰³

On January 28, 2002, Global Relief filed a Petition for Declaratory and Injunctive Relief and for a Writ of Mandamus naming high-ranking

94. *See* Global Relief Found., Inc. v. O’Neil, 207 F. Supp. 2d 779, 785 (N.D.Ill. 2002).

95. *Id.*

96. *Id.* at 786.

97. *Id.* at 785.

98. *Id.* at 786.

99. *Id.*

100. *Id.*

101. *Id.*

102. *See id.* at 785.

103. *See id.* at 786.

government officials as the defendants.¹⁰⁴ Global Relief's Petition challenged the constitutionality of the government's actions blocking Global Relief's assets pursuant to the IEEPA and requested that the government be ordered to "unfreeze" those assets and return the items seized in the FBI's search.¹⁰⁵ Two weeks later, Global Relief filed a motion for a preliminary injunction that argued that the temporary freezing of assets was unconstitutional and unlawful.¹⁰⁶ The government replied by asking the court to deny Global Relief's motions and to grant the government's motion to submit *ex parte, in camera* evidence in support of its actions.¹⁰⁷ Among the evidence the government sought to present in secret were records presented to OFAC that led to the freezing of Global Relief's assets and the application for a search warrant for Global Relief's headquarters.¹⁰⁸

The court ruled in favor of the government on all counts.¹⁰⁹ The court found that the IEEPA, as modified by the USA PATRIOT Act, Section 1702(a)(1)(B), permits the President to:

block during the pendency of an investigation . . . any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of . . . any right, power, or privilege with respect to any property in which any foreign country or a national thereof has any interest by any person . . . subject to the jurisdiction of the United States.¹¹⁰

It is clear, the court noted, that Congress intended for the President to have sweeping powers to regulate questionable property at the time of a national emergency.¹¹¹ This power included the ability to block domestic assets of either a domestic corporation or a U.S. individual pending investigation when a foreign national or foreign country has an interest in those assets.¹¹² As Global Relief is operated and controlled by foreign nationals, with foreign as well as domestic offices, and the overwhelming majority of its charitable donations are for relief overseas, the court found that both foreign nationals and foreign countries have the most interest in this corporation.¹¹³ Based on the plain language of the IEEPA, the court

104. *See id.* at 786-87.

105. *See id.* at 787.

106. *See id.*

107. *See id.* at 785.

108. *Id.*

109. *Id.* at 809.

110. *Id.* at 793.

111. *Id.*

112. *Id.*

113. *See id.* at 794.

found that OFAC's Order blocking the assets as well as the search of the assets of Global Relief pending the FBI investigation were proper.¹¹⁴ Notably, however, the Court did not cite to the USA PATRIOT Act as support for the government's actions.¹¹⁵ Instead, the Court relied on the language of the IEEPA statute and pre-existing case law – and declined to address the constitutional issues raised by Global Relief's challenge.¹¹⁶

C. Benevolence International Foundation, Inc. v. Ashcroft, et al.

Finally, on January 30, 2002, Benevolence International Foundation (“Benevolence International”) filed a lawsuit against Ashcroft and a number of other high-ranking government officials¹¹⁷ in their official capacities challenging the government's seizure of Benevolence International's property.¹¹⁸ Founded in 1992, Benevolence International is a not-for-profit, charitable organization that has provided several million dollars' worth of humanitarian aid to several countries around the world, including the United States.¹¹⁹ The organization's charitable activities are often conducted in partnership with international relief organizations such as the United States Agency for International Development, the United Nations High Commission for Refugees, the United Nations World Food Programs, and the United Nations International Children's Emergency Fund.¹²⁰

On December 14, 2001, the Department of the Treasury's Office of Foreign Assets Control (“OFAC”) issued Benevolence International a notice that the government had reason to believe that Benevolence International was engaged in activities in violation of the IEEPA.¹²¹ The letter further notified Benevolence International that the government was blocking all of Benevolence International's funds, accounts and business

114. *See id.*

115. *Id.* at 790-809.

116. *See id.*

117. *See* Complaint, *Benevolence Int'l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (No. 02-C-0763) [hereinafter BIF Complaint]. Benevolence International Foundation filed suit not only against John Ashcroft, but also Secretary of the Treasury, Paul H. O'Neill, Secretary of State, Colin Powell, Director of the Federal Bureau of Investigation, Robert S. Mueller, and Richard Newcomb, Director of the U.S. Department of the Treasury, Office of Foreign Asset Control. *See id.*

118. *See id.*

119. *See id.* ¶ 4.

120. *See id.*

121. *See* *Benevolence Int'l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935, 936 (N.D. Ill. 2002).

records pending further investigation.¹²² On that same date, the FBI searched Benevolence International's offices in Palos Hills, Illinois and Newark, New Jersey.¹²³ These searches resulted in the seizure of all of Benevolence International's financial records, as well as other documents and personal property.¹²⁴ A separate but related search was conducted that same day at the home of Benevolence International's Chief Executive Officer, Enaam Arnaout. During this search, a number of personal effects were seized including family photographs, Arnaout's citizenship papers, and a microphone from his son's Nintendo game.¹²⁵

All of the searches were conducted pursuant to an Attorney General Emergency Physical Search Authorization ("AGEPSA") executed on December 14, 2001.¹²⁶ Benevolence International's lawyers were not permitted to review the AGEPSA that day, supposedly because it was a classified document.¹²⁷ In fact, Benevolence International's lawyers were not permitted to even read the AGEPSA until January 25, 2002.¹²⁸ When Benevolence International's lawyers were finally permitted to review the AGEPSA, Benevolence International discovered that the government was operating under what Benevolence International believes is false information that Arnaout was actually "Samir Abdul Motaleb."¹²⁹

Benevolence International's lawyers subsequently challenged the constitutionality of the government's actions in "seizing the property, and blocking the property and activities, of a law-abiding faith-based charity engaged in critical humanitarian work, without a hearing, without meaningful notice or opportunity for a hearing, and without probable cause."¹³⁰ Benevolence International's Complaint asserted claims for relief for violations of procedural due process, substantive due process, taking without just compensation, and other First, Fourth, Fifth and Sixth Amendment violations, as well as violations of federal statutory law.¹³¹ On April 18, 2002, the government filed a motion to submit evidence *in camera* and *ex parte* with the Court in support of their position in the case.¹³²

122. *See id.*

123. *See* BIF Complaint, *supra* note 116, ¶ 14.

124. *See id.*

125. *See id.* ¶ 16.

126. *See id.* ¶ 15.

127. *See id.* ¶ 17.

128. *See id.*

129. *See id.*

130. *Id.* ¶ 1.

131. *See id.* ¶¶ 35-60.

132. *See* Plaintiff's Memorandum In Opposition to Defendants' Motion to Submit Evidence in

Subsequently, on April 29, 2002, the United States Attorney filed criminal charges against Benevolence International and Arnaout for “knowingly submitting false material declarations under oath” in Benevolence International’s civil proceeding against the government.¹³³ The criminal charges were based on what the government maintained were false affidavits submitted by Benevolence International and Arnaout that “BIF has never provided aid or support to people or organizations known to be engaged in violence, terrorist activities, or military operations of any nature.”¹³⁴ The government then successfully moved to stay discovery in Benevolence International’s civil case against the government as a result of the criminal complaint against Benevolence International and Arnaout.¹³⁵ The civil case is still pending before the United States District Court for the Northern District of Illinois although the criminal complaint has since been dismissed.¹³⁶

IV. DUE PROCESS AND *EX PARTE, IN CAMERA* SUBMISSIONS OF EVIDENCE

As explained above, one of the more controversial provisions of the USA PATRIOT Act is Title I, section 106 that invokes the issue of property protection under the Fifth Amendment. Section 106 greatly increases presidential authority over the property or assets of foreign persons or organizations by amending section 203 of the International Emergency Powers Act, and permitting the submission of evidence in support of the government’s action to the court on an *ex parte, in camera* basis.¹³⁷ Specifically, section 106(c) provides:

In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act)¹³⁸ such

Camera and Ex Parte at 1, *Benevolence Int’l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d. 935 (N.D. Ill. 2002) (No. 02-C-0763) [hereinafter BIF Mem. in Opp’n].

133. See *Benevolence Int’l Found.*, 200 F. Supp. 2d at 937.

134. *Id.* at 937.

135. See *id.* at 941.

136. See *id.* at 941 (staying “case in its entirety until the conclusion of the parallel criminal case, *United States v. Benevolence Int’l Found.*,”). In *United States v. Benevolence International Foundation, Inc. v. Ashcroft*, the court granted the defendants’ motion to dismiss the indictment. *United States v. Benevolence Int’l Found., Inc.*, No. 02-CR-414, 2002 WL 31050156 (N.D. Ill. 2002).

137. See USA PATRIOT Act § 106, 50 U.S.C. § 1702(c) (2003).

138. See Classified Information Procedures Act, 18 U.S.C. Appx. §1(a) (2003). Section 1(a) defines classified information as “any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data,

information may be submitted to the reviewing court *ex parte* and *in camera*. This subsection does not confer or imply any right to judicial review.¹³⁹

The Attorney General explained the perceived need for this provision, stating that:

[l]aw enforcement must be able to ‘follow the money’ in order to identify and neutralize terrorist networks. We need the capacity for more than a freeze. We must be able to seize. Consistent with the President’s action yesterday [seizing assets of identified groups and individuals allegedly associated with al-Qaeda], our proposal gives law enforcement the ability to seize their terrorist assets.¹⁴⁰

However, it is well-established that both temporary and permanent aliens in the United States enjoy a Fifth Amendment right to due process, a right that encompasses the right to hold personal and real property.¹⁴¹ As a result, the proposition that the President may seize and dispose of such assets apparently without the benefit of the type of meaningful judicial review granted by the Fifth Amendment raises several questions.

The PATRIOT Act does not completely strip individuals accused of providing material support to terrorists of any form of judicial review. In fact, judicial review of asset blocking orders is available under section 316(a) of the USA PATRIOT Act, which provides that owners of confiscated property may file federal lawsuits challenging the determination that the property was an asset of suspected terrorists.¹⁴² However, pursuant to section 316(b), the Federal Rules of Evidence may be suspended if the court determines that compliance with the Federal Rules

as defined in paragraph r. of Section 11 of the Atomic Energy Act of 1954.” *Id.*

139. See USA PATRIOT Act § 106(c), 50 U.S.C. § 1702(c) (2003) (emphasis added).

140. *Homeland Defense Before the Senate Comm. On the Judiciary*, 107th Cong. (2001) (Sept. 25, 2001) (written testimony of the Honorable John Ashcroft, Attorney General), available at <http://www.usdoj.gov/ag/testimony/2001/0925AttorneyGeneralJohnAshcroftTestimonybeforetheSenateCommitteeontheJudiciary.htm>.

141. See, e.g., *Chew v. Colding*, 344 U.S. 590, 596 (1953); *Zadvydus v. Davis*, 533 U.S. 678, 693 (2001).

142. See USA PATRIOT Act, Pub. L. No. 107-56, § 316(a), 115 Stat. 272, 309 (2001). Section 316(a) provides:

[a]n owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (supplemental rules for certain admiralty and maritime claims), and asserting as an affirmative defense that –

- (1) the property is not subject to confiscation under such provision of law; or
- (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case.

Id.

of Evidence could jeopardize national security interests.¹⁴³ When faced with such a determination, the court is required to strike a delicate balance between the need to protect the sanctity of confidential information sources and the potential to undermine the right to a fair trial through a violation of the aggrieved party's right to fundamental due process. In each of the cases discussed in Part III, the court was required to make that determination. An examination of the arguments, both for and against the use of such evidence, is particularly instructive as to the constitutionality of the use of secret evidence pursuant to section 316(b) of the USA PATRIOT Act.

A. ARGUMENTS AGAINST THE USE OF SECRET EVIDENCE

The fundamental theory underlying the briefs submitted by the plaintiffs in the terrorist funding cases is that our adversarial system of jurisprudence requires that each side be permitted to present its own evidence and rebut the other party's evidence through contrary evidence.¹⁴⁴ However, the plaintiffs contend, that system is placed in jeopardy if one party is allowed to present secret *in camera* evidence that the other party is unable to examine, challenge and answer.¹⁴⁵ The Supreme Court has repeatedly upheld the argument that the ability to confront and respond to evidence is a fundamental right of due process. Thus, with regard to the use of secret evidence:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.¹⁴⁶

Perhaps not surprisingly, the plaintiffs in the terrorist-funding cases strenuously argue that the government's attempt to submit evidence on an *in camera, ex parte* basis constitutes just such a violation of their fundamental rights to due process.

143. *See id.* § 316(b). Section 316(b) provides:

In considering a claim filed under this section, a court may admit evidence that is otherwise inadmissible under the Federal Rules of Evidence, if the court determines that the evidence is reliable, and that compliance with the Federal Rules of Evidence may jeopardize the national security interests of the United States.

Id.

144. *See* BIF Mem. in Opp'n, *supra* note 131, at 10.

145. *See id.*

146. *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

One of the most persuasive cases in favor of the argument that the use of such evidence violates fundamental due process rights was set out in the briefs submitted on behalf of the plaintiff in *Benevolence International*. In particular, counsel for Benevolence International argued that several prior courts had applied the basic principles of due process—in the context of the government’s use of secret evidence to demonstrate the opposing party’s links to terrorism – and found that such evidence violated due process.¹⁴⁷ The fact that the government intended to argue that it was entitled to summary judgment on the basis of that secret evidence further compounded the problem.¹⁴⁸ “The government cannot,” Benevolence International’s lawyers argued, “be permitted to seize an American corporation’s assets indefinitely, never bring criminal or civil charges, and obtain dismissal of the corporation’s suit for return of its property by using ‘evidence’ that the corporation cannot see or respond to.”¹⁴⁹

Rather, under the application of the test set out in *Mathews v. Eldridge*, such an action would clearly violate the involved individuals’ fundamental due process rights.¹⁵⁰ Under the standard set out by the Supreme Court in *Mathews v. Eldridge*, the minimum requirements of due process include: (1) written notice of the specific charges against the party; (2) disclosure to the party of the evidence against it; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral and detached hearing body; and (6) if the hearing body rendered a decision adverse to the party, a written statement as to the evidence relied on and the basis for the decision.¹⁵¹ Benevolence International’s attorneys argued that the government clearly denied the charity a number of these fundamental due process requirements.¹⁵² Benevolence International’s lawyers were particularly concerned that over four months were permitted to pass without Benevolence International being charged by the government with any offense.¹⁵³

Finally, even if the Court were to permit the use of secret evidence, lawyers for the charities have argued that its use should be narrowly circumscribed to permit the government to conceal its sources but also permitting the accused individual or organization to learn the nature and

147. BIF Mem. in Opp’n, *supra* note 131, at 12.

148. *Id.* at 14.

149. *Id.* at 15-16.

150. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

151. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

152. BIF Mem. in Opp’n, *supra* note 131, at 16.

153. *Id.* at 2, 16.

contents of the evidence in question.¹⁵⁴ Instead, the charities contend, the introduction of secret evidence should not alter substantive or procedural rules.¹⁵⁵ If the government is permitted to rely on the submission of secret evidence in support of actions taken under the PATRIOT Act, the government should be required to file a Statement of Undisputed Facts with the court that would set out the facts that the government contends the secret evidence proves in summary form.¹⁵⁶ Once such a submission is made to the court, the accused party will be able to evaluate all the evidence, as the law requires.¹⁵⁷

The arguments set forth by the charities are not entirely unfounded. As a number of lawyers who have litigated secret evidence cases in the past recently noted,¹⁵⁸ there are a number of cases where such close scrutiny has permitted defense attorneys enough information to confront the evidence against their clients and ultimately to cause the government's charges against those individuals to fall apart.¹⁵⁹ The most notable of these cases involved Hany Kiareldeen, a Palestinian living in New Jersey who was detained after he was accused of meeting with one of the men convicted of bombing the World Trade Center in 1993.¹⁶⁰ Upon closer examination of the "evidence" against him, Kiareldeen came to suspect that the main source of the secret evidence was his ex-wife, with whom he was involved in a bitter child-custody battle.¹⁶¹ When Kiareldeen brought these suspicions to the attention of the federal judge in charge of his case, the judge questioned both the government's evidence against him and the process by which it was presented.¹⁶² In particular, the court noted, it was concerned with "the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness."¹⁶³ As the

154. *See id.* at 16.

155. *Id.* at 17 (citing *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989); *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983)).

156. *See id.* at 17.

157. *See id.*

158. Secret evidence was first sanctioned by Congress in 1996. The most common venue for the use of secret evidence is certain immigration cases. *See* Immigration and Nationality Act, § 504(e)(3), 8 U.S.C. § 1534(e)(3) (2003). Section 504(e)(3) provides that for the submission of "ex parte and in camera, any evidence for which the Attorney General determines that public disclosure would pose a risk to the national security of the United States or to the security of any individual because it would disclose classified information . . ." *Id.*

159. *See* Dougherty & Cohen, *supra* note 76.

160. *See id.*

161. *See id.*

162. *Id.*

163. *Id.*

Kiareldeen case makes clear, even the opportunity to confront the evidence against an individual in summary form can make a significant difference in the ability of an individual to overcome the “evidence” brought against them.

B. ARGUMENTS IN FAVOR OF THE USE OF SECRET EVIDENCE

In response to the allegations raised by the charities in their lawsuits, the government set forth a number of arguments in support of the contention that *in camera* and *ex parte* consideration of classified evidence is both statutorily authorized and constitutional. First, the government noted, both FISA and IEEPA expressly authorize the Court’s acceptance of evidence on an *ex parte, in camera* basis.¹⁶⁴ While the IEEPA was amended by the PATRIOT Act to provide for the discretionary use of such evidence, FISA has provided for the use of such evidence on a mandatory basis since its enactment.¹⁶⁵ Second, the government noted, the constitutionality of these provisions is not in dispute. Courts have ruled on a number of occasions that *ex parte, in camera* review of FISA materials is constitutional.¹⁶⁶ Furthermore, while the charities’ argument about the potential difficulties arising from such a procedure is well-taken, Congress was fully aware of these potential difficulties and chose to resolve them through a method other than requiring that all such evidence be disclosed.¹⁶⁷

Finally, the government noted, courts have routinely approved the use of *ex parte* classified information where, as here, national security concerns are implicated by the nature of an alleged offense, “or where Congress has specifically authorized the court to rely on such evidence.”¹⁶⁸ In the

164. See Defendants’ Memorandum In Support of Their Motion to Submit Evidence *In Camera* and *Ex Parte* at 5, *Benevolence Int’l Found. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (No. 02-C-0763).

165. *Id.* FISA provides that in evaluating a challenge to a search conducted pursuant to FISA, the Court:

shall, notwithstanding any other provision of law, if the Attorney General files an affidavit under oath that disclosure or any adversary hearing would harm the national security of the United States, review *in camera* and *ex parte* the application, order, and such other materials relating to the physical search as may be necessary to determine whether the physical search of the aggrieved person was lawfully authorized and conducted.

See *id.* (quoting 50 U.S.C. § 1825(g)). As the government noted, in the twenty-four years following the enactment of FISA, no court has authorized the disclosure of FISA materials to a defendant. See *id.* at 5 n.3.

166. See *id.* at 6.

167. See *id.*

168. *Id.* at 7.

terrorist-funding cases, the government argued, national security concerns were paramount in light of the events of September 11th and the U.S. action in Afghanistan in reaction to those events.¹⁶⁹ Congress was well aware of those national security interests when it passed the USA PATRIOT Act to expressly recognize the need for the government to utilize and rely on classified evidence under IEEPA.¹⁷⁰

C. BALANCING THE PUBLIC INTEREST AND FUNDAMENTAL DUE PROCESS RIGHTS

The outrage and alarm expressed by critics of the PATRIOT Act's authorization of the use of secret evidence might lead one to believe that courts faced with challenges to the Act's constitutionality would overwhelmingly find in favor of the plaintiffs. Notably, however, the courts in the terrorist-funding cases have been reluctant to hold that *ex parte*, *in camera* submission of evidence by the government pursuant to section 316 of the PATRIOT Act violates fundamental due process rights.¹⁷¹

Some courts have declined to address the issue, choosing to resolve the lawsuits brought on behalf of the affected parties on other grounds. For instance, Judge Kessler of the U.S. District Court for the District of Columbia found that the Holy Land Foundation for Relief and Development's allegations about the use of secret evidence by the government in that case were "very significant and distressing."¹⁷² At a preliminary hearing addressing the issue of the government's intention to utilize section 316 *ex parte* evidence, Judge Kessler stated:

the government will have a heavy burden to convince me that they can submit material . . . *ex parte* [I]n particular in a case with as many ramifications as this case, with as much public interest as has been demonstrated in this case, I . . . feel particularly strongly that unless the law [is] crystal clear . . . everything should be on the public record, so . . . that the public understands full well what we are doing and the reasons for what we are doing.¹⁷³

Ultimately, Judge Kessler refused to address the propriety of section 316-type secret evidence, finding that it was not necessary to reach the issue in resolving the case.¹⁷⁴

169. *See id.* at 8.

170. *See id.*

171. *See* Global Relief Found., Inc. v. O'Neill, 207 F. Supp. 2d 779, 808 (N.D. Ill. 2002).

172. BIF Mem. in Opp'n, *supra* note 131, at 15 n.11 (discussing Judge Kessler's remarks).

173. *See id.* at 15 n.11.

174. *See* Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 64 n.3 (D.D.C.

Other courts, however, have addressed the issue directly. For instance, the *Global Relief* court admitted that such proceedings are extraordinary events in our judicial system because they deprive the parties against whom they are directed of the basic requirements of due process.¹⁷⁵ The *Global Relief* plaintiffs based their due process claims on a theory that a party is guaranteed the right to confront the witness against them.¹⁷⁶ This right, which is provided by the Confirmation Clause of the Sixth Amendment,¹⁷⁷ is inapplicable to the terrorist financing cases because these cases do not involve criminal sanctions. The parties also argued that they were deprived of notice setting out the alleged misconduct and an opportunity for a hearing.¹⁷⁸ Extraordinary events such *in camera* submissions of the type utilized by the government in *Global Relief* are clear violations of a party's due process rights unless they are justified by compelling state interests.¹⁷⁹ In such a situation, the court must carefully balance the government's interest against those of the private party whose assets have been frozen.

Abiding by this mandate, the *Global Relief* court appropriately found that the government sufficiently demonstrated that it would harm the national security of the United States to disclose the evidence the government sought to submit *ex parte* and *in camera* in support of freezing the charity's assets while the government's investigation was pending.¹⁸⁰ Further, the government had attempted to compensate for its inability to disclose certain portions of the evidence against the charity by publicly filing four binders of exhibits.¹⁸¹ The government's confidentiality interest was particularly compelling because the case involved the freezing of funds and examination of seized potential evidence to further aid in the investigation.¹⁸²

As demonstrated by the *Global Relief* court's analysis, perhaps the most important procedural safeguard justifying the government's ability to submit evidence *ex parte* and *in camera* is the court itself. Specifically, the unbiased judiciary is a tremendous asset to an affected party when combatting *ex parte*, *in camera* evidence submissions by the government.

2002).

175. *Global Relief*, 207 F. Supp. 2d at 808.

176. *See id.*

177. *See e.g.*, *Davis v. Alaska*, 415 U.S. 308, 315-17 (1974).

178. *Global Relief*, 207 F. Supp. 2d at 808.

179. *See id.*

180. *See id.*

181. *See id.*

182. *See id.*

The Due Process Clause of the Fifth Amendment provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.”¹⁸³ As our government’s most vigorous defenders of the Constitution, courts are tasked with upholding the Fifth Amendment and ensuring that an affected party’s due process rights remain intact.¹⁸⁴ The mere submission of “secret” evidence in support of the government’s position does not prove the government’s argument automatically. Rather, as finder of fact in an action challenging an asset blocking order, the court must weigh the government’s evidence supporting the decision and determine the sufficiency of such evidence.¹⁸⁵ Furthermore, the court is loath to proceed without providing a party the right to confront the evidence against them, and will act to ensure that any non-classified evidence is produced to that party. In fact, the *Global Relief* court acted early in the litigation to ensure that all documents of a non-classified nature were either provided or returned to *Global Relief* on an on-going basis.¹⁸⁶

V. CONCLUSION

The terrorist attacks of September 11, 2001 resulted in an intense focus on money laundering as a source of terrorist funding. As a result of this attention, new legislation was enacted to increase government authorities’ ability to combat such money laundering efforts. While this new legislation resulted in a necessary increase in governmental enforcement capabilities, some critics question whether some of the provisions of these new laws may have potentially dangerous ramifications for our judicial process. The continued use of *ex parte*, *in camera* evidence as a part of judicial proceedings challenging blocking orders pursuant to section 316 of the USA PATRIOT Act has drawn attention as one of the potentially dangerous ramifications of such a course of action. However,

183. U.S. CONST. amend. V.

184. For instance, U.S. District Court Judge Nancy Edmunds – in a decision that is being hailed as a “positive step in thwarting the government’s post-September 11 transgressions” – recently ruled that Muslim leader (and *Global Relief* co-founder) Rabih Haddad’s immigration hearings must remain open to the public. See *A Pyrrhic Victory: Haddad Ruling Begins Challenging Patriot Act*, April 8, 2002, available at <http://www.michigandaily.com>. Typically, immigration hearings remain open to the public, but following the enactment of the PATRIOT Act the government instructed all immigration judges to close hearings that are part of the government’s ongoing terrorist investigations. See *id.* After evaluating the government’s argument in favor of closing the hearing, Judge Edmunds found that the failed to provide sufficient evidence of any specific security concerns warranting such an action. See *id.*

185. See *Global Relief*, 207 F. Supp. 2d at 787.

186. See *Global Relief*, 207 F. Supp. 2d at 805 (“the issue of *Global Relief* being denied access to its own documents has been addressed by the Court and [the government has] been returning documents to *Global Relief* on an on going basis.”).

while the provisions of the USA PATRIOT Act relating to the submission of *in camera, ex parte* evidence in support of the government's allegations are alarming at first glance, it appears that the ultimate goal of combating money laundering as an increasingly potent source of terrorist financing can and will only be accomplished through the broad enforcement capabilities provided by the USA PATRIOT Act held in check by the unbiased members of the judiciary.