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by Matthew H. Simmons

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In the wake of the September 11 attacks (9/11), representing Middle Eastern clients, particularly Muslims who are under investigation by the government, presents unique challenges. As Alexander Hamilton wrote, "'[n]othing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves.'" *United States v. Brown*, 381 U.S. 437, 444 (1965). During World War II, the Supreme Court upheld an Executive Order directing internment in "relocation centers" of Japanese-Americans reasoning that "[p]ressing public necessity may sometimes justify…restrictions which curtail the rights of a single racial group…[including even the] imprisonment of a citizen in a concentration camp solely because of his ancestry[.]" *Korematsu v. United States*, 323 U.S. 214, 215, 233 (1944).

Though viewed by many as being on a par with the *Dred Scott* decision, *Korematsu* remains good law and is not atypical of wartime jurisprudence. The tendency of the judiciary to defer to the executive as exemplified in *Korematsu* is understandably at its highest in "wartime"—and with the invocation of "war" on terrorism, the urge to defer to the executive branch has returned to the courts and is allowing for the constricting of rights that prior to 9/11 were thought inviolate.

My exposure to this post-9/11 brave new world stems from my firm's involvement as litigation counsel to Global Relief Foundation, Inc. (GRF), an Islamic charity incorporated in Illinois and headquartered in suburban Chicago. GRF's litigation experience since 9/11 features many of the themes that have played out in courts across the United States, as lawyers for Muslims and Muslim institutions face off against government attorneys.

From my work for GRF and from closely following post-9/11 legal events, I believe that if ever there was a time of "heat and violence" in which to be mindful of Alexander Hamilton's cautionary observation, this is it. In this new and highly charged post-9/11 climate, the traditional skill set of the civil rights attorney may not be sufficient to the task of protecting the interests of Muslim and Middle Eastern clients. Ironically, perhaps the biggest advantage in the struggle to resolve the tension between the claims of national security and individual liberty may turn out to be the feeling of national shame over the internment of Japanese-Americans in 1942.

In these perilous times, it is crucial to remind decision-makers that in contrast to *Korematsu*, the principles embodied in the Supreme Court's opinion in *United States v. Robel* withstand historical scrutiny far better. That is,

> [e]ven the war power does not remove constitutional limitations safeguarding essential liberties. [T]his concept of National defense cannot be deemed an end in itself, justifying any exercise [of] power[.] Implicit in the term 'National Defense' is the notion of defending those values and ideals which set this Nation apart.

389 U.S. 258, 263-64 (1964).

As the growing body of post-9/11 decisions involving challenges to the government's secretive and, in my opinion, over-inclusive and too frequently heavy-handed approach to the Muslim community demonstrates, the ability to drive this point home may well be the only avenue to success. In those recent cases when the courts have rejected the government's position, they have invoked broad democratic principles that form the backbone of our free society.

Within a week of 9/11, the United States began identifying the targets of the "war on terrorism," including Al Qaeda. By September 19, President Bush had pronounced that the war would focus on "NGOs, nongovernmental organizations," that "serve as a funding mechanism" for terrorists, with the stated objective of "starving" terrorists of their alleged funding. While in theory this objective sounds eminently reasonable, in practice the administration's expansive definition of

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funding sweeps in for more than it would appear at first blush and in fact targets far more than merely financial funding. Thus, the Treasury Department takes the position that:

> NGOs may indeed fund legitimate social projects such as hospitals, orphanages, and schools. Such groups may operate as humanitarian programs but also function to attract supporters and to provide a safe haven for people to discuss and advance radical agendas that can include terrorist activities.

Affidavit of Richard Newcomb, Director of the Treasury's Office of Foreign Asset Control, filed on March 27, 2002, in *Global Relief Foundation, Inc. v. O'Neill*, C.A. 02 C 674 (N.D.Ill.).

To put these policies into action, the President signed Executive Order 13224 on September 23, 2001, effectively firing the opening shot in the administration's "war" on alleged funding for terrorism less than two weeks after September 11. The Order designated 27 foreign persons and entities as terrorists, froze their assets, and outlawed interaction by U.S. persons with them. Among the 27 targets of the Executive Order were "three charitable or humanitarian organizations" that according to the government, "operate as fronts for terrorist financing and support.…" The Executive Order also authorized the Secretary of State and Secretary of the Treasury to freeze the assets of additional persons they determined were somehow "associated with" terrorists or terrorist supporters.

Executive Order 13224 invokes as its legal authority an obscure foreign policy law, the International Emergency Economic Powers Act (IEEPA). 50 U.S.C. §§ 1701-1705. The operative language of IEEPA was drawn from the longstanding Trading With the Enemy Act (TWEA), which as its name implies, makes it illegal to trade with a presidentially designated enemy of the United States. Under IEEPA, once the executive branch has branded a person or entity as a "terrorist," the executive branch may unilaterally impose the consequences outlined above. 50 U.S.C. §§ 1701-1705.

GRF was not one of the 27 organizations listed as terrorist in the September 23, 2001, Executive Order. In fact, no U.S.-based companies or residents were so branded by the Executive Order. Thus, all initial indications—including the President's report to Congress immediately following issuance of his Order—were that the Order was aimed only against non-U.S. individuals and businesses over whom the U.S. criminal justice system lacked any jurisdiction.

However, in October of 2001, Congress passed the U.S.A. P.A.T.R.I.O.T. Act (PATRIOT Act) which amended IEEPA to allow all the consequences of being designated a terrorist to also be imposed on a person or company "pending investigation"—that is, *before* the designation as a terrorist has even been made. *See generally* David Cole, "The New McCarthyism: Repeating History in the War on Terrorism," 38 *Harv. C.R.-C.L. Rev.* 1, 26-29 (Winter 2003) (cataloging administration's "preventative" law enforcement tactics, including use of IEEPA to "selectively blacklist disfavored" groups like the Global Relief Foundation "based not on allegations of criminal conduct but on their alleged associations"). Moreover, the PATRIOT Act also provides that the district courts can view classified evidence pertaining to the designation *in camera*, so that while the government and the court have access to the evidence against the person or company under investigation, that person or company and their lawyers do not.

In the fall of 2001, the media began reporting that the Bush administration was poised to add American companies, and in particular, three domestic charities, to the list of those whose assets were frozen under the Executive Order. For example, *Good Morning America* reported that GRF was one of three U.S. "charities accused of getting funds to bin Laden." Although later that day ABC admitted (on its website) that it had been wrong, a flurry of similar reports against Muslim charities, with titles like "Beware the Wolves Among Us," ensued. (These rumors centered around three charities: Holy Land Foundation, Benevolence International Foundation, and GRF, a notable fact insofar as each of these charities was, in fact, later subject to a blocking order while no other U.S.-based Islamic charities have been so targeted).

As its donations began to drop precipitously in light of these rumors, GRF retained our firm. Although no official government action had been taken against GRF, the persistent rumors were wreaking havoc on its operations. Thus, in mid-November 2001, we brought suit on behalf of GRF against several news organizations for defamation. We never got the chance even to try to establish the falsity of the suggestion that GRF was a terrorist front.

After a spate of high-profile terrorist attacks in Israel, the Treasury's Office of Foreign Asset Control (OFAC) designated the Holy Land Foundation (HLF) a specially designated global terrorist (SDGT) on December 4, 2001. HLF's offices were raided without a search warrant. The Treasury vilified it as a terrorist front, and the President accused it of funding schools for the next generation of suicide bombers. This incident was, so far as I knew, the first time in history that a president had tried to outlaw a U.S.-based organization as an enemy of the state.

About ten days later, OFAC officials signed a memo blocking GRF's assets and activities "pending investigation." This internal OFAC directive, kept secret at the time from GRF, describes the move as a "…blocking in furtherance of the investigation of the nature and extent to which GRF meet[s] one or more of the criteria contained in subsections 1(c) and 1(d) of Executive Order 13224." These criteria include funding or "otherwise associating with" a blacklisted person or group.

On December 13, the *New York Times* called our firm, asking for a comment about the government's apparent plan to block GRF and asking for a reaction. This raised the obvious question: How could the *Times* know in advance of the government's action?

On December 14, two dozen FBI agents raided GRF's offices in suburban Chicago without a warrant. They seized some 500,000 items, including all of GRF's business records, promotional books, tapes, e-mail files, literature, religious texts, videos, video equipment, computers, and the like.

Although our firm requested a copy of a warrant to support the seizures, the FBI provided no warrant because none existed. The day *after* the raid, the government invoked an "emergency" procedure outlined in the Foreign Intelligence Surveillance Act

(FISA), 50 U.S.C. §§ 1821-1829, contending that this provision authorized the warrantless search; GRF disagreed.

In contrast to its above-described internal memo, later that day OFAC issued to GRF a document entitled "Blocking Notice and Requirement to Furnish Information" which stated as follows: "The United States Government has reason to believe that [GRF] may be engaged in activities that violate the I[EEPA] 50 U.S.C. §§ 1701-06[.]" Though the Blocking Notice from OFAC implied that if GRF had not violated IEEPA, its assets would be unfrozen, OFAC actually claims power to brand GRF as an SDGT without reference to allegations or evidence that GRF violated IEEPA (or any other U.S. law). *See* Cole, *supra*, at 27.

Also on December 14, the chairman of GRF's board, Rabih Haddad, was arrested by INS officials on an alleged technical visa violation. The INS denied there was any coordinated effort with OFAC or the FBI and claimed that it independently acted to arrest Pastor Haddad for reasons having nothing to do with any Treasury or FBI actions.

In a separate but likewise curious coincidental move, on December 14, 2001, FBI and Treasury agents raided the New Jersey headquarters of the Benevolence International Foundation (BIF), the third of the trio of charities about which the media had been circulating rumors of imminent government action for months. Also, on December 14, 2001, OFAC blocked BIF, also "pending investigation." CNN reported that the BIF and GRF cases were the first uses of the new PATRIOT Act powers.

Neither the legal justification nor the factual basis for the "blocking" was provided to GRF from December 14, 2001 until March 27, 2002. Until then, the only official communication from OFAC regarding its order shutting GRF down was the cryptic Blocking Notice. When suspending GRF's operations, OFAC stated that GRF could challenge the freezure by sending in "a letter setting forth GRFI['s] views …to the… Treasury." To the media, OFAC said that if GRF could come forth and prove it was "not guilty," it would be allowed to reopen. OFAC never explained, however, "of what" crime GRF was supposed to prove that it was innocent.

GRF could not determine how to react to OFAC's allegations against it without examining OFAC's evidence, but OFAC declined to provide any further explanation of its allegations or evidence. And, kept in the dark and deprived of the most likely source of exculpating evidence—its own business records, which provided the only audit trail to prove GRF's compliance with IEEPA—GRF had few choices. On January 28, 2002, we filed suit on behalf of GRF seeking to enjoin continued violations of its rights, restoration of its money, access to its documents and the right—at least pending any actual designation as a terrorist or a criminal conviction—to resume lawful humanitarian activities.

On March 27, 2002, as its opposition to GRF's motion for preliminary injunction finally came due with no further extensions of time on the horizon, the government abruptly declassified portions of four volumes of material that it claims constitute the record against GRF. The declassified portion of the evidence consisted mostly of unsworn comments, newspaper articles, and hearsay information presented in a format that insulated it from cross-examination. (Much of this "record" was generated after December 14, 2002.) In addition to newspaper articles, among the "evidence" the government declassified were GRF's publicly available Form 990 tax returns, which are filed by all non-profit organizations. The government claimed the Form 990s were lacking in detail, thereby implying that GRF could not account for its funds.

Secret Evidence

The government announced its intention to hold an ex parte hearing in which it would make argument and tender additional, still "classified" evidence for the court's *in camera* review in opposition to GRF's motion. Over GRF's vigorous opposition, the district court held *in camera* hearings of which no record was kept, and relied on secret evidence and ex parte contacts in ruling on GRF's request for preliminary injunctive relief. Even the government's public pleadings were heavily redacted, and their contents were kept hidden from GRF and its attorneys.

The government argued that OFAC could not allow GRF to continue as a functioning organization because OFAC could not "monitor" its activities. OFAC's position was that it was empowered to "swiftly immobilize" any asset that "*could be*" used to finance activity posing any "threat" to any "U.S. interest" anywhere; and, that if not permitted to continue to keep GRF's assets "immobilized" as a prophylactic, OFAC would "lose the ability" to "monitor" those assets and "prevent their possible use" in unspecified "global terrorist plots." Newcomb Affidavit, *supra*.

Despite the fact that GRF had brought the lawsuit, the government's position is that only those materials that OFAC puts into its "record" can be considered by a district court in determining the legality of an IEEPA action. Of course, any administrative record created to support actions taken without prior notice to the person acted upon is by definition compiled without the target's participation. Thus, GRF had no opportunity to include any evidence in the record tendered to support the government's Blocking Notice. Nor could it have done so in any event, as it was not until April that the government slowly begin returning small, unorganized copies of GRF's records to it.

OFAC denied permission for GRF to resume activities as a charity either within or outside the United States. To this day, it is illegal to do business with or as GRF. After 16 months of combing through GRF's records, however, OFAC has found no evidence of any violation of IEEPA. Of 450,000 seized items the government categorized as "pertinent," OFAC has not included a single sheet of paper in its administrative record for consideration. Yet, to this day, GRF is shut down, and it remains potentially felonious even to associate with it. *See* Cole, *supra*, at 27-28 (concluding that GRF was "put out of business" through "administrative" measures devoid of due process protections).

The district court has issued two opinions in *Global Relief Foundation, Inc. v. O'Neill*. In the first, 205 F. Supp. 2d 885 (N.D.Ill. 2002), the court sustained the use of classified evidence and *ex parte* court proceedings under the PATRIOT Act;

and, in the second, 207 F. Supp. 2d 779, (N.D.Ill. 2002), the district court denied GRF's motion for preliminary injunctive relief to preclude the executive branch from enforcing OFAC's Blocking Notice. In my opinion, both decisions run counter to core principles of American law. The Seventh Circuit Court of Appeals, however, declined to reverse the district court, while indicating that its disposition of GRF's prayer for preliminary injunctive relief did not impinge on GRF's rights on the underlying substantive merits. *Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002).

Elsewhere, other courts have issued opinions backing the government's approach to the war on terror. *See, e.g., North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (upholding general closure of "special interest" immigration hearings as set forth in a memo issued by the Chief United States Immigration Judge, Michael Creppy (the "Creppy Memo")); *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002) (upholding Treasury's December 4, 2001 designation of Holy Land as an SDGT); *Benevolence International Foundation, Inc. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (staying civil challenge to OFAC's block of charity pending outcome of government's indictment of charity's chairman for perjury in an affidavit regarding the charity's lack of support for militaristic groups).

Not all post-9/11 court decisions support the government. GRF's Pastor Haddad's detention case has become something of a *cause celebre*. And though he has been held without bond for many months, the Sixth Circuit remarked that "democracies die behind closed doors" and ordered that Pastor Haddad's bond hearings be opened to the public. *Haddad v. Ashcroft*, 221 F. Supp. 2d 799 (E.D. Mich. 2002) (concluding that secret immigration hearings had violated Pastor Haddad's rights to due process and that he would suffer irreparable injury from continued secret proceeding, the court granted Pastor Haddad's motion for preliminary injunction that he be provided an open hearing and that the matter be assigned to a new immigration judge not tainted by the prior closed proceedings). Similarly, in *Detroit Free Press v. Ashcroft*, the district court held that closed hearings violate the First Amendment. 195 F. Supp. 2d 937 (E.D.Mich.), *affirmed* 303 F.3d 681 (6th Cir. 2002).

There are other decisions declining to allow unfettered executive power. *See Center for National Security Studies v. Dep't. Of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) (ordering D.O.J. to release names of 9/11 detainees), stayed pending appeal, 217 F. Supp. 2d 58 (D.D.C. 2002); *United States v. Benevolence International Foundation, Inc.*, 2002 WL 31050156 (N.D. Ill. Sept. 13, 2002) (dismissing perjury indictment against charity's chairman); *United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D.Ca. 2002) (ruling that AEDPA unconstitutionally empowered State Department to designate groups or persons to be terrorists without due process, and, that because that law is invalid, prosecutions for dealing with a person designated a terrorist pursuant to the AEDPA will not lie); *United States v. Hamdi*, 296 F.3d 278 (4th Cir. 2002) (suggesting executive authority to designate citizens to be "enemy" combatants may not be unlimited). Through stays and appeals, however, the government has avoided complying with orders, such as those permitting U.S. citizens branded as so-called enemy combatants to consult with counsel or requiring the government to divulge the identities of post-9/11 detainees.

The government's use of "material witness" warrants to detain non-criminal suspects indefinitely without counsel has been both decried, *United States v. Awadallah*, 202 F. Supp. 2d 82 (S.D.N.Y. 2002), and upheld. *In re Application of the United States for Material Witness Warrant*, 214 F. Supp. 2d 356 (S.D.N.Y. 2002); *In re Application of the United States for Material Witness Warrant*, 213 F .Supp. 2d 287 (S.D.N.Y. 2002).

Lawyers engaged to represent a Muslim client in the post-9/11 environment would be well advised to read these and any newer decisions, and to keep in front of the court before which they appear the precepts of *Robel* and all those decisions that enunciate with such clarity and force the ideals on which our nation was founded and under which we have flourished.

In the media and in government thinking, the case of *Global Relief Foundation, Inc. v. O'Neill* is one of several post-9/11 cases involving challenges to the government's handling of the war on terror, most of which involve Muslims and Muslim institutions that find themselves under suspicion or are branded as terrorists. A review of these cases yields some obvious and not-so-obvious practical do's and don'ts for counsel representing similarly situated clients, whatever their faith or nationality.

Let me begin with some thoughts about dealing with the press. If a reporter calls asking for a comment regarding anticipated government action, pay attention. The media often appear to have advance warning of governmental actions. They are extraordinarily resourceful, and sometimes they correctly predict the next day's government actions, as they did in connection with the freeze of HLF, BIF, and GRF. Be attentive to the information the reporter seems to have. Because they have to ask questions, usually with predicates having some basis in reality, reporters are often better sources for information than you or they realize. A reporter's question may provide insight into the government's beliefs about your client. Particularly given the prevalence of *in camera* proceedings in these kinds of cases, your opposing counsel may not level a similar allegation in open court for you to rebut, but they will share it with the court when you are not there to defend your client's position.

In this way, the reporter might present your only chance to learn what the government knows or suspects about your client. Because the government has leveled or likely will level the same accusations behind your back during the ex parte hearing, you should consider raising issues suggested by the reporter's questions with the court on your own. This is especially true if the reporter raises concerns or matters not known to you to be in the case and about which you might otherwise have remained silent.

Finally, take care in refusing the media access to information about your client. In GRF's case, OFAC has repeatedly attempted to attach nefarious significance to an article in which a reporter wrote that GRF's general counsel had refused to throw open his client's books and records to the reporter. Obviously, GRF had no obligation to let an unknown

reporter rummage around in its operations, particularly not on a day's notice. But in this instance, GRF's reasonable refusal was being construed against it as evincing consciousness of guilt. This example points out the need to find ways to turn away the media where appropriate without offending or making it look like your client has something to hide.

Focusing a moment on counsel's role, it's worth bearing in mind that the administration has indicted defense counsel on aiding-and-abetting-terrorism theories, as the indictment of New York defense attorney Lynne Stewart cautions (*see* www.lynnestewart.org). Thus, lawyers for Muslim clients should try to avoid certain obvious, and several not-so-obvious, pitfalls. A line-by-line review of Executive Order 13224 seems to show that even "association" with groups such as GRF may itself be illegal; and a review of OFAC-related regulations seems to confirm the agency's position in this regard. *See also* Cole, *supra*, at 26-29. For these reasons, our firm applied for a license to represent GRF before challenging OFAC's position. Though the license took weeks to obtain, it provides some measure of protection from charges of giving aid and comfort to an enemy of the state.

Relatedly, be aware that the IEEPA, TWEA and 1996's Anti-Terrorism and Effective Death Penalty Act (AEDPA) all may give rise to broad asset seizure and freeze powers. IEEPA extends to *any* interest in *any* property, *anywhere* of a blocked person. Accordingly, you should approach your financial arrangements with your client at least as carefully as if you were representing an accused drug dealer, if not more so. Such issues are likely unfamiliar territory for most non-criminal defense practitioners, as they were for us; that makes them a potential minefield for the unwary. It seems only a matter of time before an unwary immigration attorney winds up holding "frozen" funds, which may even be commingled in escrow with unblocked funds from unblocked clients.

As in a drug or RICO case, the Treasury's "seizure and freezure" powers could result in your fee being frozen or seized—even if it is in escrow in your client trust account. If the Treasury Department issues a freeze order while you have unearned, unbilled, or uncollected fees in your escrow account, it may take the position that the funds are frozen. Unlike most civil forfeiture cases, which may result in the loss of a fee, one who draws from potentially frozen funds located in an escrow account without first applying for and receiving a Treasury license arguably violates IEEPA, which carries hefty civil penalties and is a felony. As the government's domestic application of IEEPA against U.S. residents—declaring them "enemies of the state"—is new, post-PATRIOT Act territory, when in doubt, err on the side of caution.

In the same vein, if you represent a client who is, has been or may be accused, or even is under suspicion of associating with people suspected of terrorist links or ties, take care how you structure your fee agreement with the client. You can try to minimize the chance of payments being subject to seizure or freezure by taking certain precautions. A flat fee retainer that is deemed earned when paid may withstand scrutiny, provided the retainer is reasonable. Beware of state ethics rules, however, a number of which declare such non-refundable retainers unethical. Friends who practice criminal defense are probably a good resource in this regard. Ask them how they structure their fee relationships to minimize the chances of freezure. Most importantly, read the forfeiture statutes and cases yourself and understand what is and is not permissible.

Whether you are dealing with the press, the government, or the court, present your client in the best light by always providing context for your client's activities. Context here is no less critical than in traditional statutory or contractual construction arguments. For example, in GRF's case, OFAC relied on the allegedly "sparse" descriptions of humanitarian projects in GRF's IRS forms 990s. It suggested that the limited descriptions showed that GRF practiced shoddy accounting and had something to hide. However, a review of 990s filed by indisputably legitimate groups such as the American Red Cross and Doctors Without Borders showed the same (low) level of detail. Thus, in addition to proving that GRF can in fact account for its moneys and expenditures in detail when called upon to do so, we have used the 990s filed by other, mainstream charities to put GRF's filings in context, thereby countering the negative inferences sought to be drawn.

Pay attention not only to judicial decisions, but to the government's briefs in other cases. Federal judges tend to react negatively when the government argues one thing to one court and something else to another. *See United States v. Cardona-Rivera*, 904 F.2d 1149, 1154 (7th Cir. 1990) ("We are not enamored of inconsistent arguments from the Government … and are inclined to give neither argument in an inconsistent pair any weight."). If the government prevailed in the earlier case, the doctrine of judicial estoppel may prevent the making of an inconsistent, argument in a later case.

Regrettably, such vacillations by the Department of Justice come up far more often than you might think. In the GRF case, this tactic was and is pertinent because the government (as it has in other "SDGT" cases) is not using live testimony or even sworn affidavits to support its claims, but instead is relying on newspaper articles for its proof. At the same time, however, in the *Center for National Security Studies* case the government's brief dismisses the plaintiffs' newspaper articles as "unsubstantiated hearsay" and urges the court to give them no weight. 215 F. Supp. 2d at n. 17.

Similarly, in both the GRF and BIF cases, the government argues that the availability of an Administrative Procedure Act claim preempts all other claims against the government defendants; yet, in another presently pending case, the DOJ filed briefs arguing the polar opposite: that availability of any other claim prevents the suit upon an otherwise valid APA claim because an APA plaintiff "must have 'no other remedy in a court.'" Memorandum of Points and Authorities in Support of the United States' Supplemental Motion to Dismiss filed in May 2002. *Ramirez-Cruz v. United States*, No. C-01-0892 (N.D. Cal. S.F. Div.).

In presenting your client's case on the merits, stress the policy arguments as outlined above. But also illustrate the government's aggressive investigative tactics by analogizing to and invoking potential mainstream defendants. This helps lead the court towards the right outcome without expressly accus-

ing a government official of racism or religious bias—a strategy that may prove counter-productive. Of course, the government must have, and must be able to articulate, a non-racial and non-religious reason for any action taken against an Arab or non-Arab Muslim person or organization. Much like an employment discrimination case, anything you can do to show that the government's asserted reasons are pretextual will help you prevail. While government officials may assert race- or nationality-neutral reasons for their actions, using examples for the court of the same government's actions directed at non-Muslims or non-Arab groups may highlight that these "neutral" reasons mask impermissible government actions.

For example, in GRF's case, we have pointed out that as construed by OFAC, IEEPA permits designation of any U.S. person; in turn, this empowers the executive branch to regulate domestic speech, associations, and transactions, e.g. GRF's relationships with its U.S. donors. The ramifications of this position are enormous, particularly for minority groups and others viewed with disfavor by either those in power or the public at large. We argued that if the IEEPA empowers the government to ban a U.S. organization, and renders it felonious for U.S. citizens to interact with it, then the president can similarly ban the Communist Party, bar it from having bank accounts, and convict its members of a felony—an outcome contrary to existing Supreme Court precedent. *See, e.g., Communist Party v. Subversive Activities Board*, 367 U.S.1, 82-83, 84-85, and n. 33 (1961). And if the government can outlaw groups like the Black Panthers, whose ideas were once termed "so radical" that J. Edgar Hoover assailed it as "the greatest threat" to the "'security of the United States,'" it could equally declare the NAACP and/or the Nation of Islam to be outlawed and their members criminals on the grounds that they are merely suspected of having "supported" or "associated with" the Panthers. Plainly, however, an order to disband such groups would not only be unsettling to most Americans, but would face stiff resistance in the courts.

Persistence will be useless if you cannot document your work. Meticulously memorialize your efforts and discussions.

Obviously, an agency decision-maker, reviewing judge, or jury who looks at your client and says "There, but for the grace of God, go I" is more likely to rule in your clients' favor. As we were litigating before the Seventh Circuit, some of whose members are advocates of the law-and-economics school of legal thought, we argued that if the court upholds OFAC's claimed ability to freeze any U.S. business in which *any* foreign person has *any* interest, the ramifications for the broader economy are profound: OFAC can, indefinitely, with no hearing, shut down Daimler-Chrysler, Volkswagen, GM or Unocal "pending investigation." While not successful there, policy arguments that might have appeal to the decision-maker should be vigorously advanced.

Keep your momentum. As in any high-stakes matter—keep pressure on government opponents for quick action and answers to your questions. Do not leave any opening for an opponent to suggest or a court to find that you have been dilatory. Even if they do not say so overtly, district courts are negatively influenced in a close case by the perception that an attorney who is asking for urgent treatment from the court has not done everything possible to act swiftly. Law and equity alike aid the vigilant. While it may be difficult (or in some cases impossible) to act swiftly, if you want the court to move quickly, especially in an injunction case—you must act with dispatch and document reasons beyond your control that caused any delay.

Make (and manage) your record. Managing the document trail is at least as important as persistence. Persistence will be useless if you cannot document your work. Meticulously memorialize your efforts and discussions, or else you cannot reconstruct what happened and what promises were made and broken. While you will not be able to make evidence by writing letters, *Leach & Co. v. United States*, 275 U.S. 120, 128 (1927), without at least some memorialization you have little chance of persuading a judge that your version of events is accurate.

Be prepared for difficulty in getting prompt responses from the government. For example, to show it had not violated IEEPA, GRF needed its documents and to know the nature of the charges. The government *internally* took the position that documents seized from frozen charities were classified, having "national security" implications that warranted keeping them secret from everyone including the charity from whom they were seized. Yet, the government did not litigate this position. Initially, for weeks after December 14, the government would not acknowledge which agency had the documents. Then, one agency said GRF needed a Treasury license even to see its own documents. GRF sought one, but Treasury took weeks to respond. When it did respond, it asserted that the FBI had the documents. Then, both the FBI and Treasury refused access. This documented inter-agency pinball game did not wash with the court, which pushed the government to make GRF's records available to it.

Similarly, on learning that the government had not returned copies of documents seized from BIF, Judge Alesia of the U.S. District Court for the Northern District for Illinois neatly explained the issue from the bench:

> Why not? How can they possibly try to sue without any documents? … [Y]ou have their documents. If they need those documents to pursue their case, they do not have those. [H]ow are they supposed to rebut the Government's case if they do not have the secret documents [either]? I mean, you know, they are being whipsawed on both ends of the spectrum.

It is fair for you to assume that government agencies are coordinating their efforts especially at the high policy level. Particularly in any lower-level dealings—like licensing pro-

cedures—assume that low-level agency personnel are not actually coordinating themselves; many agency functionaries are chafing under the new practices, and some may privately let you know that they empathize with your client. Such people will do all they can, within the constraints imposed from the top down, to help you.

For slightly different reasons, however, assume (or pretend) that the attorneys you are dealing with as opposing counsel do not know any of the foregoing. This makes it easier to paper them with requests that they try to cut through the red tape—a great way to document bureaucratic run-arounds and efforts to keep things moving. If you are polite about it, you can make your point and your record without attacking the government's lawyers personally. District judges are generally protective of government lawyers, and don't like personal acrimony among the lawyers, in any case.

Conserve your resources. Whether your case or issue is big or small, if the government does not want to give ground, you may find yourself in protracted battles over seemingly silly things. Sometimes the government is litigating because it thinks the issues are significant. Sometimes, as is common in private civil litigation, resources may be expended to force up costs of defense when the defendant's resources are limited. In GRF's case, on October 18, 2002 OFAC proclaimed in an official press release that its objective has been to "bankrupt" GRF. Husband your resources and only fight the battles that really count. Judges are intelligent people and can tell when you are being unfairly pushed. Play the game straight, and you may find you have an ally in the judge.

Be thorough in your preparation. If you are representing a Muslim in any case involving the U.S. government, ask your client if he or she has ever been to "hot spots" like Afghanistan, Pakistan, the West Bank, Kashmir, Kosovo, Bosnia, or Chechnya. The government is highly focused on Arabs and others who were in Afghanistan in the 1980s, and others who may have "links" or sympathies with groups espousing Islamic ideologies. If your client was in one of those places, find out precisely when and why, and what occurred there, and be prepared to defend even innocent contacts. For example, though the Soviet Union was (during the 1980s) the "evil empire," and though the United States equipped and advised the Afghan Mujaheddin anti-Soviet forces, the administration is now treating ex-Mujaheddin fighters and supporters as presumptive terrorists or terrorist sympathizers. Anyone who associated with, or gave money to, those who fought on the Islamic side of any struggle is at risk for heightened scrutiny, if nothing else.

My experience over the past year has been sobering. Much that I took for granted in our legal system is being challenged under the extraordinary pressures created by the 9/11 attacks. For example, it is fair to say that the government has attempted to avoid public trials in cases involving suspected terrorists and to substitute a military tribunal system for the public justice system in its place. *See* Christopher Schroeder, "Military Commissions and the War on Terrorism," Vol. 29, No. 1 Litigation at 28 (Fall 2002). Further, while the government can do obviously much more to pursue non-domestic enemy combatants than it can to prosecute individuals within its borders, by conflating the notions of justice within American borders and justice writ large on the world stage, the government has essentially announced its intention to treat those deemed to be its "enemies" in the same way—no matter where they are from, what their citizenship, or what protections their presence within American borders might otherwise have afforded them.

Perhaps nowhere are these challenges to our legal system better documented than in the *Hamdi* case. The government had held Yaser Hamdi incommunicado for an extended period. When his father hired an attorney, the government argued that it did not have to let the lawyer communicate with Hamdi, reasoning that he was not Hamdi's lawyer because Hamdi had not, himself, hired or accepted the attorney as his counsel. The *Awadallah* case, *supra*, describes similar conduct, whereby there was a systematic deprivation of access to counsel by, in effect, juggling Muslim detainees—keeping them constantly moving from prison to prison. These developments illustrate the legal crossroads at which we find ourselves and which we must now face.

Know your client. For a variety of reasons, it is imperative that you make sure you know your client. If you are not from a similar cultural background, take care to pay particular attention to avoid the miscommunications that sometimes flow from cultural gaps. This might prove the difference between a carefully drafted affidavit which is truthful and accurate, and one which is true in spirit but technically incorrect. In turn, this can be the difference between waging a civil case and defending a perjury indictment. If English is not your client's first language, be extremely careful.

Perjury Indictment

This potential pitfall was demonstrated with stunning clarity in the BIF case. BIF's Enaam Arnaout signed an affidavit not dissimilar from (and perhaps even patterned after) one signed by GRF's chief executive officer. However, Arnaout had a slightly different background, and used slightly different wording in his affidavit. He averred that BIF had not supported "militaristic" activities, whereas GRF's executive averred that it had not knowingly supported terrorists. The result: a perjury indictment. *United States v. Enaam M. Arnaout*, No. 02 CR 892 (N.D.Ill.). The basis: BIF allegedly gave a medical x-ray machine not to terrorists bent on destroying America, but to Muslim fighters openly conducting a paramilitary "violent" conflict in the form of resisting extermination during the ethnic cleansing in Bosnia-Herzegovina. But the government pounced, claiming these activities were "militaristic" and that Arnaout's affidavit was perjury.

In the post-9/11 environment, things not previously or obviously important may prove to be so. Miscommunications or failures to communicate may be devastating to a case and to your client.

Do not let your client commit a foul. Criminal defense lawyers have long claimed that the government—especially via law enforcement agencies—employs subtle and not-so-subtle tactics in order to spook a prospective or actual defendant into committing acts that they might not otherwise have committed absent the government pressure. And often clients

don't need any prompting at all. If your client is under pressure or fearful of possible forthcoming adverse governmental action, it is imperative to stress and re-stress to your client to not destroy anything, and to avoid doing anything else untoward, especially anything that could be deemed an obstruction of justice. For example, an official at one Islamic charity (not GRF) who was apparently wiretapped was allegedly overheard telling someone to take money and get out of reach of U.S. authorities. While perhaps there are innocent rather than guilty inferences that can be argued, this conduct was not well taken by the district court and later served as corroborating evidence in a RICO indictment of the caller. Explain to your client that destroying evidence or fleeing, or urging others to do so will not be helpful. For those representing Muslims post-9/11, the adverse consequences stemming from even the suspicion that they have destroyed or might destroy evidence or engaged in some form of spoliation will be devastating. Caution your clients that it is a fatal mistake to think that such behavior will not be found out and that even if their reason for doing so is based on the fear that they will not be treated fairly or will be misunderstood, it is simply not worth the risk.

Three thousand Americans perished on September 11. The lives of countless people have been profoundly affected. Our economy has suffered to an extent thought unimaginable a few years ago. The future is full of fear and uncertainty. In the face of this terrible reality, invocations of the abstract principles of due process, right to trial by jury, and right to counsel have lost much of their luster for many of our people. Even some judges may not be immune. Yet, this is the inescapable reality with which you must deal. Ignore it and you endanger the very liberties you are seeking to protect. As counsel for an individual involved in a case where terrorism is alleged or implicated, you have a challenge faced by few lawyers in our history.

But Chief Judge Kocoras of the Northern District of Illinois has said, With that challenge go equivalent opportunities; "you will join that long line of lawyers—stretching back centuries—whose fidelity to ideals that would survive the passions and tempests of the moment have spurred … the upward march from savage isolation to organic social life." Charles P. Kocoras, "From the Bench: Judicial Neutrality and Independence: Current Challenges," Litigation, Vol. 29, No. 3 at 3 (Spring 2003).