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Mindy Herzfeld
University of Florida Levin College of Law

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RESTRICTING THE FLOW OF FUNDS FROM U.S. CHARITIES TO INTERNATIONAL TERRORIST ORGANIZATIONS—A PROPOSAL

Mindy Herzfeld*

Numerous news reports since September 11, 2001 have reviewed the shortcomings within the intelligence system that may have led to the failure to prevent the terrorist attacks on the United States. In response, oversight committees have focused on the need for revamping our intelligence operations and agencies. In contrast, there has been relatively little attention paid to the extent to which the U.S. government and unknowing U.S. taxpayers have actively supported the types of terrorist groups that orchestrated the terror attacks. The operation under tax-exempt status in the United States of organizations that actively fund terrorist activities abroad, has meant that the U.S. government, and all U.S. taxpayers, indirectly finance such organizations and the recipients of their funding dollars.

This paper argues that the Service should take a more active stance in denying tax exemption to organizations that finance terrorist activities abroad. The paper explores the well-established principle that organizations granted U.S. tax-exemption must act consistently with national public policy, and the application of that principle to charitable organizations that send monies overseas. To foster that policy, the Service should apply special guidelines to charitable organizations that channel contributions abroad, similar to the special guidelines in effect for tax-exempt private schools. In addition, legislative changes should be made to advance such a goal in order to provide additional legal support for necessary changes in the Service’s policy.

Part I of this Article reviews some of the commonly advanced theories as to the purpose of the tax exemption provisions of the Internal Revenue Code (the Code), and the reliance on such theories by the courts and by the Service to deny tax exemption to organizations operating in furtherance of an illegal purpose and organizations acting contrary to national public policy. Part II summarizes some of the publicly available information on the links between charitable organizations raising funds in the United States and individuals and organizations the U.S. government has classified as engaged in or supporting terrorism. Part III

*Barnard College, B.A. 1990; Yale Law School, J.D. 1995; Georgetown Univ. Law Center, LL.M. 2003. The author would like to thank Professor Michael Sanders of the Georgetown University Law Center for his support and guidance in the writing of this article.


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ends with concrete suggestions for a change in policy to prevent the continued operation of such organizations in the United States under tax-exempt status, including changes to the Code, changes to the Form 990, and the issuance of published guidance by the Service.

I. TAX EXEMPTION, CHARITABLE ORGANIZATIONS, AND THE PUBLIC GOOD

A. Background

A number of provisions of the Code interact to create the regime that governs entities claiming exemption from U.S. federal income taxes. Section 501(a) grants an exemption from income taxes to, among others, organizations described in section 501(c)(3). Section 501(c)(3) includes:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or education purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.

Section 170 provides a deduction for a charitable contribution made to a corporation, trust, or community chest, fund or foundation created or organized in the United States organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.3

The special tax exemptions provided to charitable organizations, which have been a part of U.S. tax law since 1894, generally are considered to be derived from similar special grants of privilege found in the English law of trusts and the Statute of Elizabeth of 1601. The English income tax laws have provided for tax exemption for charitable organizations since the nineteenth century.6

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3Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended.
3I.R.C. § 170(c)(2).
4See Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 509 (exempting from a two percent tax imposed on the net profits of a corporation, "corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes."). See, e.g., Bruce R. Hopkins, The Law of Tax-Exempt Organizations (7th ed. 1998) at 12 n.56 (describing exemption in the Tariff Act of 1894 for nonprofit charitable, religious, and educational institutions). See also 55 Cong. Rec. 6728 (1917) (regarding the enactment of the deduction for charitable contributions).
6See 26 Cong. Rec. 585-86 (1894) (summarizing survey taken of income tax laws of the United Kingdom by the U.S. Department of State).
gressional debates from the early days of our modern tax system indicate near unanimity of thought that organizations involved in the public good, rather than the pursuit of private wealth, should be exempt from the tax burdens imposed on profit-seeking. As Senator Bacon stated in 1909, in connection with introducing the exemption from the income tax for charitable organizations:

In this partial levy of tax, where we are seeking to reach a certain class of wealth, we very properly except those institutions and those enterprises which have no element of personal gain in them whatever, and which are devoted exclusively to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse.7

The tax exemption granted to charitable organizations most often has been justified on the grounds that such organizations provide a benefit to the general public and serve a public purpose.8 Congress has also explained the reason for the exemption on the grounds that the government receives a financial benefit in exchange for giving up its right to collect tax receipts. In proposing a deduction for charitable contributions in 1917, Senator Hollis argued that:

For every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 per cent; it is all devoted to that purpose. If it were undertaken to support such institutions through the Federal Government or local governments and the taxes were imposed for the amount they would only get the percentage, 5 per cent, 10 per cent, 20 per cent, or 40 per cent, as the case might be.9

The quid pro quo justification for the tax exemption provides a partial explanation for why the Code denies a deduction for contributions to charities not organized in the United States.10

744 CONG. REC. 4150 (1909).
8See, e.g., Bob Jones Univ., 461 U.S. at 588.
955 CONG. REC. 6728 (1917). This type of thought also is evident in the passage of the Revenue Act of 1938, § 101, Revenue Act of 1938, ch. 289, 52 Stat. 448 (1938). The accompanying House report states that the exemption "is based on the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds..." H.R. REP. No. 1860, 75th Cong., at 19 (3d Sess. 1938) (quoted in Bob Jones Univ., 461 U.S. at 590).
10See I.R.C. § 170(c)(2)(A). Nevertheless, recent commentators, and even the Service, have questioned the application of the quid pro quo theory in this context. For example, it is well accepted that contributions to a domestic organization may qualify for a tax deduction even if the organization sends the contributed funds overseas. See Harvey P. Dale, Foreign Charities, 48 TAX LAW. 657, 660 (1995). See also Reg. § 1.170A-8(a)(1) ("A charitable contribution by an individual may be deductible even though all, or some portion, of the funds of the organization may be used in foreign countries for charitable or educational purposes."); Rev. Rul. 1974-229, 1974-1 C.B. 142 (holding that an organization which otherwise meets the requirements of section 509(a)(3) qualifies as an organization described in section 509(a)(3) where it supports a foreign organization that otherwise meets the requirements of section 509(a)). Moreover, commentators have questioned the quid pro quo analysis altogether. See Dale, Foreign Charities, 48 TAX LAW. at 660-61 ("there is no indication that the tax exemption, afforded since the end of the nineteenth century, was predicated on the quid pro quo rationale."); quoting ADLER, HISTORICAL ORIGIN OF TAX EXEMPTION OF CHARITABLE INSTITUTIONS (1922); Harry Hansmann, The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation, 91 YALE L.J. 54 (1981).
If "[c]haritable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues,"11 the converse of this proposition also is true: organizations that do not serve a public benefit, but are a detriment to society, may not qualify for tax exemption.

The Supreme Court stated in its 1877 decision, Ould v. Washington Hospital for Foundlings, that charitable use "where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."12 Thus, organizations that serve an illegal purpose, or that act contrary to established public policy, cannot qualify as charitable. The Restatement (Second) of Trusts states that "[a] trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid."13 The principle that "the purpose of a charitable trust may not be illegal or violate established public policy,"14 has been extended to the law of tax-exempt organizations.

Consistent with the above, both the Service and the courts generally have denied tax exemption to organizations that serve an illegal purpose. In Church of Scientology v. Commissioner,15 the Tax Court upheld the denial of tax exemption to the Church of Scientology, partly on the grounds that the Church had violated public policy by conspiring for almost a decade to defraud the U.S. government by preventing the Service from collecting taxes due.16 The court found that "that criminal manipulation of the IRS to maintain its tax exemption (and the exemption of affiliated churches) was a crucial and purposeful element of petitioner's financial planning."17 In Revenue Ruling 1975-384,18 the Service denied tax exemption to an organization that was primarily engaged in sponsor-

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13RESTATEMENT (SECOND) OF TRUSTS § 377 (1959). See also AUSTIN W. SCOTT & WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 377 (4th ed. 1987) (explaining that "[a] trust cannot be created for a purpose which is illegal. The purpose is illegal if the trust property is to be used for an object which is in violation of the criminal law, or if the trust tends to induce the commission of crime, or if the accomplishment of the purpose is otherwise against public policy."); Lockwood's Estate, 41 D.&C. 621 (1941).
14See Bob Jones Univ., 461 U.S. at 591. See also Green v. Connally, 330 F. Supp. 1150, 1159 (D.D.C.), summarily aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971) ("All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.").
1583 T.C. 381 (1984), aff'd on other grounds, 823 F.2d 1310 (9th Cir. 1987).
1683 T.C. at 466.
1783 T.C. at 504-05. "[T]he Government's interest in ferreting out crime is not the only interest at stake here. The Government also has an interest in not subsidizing criminal activity. Were we to sustain petitioner's exemption, we would in effect be sanctioning petitioner's right to conspire to thwart the IRS at taxpayers' expense." Id. at 506.
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Progressing anti-war protest demonstrations and nonviolent action projects, on the ground that such activities "encourage[d] the commission of criminal acts," and such an illegal purpose could not be consistent with charitable ends.\textsuperscript{19} In one of the most important cases in this area,\textit{Bob Jones University v. United States}, the Supreme Court, in denying tax-exempt status to an educational institution that engaged in racial discrimination, stated that:

\begin{quote}
to warrant exemption under section 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.\textsuperscript{20}
\end{quote}

As the above authorities demonstrate, to grant tax exemption to organizations that engage in activities that violate public policy would subvert the underlying purpose and historical underpinnings of the tax-exempt provisions of our income tax system.

B. Charitable Purpose, National Public Policy, and Race Discrimination in Private Schools

The impropriety of having the benefits of tax exemption support institutions that operate contrary to the law or to national public policy has been most extensively discussed, and most vigorously applied, in the context of the tax-exempt status of private schools that discriminate on the basis of race.

In response to the Supreme Court's decision in\textit{Brown v. Board of Education}\textsuperscript{21} and subsequent orders by local courts mandating the desegregation of the nation's public schools, racially segregated private schools rapidly began opening up in the Southern states. In 1970, a group of African-American parents and their minor children attending public school in Mississippi sued to enjoin the Treasury Department from recognizing the tax-exempt status of private schools in Mississippi with racially-discriminatory admissions policies.\textsuperscript{22} The U.S. District Court for the District of Columbia granted a preliminary injunction to the plaintiffs in\textit{Green v. Kennedy},\textsuperscript{23} enjoining the Service from recognizing private schools in Mississippi as tax-exempt "unless they have affirmatively determined on the basis of adequate investigation that the applicant school does not discriminate against Negroes in its admissions policy."\textsuperscript{24} In response to the court's orders, the

\begin{footnotesize}
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\item\textsuperscript{19}As additional support for its conclusion, the Service alluded to congressional policy that tax-exemption should be granted to organizations that relieve the government of a financial burden.
\item\textsuperscript{20}461 U.S. 574, 592 (1983).
\item\textsuperscript{21}347 U.S. 483 (1954).
\item\textsuperscript{23}Id.
\item\textsuperscript{24}Id. at 1131.
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Service issued two releases in 1970 in which, reversing its earlier position, it stated that it can “no longer legally justify allowing tax-exempt status . . . to private schools which practice racial discrimination.” Subsequent to the Service releases, the district court issued its final order in the Green case and enjoined the Service from approving tax-exempt status for any school in Mississippi that did not publicly maintain a policy of nondiscrimination. The order stated that “the Code requires the denial and elimination of Federal tax exemptions for racially discriminatory private schools and of Federal income tax deductions for contributions to such schools.”

In response to the court’s ruling in Green, the Service issued published guidance adopting the court’s position. In Revenue Ruling 1971-447, the Service ruled that a private school without a racially nondiscriminatory policy as to students does not qualify for exemption under section 501(c)(3). The Service defined a racially nondiscriminatory policy as:

meaning that the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

The Service acknowledged that the operation of such a school was not prohibited by federal law. Nevertheless, based on the existence of a national policy to discourage racial discrimination in education, the Service concluded that a school not having a racially nondiscriminatory policy as to students may not be considered charitable within the common law concepts reflected in sections 170 and 501(c)(3) and, accordingly, could not qualify as an exempt organization under section 501(c)(3).

In 1982, the Supreme Court reviewed the issue of the tax-exempt status of racially discriminatory private schools in the cases of Bob Jones University v. United States and Goldsboro Christian Schools v. United States. In Bob Jones University, the plaintiff Bob Jones University was a non-profit religious and educational institution “dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs.” As a result of such religious beliefs, Bob Jones University prohibited interracial marriage or dating by its students. Plaintiff Goldsboro Christian Schools was a non-profit primary and high school, also “giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures.” Goldsboro’s Christian beliefs led it to maintain a racially

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27Id. at 1156.
30Id. at 579.
31Id. at 580.
32Id. at 583.
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discriminatory admissions policy. In upholding the Service's denial of tax-exemption to the two organizations because of their racially discriminatory admission policies, the Supreme Court approved the doctrine enunciated by the Service in Revenue Ruling 1971-447:

There can thus be no question that the interpretation of § 170 and § 501(c)(3) announced by the IRS in 1970 was correct . . . . It would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities . . . . Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the "charitable" concept . . . or within the congressional intent underlying § 170 and § 501(c)(3).33

The Court agreed that in order to qualify for tax-exempt status under the Code, an organization must meet the "common-law standards of charity—that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."34

Acting upon the impetus provided by the court decisions described above, the Service in 1975 issued general guidelines governing the procedures private schools are required to follow with respect to a policy of non-racial discrimination, in order to ensure their tax-exempt status. Revenue Procedure 1975-5035 states that in order to qualify as an organization exempt from federal income tax, a school "must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith." Revenue Procedure 1975-50 also sets out detailed informational and record keeping requirements that an organization is required to maintain. They include records indicating the racial composition of the student body, faculty, and staff, records sufficient to document that scholarship and other financial assistance is awarded on a racially nondiscriminatory basis, and copies of all brochures, catalogues, and advertising dealing with student admission, programs and scholarships. The focal point of the Revenue Procedure, however, is the requirement that all schools adopt a policy of non-discrimination and that policy must be publicized to "all segments of the general community served by the school."36 The non-discriminatory policy must be included in the school's charter, bylaws, or other governing document, and a statement of the school's racially non-discriminatory policy is required to be included in all brochures and catalogues dealing with student admissions, programs, and scholarships. Compliance with the Service guidelines is necessary for private schools to obtain and maintain tax-exempt status.

31Id. at 595-96.
34Id. at 586.
351975-2 C.B. 587.
36Id.
With respect to private schools and racial discrimination, the Service has vigorously applied the common law notion that to qualify as charitable, organizations must operate and promote policies consistent with the national public policy. The courts, including the Supreme Court, overwhelmingly have upheld and ratified this Service policy and approved the application of the common law doctrine to the Service enforcement of sections 501(c)(3) and 170.

II. TERRORIST ORGANIZATIONS AND TAX EXEMPTION

A. Charities Engaged in Supporting Terrorism

Organizations that currently engage in the financing of terrorist activities via their status as U.S. tax-exempt organizations pose a threat to the public good, and to elementary justice, no less serious than that posed by racially discriminatory private schools. Charitable organizations that engage in such suspect activities form a not-insignificant part of the U.S. non-profit world. A 1996 report prepared by the CIA states that "approximately one-third of . . . Islamic [Non-Governmental Organizations] support terrorist groups or employ individuals who are suspected of having terrorist connections." The following discussion demonstrates the nature and magnitude of the problem of financing of terrorist organizations by U.S. tax-exempt organizations.

The Tax Court has stated that:

[o]rganizations qualifying for tax-exempt status under section 501(c)(3) are doubly rewarded. Not only do they not have to pay taxes, but they also stand in a better position to attract income since taxpayers who contribute to section 501(c)(3) organizations are permitted by section 170(c)(2) to deduct the amount of their contributions on their Federal tax returns.

In practical terms, this means that U.S. taxpayers effectively subsidize the work of tax-exempt terrorist-financing organizations to the tune of approximately 30% of the dollars such organizations raise in the United States, in addition to the tax benefits afforded to the organizations themselves.

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10Church of Scientology v. Commissioner, 83 T.C. 381, 505 n.75 (1987).
11Assuming donors are subject to, on average, a 30% income tax rate.
12It generally is well accepted that the tax benefits and deductions afforded tax-exempt entities may be equated to direct or indirect governmental support. See, e.g., Regan v. Taxation with Representation, 461 U.S. 540, 544 (1982) ("Both tax exemptions and tax deductibility are a form of
Two organizations that have had their assets frozen by the U.S. government, the Global Relief Foundation (Global Relief) and the Holy Land Foundation, were responsible for raising close to $20 million in the U.S. in 2001. Global Relief raised more than $5 million in the United States last year, while the Holy Land Foundation’s total revenue exceeded $13 million. A network of 11 charities based in Virginia, which includes the International Institute of Islamic Thought (IIIT), raised approximately $21.2 million between 1998 and 2001. These organizations have been alleged by NATO to be “involved in planning attacks against targets in the U.S.A. and Europe” and to act as fronts for al-Qaeda and other terrorist organizations (Global Relief), to engage in fundraising activities for the militant Palestinian group Hamas (the Holy Land Foundation) with the monies being used to recruit suicide bombers, and in the case of the IIIT, tied to Palestinian Islamic Jihad and Hamas, as well as to al-Qaeda.

The Virginia network of which the IIIT was a part also is linked to the Muslim World League and the International Islamic Relief Organization, both of which have “been probed a number of times over the years for links to terrorism.” The International Islamic Relief Organization (IIRO), with offices in Northern Virginia, allegedly has links to al-Qaeda, and its offices were raided by the U.S. government in March, 2002. The IIRO has been alleged to be

subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual’s contributions.“). *See generally* STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES (1973). For a more nuanced discussion of this complex subject, see, e.g., Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407 (1999).


44Hearings, supra note 39 (testimony of Matthew A. Levitt).


47Hearings, supra note 39 (testimony of Matthew A. Levitt). The Bosnian government has released a report tying Global Relief to the Taibah International Aid Association—an organization that, according to the report, has links to al-Qaeda and may have been engaged in terrorist financing. *See* Glenn R. Simpson, *Report Links Charity to an al-Qaeda Front*, WALL ST. J., Sept. 20, 2002, at A4.


49Ibid.

50Schmitt, Kurlantzick and Smucker, supra note 45. An employee of IIIT allegedly provided bin Laden with satellite phone equipment for his operations. *See* Hearings, supra note 39 (testimony of Matthew A. Levitt) (“It was clear that [he] had ties to terrorist organizations,” said an Immigration and Naturalization Service official who was present at his arrest.”).

51Schmitt, Kurlantzick and Smucker, supra note 45. *See also* Judith Miller, A Nation Challenged: The Money Trail, N.Y. TIMES, Mar. 21, 2002, at section A, page A.

52Miller, supra note 51; Simpson, supra note 40. For more information on the alleged activities of these organizations, *see* Hearings, supra note 39 (testimony of Matthew A. Levitt).
“[f]oremost among charities tied to Osama Bin Laden and al-Qaeda,” and also has been tied to the Abu Sayyaf Islamic group, which operates in the Philippines, and to a failed plot to destroy two U.S. diplomatic missions in India. In addition, the IIRO has been associated with a company called BMI Inc. In September 1988, a former accountant of BMI tied the money that he was transferring overseas on behalf of BMI to the financing of embassy bombings in Africa that had taken place a month earlier.

Many of these organizations are related in ways that make it difficult for investigators to trace the flow of funds between and among different groups. For example, in 1991, a Mr. Qadi, an investor in BMI, transferred $820,000 through one of his companies from a Swiss bank account to the Quranic Literacy Institute, a Chicago-based organization. The U.S. government has alleged that the Quranic Institute “lent substantial assistance, through means of repeated and possibly illegal subterfuge and misrepresentation, to a man who is an admitted operative of Hamas.” Mohammad Salah, an employee of the Quranic Literary Institute, was arrested in Israel in 1993 “with a large sum of cash and a cache of notes describing meetings with various Hamas cells,” and later pled guilty in an Israeli court “to being a top Hamas operative involved in raising money for the terror group.” A 1995 confession by Mr. Salah stated that while in Chicago “in the early 1990s, he trained recruits to work with ‘basic chemical materials for the preparation of bombs and explosives,’ as well as various toxins.” Mr. Salah has also been identified with the Taibah International Aid Association, another Islamic organization with alleged links to terrorist groups, and was an officer of yet another charity, the Safa Trust. The U.S. government alleges that the Safa Trust has been active in supporting terrorist activities.

Many of the organizations that operate under tax-exempt status in the U.S. but have demonstrated relationships to terrorist organizations do some charitable work in addition to their terrorism-sponsoring activities. For example, the al-Wafa Humanitarian Organization, a Saudi charity, has been described as doing

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53Hearings, supra note 39 (testimony of Steven Emerson).
54Mark Huband, Bankrolling bin Laden, FIN. TIMES, Nov. 29, 2002.
55When arrested at the Delhi train station, the suspected ringleader of the plot told police that he had been working for the International Islamic Relief Organization. Dexter Filkins, Attacks on U.S. Missions Foiled, Indian Police Say, LOS ANGELES TIMES, Jan. 21, 1999, at A4.
56BMI’s other investors included Mousa Abu Marzouk, a top Hamas leader. Glenn R. Simpson, Report Links Charity to an al-Qaeda Front, supra note 47.
57Simpson, supra note 39. Another company, Abrar Investments Inc., jointly invested more than $2 million with the IIRO in a Chicago chemical company, Global Chemical. The president of Global Chemical, Mohammed Mabrook, was a Libyan immigrant and Islamic activist who had worked for a pro-Palestinian group headed by Mr. Marzouk, a leader of the Hamas terrorist organization with ties to BMI. Two of the IIRO’s top officials allegedly owned a total of a 20% percent interest in Global Chemical. Id. (information taken from FBI affidavit).
58Id.
59Id.
60See supra note 48.
61Simpson, Report Links Charity to an al-Qaeda Front, supra note 47. See also Hearings, supra note 39 (testimony of Matthew A. Levitt).
"a small amount of legitimate humanitarian work and rais[ing] a lot of money for equipment and weapons," while it also has been described as "a key part of Mr. bin Laden’s organization." The Al Rashid Trust and Global Relief are engaged in charitable relief work, yet also are suspected "here and abroad of funneling money to al-Qaeda or other terrorist organizations." The Al Rashid Trust, a charitable organization with ties to al-Qaeda, had its assets frozen by executive order in October 2001. The organization "proclaims having ‘aided widows and orphans of martyrs,’ which many interpret as providing funds to the families of suicide bombers and other terrorists." The Al Rashid Trust also has been linked to the militant group whose members were convicted of the murder of Wall Street Journal reporter Daniel Pearl in January 2002. As this material makes clear, terrorist financing activities often may be masked by legitimate humanitarian works carried on by these same organizations.

While the relationship between the organizations discussed above and terrorism for the most part involves terrorist financing, the activities of a number of U.S. charities apparently have gone beyond merely providing financial resources to terrorist operations. The Mercy International Relief Organization, for example, is said to have played a role in the 1998 bombings of the U.S. embassies in Nairobi and Tanzania, in the 1993 World Trade Center bombing, and in planned bombings in Bosnia. L’Houssaine Khertchou, who was convicted of the 1998 bombings of the U.S. embassies in Nairobi and Tanzania, testified during his trial that in Nairobi, "al-Qaeda members there were ‘dealing with’ Mercy International Relief Agency," and related how the organization assisted both Muhammed Atef, the military training chief of al-Qaeda, and Osama bin Laden. On Mercy International’s payroll in Pakistan were relatives of Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing. Relation-

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63 Id.
64 Schmitt, Kurlantzick and Smucker, supra note 45. Mr. Levitt stated that of the money raised by the Global Relief Foundation, “much—perhaps most—of these funds likely went to legitimate causes.” Hearings, supra note 39 (testimony of Matthew A. Levitt).
65 Schmitt, Kurlantzick and Smucker, supra note 45.
66 Karl Vick and Kamran Khan, Officials Say Body Probably is Pearl’s; New Suspect Claims he Killed Reporter, WASH. POST, May 18, 2002, at A01; see also Hearings, supra note 39 (testimony of Matthew A. Levitt).
67 Schmitt, Kurlantzick and Smucker, supra note 45.
68 The Levitt Testimony details the role played by the Mercy International Relief Organization in the 1998 U.S. embassy bombings. See also Huband, supra note 54 (quoting the testimony of U.S. prosecutors regarding Mercy International that it “had a legitimate charitable purpose, but it had other purposes “‘contrary to that’”); Hearings, supra note 39 (testimony of Steven Emerson) (“Mercy International was one of the organizations that was used to support the network of Al Jihad when it was conducting its operation against American embassies in East Africa when they were blown up.”).
69 Huband, supra note 54.
70 Id.

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ships have also been established between Mercy International and BMI, the investment vehicle accused of funding the African embassy bombings. 71

The above excerpts from newspaper articles and other public documents, while providing a small snapshot of the information available on charitable organizations with ties to terrorism, amply demonstrate the extent to which terrorist financiers have operated with impunity in the United States, taking advantage of this country’s freedoms, and effectively receiving indirect federal government support for their heinous crimes and plots. Furthermore, the material also demonstrates the difficulties the U.S. government faces in closing down such organizations, even when there exists numerous pieces of evidence documenting links between funds raised by an organization and terrorist activities. 72

B. Government Attempts to Date with Respect to Charitable Organizations Supporting Terrorism

As a means of curtailing the activities of the types of organizations outlined above, the primary weapon of the U.S. government has been the blocking of assets, a tactic which it has used more aggressively since September 11, 2001. 73 For example, shortly after September 11, the government froze the assets of 27 organizations it alleged were linked to al-Qaeda, including the al-Wafa Humanitarian Organization and the Al Rashid Trust. 74 On December 3, 2001, the government froze the assets of the Holy Land Foundation for Relief and Development, and on December 14, 2001, it blocked the assets of the Benevolence International Foundation, Inc. and Global Relief Foundation, Inc. 75

The U.S. government’s authority for issuing blocking orders such as the ones detailed above is derived from an Executive Order issued by President Bush on September 23, 2001. Pursuant to Executive Order 13,224 the President declared a national emergency, by reason of the threat of continuing and immediate attacks on the United States by foreign terrorists. 76 The Executive Order states that “because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists.” 77
rorism is defined for these purposes as an activity that involves a violent act or an act dangerous to human life, property, or infrastructure; and appears to be intended to intimidate or coerce a 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, kidnapping, or hostage-taking. Executive Order 13,224 blocks the assets of certain foreign persons and organizations, and assets of persons that assist, sponsor, or provide financial, material, or technological support for acts of terrorism or certain specified terrorist organizations or persons. The Executive Order also prohibits U.S. persons from making certain donations to such persons or organizations, as covered in the International Emergency Economic Powers Act (IEEPA).

Executive Order 13,224 builds upon concepts enunciated in Executive Order 12,947, issued by President Clinton in 1995. Executive Order 12,947, entitled “Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process,” was issued in response to the violent acts of terrorism that the President found constituted “an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”

Specifically, the Executive Order provides that the assets of the following are blocked:

(a) foreign persons listed in the Annex to this order;

(b) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States;

(c) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of 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;

(d) except as provided in section 5 of this order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General; (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.


Section (b)(2) of the International Emergency Economic Powers Act (“IEEPA”) (50 U.S.C. § 1702(b)(2)) provides that generally the authority granted to the President by section 1702 does not include the authority to regulate or prohibit “donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations would seriously impair his ability to deal with any national emergency . . . or would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances” (emphasis added).

Order 12,947 blocks the assets of certain persons specified in an Annex to the Order and of foreign persons designated by the Secretary of State, in coordination with the Secretary of the Treasury and the Attorney General, who are found to have committed certain prohibited acts, or to pose a significant risk of disrupting the Middle East peace process, or to assist in, sponsor or provide financial, material, or technological support for, or services in support of, such acts of violence; persons found to act for or on behalf of the above persons are also subject to the Order. The Order further blocks all property and interests in property subject to U.S. jurisdiction in which there is any interest of persons determined by the Secretary of the Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of any other person designated pursuant to the Order (collectively "Specially Designated Terrorists" or "SDTs"). Executive Order 12,947, like Executive Order 13,224, specifically prohibits donations to the persons specified in the Order.

Regulations issued by the Treasury Department define SDTs to mean:

1. Persons listed in the Annex to Executive Order 12,947;
2. Foreign persons designated by the Secretary of State, in coordination with the Secretary of the Treasury and the Attorney General, because they are found:
   i. To have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of disrupting the Middle East peace process, or
   ii. To assist in, sponsor, or provide financial, material, or technological support for, or services in support of, such acts of violence; and
3. Persons determined by the Secretary of the Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of, any other specially designated terrorist.

The regulations prohibit charitable contributions to or for the benefit of a SDT, and provide that:

A contribution or donation is made to or for the benefit of a specially designated terrorist if made to or in the name of a specially designated terrorist; if made to or in the name of an entity or individual acting for or on behalf of, or owned or controlled by, a specially designated terrorist; or if made in an attempt to

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84 Executive Order No. 13,224 and Executive Order No. 12,947 were issued partially under the authority derived from the IEEPA. The IEEPA provides the President with the authority, in the circumstance of an unusual and extraordinary threat with respect to which a national emergency has been declared, to investigate, regulate, or prohibit, among other activities, transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof, and the importing or exporting of currency or securities. 50 U.S.C. §§ 1702(a)(1), 1701.
85 31 C.F.R. § 595.311.

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violate, to evade or to avoid the bar on the provision of contributions or donations to specially designated terrorists. 86

The presidential authority with respect to the Executive Orders set forth above is derived principally from the Antiterrorism and Effective Death Penalty Act of 1996 (the Antiterrorism Act). 87 The Antiterrorism Act, recognizing that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States," was enacted to "provide the Federal Government the fullest possible basis, consistent with the Constitution, to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities." 88 The Antiterrorism Act makes it a crime to knowingly provide material support or resources to a foreign terrorist organization (FTO). 89 An FTO is specifically defined by the Antiterrorism Act as a foreign organization designated as such by the Secretary of State, if the Secretary finds that the foreign organization engages in terrorist activity 90 and the terrorist activity of the organizations threatens the security of the United States nationals or the national security of the United States. 91 The Antiterrorism Act also makes it a criminal offense for U.S. persons to provide material support or resources to FTOs and requires financial institutions to block all funds in which FTOs or their agents have an interest. 92

Terrorist activity is defined for these purposes as any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves the highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle); the seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; a violent attack upon an internationally protected person 93 or upon the

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86 31 C.F.R. § 595.408.
88 18 U.S.C. § 2339B.
90 For these purposes, terrorist activity is defined in the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B).
92 18 U.S.C. § 2339B. The term "material support or resources" is defined in 18 U.S.C. § 2339A(b) as "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, transportation, and other physical assets, except medicine or religious materials."
93 See 18 U.S.C. § 1116(b)(4) (defining "internationally protected person").

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liberty of such a person; an assassination; the use of any—(a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; or a threat, attempt, or conspiracy to do any of the foregoing.\(^9\)

The first designated FTOs were identified as such by Secretary of State Albright in 1997.\(^9\) As of January 30, 2003, the number of designated FTOs stands at 36 and the U.S. government has named over 250 organizations and individuals as financiers of terrorism.\(^6\) Close to $125 million assets have been frozen worldwide since September 11, 2001, approximately $35 million in the U.S.\(^7\)

The number of individuals and organizations, and the amounts involved, suggest the practical and legal difficulties the government faces in acting under the authorities set forth above. With respect to the Holy Land Foundation, for example, despite evidence linking it to Hamas through the 1990s,\(^8\) the Foundation was able to continue to operate and raise funds in the U.S. because of the logistical hurdles involved in building a legal case around the relationship between the organization's funds and terrorist activities.\(^9\) The difficulty the government faced in shutting down an organization such as the Holy Land Foundation.

\(^{9}\)See Simpson, supra note 48.
\(^{9}\)Id. See also Cohen, Simpson, Maremont and Fritsch, supra note 62 ("seven years of legal efforts in U.S. courts to prove allegations that several Islamic charities were fronts for terrorist activities have gone nowhere.").
tion, despite nine years of surveillance and documented ties to terrorist organizations, demonstrates "the difficulties of rooting out terror financiers in an open society that is hesitant to squelch political or religious advocacy." 100

III. PROPOSALS FOR REFORM

The foregoing discussion makes several things quite clear. First, there is a compelling national interest in precluding identified terrorists and their organizations from using the freedoms this country traditionally supplies as a means of fostering their unacceptable activities and purposes. Second, however, those freedoms cannot be generally dispensed with in order to prevent such use. Third, particularly where charitable organizations are concerned, it is necessary to sort between the acceptable public benefits they provide and their activities that are detrimental to the public good of this country. From the standpoint of the Code, those benefits depend on the indirect subsidies supplied by sections 170 and 501(c)(3). The Service is well-positioned to take affirmative action to ensure that U.S. taxpayer's dollars are not used to support improper activities, and it can do so within the framework of existing law without impinging on the proper entitlement of exempt organizations acting consistently in support of the public good. Several proposals to that effect follow.

A. Issue Public Guidance Similar to Revenue Procedure 1975-50

The Service should use guidelines patterned on those set forth in Revenue Procedure 1975-50, described in Part I, above, to prevent the abuse of our tax system by domestic organizations that fund terrorist activities abroad. Under Revenue Procedure 1975-50, the Service requires all educational institutions seeking tax-exempt status to adopt and make public a policy of non-discrimination in their organizational documents. The Service should adopt similar requirements with respect to organizations seeking to qualify as charitable organizations that send money overseas. All such organizations should be required to state that they have adopted a policy of not supporting terrorist activities, and to publicize such statements, both in the general press and in brochures seeking donations. 101 The Service should also apply record-keeping requirements similar to those of Revenue Procedure 1975-50 to international charities, and all organizations funding international activities should be required to keep copies of all brochures and information demonstrating their compliance with a policy of non-

100 Simpson, Hesitant Agents: Why the FBI Took Nine Years to Shut Group it Tied to Terror, supra note 48; see also Simpson, U.S. Knew of Terrorist, Charity Ties, supra note 38.

101 Members of the ABA Tax Section have made a similar recommendation. See ABA Section of Taxation Exempt Org. Comm., Comments Pursuant to Internal Revenue Service Announcement 2002-87, 2002-39 I.R.B. 624, on Form 990 Series Developments and Request for Comments Regarding Possible Changes (Feb. 11, 2003), printed in TAX NOTES TODAY (Feb. 12, 2003) (suggesting amendments to Form 990 that would ask tax-exempt organizations to obtain signed agreements from foreign grantees "limiting the use of grant funds to purposes and activities within the scope of Code Section 501(c)(3) and requiring the grantee to refrain from using the grant funds to support or promote violence or terrorist organizations").

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support of terrorist activities (as described in greater detail below).

There are those who will argue that the proposal outlined above, requiring an affirmation against the funding of terrorist activities, is tantamount to or may ultimately lead to the conditioning of the grant of tax exemption on the expression of support for a current political regime, and that such a requirement would constitute an impermissible infringement on the constitutional right of free speech. In *Speiser v. Randall,* 102 the Supreme Court struck down as an impermissible restriction on free speech a California law that conditioned the grant of a property tax exemption upon the taxpayers' undertaking an oath that they did not advocate the overthrow of the governments of California or the United States. Although the Court acknowledged that speech can be "effectively limited by the exercise of the taxing power," 103 it nevertheless concluded that, given the fundamental importance of the right, the method chosen by California imposed an overly restrictive burden on the taxpayers' rights to free speech. The Court's concern was that California's policy placed upon the taxpayers the burden of demonstrating that they met the requirements for tax exemption; the Court held that such an allocation of the burden of proof in a freedom of speech issue did not meet the requirements of due process. 104 The Court found that because of the important role of free speech in a democratic society, "[w]hen the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights." 105

The oath required by the California government in *Speiser* differs from the proposal outlined above in that the present proposal does not prohibit any individual or organization from advocating any particular position vis-à-vis terrorist activities and the overthrow of the U.S. government. Rather, the suggested Service guidelines relate to the specific activities of the organization seeking tax exemption. The distinction is between asking an organization to make a statement regarding its beliefs, which imposes a restriction on free speech, and asking an organization to make a statement about its activities. The Courts' greatest concern in this area appears to be focused on legislation that results in the "suppression of dangerous ideas." 106 Asking an organization to make a statement about whether it provides support to criminal activities does not interfere with one's ability to speak freely. Another concern expressed by the *Speiser* Court, the lack of a demonstrated nexus between the harm the government was attempting to address and the burdens imposed upon the individual's constitutional rights, also distinguishes *Speiser* from the present proposal. 107 As Part II indicates, there is sufficient evidence to justify the government's attempt to withhold

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103Id. at 518 (citing Grosjean v. American Press Co., 297 U.S. 233 (1936)).
104Id. at 523, 528-29.
105Id. at 521.
107"[W]e hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser,* 357 U.S. 513, 528-29 (1958).
tax exemption from organizations that fund terrorist activities as a serious threat to government and national security. Thus, the above proposal differs from the statement required of the taxpayer in Speiser because of the limited nature of the prohibited practice, and the demonstrated connection between specific acts of harm. Rather than a general prohibition against advocacy, the proposal addresses a limited class of activities, and specified groups or individuals, whose activities have been linked to mass murder and have as their aim the destruction of our free society. Thus, the proposal should not fall into the category found unlawful by the Court in Speiser.

Furthermore, the Supreme Court has distinguished Speiser on numerous occasions. In Regan v. Taxation With Representation, the Court upheld the Service’s denial of tax exemption to Taxation With Representation (TWR) under section 501(c)(3) on the grounds that a substantial part of TWR’s activities would consist of lobbying, which is not allowed under section 501(c)(3). TWR argued that conditioning tax-exempt status upon the taxpayer’s refraining from undertaking lobbying activities constituted an impermissible restriction on its First Amendment rights. The Court rejected the taxpayer’s argument, holding that the mere refusal by Congress to subsidize the taxpayer’s activities did not give the taxpayer a constitutional claim, and that it had “never held that Congress must grant a benefit . . . to a person who wishes to exercise a constitutional right.” In several other cases, the Supreme Court has held that “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.” As the district court for the District of Columbia stated in Green v. Connally, “freedom from governmental ‘regimentation’ or interference is not to be equated with a right of support.”

In the 1973 case of Norwood v. Harrison, the Supreme Court drew the distinction between the constitutional rights of individuals to organize to promote their goals, and any constitutional right such individuals may have to mandate government support for those goals. In Norwood, parents of schoolchil-
H. John's children in Mississippi sued the State of Mississippi to enjoin the enforcement of the State's textbook lending program, which provided books to private schools without investigating whether such schools pursued a policy of racial discrimination. The State of Mississippi argued that striking down its textbook program would constitute a violation of the equal protection rights of its citizens who were entitled to send their children to a school of their choice. The Supreme Court rejected that argument, distinguishing its earlier precedents, which had affirmed the right of citizens to maintain private schools with "admission limited to students of particular national origins, race, or religion." The Court's statements are instructive, and equally applicable to similar arguments that may be made in the present context, namely that the requirement that exempt-organizations adopt a statement of nonsupport for terrorism would violate constitutional rights:

In Pierce, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

The Norwood decision was predicated upon the analogy the Court drew between state tuition grants to students attending racially discriminatory private schools and a textbook lending program, and its conclusion that a textbook lending program, like a tuition grant, is a form of state subsidy that may be restricted by the government without the infringement of constitutional rights.

Similarly, in Bob Jones University, the plaintiffs' racial-discriminatory policy in their schools was based on their sincerely held religious beliefs. Nevertheless, the Supreme Court held that the denial of tax exemption did not interfere with the plaintiffs' First Amendment rights to the free exercise of their religious beliefs, given the compelling government interests at stake. Recognizing that the denial of tax benefits would have a substantial impact on the operation of these schools, the Court nevertheless found that the governmental interest substantially outweighed whatever burden the denial of tax exemption placed upon the plaintiffs' exercise of their religious beliefs. One may also argue that the Court's decision in Bob Jones University, although it did not specifically consider the validity of the requirements of Revenue Procedure 1975-50, gave an

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114Norwood, 413 U.S. at 457 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925)).
115Id. at 462. See also Lemon v. Kurtzman, 403 U.S. 602, 640 (1971) (Douglas, J., concurring) (confirming validity of precedents holding that use of taxpayer funds to support parochial schools violates the First Amendment).
116Norwood, 413 U.S. at 463 and cases cited therein.
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implicit blessing to these guidelines by explicitly approving the Service’s policy and procedures in enforcing the policy of Revenue Ruling 1971-447. The proposal outlined above should no more be considered a restriction on free speech than such restrictions as may be imposed upon educational institutions under Revenue Procedure 1975-50.

The court decisions, however, also point to the difficulty of setting forth appropriate guidelines in this area, given the strong constitutional interests at stake. In Big Mama Rag, Inc. v. United States,118 the D.C. Circuit Court of Appeals overturned the district court’s decision upholding the Service’s denial of tax exemption to Big Mama Rag, “a nonprofit organization with a feminist orientation.”119 The Service had determined that Big Mama Rag’s activities of publishing a newspaper were commercial in nature, and that neither the content of the publication nor the distribution of the newspaper was “valuable in achieving an educational purpose.”120 The relevant regulations at the time provided that an organization may be educational even though it advocates a particular position or viewpoint, so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion.121 The Service found that Big Mama Rag failed to meet the criteria of educational as then defined in its regulations because its “doctrinaire” stance failed to provide a “sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion.”122 In overturning the lower court’s decision, the court of appeals cited approvingly to Speiser for the proposition that “although First Amendment activities need not be subsidized by the state, the discriminatory denial of tax exemptions can impermissibly infringe free speech.”123 Due to those concerns, the court found that the regulations defining “educational” were impermissibly vague and therefore violated the First Amendment.124

Big Mama Rag is indicative of the courts’ concerns regarding the impact of the tax laws on constitutional values, and the harsh scrutiny to which tax laws that impact on constitutional concerns are subject. It also indicates to the Service the perils of attempting to regulate in areas at the intersection of the tax law with constitutional law. Similarly, recognizing that a trust that violates public policy

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118631 F.2d 1030 (D.C. Cir. 1980).
119Id. at 1032.
120Id. at 1033 n.4. The Service’s National Office denied tax-exempt status on three grounds: “1. the commercial nature of the newspaper; 2. the political and legislative commentary found throughout; and 3. the articles, lectures, editorials, etc., promoting lesbianism.” Big Mama Rag, 631 F.2d at 1033 n.2.
123Big Mama Rag, 631 F.2d at 1034.
124“What makes an exposition ‘full and fair’? Can it be ‘fair’ without being ‘full’? Which facts are ‘pertinent’? How does one tell whether an exposition of the pertinent facts is ‘sufficient . . . to permit an individual or the public to form an independent opinion or conclusion’? And who is to make all of these determinations?” Id. at 1037.

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is illegal, the commentators have acknowledged the subjectivity of this notion. Nevertheless, the close ties between the identified harm and the government’s remedy in the present case should prevent application of the type of analysis employed by the court in *Big Mama Rag*. In addition, the support of terrorist activities, no less than racial discrimination, “violates a most fundamental national public policy, as well as rights of individuals.” In *Norwood*, the Court distinguished between a private parochial school, which may receive certain forms of state aid without violating the Establishment Clause of the First Amendment, and racially discriminatory private schools, regarding which it found that “the legitimate educational function cannot be isolated from discriminatory practices.” A requirement that organizations benefiting from the support of our government through their tax-exempt status publicly renounce the support of terrorist activities compromises no one’s right to free speech, but simply ensures that such beliefs will not be supported by taxpayer dollars.

**B. Require More Information on Form 990**

As described in Part II, above, U.S. law already identifies a class of organizations to which the provision of material support (defined to include financial support) is illegal. Furthermore, the government specifically has designated identifiable organizations as financiers of terrorism pursuant to executive orders and Treasury Department regulations. Form 990 should provide more specific questions to ensure that no funding from domestic tax-exempt organizations is channeled to such designated organizations.

Form 990 is a required filing for most non-profit organizations claiming tax-exempt status under section 501(c)(3). Section 6033, which sets forth the statutory obligation to file the Form 990, generally provides that:

> every organization exempt from taxation under section 501(a) shall file an annual return, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the internal revenue laws as the Secretary may by forms or regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and comply with such rules and regulations as the Secretary may from time to time prescribe.

Form 990 asks the organization questions regarding its finances and administration, about any relationships it may have with tax-exempt organizations not described in section 501(c)(3), and for other information designed to ensure that individuals connected to the charity are not the recipient of excess benefits from

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125 *See Austin Wakeman Scott, IV The Law of Trusts* § 377 (3d ed. 1967) (“Questions of public policy are not fixed and unchanging, but vary from time to time and from place to place. A trust fails for illegality if the accomplishment of the purposes of the trust is regarded as against public policy in the community in which the trust is created and at the time when it is created”); *see also Bob Jones Univ.*, 461 U.S. 574, 592 (1983) (“The institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.”).

126 *Bob Jones Univ.*, 461 U.S. at 593.

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On September 4, 2002, the Service issued a request for comments on proposed changes to Form 990. In it, the Service specifically asked for comments with respect to changes that would more effectively identify on Form 990 transactions that present a risk of the diversion of charitable funds, in response to the concern that "has been expressed that purportedly charitable organizations may be transferring funds outside the United States to organizations or individuals suspected of supporting terrorist activities." To that end, a new Part VIII should be added to Schedule A of Form 990.

Schedule A of Form 990 requires additional supplementary information from section 501(c)(3) organizations. Some of the information requested is required of all section 501(c)(3) organizations, to enable the Service to make a determination that non-private foundation status does not apply to the organization. Other information is requested only of particular types of organizations. Notably, Part V only applies to private schools, and asks for information regarding whether the organization has complied with the policies of Revenue Procedure 1975-50, and whether the organization has maintained records to demonstrate the racial composition of the school and the racial discrimination policy as evidenced in brochures and other material intended to solicit students and provide information about the school.

A new series of questions, in a new section of Form 990, should pose screening questions of charitable organizations that send money abroad, similar to those applicable to educational institutions. As a preliminary matter, Form 990 should ask what percent of an organization's funds are sent (i) directly abroad; and (ii) to organizations that had as their stated purpose charitable efforts abroad. Schedule A then should require organizations that sent more than a specified threshold of money abroad to answer additional questions. To the extent that

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128 See generally BNA TAX MANAGEMENT PORTFOLIOS, 868-1st T.M., Tax Issues of Religious Organizations, 868-1st T.M. IV-B.
129 Announcement 2002-87, 2002-39 I.R.B. 624 (Sept. 4, 2002). Since then, the Service also has requested comments on revising various other aspects of tax forms and regulations that would improve oversight of charitable organizations. In Announcement 2002-92, 2002-41 I.R.B. 709 (Oct. 15, 2002), the Service asked for comments on changes to Form 1023; and in Announcement 2003-29; 2003-29 I.R.B. 1 (May 2, 2003), the Service announced that it was considering new guidance to clarify standards and requirements for international grant-making and international activities.
130 Announcement 2002-87.
131 Form 990, Schedule A, generally requires the following information to be provided by private schools claiming tax-exempt status: whether the organization has a racially nondiscriminatory policy toward students evidenced by statements in its charter, bylaws, other governing instrument; whether the organization includes a statement of its racially nondiscriminatory policy in its brochures, catalogues, and other written communications; whether the organization has publicized its racially nondiscriminatory policy through newspaper or broadcast media; and whether the organization maintains records indicating the racial composition of the student body, faculty, and administrative staff and documenting that scholarships and other financial assistance are awarded on a racially nondiscriminatory basis. Form 990 also requires an organization to certify that it has complied with the applicable requirements of sections 4.01 through 4.05 of Revenue Procedure 1975-50, 1975-2 C.B. 587, covering racial nondiscrimination.
guidelines similar to the ones in Revenue Procedure 1975-50 are adopted, Schedule A could ask whether those guidelines have been followed. Additionally, Schedule A should ask whether (i) any funds go to organizations that have been named as a SDTG; (ii) any funds have gone to individuals who have been affiliated with an SDTG; and (iii) any funds have gone to an organization established to have a link to an SDTG, or engaged in terrorist activities.

The general Form 990 asks for a list of officers and directors of the section 501(c)(3) organization. Schedule A should ask the organizations specified above for additional information about their officers and directors, such as whether any of those individuals have ever been affiliated with an SDTG. Schedule A also should require the organization to certify to that effect. Finally, Schedule A should ask whether the organization has ever been the recipient of a request for information from the U.S. government in connection with alleged affiliations with SDTGs.

It is quite possible that organizations involved in legitimate international humanitarian works may protest the above proposal as imposing overly burdensome requirements upon their good works. Organizations involved in terrorist financing, the argument goes, are unlikely to provide any helpful information in response to the proposed questions, and the proposal therefore will result in unproductive and burdensome reporting requirements on organizations that are trying to help the needy with budgets that always fall short. Such organizations may argue that the expenditure reporting requirements imposed by section 4945 already pose far too great a burden on those engaged in charitable efforts, and that any additional requirements will further hinder the efforts to help the indigent peoples of the world. Admittedly, these claims have some merit, but they are outweighed by the seriousness of the problem of the abuse of our current system by terrorist financiers. Because of the documented evidence regarding the use of our system of tax exemption by terrorist-funding organizations, in granting tax exemption to organizations involved in international charitable efforts, the government must weigh the humanitarian needs of the poor of the world against the safety of its own citizens and the survival of its state.

\[1^{132}\] The Independent Sector, a coalition of 700 national nonprofit philanthropic organizations, has already made a public statement in opposition to such a proposal. See Independent Sector, Comments in Response to Announcement 2002-87 (Feb. 1, 2003), printed in Tax Notes Today (Feb. 12, 2003):

We oppose requiring separate schedules for grants made to foreign recipients and imposing any other additional reporting obligations on exempt organizations with foreign operations, foreign grant-making programs and other types of business relationships with foreign parties. While we understand the interest in protecting against the risk that exempt organizations' funds could be diverted for terrorist or other inappropriate activities, we do not believe that there is any basis for the IRS to impose such significant burdens on all exempt organizations that have ties to foreign countries. Despite the large scale of US charities' activities in foreign countries—from aid and missionary organizations to university branches and scientific research organizations—and the substantial amount of U.S. charities' expenditures in foreign countries, there is no evidence to indicate widespread abuse of such funds for terrorist purposes.

\[1^{133}\] Id.
Surely, in such a balance, the government's need to combat worldwide terrorism directed at U.S. citizens and interests outweighs the burden additional reporting obligations may impose upon legitimate charities. Furthermore, the need to be more circumspect in their financial dealings and the information reporting requirements may make it more difficult for some organizations that otherwise would operate easily under tax-exempt status to finance terrorist activities, and may require that their attempts to do so are undertaken without the support of U.S. taxpayers. Finally, at a minimum, the violent acts accomplished and proposed by these groups mandate that the U.S. government take some active and public steps to attempt to restrict the benefits provided to such organizations by our system of tax exemption.

Admittedly, there are practical considerations involved in this proposal in connection with the burdens it would impose upon the Service. Given that the Exempt Organizations Division is already severely limited in its ability to perform its primary function of tax determination and collection, there exists an argument that the Service should not be involved in anti-terrorist battles. Nevertheless, the fact that the Exempt Organizations Division may not presently be equipped for oversight of terrorist financing such consideration does not mitigate the fact that in allowing a tax benefit to organizations in the form of tax exemption, the government has an obligation to make sure that this benefit is not abused, and to organize its administrative capabilities accordingly.

C. Legislative Changes

The Service's authority to undertake such regulatory changes specifically is provided by Executive Order 13,224, which directs the Secretary of the Treasury to promulgate rules and regulations, and to employ all powers granted to the President by statute as may be necessary to carry out the purposes of the Executive Order. Furthermore, the Service's authority to respond to "changing conditions and new problems" in its interpretation of the Code was recognized by the Supreme Court in *Bob Jones University*, when the Court explicitly rejected the plaintiff's claim that the Service exceeded its authority in the promulgation of Revenue Ruling 1971-447.134

Nevertheless, in response to those who would argue that the Service lacks the authority to adopt the policies outlined above without specific legislative guidelines, section 501 should be amended to make Congress' intent clear in this regard. Such legislative changes would not be unprecedented. Section 501 has been amended over the years to specifically enumerate certain organizations that should be considered as having a charitable purpose. In addition, section 503(a) provides for the denial of exemption to certain organizations. Section 503(a) also could be amended to deny exemption to organizations that fund terrorist activities.

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134 *Bob Jones Univ.*, 461 U.S. 574, 596 (1983). *But see id. at 622 (Rehnquist, J., dissenting)* (arguing that Congress' failure to legislatively deny tax-exemption to educational institutions that practice racial discrimination prevents the Service and the Court from adopting such a policy).

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Similar legislative proposals have been made in both the House and the Senate. The Care Act of 2003, passed by the Senate on April 9, 2003, provides for an amendment to section 501 that would suspend the tax-exempt status of an otherwise qualifying tax-exempt organization once the organization has been designated as a terrorist organization or supporter of terrorism. The provision also makes such an organization ineligible to apply for tax exemption under section 501(a). The House has introduced a similar measure.

Congress’ legislative mandate also may be derived from the Financial Action Task Force on Money Laundering, which on October 31, 2001, at a special plenary meeting, issued Special Recommendations on Terrorist Financing, which included the following statement:

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organizations are particularly vulnerable, and countries should ensure that they cannot be misused:

i. by terrorist organisations posing as legitimate entities; ii. to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and iii. to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

Furthermore, Congress should amend section 6033 to specify additional information to be required of a section 501(c)(3) organization in its annual filing on Form 990. In section 6033, Congress provided a detailed list of the information it requires from charitable organizations on an annual basis. Although the statute also gives the Service discretion to require additional information and

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[135]See The Care Act of 2003 § 208, S. 476 (Apr. 9, 2003); Joint Comm. On Taxation, Technical Explanation of the Revenue Provisions of S. 476, The Care Act of 2003 (May 12, 2003). Specifically, the bill denies tax exempt status to any organization designated under section 212(a)(3)(B)(vi)(II) or 219 of the Immigration and Nationality Act as a terrorist organization or foreign terrorist organization; in or pursuant to an Executive Order related to terrorism and issued under the authority of the International Emergency Economic Powers Act or section 5 of the United Nations Participation Act of 1945 for the purpose of imposing on such organization an economic or other sanction; or, in certain cases, pursuant to an Executive Order.


[138]The statute enumerates 13 specific items of information that must be provided, including the organization’s gross income for the year; its expenses attributable to such income and incurred within the year; its disbursements within the year for the purposes for which it is exempt; the respective amounts (if any) of the taxes imposed on the organization; or any organization manager of the organization, during the taxable year under any of the following provisions (and the respective amounts (if any) of reimbursements paid by the organization during the taxable year with respect to taxes imposed on any such organization manager under section 4911, section 4912, and section 4955; and such information as the Secretary may require with respect to any excess benefit transaction (as defined in section 4958). See I.R.C. § 6033(b).
provides that the annual filing must include "such other information for purposes of carrying out the internal revenue laws as the Secretary may require,"\textsuperscript{139} a more specific requirement by Congress would provide insulation from a later attack on the validity of the Service's actions.

IV. CONCLUSION

There exist numerous organizations that have claimed tax-exempt status under our income tax laws, and have used the resulting privileged status to support terrorist organizations that have as their fundamental creed the destruction of the United States. There is no justification for the continued use of U.S. taxpayer dollars to subsidize the activities of those who wish to destroy it. Organizations that finance terrorism obviously do not benefit the general public, and clearly violate established public policy. They should not be entitled to tax exemption under the Code.

To combat the financiers of terror operating through tax-exempt entities in this country, the Service should impose informational requirements on charitable organizations that send money abroad, similar to the requirements imposed upon educational institutions. That information should identify the foreign recipients of the funds, including details about the individuals governing or playing a significant role in any such recipient organizations. In 1982 the Supreme Court, in upholding the Service's ability to deny tax exemption to two schools with racially discriminatory policies, stated that "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice."\textsuperscript{140} Similarly, there can no longer be any doubt that organizations that fund terrorism seek to violate the most precious rights of life, liberty and the pursuit of happiness. The Service should implement better procedures to prevent taxpayer dollars from being used to support them.

\textsuperscript{139}I.R.C. § 6033(b)(14).

\textsuperscript{140}Bob Jones Univ., 461 U.S. 574, 592 (1983).