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Breaking Terror’s Bank Without Breaking the Law: A Comment on the USA Patriot Act and the United States Financial War on Terrorism

By Carrie L. Folendorf*

“[W]ar is not so much a war of arms as war of MONEY, by means whereof arms are useful . . .”
Thucydides, great historian of ancient Greece.†

I. INTRODUCTION

February 26, 1993, a truck filled with a nitro urea bomb, in excess of 1,000 pounds, exploded in parking garage B-2 of the World Trade Center,¹ killing six people and injuring 1,042 people.² April 19, 1995, just after parents dropped their children off at day care in the Murrah Federal Building in downtown Oklahoma City, a truck loaded with explosives detonated, “blowing half of the nine-story building into oblivion.”³ The lives of 168 men, women and children were claimed by this explosion.⁴ September 11, 2001, two

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* I would like to thank Jennifer Grossman to whom I am eternally grateful. Without her contributions and support this paper would not have been possible. I would also like to thank my family, friends and Scott for their love, support and encouragement.


2. Id.


4. Id.
commercial airplanes filled with innocent citizens flew into the Twin Towers of the World Trade Center, while two more crashed into the Pentagon and a field in Pennsylvania, killing nearly 3,000 people total.\(^5\) For at least the third time on American soil, our nation sat in horror, as mothers, fathers, sons and daughters, crushed under two colossal symbols of the power of our country, were attacked by terrorists.\(^6\)

In response to this final and most horrific act, on September 25, 2001, President Bush issued an executive order to starve terrorists of financial support by freezing the assets of individuals, entities and corporations who commit, threaten to commit or support terrorism.\(^7\) Congress responded by passing anti-terrorism legislation known as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), which among other things increased the ability of the Treasury Department to freeze U.S. assets and block the transactions of any person or institution associated with terrorists or terrorist organizations.\(^8\) The Executive Order issued by President Bush, and the subsequent USA PATRIOT Act, were created in recognition that America’s war on terrorism can no longer be limited to arresting terrorists after they have infiltrated our country, but rather that it must be fought on multiple fronts. With the passage of the USA PATRIOT Act, Senator John Ashcroft remarked that “Americans alive today and yet to be born[,] and freedom-loving people everywhere[,] will have new reason to hope because our enemies now have new reason to fear.”\(^9\) But do Americans now face the same fear that confronts our enemies?


\(^6\) I say “at least the third time” because it has been speculated but never proven that the TWA Flight 800 mid-air explosion minutes after take-off from JFK Airport in New York on July 17, 1996 was the work of terrorists.


Justice Thurgood Marshall was quoted as saying that "[h]istory teaches that grave threats to liberty . . . [have] come in times of urgency, when constitutional rights seem too extravagant to endure." But are constitutional rights such as our First Amendment right of freedom of association and our Fifth Amendment right to due process too extravagant to endure in our war against terrorism? Secretary of Treasury, Paul O'Neil commented that under the guidance of the USA PATRIOT Act, the goal of the Treasury Department would be "to remove structural limitations that handicap government[al] efforts to eliminate the violence of terrorism." But is our Constitution really a "structural limitation?" Why should we remove constitutional safeguards when we fight in the name of democracy and for preservation of our belief in the Constitution? Is the government willing to terrorize its own citizenry fighting terrorism? In restricting our constitutional rights through times of national crisis by removing the procedural and structural safeguards of our Constitution, we allow terrorists to emerge victorious before the real war has even begun.

This comment will discuss the effect of abandoning our Constitution in times of crisis by discussing how Executive Order 13,224 and the USA PATRIOT Act infringe upon our fundamental First Amendment freedoms of association, and how they violate the Due Process Clause of the Fifth Amendment by withholding notice and the opportunity to be heard. Part II will outline legislation which demonstrates how the United States has historically dealt with freezing the assets of designated terrorists, and will include a discussion of the provisions in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and the USA PATRIOT Act which relate to the designation process and asset forfeiture. Part III will consider the effect of the new terms for designating "terrorists" under the PATRIOT Act by exploring its First Amendment impact on the freedom of association, as well as its Fifth Amendment ramifications on the right to due process. Part IV will conclude with a

brief recap of the above discussion and will analyze the possible impact of the USA PATRIOT Act.

II. A HISTORY OF OUR ANTI-TERRORISM LEGISLATION - FREEZING THE ASSETS OF OUR ENEMIES

A. Trading With the Enemy Act

The use of economic sanctions to shape U.S. foreign policy originated statutorily through the ratification of the Trading with the Enemy Act (TWEA). In 1917 the TWEA was established as a vehicle through which the President could both exercise control over financial transactions and impose sanctions on foreign countries and/or nationals through the issuance of an executive order. The congressional intent behind enacting the TWEA was to deter those under the jurisdiction of the U.S. from transacting with the declared enemies of the United States. As originally conceived, the TWEA was designed to afford the President an economic weapon in times of war, but was amended in 1933 to extend to other declared periods of national emergency. This broad grant of power was revoked, however, as a repercussion of the perception that executive authority had gotten overly broad during the Nixon administration. In response, Congress amended the TWEA, once again limiting the exercise of presidential authority to times of war while concurrently enacting the International Emergency Economic Powers Act
B. International Emergency Economic Powers Act

The IEEPA was established to supplement the amended restrictions placed on the TWEA by governing the use of economic regulatory powers during periods of non-wartime national emergencies. The motivation was, in part, to create a procedure for declaring emergencies which included congressional input and veto power, with the desired effect of increased legislative oversight in foreign affairs. Although the intention of the IEEPA was to curb executive power, in actuality the Act did very little to this effect. The IEEPA left much to the discretion of the Executive by establishing only a vague specification for when economic sanctions could be used under the Act. Specifically the IEEPA stated that any economic regulation executed under the Act must result from "'unusual and extraordinary threats' and these threats must originate in whole or in large part outside of the United States." Essentially, the:

IEEPA authorize[d] the President to act against foreign threats to national security, foreign policy, or economy of the United States by declaring a national emergency with respect to an identified threat . . . [and] provid[ed] the President and his designees

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18. Id.

19. Savage, *supra* note 13, at 30. In addition to the congressional hope of establishing input and veto power, Savage states that Congress intended the IEEPA to limit the grant of emergency power in two additional ways: (1) diminishing the breadth of power granted; and (2) more strictly defining the occasions for the use of power. *Id.*


22. *Id.*

23. The Office of Foreign Assets Control of the Treasury Department ("OFAC") of the U.S. Department of Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign
with the authority to seek information regarding transactions subject to Presidential Executive Order.\textsuperscript{24}

Under this authority, the IEEPA evolved from its original use of penalizing foreign governments for their implementation of disagreeable foreign policy into an effective tool for combating terrorist governments, leaders, and their agents.\textsuperscript{25} In keeping with this new application, the IEEPA has been used to block transactions, and to freeze and seize assets of terrorists who in many cases are basically stateless.\textsuperscript{26}

\textit{C. Anti-Terrorism and Effective Death Penalty Act}

One major act that resulted from using the IEEPA in this manner was the AEDPA.\textsuperscript{27} The AEDPA came into effect during the Clinton Administration in response to the Oklahoma City bombing of 1996. The AEDPA was the legislative supplement to Executive Order 12,947.\textsuperscript{28} This Order was responsible for classifying twelve organizations as terrorists groups in response to their efforts in disrupting the Middle East peace process.\textsuperscript{29} "Criminalizing financial countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction. OFAC acts under Presidential wartime and national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze foreign assets under US jurisdiction.


\textit{25. Savage, supra note 13, at 37.}

\textit{26. Id.}


\textit{29. Id.}
contributions to any organization designated as a foreign terrorist organization,"30 the AEDPA was also among the first pieces of anti-terrorism legislation to raise questions concerning First Amendment rights of free speech and association.31 This was in part because the AEDPA permitted the Treasury Department to go beyond the limitations of prior legislation by allowing them to freeze all asset interests of designated organizations as well as block U.S. citizens from financially assisting them.32 The AEDPA was widely criticized for its direct attack on contributions made by U.S. citizens to organizations either directly suspected of terrorist activity or suspected of funneling money to terrorist groups, without concern for whether or not the contributions were made for the peaceful or otherwise legal activities of the group.33 Many critics felt that the

The Executive Order identifies the following twelve groups: Abu Nidal Organization (ANO), Democratic Front for the Liberation of Palestine (DFLP), Hizballah, Islamic Gama’ at (IG), Islamic Resistance Movement (HAMAS), Jihad, Kach, Kahane Chai, Palestinian Islamic Jihad-Shiqaqi faction (PIJ), Palestine Liberation Front-Abu Abbas faction (PLF-Abu Abbas), Popular Front for the Liberation of Palestine (PFLP), Popular Front for the Liberation of Palestine-General Command (PFLP-GC).”

Id. at n. 91.


31. See Joseph Furst III, Guilt By Association and the AEDPA’s Fund Raising Ban, 16 N.Y.L. SCH. J. HUM. RTS. 475 (1999). “The AEDPA has revived the unconstitutional concept of guilt by association ... [t]he AEDPA’s fundraising ban permits a United States citizen to be imprisoned, up to ten years, for supporting- through contributions- the non-violent conduct of a group that our government believes threatens its national security.” Id.

32. Lehrer, supra note 12, at 345.

In 1998, President Clinton amended the 1995 Executive Order to include Usama Bin Ladin, the Al-Qaeda organization, and two other individuals. The following year, the Clinton Administration, upon finding that the Taliban government provided safe haven to Usama bin Laden (sic.) and the Al-Qaeda organization, authorized the OFAC to block property and transactions with the Taliban.

Id.

33. Beall, supra note 30. Prior to the AEDPA, financial contributions to the organizations of one’s choice was protected by the Violent Crime Control and Law Enforcement Act of 1994 for First Amendment reasons. Id.
D. Executive Order 13,224

In similar fashion to the Clinton Administration, President Bush enacted the powers granted to the Chief Executive under the IEEPA by declaring a national emergency after the September 11th terrorist attacks. The President issued Executive Order 13,224 as a way of publicly targeting organizations in Afghanistan and other global locations, finding that the terrorist attacks on our nation constituted "an unusual and extraordinary threat to the national security and foreign policy and economy of the United States." President Bush defined terrorism in broad terms, eliminating the distinction between terror organizations and the governments and agencies that harbor and aid them. Further, the President authorized executive agencies


36. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001). Section 3 of this order states:

a. the term "person" means an individual or entity;
b. the term "entity" means a partnership, association, corporation, or other organization, group, or subgroup;
c. the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States; and
d. the term "terrorism" means an activity that-
   i. involves a violent act or an act dangerous to human life, property, or infrastructure; and
   ii. appears to be intended—
   A. to intimidate or coerce a civilian population;
   B. to influence the policy of a government by intimidation or coercion; or
   C. to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

Id.
to act without prior notification to designated targets before seizing their funds.\textsuperscript{37} The impact of Executive Order 13,224 has therefore been much farther reaching than Orders issued in the past. It greatly expands existing authority in three principal ways: (1) it expands the coverage of existing Executive orders from terrorism in the Middle East to global terrorism; (2) it expands the class of targeted groups to include all those who are "associated with" designated terrorists groups; and (3) it establishes the ability to block the U.S. assets of, and deny access to U.S. markets to, those foreign banks that refuse to freeze terrorist assets.\textsuperscript{38} As codification of his Executive Order, Bush encouraged Congress to pass the USA PATRIOT Act.\textsuperscript{39}

\textbf{E. The USA PATRIOT Act}

Over vigorous objections from civil liberties organizations, the USA PATRIOT Act was overwhelmingly approved by both houses of Congress, and was signed into law on October 26, 2001.\textsuperscript{40} Redefining what constitutes a terrorist or terrorist organization, the USA PATRIOT Act greatly expanded those targeted in the new "war on terrorism." The Act, in part, aims to fight terrorism by disrupting terrorist financial networks through Title III, known as the

\begin{quote}
\textsuperscript{37} \textit{Id.} Section 10 of the Order States:
For those persons listed in the Annex to this order or determined to be subject to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer fund 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. (emphasis added).
\end{quote}

\textit{Id.}

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\textsuperscript{38} Press Release, White House on Terrorist Financing, \textit{at}
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\textsuperscript{40} Nancy Chang, \textit{How Does USA PATRIOT Act Affect Bill of Rights?}, N.Y. L. J., December. 6, 2001.
\end{quote}
International Money Laundering and Abatement and Anti-Terrorist Financing Act of 2001.\footnote{41} By including not only those who are directly involved in the suspected organizations, but also those even associated with them, the USA PATRIOT has gone farther than any prior anti-terrorism legislation. In general, the money laundering provisions of the USA PATRIOT Act require banks and financial institutions to monitor account activity and to report suspicious transactions to the Treasury Department.\footnote{42} The Act further provides for increased information sharing by allowing suspicious activity reports received by the Treasury Department to be shared with intelligence agencies who in turn are allowed to share surveillance information with law enforcement agencies.\footnote{43} Additionally, the Act grants the government access to credit records without any prior notification to those whose financial records will be reviewed.\footnote{44} The USA PATRIOT Act’s expansion of governmental authority has made it a focal point for the ongoing national debate over balancing protection against terrorism with the preservation of civil liberties. Vocal coalitions of civil libertarians, privacy advocates, and immigrant organizations have challenged the USA PATRIOT Act as an overbroad and unjustified infringement of both association, and due process rights.

\footnote{41}{§ 301, 115 Stat. 272, at 296.}
\footnote{42}{Financial institutions are required to file suspicious activity reports (SARs). \textit{Implementing Anti-Terrorism Laws:} Hearing Before the Senate Judiciary Subcomm. on Tech., Terrorism, & Gov’t Info., 107th Congress (2002) (statement of Dennis Lormel, Financial Crimes Section Federal Bureau of Investigation).}
\footnote{44}{Id.}
III. CONSTITUTIONAL IMPLICATIONS

A. Re-Defining "Designated Organizations" and "Designated Individuals" Under the USA PATRIOT Act

"Cynics often comment that one state's 'terrorist' is another state's 'freedom fighter.'" Under the United States new definition of terrorism, "freedom fighters" will be fewer and further between. Prior to the enactment of the USA PATRIOT Act, there were three defined levels of terrorism: (1) international terrorism; (3) terrorism transcending national borders; and (3) federal terrorism. The USA PATRIOT Act broadened this scope by adding a fourth level of "domestic terrorism." Section 802 of the Act defines domestic terrorism as including those activities that "involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State" if the activities "appear to be intended to intimidate or coerce the civilian population; to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination or kidnapping; and occur primarily within the territorial jurisdiction of the U.S." Section 411 further defines endorsing terrorism as "committing or inciting terrorist acts, under circumstances indicating intent to cause death or serious bodily injury, planning or preparing acts of terror, gathering information on potential terrorist targets, and soliciting funds for any of the previously listed activities." In addition, the term "terrorist organization" is no longer confined to organizations that have had their terrorist designations published in the Federal

47. Id.
"Section 411 even includes as ‘terrorist organizations’ groups that fall under the loose criterion of ‘two or more individuals, whether organized or not,’ which engage in specified terrorist activities,” as well as individuals who are associated with terrorists.51

These extensions of the definition of the term “terrorist” could conceivably bring within their sweep diverse domestic political activist campaigns and organizations. Under this broad classification, groups such as the “Army of God” could be considered a terrorist organization, subject to criminal prosecution and asset forfeiture. The Army of God is an anti-abortion group,52 which lists ninety-nine covert ways to stop abortion clinics from performing abortions. The “Army of God” is in favor of assassinating doctors who perform abortions.53 Freezing their assets may be seen by some as a good thing, but the downside is that other less extreme groups, such as Green Peace or similar peace organizations that collect funds for refugees, could also fall under this definition. As a further illustration of the overly broad terrorist classification system imposed under the Act, organizations such as People for the Ethical Treatment of Animals (PETA), by virtue of the fact that some of their protests present the threat of violence, could be flagged a terrorist organization.54 Consequently the funds and assets of organizations such as these could be frozen and their members could be subject to criminal prosecution for participating in political protests because some of their protesting tactics include minor violations of the law.

Under the PATRIOT Act, the term “terrorist” has become overly broad. Before its passage, Glenn Norquist agreed, testifying to the Senate Judiciary Committee, that “[n]ow [that] we are told the government wants to fight against terrorists,” we need to limit “the use of these powers to terrorist cases and terrorist cases alone.”55

51. Chang, supra note 40.
52. See http://www.armyofgod.org.
53. Id.
55. Protecting Constitutional Freedoms in the Face of Terrorism, Hearing Before the Senate Committee on the Judiciary Subcomm. on the Constitution,
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Since September 11th, however, the list of terrorists has grown much larger and more costly to those included. Two hundred and fifty individuals and entities have been publicly targeted as terrorists or terrorist supporters, with over $113 million of their assets frozen.56 Included in this number are twelve charitable organizations accused of having ties to al-Qaida or other terrorist groups.57 The relative ease with which organizations and individuals have been targeted as "designated organizations" and "designated individuals" under this new definition of terrorism is sure to raise the red flag of encroachment on our civil liberties. Giving such broad discretion to designate organizations as terrorists under a definition that is capable of reaching beyond them, creates a real danger that abuse of the designation provision could lead to the inclusion of groups that do not incite violence or criminal acts, but simply advocate controversial views or engage in crimes of social dissidence, including those people who merely contribute to them.58 Under such a free wielding designation system, American citizens are faced with being deprived of their freedom to associate as well as their freedoms of life, liberty and property.

B. Limiting our Freedom of Association

In considering how the USA PATRIOT Acts infringes on our freedom of association, the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."59 Although the freedom of association is not explicitly stated in the First Amendment, the Supreme Court has determined that "‘freedom to engage in association for the advancement of beliefs and ideas is an

57. Id.
58. See Furst, supra note 31, at 499; see also McCarthy, supra note 43, at 450.
59. U.S. CONST. amend. § I. The full text of the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Id.
inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”

As such, the USA PATRIOT Act has come under challenge by organizations and citizens who believe that criminalizing the material support directed to only aid the legal and political activities of a designated organization, infringes on our First Amendment freedom of association.

Although courts have not yet ruled on whether this potential danger renders the new designation system of the USA PATRIOT Act and the restrictions that Title III places on First Amendment rights, unconstitutional, courts have analyzed similar criticisms which have arisen from related, however less encroaching, provisions in the AEDPA.

In Humanitarian Law Project v. Reno, injunctive relief was sought on First Amendment grounds by six organizations and two United States citizens who were against the enforcement of the AEDPA’s ban on support for designated terrorist organizations. The plaintiffs were prevented from providing any support to the political and humanitarian activities of two organizations which had been designated as foreign terrorist groups. The district court denied the request for injunctive relief and the Ninth Circuit Court of Appeals affirmed their judgment.

The court rejected the argument that the AEDPA was unconstitutional through its imposition of guilt by association. “The court recognized that liability under First Amendment jurisprudence could not be imposed ‘by reason of association


61. A “designated organization” is one which either the OFAC or the State Department has targeted as a possible terrorist organization or an organization that may be involved in terrorist activities.

62. 205 F.3d 1130 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001).

63. Iraola, supra note 60, at 17.

64. Id.

65. Id.

66. Id.
alone.” 67 The court determined that the AEDPA did “not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group,” but that it did prohibit giving them material support, 68 by stating that “there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.” 69

In regards to the argument that the AEDPA was also unconstitutional because it disregarded the donor’s intent for giving support, the court found that “[a]dvocacy is always protected under the First Amendment whereas making donations is protected only in certain contexts.” 70 The court reasoned that “[m]aterial support . . . can be used to promote the organization’s unlawful activities, regardless of the donor’s intent.” 71 As such the court denied the claim that specific intent to aid an organization’s illegal activities must be proven before attaching liability to the donation of funds. 72

67. Id. (quoting NAACP v. Claiborne Hardware Corp., 458 U.S. 886, 920 (1982)).

In Claiborne Hardware, the Supreme Court held that the ‘right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.’ Claiborne Hardware, 458 U.S. at 908. As a result, following Claiborne Hardware, ‘a law may not punish association without more, but it may proscribe association with an organization whose members strive to advance the group’s violent goals.’


68. “The phrase ‘material support or resources’ is broadly defined as ‘currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” Humanitarian Law Project, 205 F.3d at 1132-33

69. Id. at 1133.
70. Id. at 1134.
71. Id. at 1133-34.
72. Id.
Executive Order 13,224 on the other hand, allows the Secretary of Treasury, in consultation with the Secretary of State and the Attorney General, to freeze all assets and funds of any persons or organizations determined

(i) to assist in, sponsor, or provide financial, material or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to this order or determined to be subject to this order; or (ii) to be otherwise associated with those persons listed in the Annex to this order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order.73

Unlike the AEDPA, this empowers the Secretary of Treasury to freeze the funds and assets of individuals who are even “associated” with persons determined to be subject to the Order.74 As such, Executive Order 13,224 seemingly disregards the court’s holding in Humanitarian Law Project, and if interpreted correctly, would therefore be in violation of the First Amendment.75 Although the courts have yet to make this determination, the contradiction between Executive Order 13,224 and case law interpreting the constitutionality of the correlative provisions of the AEDPA seems quite apparent, and is most prominent when coupled with the newly expanded definition of terrorism.76

C. Freezing and Seizing Assets without Due Process

In addition to the First Amendment questions posed by Executive Order 13,224 and the USA PATRIOT ACT, Fifth Amendment, due process questions are also significant. Under the Fifth Amendment, “[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that

74. Id.
75. See supra note 60 and accompanying text.
76. See discussion infra Part III.A.
right they must first be notified.' It is equally fundamental that the right to notice and the opportunity to be heard 'be granted at a meaningful time and in a meaningful manner.' 77 The norm of due process clause jurisprudence requires that parties receive notice before the government deprives them of their protected liberty interests. 78 This proposition presents another controversial aspect of the USA PATRIOT Act; namely whether it fails to provide for notice "at a meaningful time" and in a "meaningful manner." 79

To begin to answer this, use of case law deciding the same question but in the context of the AEDPA, is again useful because of the recent time frame of the USA PATRIOT Act. In National Council of Resistance of Iran v. Albright, 80 petitioners, two organizations known as the National Council of Resistance of Iran and the People's Mojahedin of Iran, argued, among other things, "that by designating them without notice or hearing as a foreign terrorist organization, with the resultant interference with their rights to obtain and possess property . . . the Secretary deprived them of 'liberty, or property, without the due process of law,' in violation of the Fifth Amendment." 81 The petitioners argued that the Secretary was obligated to give them notice of her intent to declare them a terrorist organization, afford them the opportunity to respond to the evidence upon which she proposed to make her declaration, and allow them to be heard in the resolution of the question. 82

To make their determination in this case, the D.C. Circuit Court looked to the Supreme Court's decision in Mathews v. Eldridge. 83 In Mathews, the Supreme Court specified that the dictates of due process generally require consideration of three distinct factors:

[F]irst, the interests that will be affected by the official action; second, the risk of erroneous deprivation of

80. Nat'l Council, 251 F.3d 192.
81. Id. at 200.
82. Id. at 205.
such interest of the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.\textsuperscript{84}

Taking these elements into consideration, the court held that the "[s]ecretary must afford the limited due process available to the putative foreign terrorist organization prior to the deprivation worked by designating that entity as such with its attendant consequences, unless he can make a showing of a particularized need."\textsuperscript{85} In making this determination, the court held that in future cases the Secretary should afford the entities under consideration notice of the impending designation, or upon an adequate showing to the court, "provide this notice after the designation, where earlier notification would impinge upon the security and other foreign policy goals of the United States."\textsuperscript{86}

Title VII, section 806 of the USA PATRIOT Act, could result in the seizure of assets, without prior notice, a hearing or upon conviction of a crime. This Section authorizes the government to seize and forfeit:

all assets foreign or domestic (i) of any individual, entity, or organization engaged in planning or perpetrating any act of domestic or international terrorism against the United States, or their property and all assets, foreign or domestic, affording any person a source of influence over any such entity or

\textsuperscript{84} Nat'l Council, 251 F.3d at 206 (citing Mathews, 424 U.S. 319, 335).
\textsuperscript{85} Id. at 208.
\textsuperscript{86} Id. However the court argued that the Secretary had not shown how affording designees notice would interfere with the Secretary's duty to carry out foreign policy. Id. As example, they argued that the Secretary could simply send out a letter to of notice which states: "[w]e are considering designating you as a foreign terrorist organization, and in addition to classified information, we will be using the following summarized administrative records. You have the right to come forward with any other evidence you may have that you are not a foreign terrorist organization." Id.
organization or (ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing an act of domestic or international terrorism against the United States, citizens or residents of the United States or their property or, (iii) derived from, involved in, or used or intended to be used to commit any act of domestic or international terrorism against the United States, citizens or residents of the United States, or their property.  

Title I, section 106 of the USA PATRIOT Act only expands this authority by allowing the President, to “confiscate any property, subject to the jurisdiction of the United States,” believed to be used by terrorists or terrorist organizations to aid or engage in hostilities or attacks against the U.S. Additionally, such confiscated property may by order of the President, be “used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States.”

_National Council of Resistance v. Albright_ was decided in June 8, 2001, three months and three days before the September 11th attacks. Because of the recency of Albright the Supreme Court has not had the opportunity to make a ruling on the constitutionality of the AEDPA provision at issue in this case, nor has the Court been faced with the similar issues that will likely arise under the USA PATRIOT Act. The Court has yet to determine what procedural devices designated terrorists must have access to in order to protect their interests and whether or not that access must be afforded before or after they are declared a terrorist. In other words, “when- in terms of pre-deprivation or post- deprivation- that process must be available.” The question the Supreme Court will face in cases yet

88. 115 Stat. 272, 277, § 106 (This section is entitled Presidential Authority).
89. Id.
90. Nat’l Council, 251 F.3d at 192.
91. See id. at 205.
92. Id. at 206
to come before it is whether or not the war on terrorism creates a “particularized need” which warrants the suspension of procedural due process until a later date – post deprivation. In Fuentes v. Shevin,93 the Supreme Court held that it may be necessary to postpone notice and opportunity for a hearing in order “to meet the needs of a national war effort.”94 But, does the war on terrorism meet this qualification?

Although in its infancy, Global Relief Foundation v. O'Neil95 may provide some of the answers that we are looking for. Global Relief Foundation (GRF) is a domestic, non-profit corporation chartered and headquartered in Illinois.96 Pursuant to Executive Order 13,224 the OFAC blocked the funds, accounts and business records in which GFR had an interest, pending further investigation.97 In their impending lawsuit against the government, GRF filed for declaratory and injunctive Relief that would unfreeze money blocked by the defendants as well as order the defendants to return documents and other materials recovered during the search of their offices.98 To date, the court has not ruled on the merits of the case.

The problems presented by cases like Global Relief Foundation are however evident and will need to be resolved. The time between seizure and forfeiture can sometimes be months; meanwhile, organizations or individuals whose assets are seized are forced to make do without them.99 Only the most financially flush non-profit organizations would be able to successfully defend themselves against governmental forfeiture.100 In short, without the full due process afforded in criminal cases, the U.S. government can bankrupt

93. Fuentes, 407 U.S. at 91.
94. Id. at 92. The Court noted, however, that only in a few situations had they allowed outright seizure without opportunity for a prior hearing. Id.
96. Id at 886.
97. Id.
98. Id. at 886
100. Id.
political organizations or their members that it asserts are involved in domestic terrorism.\textsuperscript{101}

\textbf{IV. CONCLUSION}

The USA PATRIOT Act is not a new form of legislation specifically tailored to combat the atrocities of September 11\textsuperscript{th}. It is simply the next chapter in a long line of legislation enacted to dismantle our Constitution in times of crisis. Fighting terrorism presents a whole new type of warfare that without question requires new and inventive techniques for combat, but enacting legislation that cripples our constitutional rights in the name of "enduring freedom," is a risky venture. Although we are just beginning to learn what fighting terrorism entails, it is already certain that terrorists hope to win by fighting battles from within our boarders. They may be able to infiltrate our country and destroy buildings, but we need to think twice before we let them penetrate the very heart and sole of our country, by forcing us to destroy the constitutional freedoms of law abiding American citizens. Because the USA PATRIOT Act is still as new as the fear of further terrorist attacks, it may be a long time before its constitutional ramifications are examined and decided. Therefore all we are left with for the time being are several unanswered questions. Do Americans now have new reason to fear? Are our constitutional rights too extravagant to endure during times of crisis? Is our Constitution really a structural limitation on the war against terrorism?

Terrorism is cheap; this is one of the reasons it is so effective. It is estimated that the two-year preparation and execution of the September 11\textsuperscript{th} attacks cost less than $500,000. Terrorists do not need fortunes to do their "work," but Americans do need steadfast constitutional freedoms to remain a free and strong society. We must make sure that our Constitution holds strong when things around it crumble, and if we can do that, then we can defeat those that seek to destroy us.

\textsuperscript{101. Id.}