

Chapter 7

The Mysterious Fate of Frozen Charitable Funds

Current counterterrorism financing policy allows the funds of designated charitable organizations to sit in frozen accounts indefinitely. The intent of the original donor is disregarded, and funds are unable to achieve any charitable purpose. The Department of the Treasury's (Treasury) *2006 Terrorist Assets Report*²²⁸ estimates that the assets of foreign terrorist organizations, a category that includes charities and foundations, is \$16,413,733. Some of these funds have been in frozen accounts for more than six years. The sanctions laws that authorize the designation and freezing of assets do not provide any timeline or process for long-term disposition, meaning that funds could remain frozen for as long as the root national emergency authorizing the sanctions lasts. Since the "war on terror" is very unlikely to have a clear ending, the funds could remain frozen indefinitely.

Most of the frozen charitable funds originated with relatively small donors who intended to provide critical humanitarian assistance, particularly to people displaced by natural disaster, war, or famine. Although current regulations grant Treasury authority to allow transfer of these funds,²²⁹ research indicates that no blocked funds have been released for charitable purposes, despite several requests. In fact, Treasury has repeatedly said that allowing transfers for humanitarian and disaster aid is not in the national interest. The situation is further complicated by lawsuits brought by families of victims of terrorism that target the funds of designated U.S. nonprofits.

A group of U.S. nonprofits has initiated a dialogue with Treasury in an attempt to resolve this situation. As their November 2006 letter to Treasury states, "The need for humanitarian assistance is not frozen and has continued to grow since 2001. Meanwhile frozen funds sit in bank accounts helping no one, while critical needs go unmet."²³⁰ To date, there is no resolution in sight.

²²⁸ "Terrorist Assets Report Calendar Year 2005 Fourteenth Annual Report to Congress on Assets in the United States of Assets of Terrorist Countries and International Terrorism Program Designees," U.S. Department of the Treasury, Office of Foreign Assets Control. Available at <http://www.treas.gov/offices/enforcement/ofac/reports/tar2005.pdf>.

²²⁹ See 31 C.F.R. 501 and 597.

²³⁰ See OMB Watch Letter to Henry Paulson, Secretary of the U.S. Department of Treasury, Nov. 6, 2007. Available at http://www.ombwatch.org/npadv/Paulson_letter.pdf.

In its opinion denying the Holy Land Foundation's (Holy Land) challenge to Treasury's terrorist designation and asset freezing, the U.S. District Court for the District of Columbia recognized that the seizure of Holy Land's property "d[id] raise significant Fourth Amendment [search and seizure] concerns."

Nonetheless, the court held that freezing assets is not a seizure but a "temporary deprivation" of property. It suggested that at some unspecified point in time, the frozen status of Holy Land's funds may no longer be temporary but a confiscation by the government: "Plaintiff may ... some day have a credible argument that the long-term blocking order has ripened into vesting of property in the United States." However, current law does not define when this "vesting" takes place. Holy Land's funds have been frozen since 2001.

Background: Authority and Process for Freezing Charitable Funds

The economic sanctions powers described in Chapter 1 allow Treasury to block bank accounts and seize tangible property and records once it designates or investigates a person or entity as a supporter of terrorism. In the case of nonprofits, this includes money earmarked for genuine charitable programs. Once an organization is designated, it can ask Treasury to reconsider or "de-list" it, but there is no formal hearing process, and Treasury has complete discretion to grant or deny such requests.²³¹ Appeals to the courts are not likely to be successful, since, as discussed in Chapter 3, the courts have deferred to Treasury when national security is involved. That leaves the licensing process under Treasury regulations as the only remaining vehicle under current law for requesting release of funds for charitable programs.²³²

Regulations allow the Office of Foreign Assets Control (OFAC), an agency within Treasury, the power to grant specific licenses to designated organizations to allow financial transactions that would otherwise be prohibited. This can include fund transfers for charitable purposes. The applicant must submit the names of all parties "concerned with or interested in" the proposed transaction and "any further information as is deemed necessary."²³³ Additional information can be submitted at any time before the decision is made. OFAC can place conditions on a license, including reporting requirements "in such form and at such times and places" as it wishes²³⁴ or "exclude any person, property, or transaction from the operation of any license."²³⁵ OFAC maintains control of the licensee's activities throughout the life of the license and has discretion-

²³¹ 31 C.F.R. 501.807.

²³² 31 C.F.R. 501.801(b).

²³³ 31 C.F.R. 501.801(b)(3).

²³⁴ 31 C.F.R. 501.801(b)(5).

²³⁵ 31 C.F.R. 501.597.502.

ary power to amend or cancel it.

If the application is denied, the applicant or “other party in interest” may request an explanation by letter or in person, or it may subsequently ask for the application to be re-opened. It can also file a new application.²³⁶ There is no independent review process for OFAC’s decision.

The Department of the Treasury has published guidelines on specific license applications for transactions with the Palestinian Authority, issued on a case-by-case basis. These guidelines provide a useful framework for any applicant seeking to unblock funds for charitable purposes. The guidelines are online at http://www.treas.gov/offices/enforcement/ofac/programs/terror/ns/pal_guide.pdf.

Treasury Policy: Humanitarian Aid and Disaster Relief Are Not in the National Interest

Several U.S.-based charities that have been shut down by Treasury have requested that some or all of their assets be transferred to other nonprofits for charitable programs. Based on a search of publicly available information and documents shared by the attorneys of designated organizations, it appears that Treasury has rejected every request.

For example, in 2002, Treasury denied a license to Benevolence International Foundation (BIF) for the release of most of its funds to a children’s hospital in Tajikistan and the Charity Women’s Hospital in Dagestan, even though the application included safeguards to ensure the money arrived at the proper destinations.²³⁷ In 2006, KindHearts USA (KindHearts) asked that its funds be released and spent by the UN, USAID, or any other humanitarian program, asking only that “special consideration be given to the refugees in the earthquake ravaged areas of Pakistan since the overwhelming majority of frozen funds were earmarked for projects therein.” The application was denied.²³⁸ In a March 23, 2006, letter to KindHearts’ attorney, OFAC said, “It is a basic tenet of OFAC sanctions policy that blocked funds are not licensed for release except under limited and compelling circumstances consistent with the national security, economic and foreign policy of the United States. Therefore, your request to fund relief efforts in Pakistan from blocked funds is denied.”

The Islamic American Relief Agency (IARA-USA) made repeated requests over a two-year period for release of funds for humanitarian and disaster aid, including assistance for victims of Hurricane Katrina. These requests included offers to change their gover-

²³⁶ 31 C.F.R. 501.801(b)(4).

²³⁷ 9/11 Commission, *Terrorist Financing Monograph*, Ch. 6, Illinois Charities, p. 14.

²³⁸ Letter from Office of Foreign Assets Control to KindHearts attorney Jihad Smali, March 23, 2006.

nance structure, financial accounting, and even personnel, in order to assure Treasury that no funds would be diverted to terrorism. In a Feb. 7, 2005, letter from its attorney, Shereef Akeel, IARA-USA explained that “the organization would be vigilant to ensure that all of its funds reach its intended humanitarian destination. This organization would even consider some sort of reasonable monitoring program imposed by the government...” In a Sept. 16, 2005, letter to OFAC, IARA-USA requested that funds be released for humanitarian purposes, including Hurricane Katrina. The letter stated, “This letter serves as an urgent appeal for you to reconsider your position to allow the unfreezing of the funds so they may be applied toward humanitarian aid.” On Nov. 15, 2005, IARA-USA asked OFAC to “unfreeze the funds to assist the victims from the earthquake which occurred in Pakistan [w]e re-emphasize that we would be agreeable to any reasonable monitoring program to ensure that the monies reached its intended humanitarian destination.”

OFAC’s response was instructive. In a June 29, 2006, letter to IARA-USA, OFAC stated:

It is a basic tenet of OFAC sanctions policy that blocked funds are not licensed for release except under limited and compelling circumstances consistent with the national security, economic and foreign policy of the United States. OFAC’s current policy to deny requests to release blocked funds is consistent with the congressional intent underlying section 201(a) of the Terrorism Risk Insurance Act of 2002, Public Law 107-297. Therefore, your request to fund relief efforts in Zaire, Niger or in the wake of Hurricane Katrina from blocked assets is denied.



Photo credit: Fund for Nonviolence

This is difficult to understand, since there are strong arguments that allowing charitable aid to flow where it is badly needed would enhance U.S. standing abroad. Treasury says that meeting the needs of foreign disaster and Hurricane Katrina victims is somehow inconsistent with national security interests. This is not a sensible or humane position for the U.S. government.

Misapplication of the Terrorism Risk Insurance Act to Frozen Funds

OFAC has taken the position²³⁹ that all frozen funds are being held in case victims of terrorism or their families file suit and obtain judgments under the Terrorism Risk Insurance Act (TRIA).²⁴⁰ However, TRIA does not authorize funds to be held where no lawsuits have been filed or judgments rendered. The law, passed in 2002 and renewed

²³⁹ OMB Watch review of correspondence between Treasury and three designated U.S. nonprofits.

²⁴⁰ 107 P.L. 297, § 201.

in December 2007,²⁴¹ is intended to reduce economic risks and consequences related to terrorism by restoring insurance capacity to the marketplace.²⁴² Section 201 of the act allows blocked assets to be used to pay judgments from litigation “against a terrorist party.” Only one of the designated organizations, the Holy Land Foundation (Holy Land), has been brought into litigation by victims of terrorism that involves a claim under TRIA. As a result, TRIA is not a legitimate basis for denying license applications from other charities, such as KindHearts.

It appears that Treasury’s reasoning is fueled by policy rather than legal necessity, putting extra-judicial restraints on funds when there is no judgment or attachment under TRIA. In addition, there is no evidence the Congress intended blocked funds to be held based only on the potential for litigation.

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In April 2004, Holy Land asked for permission to transfer \$50,000 to the Palestine Children’s Relief Fund. The application was denied²⁴³ due to a February 2004 judgment awarded to the children of Yaron and Efrat Ungar, who were killed in an attack by Hamas in 1996.²⁴⁴ Although the Ungars did not sue Holy Land itself, the court granted them a writ of execution, allowing them to collect from Holy Land’s blocked funds. The writ was based on OFAC’s designation of the organization as a supporter of terrorism.²⁴⁵ Holy Land did not have notice of the litigation or the application for the writ of execution and only learned of it when the writ was served on the group’s bank.²⁴⁶

In July 2004, before the Ungars could collect the funds, Holy Land and several of its leaders were indicted on federal criminal charges. The prosecutors sought and obtained a restraining order from the federal District Court for the Northern District of Texas, which prevented the Ungars from receiving Holy Land’s funds. The ruling was based on federal criminal forfeiture laws, which provide for forfeiture to the U.S. government in the case of a conviction.²⁴⁷ The Ungars challenged this decision, but in July 2007, the United States Court of Appeals for the Fifth Circuit upheld it.²⁴⁸ The criminal case is still pending, since the first trial ended in a mistrial and the government has indicated it will retry the case. As a result, the Ungars’ right to collect their judgment against Hamas from Holy Land assets remains up in the air as long as the criminal case is pending.

A similar case not brought under TRIA but using a provision of federal criminal law provides some insight into the possible outcome of the Ungars’ litigation. On Dec. 28,

²⁴¹ Reauthorization Act of 2007, signed by President George W. Bush on Dec. 26, 2007.

²⁴² “The Business of Terrorism: TRIA,” 77 *Fla. Bar J.* 63 (October 2003).

²⁴³ Letter from OFAC Director Richard Newcomb to John Boyd, attorney for Holy Land Foundation for Relief and Development, April 28, 2004, Case No. SDGT-314.

²⁴⁴ *Ungar v. Palestinian Authority, et al*, Civil Action No. 00-105L (D. R.I.).

²⁴⁵ *Estates of Ungar ex. Rel. Strachman v. Palestinian Authority*, 304 F.Supp.2d 232, 238, 242, (D. R.I. 2004).

²⁴⁶ Interview, John Boyd, Feb. 1, 2008.

²⁴⁷ 21 U.S.C. 853(e)(1)(A).

²⁴⁸ *U.S. v. Holy Land Foundation*, No. 04-11282, July 18, 2007.

2007, the U.S. Court of Appeals for the Seventh Circuit overturned a \$156 million judgment against Holy Land and two other U.S.-based charities brought by the Boim family, whose son was a victim of terrorism by Hamas.²⁴⁹ The court ruled that any judgment must be based on evidence and not solely on Treasury's designation. The court explained that Treasury's finding was based on evidence that Holy Land never had the opportunity to see or contest. In addition, the court found the trial court's reliance on hearsay evidence and out-of-court statements to be improper. The court drew a distinction between a civil dispute between private litigants and one involving a national security sanctions program. Judge Ilana Diamond Rovner wrote,

Belief, assumption, and speculation are no substitutes for evidence in a court of law.... We must resist the temptation to gloss over error, admit spurious evidence, and assume facts not adequately proved simply to side with the face of innocence and against the face of terrorism. Our endeavor to adhere to the dictates of law that this great nation has embodied since its founding must persevere...²⁵⁰

The case was sent back to the lower court where there may be a new trial.

The Nonprofit Sector Seeks Release of Frozen Funds for Charitable Purposes

In a Nov. 6, 2006, letter, a group of nonprofits asked Treasury to release frozen funds belonging to charities or foundations designated as supporters of terrorism "to trustworthy aid agencies that can ensure the funds are used for their intended charitable purposes."²⁵¹ The signatories requested a meeting with Treasury officials to discuss the proposal in more detail. The letter's organizational signers include the Council on Foundations, Grantmakers Without Borders, Independent Sector, Global Fund for Women, the Muslim Public Affairs Council, and OMB Watch.

On Jan. 15, 2008, representatives of this group met with Treasury to discuss a process for releasing the funds, but the results were inconclusive, making further efforts necessary to ensure these funds benefit people in need. During the meeting, Treasury was given a list of questions regarding the status of frozen charitable funds but has said it will not respond.

²⁴⁹ *Boim v. Holy Land Foundation*, U.S. Court of Appeals for the Seventh Circuit, No. 05-1815, 05-1816, 05-1821 & 05-1822, Dec. 28, 2007.

²⁵⁰ *Ibid.*, at 93.

²⁵¹ See Letter to Henry Paulson, Secretary of the U.S. Department of Treasury. Available at http://www.ombwatch.org/npadv/Paulson_letter.pdf.