

THE EMERGING FACE OF LAWFARE: LEGAL
MANEUVERING DESIGNED TO HINDER THE
EXPOSURE OF TERRORISM AND TERROR
FINANCING

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INTRODUCTION

In December 2001, shortly after the 9/11 attacks on American soil, President George W. Bush joined Treasury Secretary Paul O’Neill and Attorney General John Ashcroft at a press conference and proclaimed, “Those who do business with terror will do no business with the United States or anywhere the United States can reach.”¹ The previous day, the Treasury

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1. President George W. Bush, Remarks on Freezing Assets of Suspected Terrorist Groups (Dec. 4, 2001) [hereinafter President Bush Remarks], *available at*

Department had frozen the assets of the Holy Land Foundation for Relief and Development (“HLF”).² At the time, HLF was the largest charitable Islamic organization in the United States.³ An Internal Revenue Service (“IRS”)-registered tax-exempt charity, the HLF raised thirteen million US dollars from US donors in 2010.⁴ Falsely claiming that donated funds were used to “care for needy Palestinians in the West Bank and Gaza,” the money was actually used to support Hamas, a designated foreign terrorist organization (“FTO”).⁵ Hamas used the money to, amongst other things, bankroll murder overseas, support schools that indoctrinate children towards violence, recruit suicide bombers, and provide monetary rewards to their families.⁶

Despite the United States’ growing concern with international terrorism, and though terrorist groups had long been using non-profit organizations to solicit tax-exempt donations from the United States, the Treasury “did not consider terrorist financing important enough to mention in its national strategy for money laundering” before 9/11.⁷ However, the provision of “material support or resources” for the commission of enumerated acts of terrorism⁸ or to designated

http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext_120401.html.

2. *Id.*

3. See Leslie Eaton, *Prosecutors Say a Charity Aided Terrorists Indirectly*, N.Y. TIMES, Sep. 18, 2007, available at <http://www.nytimes.com/2007/09/18/us/nationalspecial3/18holyland.html>.

4. President Bush Remarks, *supra* note 1 (noting that Hamas obtains much of its finances from US donors); *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Sept. 28, 2012) [hereinafter STATE DEP’T, *Foreign Terrorist Organizations*].

5. *Id.*; see U.S. v. El-Mezain, 664 F.3d 467, 528 (5th Cir. 2011) (upholding the convictions of Holy Land Foundation for Relief and Development (“HLF”) leaders for supporting Hamas); STATE DEP’T, *Foreign Terrorist Organizations*, *supra* note 4 (noting Hamas was designated as a foreign terrorist organization (“FTO”) on October 8, 1997).

6. President Bush Remarks, *supra* note 1.

7. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 186 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

8. 18 U.S.C. § 2339A (2006).

FTOs⁹ has been outlawed in the United States since the mid-1990s, as codified in 18 U.S.C. §§ 2339A and 2339B.¹⁰

Congress enacted § 2339A as part of the Violent Crime Control and Law Enforcement Act of 1994.¹¹ The definition of material support was later expanded by § 2339B when Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).¹² The post-9/11 USA PATRIOT Act bolstered both sections on material support, adding “expert advice or assistance” to the list of prohibited material support, increasing the maximum terms of imprisonment for violating the statutes, and imposing the same maximum penalties for attempts and conspiracies to violate § 2339A as are imposed for substantive violations thereof.¹³

Today, both §§ 2339A and 2339B define “material support or resources” as

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.¹⁴

In the recently decided case *Holder v. Humanitarian Law Project*, the US Supreme Court held that even “ostensibly peaceful aid” to designated terrorist groups may be criminalized for its harmful effects, specifically recognizing Congress’s

9. *Id.* § 2339B. A “terrorist organization” to which “material support or resources” is defined as “an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.” *Id.* § 2339B(g)(6); *see* 8 U.S.C. § 1189 (designating FTOs).

10. *See* 18 U.S.C. §§ 2339A, 2339B; *see generally* CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B (2010), *available at* <http://www.fas.org/sgp/crs/natsec/R41333.pdf> (reviewing development of §§ 2339A and 2339B since the 1990s, and discussing recent constitutional challenges of the statutes).

11. Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022.

12. Pub. L. No. 104-132, §§ 303, 323, 110 Stat. 1214, 1250, 1255.

13. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“USA PATRIOT Act” or “PATRIOT Act”) of 2001, Pub. L. No. 107-56, §§ 805(d), 810(c)–(d), 811(d), 115 Stat. 272, 380, 381.

14. 18 U.S.C. § 2339A(b)(1), 2339B(g)(4).

decision to repeal the statutory exception for humanitarian assistance from the categories of prohibited material support.¹⁵ In enacting Section 2339B, Congress found that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization facilitates that conduct.*”¹⁶ Indeed, the Court recognized that terrorist organizations “systematically conceal their activities behind charitable, social, and political fronts,” which provide financial and logistical support as well as political cover for the organizations’ operations.¹⁷

Unfortunately, over the past ten years there have been numerous legal attempts to frustrate the efforts of journalists, authors, intelligence agents, lawyers, members of Congress, and others upon whom society relies to expose and prosecute terror groups and the individuals and entities who provide them with unlawful support. Such *lawfare*—the manipulation of Western laws and judicial systems to achieve strategic military and political ends¹⁸—often manifests as frivolous lawsuits designed to silence, punish, and deter those who publically speak and report on militant Islam, terrorism, and their sources of financing.¹⁹ This ongoing abuse of the law is not only a direct assault on free speech; it undermines the ability of the United States to adequately respond to and defend itself against the threat of terrorism by wrongfully impeding the dissemination of information on issues of national security.²⁰

15. 130 S. Ct. 2705, 2725 (2011) (rejecting plaintiffs’ request for preliminary injunction to provide “ostensibly peaceful aid” to two organizations designated as FTOs).

16. *Id.* at 2710 (emphasis added).

17. *Id.* at 2725.

18. *What Is Lawfare?*, LAWFARE PROJECT, <http://www.thelawfareproject.org/what-is-lawfare.html> (last visited Oct. 2, 2012).

19. *Id.*

20. See Sebastian L. Gorka, Military Affairs Fellow at the Found. for Def. of Democracies, Briefing to Conference Call Entitled *White House Review Threatens Counter-Terrorism Operations* (Dec. 5, 2011) [hereinafter Gorka Briefing], available at http://www.thelawfareproject.org/component/option,com_eventlist/Itemid,75/id,16/view/details (last visited Oct. 15, 2012) (saying “[t]his kind of action will directly affect the capacity of the United States to protect its citizens on US soil”).

I. *LAWFARE AGAINST FREE SPEECH IN EUROPE & CANADA*

Terrorists and their sympathizers have determined that where advocating and exercising violence will not achieve their goals, they can attempt to undermine their opponent's willingness and capacity to fight them using legal means. Consequently, in Europe and Canada, dozens of "hate speech" and libel lawsuits have been filed against academics, politicians, think tanks, members of the counter-terrorism community, and others who raise awareness about issues such as radicalization and the network of religious, political, and monetary support for terrorism. The result is a detrimental chilling effect on the exercise of free speech for would-be speakers. The goal of such "libel lawfare" is clear: to impede the free flow of public information about terrorism in order to prevent opponent nations from understanding and combating it. A fraction of these lawfare lawsuits in Europe and Canada are detailed below.

In 2002, the Saudi Al Rajhi Bank filed a lawsuit against The Wall Street Journal Europe for reporting that Saudi authorities were monitoring Al Rajhi Bank accounts, at the request of the United States, in connection with the funneling of money to terrorist groups.²¹ Though the article at issue did not allege that the bank supported terrorism, but rather reported on the fact that the bank's accounts were being monitored, the article nonetheless formed the basis of the lawsuit.²² Three years following its initial filing, the Al Rajhi Bank curiously dropped its suit. Shortly thereafter, US intelligence reports emerged detailing the bank's maintenance of accounts and acceptance of donations for Saudi charities that had been formally designated as al-Qaeda and other terrorist group fronts.²³

21. Glenn R. Simpson, *U.S. Tracks Saudi Bank Favored by Extremists*, WALL ST. J. (July 26, 2007), <http://online.wsj.com/article/SB118530038250476405.html> (describing a Central Intelligence Agency ("CIA") report about "the use of Al Rajhi Bank by alleged extremists").

22. *Id.*; Carrick Mollenkamp, *U.S. Report Says HSBC Handled Iran, Drug Money*, REUTERS (July 16, 2012), <http://www.reuters.com/article/2012/07/17/hsbc-compliance-senate-idUSL2E8IGFJ520120717> ("Al Rajhi and the paper settled in 2004. The paper did not pay damages . . .").

23. *See* Simpson, *supra* note 21 ("The U.S. intelligence reports, heretofore secret, describe how Al Rajhi Bank has maintained accounts and accepted donations for Saudi charities that the U.S. and other nations have formally designated as fronts for al Qaeda or other terrorist groups.").

In 2004, Saudi billionaire Khalid bin Mahfouz filed a defamation lawsuit in England against American author Rachel Ehrenfeld for statements made in her book, *Funding Evil: How Terrorism Is Financed—and How to Stop It*.²⁴ Specifically, the book reported that bin Mahfouz funded Osama bin Laden, al-Qaeda, and other terrorist organizations.²⁵ Despite the facts that neither Ehrenfeld nor bin Mahfouz were English citizens and that the book had not been published nor marketed there, the High Court of Justice took the case and justified the assertion of personal jurisdiction over both parties merely because twenty-three copies of the book were purchased online and shipped to England via Amazon.com.²⁶ A seasoned lawfare proponent, bin Mahfouz had threatened or initiated libel suits in England more than thirty times, seeking to avail himself of the nation's plaintiff-friendly libel laws.²⁷ Since Ehrenfeld refused to travel abroad to defend herself in a jurisdiction that afforded her less free speech protections than where she lived and wrote the book, the court found against Ehrenfeld by default and awarded bin Mahfouz hundreds of thousands of dollars in damages.²⁸ Before the English suit had concluded, Ehrenfeld filed an action in the US District Court for the Southern District of New York²⁹ seeking a declaratory judgment that bin Mahfouz could not prevail on his libel claim under US federal and New York state

24. RACHEL EHRENFELD, *FUNDING EVIL: HOW TERRORISM IS FINANCED—AND HOW TO STOP IT* (2003).

25. *Libel Tourism: Hearing Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary*, 111th Cong. 11–15 (2009) (Oral Testimony and Written Statement of Dr. Rachel Ehrenfeld, American Center for Democracy) [hereinafter Ehrenfeld Statement], available at http://judiciary.house.gov/hearings/printers/111th/111-4_47316.PDF (describing allegations against bin Mahfouz included in book); Rachel Ehrenfeld Aff. ¶ 27, *Ehrenfeld v. Bin Mahfouz*, 2006 WL 1096816 (S.D.N.Y. Apr. 26, 2006) [hereinafter Ehrenfeld Affidavit] (“It has been widely reported that Mahfouz provided material support to Osama bin Laden and his al Qaeda terrorists that aided and abetted al Qaeda in carrying out the 9/11 attacks, by providing them with millions of dollars in the 1990’s.”).

26. Ehrenfeld Statement, *supra* note 25, at 14.

27. Ehrenfeld Affidavit, *supra* note 25, ¶ 24 (noting Mahfouz had threatened or commenced more than thirty libel actions in England).

28. *Id.* ¶¶ 7–8 (stating that she declined to appear because of a lack of financial resources necessary to defend herself, “formidable procedural burdens a libel defendant faces in the UK,” and disagreement “in principle with Mahfouz’s tactic”).

29. *Ehrenfeld v. Bin Mahfouz*, No. 04 Civ. 9641(RCC), 2006 WL 1096816 (S.D.N.Y. Apr. 26, 2006) (granting Bin Mahfouz’s motion to dismiss because of lack of personal jurisdiction over Bin Mahfouz).

law, and that the English judgment was invalid and could not be enforced in the United States.³⁰ Ultimately, the suit prompted the New York state legislature to enact the Libel Terrorism Protection Act (“Rachel’s Law”).³¹ The law operates to prevent the enforcement of foreign libel judgments by New York state courts unless the defamation law applied in the foreign jurisdiction affords at least as much protection for free speech and press as do the US and New York constitutions.³² Practically speaking, if a foreign plaintiff wishes to recover for defamation against a New York State resident, the plaintiff must file suit in a US court, as no non-US jurisdiction guarantees the same free speech protection as the First Amendment.³³ The Securing the Protection of our Enduring and Established Constitutional Heritage (“SPEECH”) Act,³⁴ a federal statute mirroring Rachel’s Law, was passed unanimously in both the House of Representatives³⁵ and the Senate³⁶ before it was signed into law in August 2010 by US President Barack Obama.³⁷

In June 2006, the Council of Europe hosted a “Programme of the Hearing on European Muslim Communities confronted with Extremism,” after which the Council released Resolution 1605 asserting widespread “Islamophobia” and calling all

30. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 504 (2007) (considering whether “CPLR 302 (a) (1) confers personal jurisdiction over a person ‘(1) who sued a New York resident in a non-U.S. jurisdiction; and (2) whose contacts with New York stemmed from the foreign lawsuit and whose success in the foreign suit resulted in acts that must be performed by the subject of the suit in New York’”).

31. N.Y. C.P.L.R. 302, 5304 (McKinney 2008) (establishing grounds for the non-recognition of foreign judgments); see Samuel A. Abady & Harvey Silvergate, *Rachel’s Lawny’s “Libel Tourism” Fix*, N.Y. POST, Feb. 25, 2008, available at http://www.nypost.com/p/news/opinion/opedcolumnists/item_q6m8BFVex4T9A4r1NbMlyJ (stating that the bill is “written in direct response to the Court of Appeals’ decision in the case of *Ehrenfeld v. bin Mahfouz*”).

32. N.Y. C.P.L.R. 5304 (a) (1) (McKinney 2008).

33. See Heather Maly, *Publish at Your Own Risk or Don’t Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-Guaranteed*, 14 J.L. & POL’Y 883, 886–906 (2006) (contrasting libel standards in the United States and the United Kingdom).

34. Pub. L. No. 111-223, 124 Stat. 2480-2484.

35. Securing the Protection of our Enduring and Establish Constitutional Heritage Act, H.R. 2765, 111th Cong. (2010).

36. S. 3518, 111th Cong. (2010).

37. Roy Greenslade, *Obama Seals Off US Journalists and Authors From Britain’s Libel Laws*, GUARDIAN (U.K.), Aug. 11, 2010, available at <http://www.guardian.co.uk/media/greenslade/2010/aug/11/medialaw-barack-obama>.

member nations to “condemn and combat” the alleged phenomenon.³⁸ Persons held accountable under the European Union’s new legal standards include actress Brigitte Bardot, who was charged in 2008, for the fifth time, with “inciting racial hatred” against Muslims and forced to pay a fine of twelve thousand pounds.³⁹ At the time of her death, noted Italian author Orianna Fallaci was being sued in France, Italy, Switzerland, and other jurisdictions by groups dedicated to preventing the dissemination of her work on militant Islam.⁴⁰ On May 13, 2008, Dutch police actually arrested a cartoonist using the pseudonym Gregorius Nekschot for the criminal offense of “publishing cartoons which are discriminating for Muslims and people with dark skin.”⁴¹ Two years later, the Dutch prosecutor dropped all charges against Nekschot based on the decision that “criminal proceedings were counterproductive.”⁴²

After releasing his short film *Fitna* (Arabic for “strife”), which contained quotes from the Koran and scenes of radical Imams preaching criminal violence against Christians, Jews, and infidels, democratically elected Dutch politician Geert Wilders

38. EUR. PARL. ASS., *European Muslim Communities Confronted with Extremism* (Mar. 27, 2008), available at <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=11916&Language=EN> (“A series of concrete measures should be taken to prevent discrimination, condemn and combat Islamophobia . . .”); EUR. PARL. ASS., *European Muslim Communities Confronted with Extremism*, Res. 1605, ¶ 9 (2008), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1605.htm>.

39. *Brigitte Bardot on Trial for Muslim Slur*, REUTERS (Apr. 15, 2008), <http://www.reuters.com/article/2008/04/15/us-france-bardot-muslims-idUSL1584799120080415> (describing prosecutors’ request that Paris court impose a two-month suspended prison sentence and 15,000 euro fine for saying the Muslim community was “destroying our country and imposing its acts”).

40. *Oriana Fallaci Prosecuted Again for “Insulting Islam”*, NAT’L SECULAR SOC’Y (May 27, 2005), <http://www.secularism.org.uk/39371.html> (describing charges against Fallaci for making statements such as “to believe that a good Islam and a bad Islam exist goes against all reason”); *Trial Over Italian Islam “Insult”*, BBC NEWS (May 24, 2005), <http://news.bbc.co.uk/2/hi/europe/4576663.stm>; *Swiss Muslims File Suit Over “Racist” Fallaci Book*, MILLI GAZETTE, <http://www.milligazette.com/Archives/01072002/0107200263.htm> (last visited Oct. 15, 2012) (describing suit filed under Swiss anti-racism laws, including a call for Fallaci’s book to be banned).

41. Thomas Landen, *Dutch Police Arrests Cartoonist*, BRUSSELS J. (May 16, 2008), <http://www.brusselsjournal.com/node/3257>.

42. Katrine Winkel Holm, *Prosecutor Drops Case against Dutch Cartoonist*, INT’L FREE PRESS SOC’Y (Sept. 26, 2010), <http://www.internationalfreepressociety.org/2010/09/prosecutor-drops-case-against-dutch-cartoonist>.

was prosecuted under Dutch anti-hate speech laws for speaking to his constituents about the threat of militant Islam.⁴³ Ultimately, both Wilders and free speech prevailed when, after a three-year prosecution, Wilders was acquitted based on the presiding judge's finding that although Wilders's oratory was "on the edge of what is legally permissible" in Holland, and sometimes "hurtful" or "shocking," his statements (including the film) were made in the context of a political and public debate about Muslim integration and multiculturalism, and were therefore protected.⁴⁴ Yet Wilder's example remains a warning to anyone who wishes to engage in public dialogue about similarly pressing controversial issues: you may have to spend thousands of dollars and years worth of your time defending your right to free speech in a court of law.

Last year, an Austrian appellate court upheld the conviction of Austrian citizen Elisabeth Sabaditsch-Wolff for "denigration of religious beliefs of a legally recognized religion," a violation of Section 188 of the Austrian Criminal Code, based on statements she made during her presentation of a series of educational seminars on Islam and terrorism.⁴⁵ In her seminars, Sabaditsch-Wolff referenced that Islam's prophet Mohammed married an under-aged girl. Sabaditsch-Wolff was initially charged with "incitement" as well as "denigration," but was exonerated of the first charge due to the court's finding that her

43. Benjamin Ryberg, "Victory for Freedom of Speech": *Geert Wilders Acquitted of Hate Speech by Dutch Court*, LAWFARE PROJECT BLOG (June 23, 2011, 12:53 PM), <http://www.thelawfareproject.org/Blog/victory-for-freedom-of-speech-geert-wilders-acquitted-of-hate-speech-by-dutch-court.html> (describing court's decision to acquit Wilders).

44. *Id.* For additional information on Wilders's acquittal and the aftermath, see Gilbert Kreijger & Aaron Gray-Block, *Dutch Populist Geert Wilders Acquitted of Hate Speech*, REUTERS, June 23, 2011, available at <http://www.reuters.com/article/2011/06/23/us-dutch-wilders-idUSTRE75M10P20110623>, and Joshua Morey & Benjamin Ryberg, *Opponents of Wilders Wage Lawfare against Dutch Judicial System*, LAWFARE PROJECT BLOG (Nov. 22, 2011, 12:55 PM), <http://www.thelawfareproject.org/Blog/opponents-of-wilders-wage-lawfare-against-dutch-judicial-system.html>.

45. Eugene Volokh, *Austrian Court Upholds Conviction for "Denigrating Religious Beliefs"*, VOLOKH CONSPIRACY (Dec. 27, 2011, 12:21 PM), <http://www.volokh.com/2011/12/27/austrian-court-upholds-conviction-for-denigrating-religious-beliefs> (relying specifically on Sabaditsch-Wolff's alleged statements implying that the Islamic Prophet Mohammed was a pedophile); Soeren Kern, "A Black Day for Austria", GATESTONE INST. (Dec. 26, 2011), <http://www.gatestoneinstitute.org/2702/sabaditsch-wolff-appeal> (describing Sabaditsch-Wolff's statement that her conviction represented "a black day for Austria").

statements were not made provocatively.⁴⁶ The charge of denigration, which has a lower burden of proof than does the charge of incitement (or “hate speech”), was reportedly introduced after the case was already underway to “ensure a guilty verdict.”⁴⁷

Prior to its repeal,⁴⁸ Section 13 of the Canadian Human Rights Act banned the electronic transmission of material deemed “likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.”⁴⁹ Religion was listed as one of the prohibited grounds along with ethnic origin.⁵⁰ Consequently, what was probably a well-intentioned yet democratically incompatible and shortsighted law enabled a wave of “human rights” complaints in the Canadian Human Rights Commissions (“CHRC”) against outspoken critics of Islamist terrorism and their publishers. Those summoned to appear before the CHRC include *Maclean’s* magazine, award-winning author Mark Steyn, and noted Canadian television host and blogger Ezra Levant. The complaints against *Maclean’s* and Steyn were initiated by the Canadian Islamic Congress (“CIC”) and based on *Maclean’s* republication of excerpts from Steyn’s book, *America Alone: The End of the World as We Know It*, which details Europe’s struggle with militant Islam and depicts the United States as potentially the last bastion of freedom.⁵¹ According to a CIC press release

46. A. Millar, *Law in Austria: Guilty for Questioning Islam*, INT’L FREE PRESS SOC’Y (Mar. 9, 2011), <http://www.internationalfreepressociety.org/2011/03/law-in-austria-guilty-for-questioning-islam> (explaining that her accusations of pedophilia were punishable because they “were colloquial rather than strictly in accordance with the medical definition of the term”); Kern, *supra* note 45.

47. Millar, *supra* note 46.

48. Jason Fekete, *Tories Repeal Sections of Human Rights Act Banning Hate Speech Over Telephone or Internet*, NAT’L POST (Can.), June 7, 2012, available at <http://news.nationalpost.com/2012/06/07/tories-repeal-sections-of-human-rights-act-banning-hate-speech-over-telephone-or-internet> (describing the new bill as one that “promotes freedom of expression and would have the courts play a larger role in handling hate-crime cases”).

49. Canadian Human Rights Act, R.S.C. 1985, c. H-6, § 13(1) (2012), <http://laws-lois.justice.gc.ca/eng/acts/H-6/page-4.html>.

50. *Id.* § 3(1).

51. Kate Lunau, *Canadian Islamic Congress Launches Human Rights Complaints Against Maclean’s*, MACLEAN’S (Can.), Nov. 30, 2007, available at http://www.macleans.ca/article.jsp?content=20071130_111821_7448 (describing the

concerning the complaints, the CIC called Steyn's piece "flagrantly Islamophobic."⁵²

Levant was similarly forced to defend himself before the Alberta Human Rights Commission after republishing the infamous Danish cartoon of Islam's prophet Mohammad with a bomb in his turban in the now defunct *Western Standard* magazine.⁵³ The complaint filed by the Edmonton Council of Muslim Communities ("ECMC") against Levant alleged that the publication of the cartoons was "discrimination on the grounds of religious beliefs" in violation of section 3(1) of the Alberta *Human Rights, Citizenship and Multiculturalism Act* ("HRCM Act")⁵⁴ and was "anti-Islamic, racist and reproduced for the purpose of inciting hatred against the Prophet and Muslims."⁵⁵ Though charges against him were eventually dropped after much publicity, time, and money were spent in his defense, the outcome could hardly be considered a win for free speech or Levant.⁵⁶

II. *LAWFARE AGAINST FREE SPEECH IN THE UNITED STATES*

Despite the presence of First Amendment protections, the United States has seen a steady increase in lawfare suits over the past ten years filed in order to impede the open discussion of terrorism and terror financing. Regardless of whether lawfare defendants ultimately win these cases, they still lose in time and money spent defending their basic and inalienable right to free speech.

denial of charges by Maclean's spokesperson); see generally MARK STEYN, *AMERICA ALONE: THE END OF THE WORLD AS WE KNOW IT* (2006).

52. See Lunau, *supra* note 51.

53. *Punished First, Acquitted Later*, CAN. NEWSWIRE, Aug. 6, 2008 [hereinafter *Punished First*], available at <http://www.newswire.ca/en/story/303807/punished-first-acquitted-later> (describing Levant's reaction to being acquitted after 900 days).

54. Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14. The Act is now formally known as the Alberta Human Rights Act.

55. ALTA. HUMAN RIGHTS & CITIZENSHIP COMM'N, INVESTIGATION REPORT: EDMONTON COUNCIL OF MUSLIM COMMUNITIES V. JMCK WESTERN PUBLISHING CORPORATION (2008) [hereinafter INVESTIGATION REPORT], available at <http://ezrlevant.com/Complaint%20rejected.pdf>.

56. See *Punished First*, *supra* note 53; INVESTIGATION REPORT, *supra* note 55 (dismissing charges against Levant).

In 2001, the Global Relief Foundation (“GRF”), now included on the US Treasury Department’s list of “Designated Charities and Potential Fundraising Front Organizations for Foreign Terrorist Organizations,”⁵⁷ filed a baseless defamation lawsuit against a number of media organizations. Defendants included *The New York Times*, *ABC*, and the *Associated Press*, who were targeted for publishing articles reporting on the fact that GRF was under federal investigation for alleged ties to terrorist organizations and that the charity might consequently have its assets frozen.⁵⁸ The court held in favor of the defendant media organizations based on its finding that they had proved the substantial truth of their reports.⁵⁹

In 2005, the Islamic Society of Boston (“ISB”) filed a libel suit against seventeen media defendants, including the local *Fox News* affiliate, the *Boston Herald*, and counter-terror expert and journalist Steven Emerson. The defendants had written articles and reported on the fact that Saudi funds were being used to finance and build an ISB Islamic center in Boston.⁶⁰ Not surprisingly, ISB dropped the suit shortly after the defendants had begun the process of discovering ISB’s financial records.⁶¹

Two years later, in 2007, investigative journalist Joe Kaufman staged a lawful ten-person protest at a Six Flags Over Texas theme park against the Islamic Circle of North America (“ICNA”), which Kaufman described in an article as “a radical Muslim organization that has physical ties with the Muslim Brotherhood and financial ties to Hamas.”⁶² In response, seven Dallas-area Islamist organizations—none of which had ever been

57. See *Foreign Terrorist Organizations*, U.S. DEP’T OF TREASURY, <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-fto.aspx> (last visited Oct. 4, 2012).

58. *Global Relief Found. v. N.Y. Times Co.*, 390 F.3d 973, 974–79 (7th Cir. 2004) (describing six different reports published by the various defendants).

59. *Id.* at 990 (affirming district court decision “to enter summary judgment in favor of the defendants because their reports about GRF were substantially true”).

60. *Islamic Soc’y of Boston v. Boston Herald*, No. 05-4637, 1 (Mass. Dist. Ct. July 20, 2006) (describing plaintiff’s claims of defamation and civil rights violations).

61. Donovan Slack, *Islamic Society Drops Lawsuit Libel Was Alleged; Mosque to go Ahead*, BOS. GLOBE, May 30, 2007, available at http://www.boston.com/news/local/articles/2007/05/30/islamic_society_drops_lawsuit (noting that the case was dropped after two years of pre-trial discovery).

62. Joe Kaufman, *Fanatic Muslim Family Day*, FRONTPAGE MAG. (Sept. 28, 2007), <http://archive.frontpagemag.com/readArticle.aspx?ARTID=28292>.

mentioned by Kaufman and all affiliated with the Council on American Islamic Relations (“CAIR”), an unindicted co-conspirator in the successful federal prosecution of the Holy Land Foundation—filed a meritless defamation lawsuit against Kaufman, funded by the Muslim Legal Fund for America.⁶³ The Texas Court of Appeals reversed the trial court’s order denying Kaufman’s motion for summary judgment and rendered judgment in favor of Kaufman, holding that the plaintiffs (which did not include ICNA) were unable to show that a reasonable reader would view Kaufman’s statements as “concerning” them, as was required to maintain their defamation claims.⁶⁴

Recently, a US district court granted summary judgment for author Seid Hassan Daiopleslam, dismissing a libel suit filed against him in 2008 by the National Iranian-American Council (“NIAC”) and its president, Trita Parsi, in response to Daiopleslam’s reporting of Parsi and NIAC’s linkages with the Iranian regime, a state sponsor of terrorism.⁶⁵ Judge John Bates held that the plaintiffs failed to adduce evidence that Daiopleslam “actually harbored any doubts about the correctness of his writings, or willfully blinded himself to the truth,” such that their defamation claim must fail.⁶⁶ The court also dismissed the plaintiffs’ false light claim due to their failure to demonstrate that Daiopleslam’s statements were made with “actual malice.”⁶⁷

63. *Kaufman v. Islamic Soc. of Arlington*, 291 S.W.3d 130, 133 (Tex. App. 2009) (rendering summary judgment for Kaufman); Josh Gerstein, *Texas Appellate Court Deals Another Blow to Islamist Lawfare—Upholds Free Speech Rights of Internet*, POLITICO (July 17, 2009), <http://www.thomasmore.org/news/texas-appellate-court-deals-another-blow-islamist-lawfare-upholds-free-speech-rights-internet> (arguing that this case was part of a pattern in which “Muslim groups in the U.S. have engaged in the tactic of filing meritless lawsuits to silence any public discussion of Islamic terrorist threats”); *United States v. Holy Land Found.*, No. 3:04-CR-240-G, 2007 WL 2059722 (N.D. Tex. July 16, 2007).

64. *Kaufman v. Islamic Soc. of Arlington*, 291 S.W.3d 130, 147–48 (Tex. App. 2009) (“[A] reasonable reader who was acquainted with appellees would not view Kaufman’s statements as ‘concerning’ them.”).

65. Josh Gerstein, *Iranian-American Group, Leader Lose Libel Case Against Writer*, POLITICO (Sept. 13, 2012), <http://www.politico.com/blogs/under-the-radar/2012/09/iranianamerican-group-leader-lose-libel-case-135502.html> (explaining that the requisite malice could not be proven with out showing that “Daiopleslam acted with knowledge the allegations he made were false or with reckless disregard about their accuracy”).

66. *Parsi v. Daiopleslam*, No. 08–705(JDB), 2012 WL 4017720, at *20 (D.D.C. Sept. 13, 2012).

67. *Id.* at *2 (requiring specific evidence of “actual malice”).

III. KEY PROPONENTS OF LAWFARE

A. *The Council on American-Islamic Relations*

The Council on American-Islamic Relations, a self-appointed representative of the Muslim American community with a generous presence on the Hill, is one of the greatest proponents of using lawfare against free speech.⁶⁸ After the Holy Land Foundation trial, the US District Court for the Northern District of Texas released a list of unindicted co-conspirators, including the Islamic Society of North America (ISNA), the Muslim Arab Youth Association (MAYA), the North American Islamic Trust (NAIT), and CAIR.⁶⁹ In fact, CAIR was founded by a leader of the Islamic Association for Palestine, an entity created by the Palestine Committee, which also founded the Holy Land Foundation.⁷⁰ CAIR, as well as ISNA, has received non-profit status from the IRS and is consequently able to receive tax-deductible donations.⁷¹

In 2003, CAIR filed a defamation lawsuit against former North Carolina Congressman Cass Ballenger after Ballenger, in response to a reporter's inquiry, characterized CAIR as a "fund-

68. See *CAIR: Who We Are*, COUNCIL ON AMERICAN ISLAMIC RELATIONS (2010), <http://www.cair.com/about-us/cair-who-we-are.html> (describing various legal methods CAIR uses to achieve its goals).

69. *United States v. Holy Land Found.*, No. 3:04-CR-240-G, 2007 WL 2059722 (N.D. Tex. July 16, 2007) (listing unindicted co-conspirators and/or joint venturers); see Press Release, King Demands Answers from Holder on Decision Not to Prosecute CAIR, its Co-Founder, and other Unindicted Co-Conspirators in Holy Land Foundation Case, Comm. on Homeland Sec. (Apr. 18, 2011), <http://homeland.house.gov/press-release/king-demands-answers-holder-decision-not-prosecute-cair-its-co-founder-and-other> (noting that the decision to not seek indictments for CAIR, ISNA, and NAIT was objected to by the FBI and US Attorney's office in Dallas).

70. See *United States v. El-Mezain*, 664 F.3d 467, 485 (5th Cir. 2011) ("According to the prosecution's case, the Palestine Committee also created other organizations in the United States to support Hamas. The Committee created not only HLF . . ."); Andrew C. McCarthy, *Holy Land Foundation Hamas Support Convictions Affirmed*, NAT'L REV. ONLINE (Dec. 7, 2011), <http://www.nationalreview.com/corner/285202/holy-land-foundation-hamas-support-convictions-affirmed-andrew-c-mccarthy>.

71. *CAIR at a Glance*, CAIR, <http://www.cair.com/about-us/cair-at-a-glance.html> (last visited Oct. 8, 2012) (providing CAIR's tax identification number); *Nonprofit Report for ISNA Development Foundation Inc.*, GUIDESTAR, available at <http://apps.irs.gov/app/eos> (follow "Are eligible to receive tax-deductible contributions" hyperlink; then search "Islamic Society of North America") (last visited Oct. 8, 2012); see *Donate Now*, ISLAMIC SOC'Y OF N. AM. ("All donations are tax deductible.").

raising arm for Hezbollah.”⁷² US District Judge Richard Leon dismissed the case, holding that Ballenger’s conduct was “within the scope of his employment” as a federal employee.⁷³

In 2008, CAIR filed a spurious complaint with the Federal Elections Commission (“FEC”) against the nonpartisan Clarion Fund, requesting an investigation of Clarion (the ultimate goal being revocation of Clarion’s 501(c)(3) non-profit status) for distributing the film *Obsession: Radical Islam’s War Against the West*.⁷⁴ CAIR argued that, because the film analyzed the nexus between militant Islam and terrorism, it somehow constituted unlawful lobbying for presidential candidate John McCain.⁷⁵ At that time, both McCain and President Barack Obama made the combating of terrorism and terror financing part of their campaign platform.⁷⁶ Clarion’s 501(c)(3) status was not revoked.⁷⁷

In 2011, CAIR and the American Civil Liberties Union (“ACLU”) brought a class action suit against the FBI alleging illegal surveillance of the Muslim community in Southern California.⁷⁸ At the same time, CAIR San Francisco was working to hamper federal investigations into terrorism by printing and publicly distributing flyers and posters warning Muslims to “build a wall of resistance and [not] talk to the FBI.”⁷⁹ US

72. Council on Am. Islamic Rel., Inc. v. Ballenger, 366 F. Supp. 2d 28, 30 (D.C. Dist. Ct. 2005) (describing plaintiff’s claims of slander *per se*, libel *per se*, and libel).

73. *Id.*

74. Letter from Nadhira Al-Khalili, Council on American-Islamic Relations to Thomasenia P. Duncan, General Counsel, Federal Election Commission (Sept. 19, 2008) (requesting that the FEC investigate the actions of the Clarion Fund, Inc.), available at <http://www.theinvestigativefund.org/files/managed/ObessionlettertoFEC.pdf>.

75. *Id.* (noting “[a] pro-McCain article was purportedly removed from the website of film’s distributor after this controversy came to public attention”).

76. See Josh Meyer, *Candidates Anti-terror Views are Largely Similar*, L.A. TIMES, Sept. 11, 2008, available at <http://articles.latimes.com/2008/sep/11/nation/na-terrorpoll11>.

77. Nonprofit Report for Clarion Fund Inc., GUIDESTAR, <http://www.guidestar.org/organizations/20-5845679/clarion-fund.aspx> (last visited Nov. 20, 2012) (showing Clarion Fund’s continued non-profit status).

78. *Farzaga v. FBI*, ACLU OF SOUTHERN CAL., <http://www.aclu-sc.org/fazaga/> (last visited Nov. 20, 2012) (“[t]he suit demands that the FBI destroy all information unlawfully collected through their operation and pay damages to the individuals who were targets of unlawful surveillance.”).

79. Oleg Atbashian and Larissa Scott, *Are You a Victim of Islamic Intimidation?*, AM. THINKER (June 18, 2012), http://www.americanthinker.com/2012/06/are_you_a_victim_of_islamic_intimidation.html.

District Judge Cormac Carney dismissed the suit, holding that allowing the case to proceed might “risk disclosure of government secrets.”⁸⁰

Several months ago, a CAIR spokesman stated that the organization would likely challenge the legality of a Kansas law, effective July 1, 2012,⁸¹ which prohibits the state’s courts, tribunals, and government agencies from basing rulings on any foreign law, legal code, or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the US and Kansas constitutions, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage.⁸²

As articulated by Sherriene Jones-Sontag, spokeswoman for Kansas Governor Sam Brownback who signed the law, the legislation “makes it clear that Kansas courts will rely exclusively on the laws of our state and our nation when deciding cases and will not consider the laws of foreign jurisdictions.”⁸³ Indeed, the law makes no mention of Sharia, or Islamic law, and even legislators who were skeptical of the bill have opined that it is “broad and bland enough” such that it does not specifically target Islam, which would run afoul of the Establishment Clause of the US Constitution.⁸⁴ Additionally, it should be noted that Article VI, Clause 2 of the US Constitution, the Supremacy Clause, already establishes that the Constitution, federal statutes, and US treaties are “the supreme law of the land,” which trump conflicting state (or non-US) laws.⁸⁵ Despite the absence of any

80. Dan Whitcomb, *Judge Tosses Lawsuit Over FBI Surveillance of California Mosques*, CHICAGO TRIB., Aug. 14, 2012, available at http://articles.chicagotribune.com/2012-08-14/news/sns-rt-us-usa-mosque-lawsuitbre87e03y-20120814_1_california-mosques-craig-monteilh-judge-tosses-lawsuit (recounting the judge’s statement that he was “reluctant to toss out the case before it could be litigated but was forced to weigh national security against individual liberties and an open judicial process.”).

81. *Kansas Governor Signs Measure Blocking Islamic Law*, USA TODAY, May 26, 2012, <http://usatoday30.usatoday.com/news/religion/story/2012-05-26/kansas-governor-signs-anti-sharia-law/55224584/1> [hereinafter *Kansas Law*].

82. KAN. STAT. ANN. § 60-5103 (2012).

83. *Kansas Law*, *supra* note 81.

84. *Kansas Law*, *supra* note 81 (“[t]he House approved the bill unanimously and the Senate, with broad, bipartisan support.”); see U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion.”).

85. U.S. CONST. art. VI, cl. 2.

language singling out religion and, as such, any viable legal challenge to the Kansas statute, CAIR spokesman Ibrahim Hooper has asserted that a suit might be brought on the grounds that supporters of the legislation allegedly expressed concern regarding Sharia law, claiming the underlying purpose of such a law is to “demoniz[e] Islam and marginaliz[e] American Muslims.”⁸⁶

B. *The Organization of Islamic Cooperation*

For more than ten years, an international movement to silence free speech about Islamist terrorism has emerged from the United Nations under the guise of “prohibit[ing] discrimination on the basis of religion or belief”⁸⁷—with a marked focus on Islam.⁸⁸ Spearheading this effort is the Organization of Islamic Cooperation (“OIC”), an international lobbying group consisting of fifty-seven member states, among which are states designated as sponsors of terrorism and authoritarian theological regimes.⁸⁹ Since 1999, the UN Human Rights Council has consistently passed an OIC-initiated resolution condemning the “defamation of religions” each year,

86. *Kansas Law*, *supra* note 81 (arguing that supporters of the bill have made it clear that targeting Islam was the purpose).

87. Human Rights Council, G.A. Res. 19/25, 19th Sess., ¶ 4, U.N. Doc. A/HRC/RES/19/25 (Apr. 10, 2012) (reaffirming “obligation of States to prohibit discrimination on the basis of religion or belief and to implement measures to guarantee the equal and effective protection of the law”); Human Rights Council, G.A. Res. 16/18, 16th Sess., ¶ 2, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011).

88. See “*Defamation of Religions*” — *UN Documents Relating to the Topic*, STRASBOURG CONSORTIUM, http://www.strasbourgconsortium.org/index.php?blurb_id=778 (last visited Nov. 23, 2012) (providing a list of U.N. Resolutions on “Combating Defamation of Religions” and pertinent U.N. reports); see also G.A. Res. 65/224, ¶ 7, U.N. Doc. A/RES/65/224 (Apr. 11, 2011); Laura MacInnis, *U.N. Body Adopts Resolution on Religious Defamation*, REUTERS, Mar. 26, 2009, <http://www.reuters.com/article/2009/03/26/us-religion-defamation-idUSTRE52P60220090326> (“A United Nations forum on Thursday passed a resolution condemning ‘defamation of religion’ as a human rights violation, despite wide concerns that it could be used to justify curbs on free speech . . .”); Press Release, Lawfare Project, *The Lawfare Project Voices Concern Over Continued State Department Engagement with the OIC to Restrict Free Speech* (Dec. 13, 2011), <http://www.thelawfareproject.org/Blog/for-immediate-release-the-lawfare-project-voices-concern-over-continued-state-department-engagement-with-the-oic-to-restrict-free-speech.html> [hereinafter *Lawfare Project Voices Concern*].

89. See *Member States*, ORG. OF ISLAMIC COOPERATION, http://www.oic-oci.org/member_states.asp (last visited Oct. 12, 2012); see also *Lawfare Project Voices Concern*, *supra* note 88.

which “covered incidents ranging from satirizing Mohammed in a newspaper cartoon to criticism of shari’a and post-9/11 security check profiling.”⁹⁰ The controversial “defamation” language was abandoned with the 2011 passage of Resolution 16/18, but the spirit of the resolution remained consistent with its predecessors.⁹¹

While preventing religious intolerance is a noble effort in theory, the practical implication of these resolutions is the suppression of legitimate dialogue about real and imminent national security threats and the resurgence of blasphemy codes. While individual Human Rights Council resolutions do not constitute binding international law, they are treated as “evidence of a general practice accepted as law”; that is, as customary international law, considered by the international community (and, of note, applied by the International Court of Justice in reaching its decisions) to be a primary source of international law.⁹² This enables regimes to punish speech designated as “racist” or “xenophobic”—terms that appear in the titles of the resolutions at issue—as a means of stifling speech on such issues as terrorism and terror financing, and to then refer to the aforementioned customary international law as a source of legitimacy for their actions. Human Rights Council Resolution 7/19, an Orwellian document, attempts to criminalize not only speech deemed offensive to Islam, but also the dissemination of *ideas* that might be offensive.⁹³

In sum, the United Nations Human Rights Council is effectively establishing anti-blasphemy law within customary

90. Patrick Goodenough, *U.N. Adopts “Religious Intolerance” Resolution Championed by Obama Administration*, CNSNEWS.COM (Dec. 20, 2011), <http://cnsnews.com/news/article/un-adopts-religious-intolerance-resolution-championed-obama-administration>.

91. See Human Rights Council, G.A. Res. 16/18, 16th Sess., ¶ 2, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011).

92. Statute of International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (stating that international conventions should be applied by the International Court of Justice); see International Law, Legal Information Institute, CORNELL UNIV. LAW SCH., http://www.law.cornell.edu/wex/international_law (last visited Oct. 12, 2012) (“[c]ustomary law . . . [is a] primary source[] of international law.”).

93. Human Rights Council Res. 7/19, Combating defamation of religions ¶ 13 (Mar. 27, 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_19.pdf (“The prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the freedom of opinion and expression.”).

international law under the guise of human rights resolutions at a time when it is essential to ensure that open societies can freely discuss religiously motivated terrorism. The cornerstone of liberal democracy is the right to speak freely, even when such speech is critical of government or religion; this is reflected and reinforced by the fundamental ideal of separation of church and state. As such, resolutions like the US co-sponsored 16/18, which reiterates a concern with the negative projection of religion, are directly at odds with the First Amendment and related jurisprudence.⁹⁴ It is interesting to contemplate whether this provision, condemning the negative projection of religion, will be applied by the United Nations against self-described Islamist terrorist groups like Islamic Jihad or the Libyan Islamic Fighting Group, as opposed to against those who are working to expose these groups as terrorists. To date it has not.

IV. *IMPACT OF LAWFARE ON US DOMESTIC POLICY*

In December 2011, Hillary Clinton hosted a three-day, closed door meeting with the OIC to implement Resolution 16/18.⁹⁵ According to Dr. Sebastian L. Gorka, Military Affairs Fellow at the Foundation for Defense of Democracies, the Obama administration has begun a parallel process of “rapidly revising federal counter-terrorism training materials in order to eliminate references to Jihad and Islam.”⁹⁶ This executive action has subsequently affected how the government approaches national security reporting. For example, Gorka noted that the “600-page bipartisan 9/11 commission report, released in 2004, mentioned Islam 322 times and Jihad as a form of ‘Holy War’ against the West 126 times,” but both terms were completely

94. See Human Rights Council, G.A. Res. 16/18, 16th Sess., ¶ 2, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011) (expressing concern about “incidents of religious intolerance, discrimination and related violence, as well as of negative stereotyping of individuals on the basis of religion or belief.”).

95. See Nina Shea, *D.C. Islamophobia Conference was a Bad Idea*, NAT’L REV. ONLINE (Dec. 13, 2011), <http://www.nationalreview.com/corner/285654/dc-islamophobia-conference-was-bad-idea-nina-shea>.

96. Cliff Kincaid, *Obama Neuters War on Islamic Terrorist*, ACCURACY IN MEDIA, May 23, 2012, <http://www.aim.org/aim-column/obama-neuters-war-on-islamic-terrorists/>; see Gorka Briefing, *supra* note 20.

absent from the Obama administration's 2009 National Intelligence Strategy.⁹⁷

The 2009 National Intelligence Strategy is but one of many examples of how the Islamist lawfare strategy to politicize speech deemed "Islamophobic," and to silence speech deemed blasphemous of Islam, is directly impacting US domestic policy. For instance, final reports issued by the three branches of the military concerning the Fort Hood massacre failed to mention perpetrator Major Nidal Hasan's ties to radical Islam, nor that he drafted an academic presentation arguing for the "painful punishment and liquidation of non-Muslims."⁹⁸ Further, the Army and the Department of Defense have continued to classify the attack as "workplace violence" rather than as an act of terrorism, despite "mountains of evidence" supporting the latter.⁹⁹ Dozens of Fort Hood victims have filed a lawsuit against the military claiming that, because of the "workplace violence" designation, they are receiving "lower priority access to medical care as veterans" and have been denied financial benefits that are available to individuals whose injuries are categorized as "combat related."¹⁰⁰ In response, members of Congress have circulated a letter demanding that the Obama administration classify the incident as a terrorist act, such that victims and their families may receive full benefits.¹⁰¹

In July 2012, Thomas Perez, Assistant Attorney General of the Department of Justice Civil Rights Division, "refused to answer" Representative Trent Franks (R-AZ), who asked Perez before the House Judiciary Subcommittee on the Constitution, "Will you tell us here today that this Administration's Department of Justice will never entertain or advance a proposal that criminalizes speech against any religion?"¹⁰² Franks's

97. Gorka Briefing, *supra* note 20.

98. Dorothy Rabinowitz, *Major Hasan, 'Star Officer'*, WALL ST. J., Feb. 16, 2011, <http://online.wsj.com/article/SB10001424052748704409004576146001069880040.html>.

99. Ned Berkowitz, *Members of Congress Demand Obama Administration Classify Ft. Hood Attack as an 'Act of Terrorism'*, ABC NEWS (Feb. 13, 2013), <http://abcnews.go.com/Blotter/members-congress-demand-obama-administration-classify-ft-hood/story?id=18493746>.

100. *Id.*

101. *Id.*

102. See Press Release, The Lawfare Project, Head of DOJ Civil Rights Division Declines to State Whether He Will Protect Speech Critical of Religion (Jul. 31, 2012),

question was prompted by discussions at an October 2010 meeting between top Justice Department officials and anti-free speech advocates, including representatives of the Institute for Social Policy and Understanding and Mohamed Magid, president of ISNA.¹⁰³ In addition to lobbying for “cutbacks in U.S. anti-terror funding,” limits on the powers of terrorism investigators, and “changes in agent training manuals,” the advocates urged for a “legal declaration that criticism of Islam in the United States be considered racial discrimination,” potentially under Title VI anti-discrimination law.¹⁰⁴ Neither Perez nor the other Justice Department officials in attendance objected to the blatant call to unconstitutionally redefine the right of free speech.

More recently, in response to the September 11, 2012 violence against the US Embassy in Cairo and the brutal murder of US Ambassador to Libya J. Christopher Stevens in Benghazi, both Secretary of State Clinton and President Obama chastised any “efforts to denigrate the religious beliefs of others,” referring to the film *Innocence of Muslims*.¹⁰⁵ Indeed, the State Department later acknowledged that the attacks were apparently pre-planned, and a senior official added that it was never the department’s conclusion that the incidents were based on the film.¹⁰⁶ More concerning, however, is that the President and Secretary of State’s qualified condemnations of brutal violence that claimed the lives of US citizens—which effectively discourages speech critical of Islamism—undermines the value

available at <http://www.thelawfareproject.org/Blog/for-immediate-release-head-of-doj-civil-rights-division-declines-to-state-whether-he-will-protect-speech-critical-of-religion.html>; see also RepTrentFranks, *High Ranking DOJ Official Refuses to Affirm 1st Amendment Rights*, YOUTUBE (Jul. 26, 2012), <http://www.youtube.com/watch?v=0www916W8yc>.

103. Neil Munro, *Progressives, Islamists Huddle at Justice Department*, DAILY CALLER (Oct. 21, 2011), <http://dailycaller.com/2011/10/21/progressives-islamists-huddle-at-justice-department>.

104. *Id.*

105. See Press Release, The White House, Office of the Press Sec’y, Statement by the President on the Attack in Benghazi (Sept. 12, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/09/12/statement-president-attack-benghazi>; Press Release, Department of State, Statement on the Attack in Benghazi (Sep. 11, 2012), available at <http://www.state.gov/secretary/rm/2012/09/197628.htm>

106. Josh Voorhees, *State Department Rewrites Benghazi Attack Narrative*, SLATE BLOG (Oct. 10, 2012, 10:40 AM), http://www.slate.com/blogs/the_slatest/2012/10/10/state_department_says_innocence_of_muslims_didn_t_prompt_benghazi_attack.html.

of, and publicly discredits, the constitutionally protected right to speak openly about religion, a right that exists even when the speech is tantamount to “hate speech” or is otherwise offensive. Indeed, in an opinion written by Justice William Douglas, the US Supreme Court has firmly established that

a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.¹⁰⁷

CONCLUSION

The grave threat posed by lawfare to the counter terrorism community cannot be ignored and permitted to further metastasize within the United States and other liberal democracies. On a theoretical level, the campaign to make politically incorrect any discourse about Islamist terrorism has an undeniable deterrent effect, which impermissibly restricts the scope of protections provided by the First Amendment. This, in conjunction with the routine filing of frivolous lawsuits solely to intimidate and punish, has the very real tendency of chilling speech just as effectively as would the continued existence of and prosecution under anti-blasphemy laws within the United States. On a practical level, lawfare against free speech is hampering the nation’s ability to uncover and confront Islamist terrorism and its sources of financing, as enemies of the United States shield their activities from penetration by shouting “Islamophobia!” If counter-terrorism experts, intelligence agents, attorneys, investigative journalists, and others are intimidated or litigated into silence—against the backdrop of a government that is increasingly chastising “speech that denigrates religion” at the expense of national security—we risk allowing tax-exempt charitable organizations established to fund designated foreign terrorist organizations to operate undisclosed. Federal legislation barring the provision of “material support or resources,” as it has been developed by

107. *Terminiello v. Chi.*, 337 U.S. 1, 4 (1949).

case law, lacks efficacy if the very organizations funding terrorist groups are left to continue their illegal activities without scrutiny.