

Anti-Terrorism on Trial

Why the Government Loses Funding Cases

By David Cole

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Nearly six years ago, the U.S. government shut down the [Holy Land Foundation for Relief and Development](#), froze its assets and made it a crime for anyone to engage in transactions with it. The administration claimed that the foundation, the largest Muslim charity in the United States, was financing terrorism.

The government never publicly produced evidence to support that charge. Under an executive order that [President Bush](#) issued shortly after Sept. 11, 2001, the government did not have to. It closed the charity without a hearing or trial or even a statement of reasons. When the foundation sued, a federal court in the District of Columbia refused to consider any evidence that the foundation submitted in its defense, relied on secret evidence that the government presented behind closed doors and rejected the foundation's assertion that taking its property on the basis of evidence that the charity had no opportunity to see or rebut was a violation of due process.

Monday brought a different result. In a criminal trial in [Dallas](#) in which federal prosecutors accused the Holy Land Foundation and its directors of 197 criminal violations related to funding terrorism, a jury issued not a single conviction. It acquitted one defendant on all but one charge and failed to reach a unanimous verdict on any of the other counts. The difference in outcomes could not have been more stark. In the first, one-sided proceeding, the government, not surprisingly, prevailed. In the second, when required to share its evidence and convince a jury, the government could not do so.

This failure wasn't the government's first. In 2005, a [Tampa](#) jury acquitted Sami al-Arian, a [University of South Florida](#) professor, of the most serious counts against him, involving alleged fundraising for the [Palestinian Islamic Jihad](#); it voted 10 to 2 in favor of acquittal on the rest. This year a jury in [Chicago](#) acquitted two men of charges that they had financed [Hamas](#). Thus far, the government has shut down and frozen the assets of seven Muslim charities in this country, but it has not obtained a conviction for financing terrorism against anyone involved in any of these charities.

Why is the government losing these cases? It is not because the laws are too narrow or the standards of proof too demanding. "Material support" laws make it a crime to give anything of value, including humanitarian aid or one's own volunteer services, to an organization the government has labeled a "terrorist" group. The government claims that it is no defense that the supporter had no intent to further any terrorist conduct or even that the support in fact furthered no terrorism. For all practical purposes, the law imposes guilt by association.

Yet federal prosecutors have sought to stretch liability even further. In the Holy Land case, for example, the government offered no evidence that the foundation had funded Hamas, a designated terrorist organization. Prosecutors claimed instead that the foundation had supported humanitarian aid "zakat committees" in various [West Bank](#) towns and that these committees were fronts for or were associated with Hamas. But the law authorizes the government to designate front groups, and it does so regularly. To this day, the government has not designated any of the zakat committees. Yet it sought to hold Holy Land criminally responsible for providing humanitarian aid to groups that the government itself had never said were off-limits.

The government's failure in the Holy Land case suggests that the administrative processes for designating groups as terrorist organizations are flawed. The president has asserted the power to designate any organization or individual he chooses, here or abroad, without formal charges, a trial or hearing of any kind; without a statement of reasons; and on the basis of secret evidence. While full-scale criminal protections are not necessary, surely groups should be afforded a meaningful opportunity to defend themselves before they are shut down.

We've seen this kind of regime before. In the McCarthy era, the government, working behind closed doors, created lists of "subversive organizations" and then held individuals responsible for any association with such groups, often using secret evidence to support its charges. Such actions invited abuse, harmed innocents and infringed on the very rights the government claimed to be protecting. As the Supreme Court said in a 1967 decision belatedly declaring unconstitutional the "guilt by association" tactics of the McCarthy period: "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties -- the freedom of association -- which makes the defense of the Nation worthwhile." The administration seems to have forgotten that lesson; American juries, thankfully, still remember.

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