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## Unreasonable Conditions Impeding Our Nation's Charities: An Unconstitutional Condition in the Combined Federal Campaign

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UNREASONABLE CONDITIONS IMPEDING OUR NATION’S  
CHARITIES: AN UNCONSTITUTIONAL CONDITION IN THE  
COMBINED FEDERAL CAMPAIGN

I.	INTRODUCTION .....	690
II.	BACKGROUND.....	692
	A. <i>Combined Federal Campaign</i> .....	692
	B. <i>The New Requirement of the CFC</i> .....	694
	C. <i>Terrorist Watch Lists</i> .....	696
III.	CONSTITUTIONAL ANALYSIS OF THE COMBINED FEDERAL CAMPAIGN.....	698
	A. <i>Cornelius v. NAACP Legal Defense and Educational Fund</i> .....	698
	B. <i>The CFC Requirement is Distinct From the Issue Addressed in Cornelius</i> .....	699
IV.	THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS.....	700
	A. <i>Background</i> .....	700
	B. <i>Doctrinal Elements &amp; Analytical Framework</i> .....	701
V.	ANALYSIS OF CFC REQUIREMENT AS AN UNCONSTITUTIONAL CONDITION .....	703
	A. <i>Step #1: Participation in the CFC is a “Benefit”</i> .....	705
	B. <i>Step #2: Requirement to Relinquish Fourth Amendment Rights</i> .....	706
	C. <i>Step #3: Constitutional Analysis of the CFC Requirement Under the Fourth Amendment</i> .....	707
	1. <i>The Fourth Amendment and Administrative Searches</i> .....	707
	2. <i>The New CFC Requirement is Unreasonable Under the Fourth Amendment</i> .....	708
	a. <i>The Information Sought is Not Within the Authority of the Agency.</i> .....	709
	b. <i>Requirement is too Indefinite and Not Reasonable in Scope</i> .....	710
	c. <i>The Information Sought Lacks Relevancy</i> .....	711

VI.	JUSTIFICATION FOR DECLARING THE NEW CFC REQUIREMENT UNCONSTITUTIONAL.....	712
A.	<i>“An Especially Malignant Unconstitutional Condition”</i> .....	712
B.	<i>The Constitution is Equal in Times of War and Peace</i> .....	713
C.	<i>Terrorist Watch Lists are Wholly Unreliable</i> .....	714
VII.	CONCLUSION.....	714

#### I. INTRODUCTION

“Antonio Romero is what my mother calls me. Antonio Romero is also how I am known to many of my friends and family members. Unfortunately, the name Antonio Romero also appears on a U.S. Treasury Department list titled ‘Specially Designated Nationals and Blocked Persons.’”<sup>1</sup>

Imagine you are the director of a non-profit charitable organization. You and your staff are dedicated to providing health and welfare services to your community. The government has instructed you to investigate the background of all your employees by annually comparing their names to a U.S. terrorist watch list. To your surprise, you discover a key member of your staff has a name that matches a name on the list. Is this employee a terrorist? Should you tell him his name matches a name on this list? Should you turn his name over to the government, despite the fact that you know this terrorist watch list is plagued with error?<sup>2</sup> The American Civil Liberties Union (ACLU) would have faced this very dilemma had it followed a requirement implemented by the Office of Personnel Management (OPM) calling for the ACLU and other organizations to compare the names of their employees to names on terrorist watch lists as a condition of participation in a national charity drive.<sup>3</sup> Had the ACLU followed the mandate, it would have discovered the name of its executive director, Anthony “Antonio” Romero, listed on the Department of Treasury’s Specially Designated Nationals List.<sup>4</sup>

The Combined Federal Campaign (CFC) is an annual charity drive in which federal employees make charitable donations to non-profit organizations through payroll deductions.<sup>5</sup> In October 2003, the federal government began requiring non-

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<sup>1</sup>Anthony D. Romero, *You, Too, Could be a Suspected Terrorist*, WASH. POST, Aug. 17, 2004, at A15. Anthony “Antonio” Romero is the Executive Director of the ACLU and has the misfortune of having his name appear on a terrorist watch list. Romero is not a terrorist, nor is he suspected of transacting with terrorists.

<sup>2</sup>Eric Lichtblau, *Papers Show Confusion As Watch List Grew Quickly*, N.Y. TIMES, Oct. 9, 2004, at A9.

<sup>3</sup>Brad Wolverton, *Federal Campaign Flap*, THE CHRON. PHILANTHROPY, Aug. 19, 2004, at 11.

<sup>4</sup>Romero, *supra* note 1.

<sup>5</sup>Adam Liptak, *A.C.L.U. Board is Split Over Terror Watch Lists*, N.Y. TIMES, July 31, 2004, at A1.

profit organizations that receive funds through the CFC to compare the names of their employees against the names on terrorist watch lists and then notify the federal government of any matches.<sup>6</sup> If an organization refuses to abide by this mandate, it is prohibited from soliciting and receiving donations through the CFC.<sup>7</sup>

This new requirement presents a question of first impression for the courts. When the issue makes its way into a courtroom,<sup>8</sup> the courts may be tempted to follow the analysis of *Cornelius v. NAACP Legal Defense and Educational Fund*<sup>9</sup> by considering the issue under the public forum doctrine of the First Amendment.<sup>10</sup> This note recommends that the courts refrain from a First Amendment analysis and instead consider the new requirement under the doctrine of unconstitutional conditions.

The doctrine of unconstitutional conditions prohibits the government from affording a gratuitous benefit on the condition that the beneficiary relinquish a constitutional right.<sup>11</sup> For example, when Congress attempted to condition distribution of federal grant dollars on an educational broadcasting station's willingness to cease editorializing, the Supreme Court ruled that Congress had imposed an unconstitutional condition on the station's right to free speech.<sup>12</sup> The unconstitutional conditions doctrine prevents the Government from "subtly pressuring citizens, whether purposely or inadvertently, into surrendering their rights."<sup>13</sup>

The following analysis of the new CFC requirement under the doctrine of unconstitutional conditions reveals that the federal government is conditioning a benefit—participation in the CFC—on the participating organizations' willingness to surrender their Fourth Amendment protections against unreasonable searches of private business records. Because this is exactly the type of government abuse the unconstitutional conditions doctrine is intended to prevent, the courts should declare this condition unconstitutional and prohibit the OPM from further enforcing the rule.

The new CFC requirement presents a compelling opportunity for the courts to develop the doctrine of unconstitutional conditions. The Supreme Court first invoked the doctrine to remedy the problem of state acts that conditioned economic privileges on a corporations' willingness to surrender constitutional rights.<sup>14</sup> A half-

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<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>Jacqueline L. Salmon, *Groups Sue OPM on Terrorism Rule; Charities Told to Screen Workers*, WASH. POST, Nov. 11, 2004, at A35 (reporting that 13 national organizations filed suit in the U.S. District Court for the District of Columbia to block enforcement of the new Campaign requirement).

<sup>9</sup>473 U.S. 788 (1985).

<sup>10</sup>*Cornelius*, 473 U.S. at 797.

<sup>11</sup>Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989) (citing to *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926) and *W. Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1 (1910)).

<sup>12</sup>*FCC v. League of Women Voters*, 468 U.S. 364 (1984).

<sup>13</sup>*Bourgeois v. Peters*, 387 F.3d 1303, 1324-25 (11th Cir. 2004).

<sup>14</sup>Sullivan, *supra* note 11, at 1416.

century later, the Court employed the doctrine to bar government measures that restricted individual liberties.<sup>15</sup> The new CFC requirement triggers a new use for the doctrine: a government act that suppresses one individual right as a condition of exercising another. Although the context of this new requirement varies from the “classic” unconstitutional condition fact pattern, it poses the very same question that the doctrine was created to resolve: the constitutionality of a government act that suppresses citizens’ rights. For this reason, the doctrine of unconstitutional conditions is the appropriate framework for analyzing the constitutionality of the new CFC requirement.

This note addresses the question of whether a federal agency operating under the authority of the executive branch can constitutionally condition the right to participate in the CFC on agreement to voluntarily search private business records, an act ordinarily subject to the Fourth Amendment requirement of judicial review. The analysis is organized into six sections. Part II explores the history of the CFC, the campaign’s new requirement, and the development and use of terrorist watch lists. Part III examines *Cornelius v. NAACP Legal Defense and Educational Fund*,<sup>16</sup> the sole Supreme Court opinion analyzing constitutional issues arising under the CFC. Although *Cornelius* is relevant for the present analysis in that the Court determined participation in the CFC is protected speech, Part III makes clear that the new CFC requirement is distinguishable from the facts in *Cornelius* and, therefore, requires consideration under the unconstitutional conditions doctrine rather than the First Amendment.

Parts IV and V scrutinize the new requirement under the doctrine of unconstitutional conditions. Part IV details the history and the analytical framework of the doctrine, and Part V presents the analysis. Part VI unearths further justifications for expanding the use of the doctrine, specifically that the CFC condition is particularly malignant, the Constitution protects equally in times of war and peace, and the terrorist watch lists are wholly unreliable. Part VII concludes that the CFC’s new requirement of conditioning the exercise of one right on the submission of another right is an unconstitutional condition and the courts should bar continued enforcement of the rule.

## II. BACKGROUND

### A. Combined Federal Campaign

The CFC is an annual charity drive that provides federal employees with the opportunity to make monetary contributions to non-profit charitable organizations through payroll deductions.<sup>17</sup> The CFC is administered by the OPM,<sup>18</sup> an independent executive agency that oversees human resource matters for the

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<sup>15</sup>*Id.*

<sup>16</sup>473 U.S. 788 (1985).

<sup>17</sup>*Cornelius*, 473 U.S. at 790.

<sup>18</sup>U.S. OFFICE OF PERSONNEL MANAGEMENT, COMBINED FEDERAL CAMPAIGN REGULATIONS & GUIDANCE, available at <http://www.opm.gov/cfc/opmmemos> (last visited Aug. 1, 2005).

executive and legislative branches.<sup>19</sup> Every year, non-profit organizations apply to participate in the program; the groups approved for participation are listed in a book distributed to all federal employees.<sup>20</sup> The employees who elect to contribute to any of the listed organizations fill out a type of pledge card, designating the organizations they would like to support and the dollar amount they intend to contribute.<sup>21</sup> This amount is then deducted from the employee's paycheck and sent to the designated organizations.<sup>22</sup> Ten thousand charities participate in the CFC, and over a million federal employees donate approximately \$250 million annually through the program.<sup>23</sup>

This federal workplace giving program was first brought to life under the Eisenhower Administration.<sup>24</sup> Prior to 1957, charitable fundraising in the federal workplace was conducted on an ad hoc basis.<sup>25</sup> Charitable organizations individually sought permission from various worksite managers to solicit funds from federal employees in their workplace.<sup>26</sup> Due to the increasing number of groups seeking donations throughout the year, this fundraising process disrupted the work environment and raised the level of confusion among employees who were not always familiar with the different groups soliciting money.<sup>27</sup> In 1957, President Eisenhower responded to this mayhem by creating an advisory committee to set forth uniform guidelines for charitable solicitations in the workplace, essentially the predecessor of the CFC.<sup>28</sup>

In 1961, President Kennedy abolished the advisory committee created by Eisenhower and directed the Chairman of the Civil Service Commission to oversee fundraising in the federal workplace,<sup>29</sup> the program that became known as the Combined Federal Campaign.<sup>30</sup> The stated purpose of this newly designed program was to provide an opportunity for "national voluntary health and welfare agencies . . . to solicit funds from Federal employees and members of the armed forces at their places of employment . . ."<sup>31</sup> Over the next two decades, federal regulations were

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<sup>19</sup>U.S. OFFICE OF PERSONNEL MANAGEMENT, OPM GOALS, *available at* <http://www.opm.gov/html/goals.asp> (last visited Aug. 1, 2005) [hereinafter OPM GOALS].

<sup>20</sup>Plaintiff's Complaint at 10-11, *Am. Civil Liberties Union Found. v. United States Office of Pers. Mgmt.* (D.D.C.) (No. 1:04cv1958) *available at* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16984&c=206> (Aug. 1, 2005) [hereinafter ACLU Complaint].

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>Wolverton, *supra* note 3.

<sup>24</sup>*Cornelius*, 473 U.S. at 792.

<sup>25</sup>*Id.* at 791.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.* at 792.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>ACLU Complaint, *supra* note 20, at 8.

<sup>31</sup>*Cornelius*, 473 U.S. at 792 (citing Exec. Order No. 10,927, 3 C.F.R. 454 (1959-1963)).

implemented to govern the CFC, and in 1978, the OPM assumed the responsibility for administering the program.<sup>32</sup> The CFC currently provides the only opportunity for charitable organizations to solicit federal employees at their place of work.<sup>33</sup>

During the Reagan Administration, the National Association for the Advancement of Colored People (NAACP), joined by other legal defense organizations, filed three lawsuits challenging the manner in which the OPM administered the CFC.<sup>34</sup> The first lawsuit successfully challenged the eligibility criteria used to determine which charitable organizations were qualified to participate in the CFC; the second lawsuit unsuccessfully challenged the manner by which the OPM distributed some of the funds collected through the CFC.<sup>35</sup> In response to these first two legal challenges, President Reagan amended Kennedy's 1961 executive order in an effort to clarify both the purpose of the program and the manner in which it was to be administered.<sup>36</sup> Reagan specified that the purpose of the CFC was to "support and facilitate fund-raising on behalf of voluntary agencies through on-the-job solicitations of Federal employees and members of the uniformed services, and to ensure that the recipient agencies are responsible in the uses of the moneys so raised."<sup>37</sup> Reagan granted the Director of the OPM the authority to determine which charitable groups satisfied the CFC eligibility requirements, and then limited the types of groups eligible to participate to "voluntary, charitable, health and welfare agencies that provide . . . direct . . . services to individuals or their families."<sup>38</sup> This limited definition excluded legal defense organizations, like the NAACP, from participating in the CFC, and thus gave rise to the third legal challenge in *Cornelius v. NAACP Legal Defense and Educational Fund*.<sup>39</sup>

#### B. The New Requirement of the CFC

In October 2003, the OPM began requiring non-profit organizations that receive funding through the CFC to "certify that they do not knowingly employ individuals or contribute funds to entities or persons on either the Department of Treasury's Specially Designated Nationals List or the Terrorist Exclusion List."<sup>40</sup> The OPM

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<sup>32</sup>*Id.* at 792-93.

<sup>33</sup>ACLU Complaint, *supra* note 20, at 8.

<sup>34</sup>*Cornelius*, 473 U.S. at 793.

<sup>35</sup>*Id.* (referring to *NAACP Legal Def. & Educ. Fund, Inc. v. Campbell*, 504 F.Supp. 1365 (D.D.C. 1981) and *NAACP Legal Def. & Educ. Fund, Inc. v. Devine*, 560 F.Supp. 667 (D.D.C. 1983), respectively).

<sup>36</sup>*Cornelius*, 473 U.S. at 795.

<sup>37</sup>Exec. Order No. 12,353, 47 Fed. Reg. 12,785 (Mar. 25, 1982).

<sup>38</sup>*Cornelius*, 473 U.S. at 794-95 (citing Exec. Order No. 12,353, 47 Fed. Reg. 12,785 (Mar. 25, 1982)).

<sup>39</sup>473 U.S. 788.

<sup>40</sup>U.S. OFFICE OF PERSONNEL MANAGEMENT, CFC MEMORANDUM 2003-10 (Oct. 3, 2003), available at <http://www.opm.gov/cfc/opmmemos/2003/2003-10.asp> (last visited Aug. 1, 2005). See COMBINED FEDERAL CAMPAIGN, 2005 APPLICATION INSTRUCTIONS FOR NATIONAL/INTERNATIONAL FEDERATIONS, NO. 3206-0131, at p. 4, available at <http://www.opm.gov/cfc/>

explains that this new mandate is “required under the authority of Executive Order 13,224 and OPM’s plenary authority to administer the CFC.”<sup>41</sup> The agency further describes the requirement as following the best practices guidelines published by the U.S. Department of the Treasury.<sup>42</sup>

On September 25, 2001, President Bush signed Executive Order 13,224, prohibiting U.S. persons from transacting or dealing with individuals and entities controlled by or otherwise associated with specially designated terrorists. This Order also blocks the property interests and assets of the named terrorists or terrorist supporters.<sup>43</sup> In response to Executive Order 13,224, the Department of the Treasury blocked the assets of three charities believed to have ties to terrorist organizations.<sup>44</sup>

Arab American and American Muslim charitable organizations, concerned about the prospect of having their assets blocked, subsequently sought guidance from the Treasury Department on how to avoid this type government interference in their activities.<sup>45</sup> The Department published the *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.—Based Charities*<sup>46</sup> (Treasury Guidelines) to advise charitable organizations on how to minimize the likelihood that their charitable funds would be diverted for terrorist activities.<sup>47</sup> The Treasury Guidelines advise charities to engage in best practices, such as maintaining an appropriate governing structure and making public the names of members of the board of directors, key employees, and affiliate organizations that receive funding from the charity.<sup>48</sup> Furthermore, charities are advised to maintain detailed personnel records of key employees, including home addresses and social

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docs/2005nationalfederationapplication.doc (last visited Aug. 1, 2005). See also Wolverton, *supra* note 3 (reporting on the new CFC requirement and the charities’ responses to the rule).

<sup>41</sup>U.S. OFFICE OF PERSONNEL MANAGEMENT, CFC MEMORANDUM 2004-12 (Nov. 24, 2004) available at <http://www.opm.gov/cfc/opmmemos/2004/2004-12.asp> (last visited Aug. 1, 2005) [hereinafter CFC MEMORANDUM].

<sup>42</sup>*Id.* (referring to U.S. DEP’T. OF THE TREASURY, U.S. DEPARTMENT OF THE TREASURY ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S. – BASED CHARITIES, available at <http://www.treas.gov/press/releases/docs/tocc.pdf> (last visited Aug. 1, 2005)).

<sup>43</sup>Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

<sup>44</sup>CFC MEMORANDUM, *supra* note 41; *Money Laundering and Terrorism Financing: Hearing Testimony Before the House Fin. Servs. Subcomm. on Oversight and Investigations*, 108th Cong. (June 16, 2004) (statement of R. Richard Newcomb, Dir., Office of Foreign Assets Control U.S. Dept. of the Treasury). Newcomb testified that the Treasury Department blocked the assets of the Holy Land Foundation, the Benevolence International Foundation, and the Global Relief Foundation.

<sup>45</sup>OFFICE OF PUBLIC AFFAIRS, U.S. DEPT. OF THE TREASURY, PO-3607 (2002), available at <http://www.treas.gov/press/releases/po3607.htm> (Aug. 1, 2005).

<sup>46</sup>OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT. OF THE TREASURY, U.S. DEPT. OF THE TREASURY ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S. – BASED CHARITIES, available at <http://www.treas.gov/press/releases/docs/tocc.pdf> (last visited Aug. 1, 2005) [hereinafter TREASURY GUIDELINES].

<sup>47</sup>OFFICE OF PUBLIC AFFAIRS, U.S. DEPT. OF THE TREASURY, *supra* note 45.

<sup>48</sup>TREASURY GUIDELINES, *supra* note 46, at 2.



security numbers.<sup>49</sup> The Treasury Guidelines suggest that any U.S. charities that provide funding to foreign organizations verify that the foreign recipient does not appear on U.S. terrorist watch lists.<sup>50</sup> What is notably absent from the Treasury Guidelines, however, is the very requirement that the OPM alleges to have adopted from these Guidelines—that charities engage in the ongoing practice of comparing names of employees against the names on the terrorist watch lists.<sup>51</sup>

In November, 2004, the OPM issued a memorandum advising charitable organizations on how to comply with the new CFC requirement.<sup>52</sup> The memorandum provides that charities planning to participate in the CFC must, at a minimum, annually compare the names of their employees to two terrorist watch lists<sup>53</sup> and sign a certification verifying that none of the names of their employees appear on these lists.<sup>54</sup> If an organization determines that an employee has a name matching a name on one of the two lists, the organization may not sign the certification and will be denied participation in the CFC.<sup>55</sup> Furthermore, if at anytime after the certification has been signed the organization determines that an employee has a name matching a name on one of the terrorist watch lists, the organization is to notify the OPM, and the agency will suspend disbursement of CFC funds.<sup>56</sup>

### C. Terrorist Watch Lists

The term “terrorist watch list” is a catchall phrase referring to more than a dozen lists, maintained by nine federal agencies, containing names used by terrorists, suspected terrorists, or individuals who may know terrorists.<sup>57</sup> While all the lists share the common purpose of curbing future terrorist acts, the specific purpose that each list serves and the procedure by which names are compiled vary among the federal agencies managing the lists.<sup>58</sup> For example, the terrorist watch list maintained by the Transportation Safety Administration serves the purpose of

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<sup>49</sup>*Id.* at 3.

<sup>50</sup>*Id.* at 5.

<sup>51</sup>See TREASURY GUIDELINES, *supra* note 46.

<sup>52</sup>CFC MEMORANDUM, *supra* note 41.

<sup>53</sup>*Id.*; see also Brad Wolverton, *Federal Charity Drive Explains How Controversial Rule Works*, THE CHRON. PHILANTHROPY, Dec. 9, 2004, at 12.

<sup>54</sup>CFC MEMORANDUM, *supra* note 41.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>OFFICE OF INSPECTOR GEN., DEPT. OF HOMELAND SEC., DHS CHALLENGES IN CONSOLIDATING TERRORIST WATCH LIST INFORMATION, OIG-04-31, at 4 (2004), available at [http://www.dhs.gov/interweb/assetlibrary/OIG-04-31\\_Watch\\_List.pdf](http://www.dhs.gov/interweb/assetlibrary/OIG-04-31_Watch_List.pdf) [hereinafter DHS INSPECTOR GEN. REPORT]. The report assesses the strengths and weaknesses of the Department’s statutorily mandated responsibility of consolidating the multiple watch lists maintained by different federal agencies. *Id.* One of the most alarming weaknesses identified by the Inspector General’s report is the lack of privacy with list management. *Id.*

<sup>58</sup>*Id.*

barring individuals thought to be terrorist threats from traveling on passenger airplanes.<sup>59</sup> The terrorist watch list maintained by the Department of Treasury identifies individuals and organizations whose property is blocked in the U.S. and with whom U.S. citizens are barred from transacting.<sup>60</sup> The Specially Designated Nationals List, maintained by the Department of the Treasury, and the Terrorist Exclusion List, maintained by the Department of State and the Department of Justice (collectively, “terrorist watch lists”) are the two lists the OPM requires charitable organizations to consult as a condition to receiving CFC funds.<sup>61</sup>

The reliability of these terrorist watch lists is questionable at best. Many of the names on the lists lack specific identification information, such as a date of birth, social security number, or last known address.<sup>62</sup> This lack of specificity leaves open the real possibility for misidentification.<sup>63</sup> One of the more notable examples of a terrorist misidentification happened to Senator Edward Kennedy of Massachusetts. Between March 1 and April 6, 2004, airline employees tried to bar Senator Kennedy from boarding flights because “Edward Kennedy” appeared on a terrorist watch list.<sup>64</sup> Unfortunately, if a name mistakenly appears on one of these terrorist watch lists or a name on a list matches that of an innocent person, the federal government has no effective procedure for either removing the name from the list or authenticating which specific individual the list is attempting to identify.<sup>65</sup>

In addition to misidentification, the Department of Homeland Security Office of Inspector General identified individual privacy as a leading concern in the maintenance and consolidation of the various terrorist watch lists.<sup>66</sup> Specifically, the Inspector General reported concerns with the Department of Homeland Security’s failure to implement an overarching privacy policy to govern the nine different

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<sup>59</sup>Glenn Frankel & Sara Kehaulani Goo, *U.S. Alert Prompts British Plane to Turn Back; Passenger Carrying French Passport Is Questioned in London and Released*, WASH. POST, Jan. 13, 2005, at A16.

<sup>60</sup>*Watch Watch Lists; Bank Secrecy Act of 1970*, SEC. INT. NEWS, Sept. 20, 2004.

<sup>61</sup>CFC MEMORANDUM, *supra* note 41.

<sup>62</sup>Ann Davis, *Far Afield: FBI’s Post-Sept. 11 ‘Watch List’ Mutates, Acquires Life of Its Own*, WALL ST. J., Nov. 19, 2002, at A1; Romero, *supra* note 1.

<sup>63</sup>Romero, *supra* note 1; Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy at Airport*, N.Y. TIMES, Aug. 20, 2004, at A1. The ACLU researched a sample of names found on the Department of Treasury’s watch list to demonstrate the potential for misidentification: “Juan M. Cruz” is also the name of a member of the Atlanta Braves and the name of over 100 individuals listed in Florida; “Charles Taylor” is also the name of a member of Congress and the name of a professor at Stanford University and a professor at Northwestern University; and “Oscar Hernandez” is also a name shared by more than 200 individuals living in Texas and Florida. This information is available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16990&c=207> (last visited Aug. 1, 2005).

<sup>64</sup>Charlie Savage, *No-Fly List Almost Grounded Kennedy, He Tells Hearing*, BOSTON GLOBE, Aug. 20, 2004, at A2.

<sup>65</sup>Plaintiff’s Complaint at 8, *Green v. Transp. Sec. Admin.* (D. Wash.), *available at* <http://news.findlaw.com/hdocs/docs/aclu/greenvtsa40604.cmp.pdf> (last visited Aug. 1, 2005).

<sup>66</sup>DHS INSPECTOR GEN. REPORT, *supra* note 57, at 27.

federal agencies maintaining terrorist watch lists.<sup>67</sup> Given these reliability problems stemming from the compilation and maintenance of the terrorist watch lists, it is a wonder why the OPM is prepared to exclude CFC participation based on the accuracy, or inaccuracy, of these lists.

### III. CONSTITUTIONAL ANALYSIS OF THE COMBINED FEDERAL CAMPAIGN

#### A. *Cornelius v. NAACP Legal Defense and Educational Fund*

Both the acts of soliciting funds and contributing funds through the CFC are protected speech, governed by the public forum doctrine of the First Amendment.<sup>68</sup> *Cornelius v. NAACP Legal Defense and Educational Fund*<sup>69</sup> held that the federal government did not violate the First Amendment by excluding legal defense and public advocacy groups from participating in the CFC.<sup>70</sup> In *Cornelius*, the NAACP and other legal defense organizations brought an action against the OPM to challenge their threatened exclusion from the CFC after President Reagan limited participation in the CFC to “voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families.”<sup>71</sup> Reagan explicitly excluded organizations that “seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves.”<sup>72</sup> As the *Cornelius* plaintiffs were all legal defense funds which influenced public policy through political activity, advocacy, lobbying and litigation, these groups stood to be excluded from continued participation in the CFC.<sup>73</sup>

The *Cornelius* Court analyzed the CFC under the First Amendment’s public forum doctrine, a doctrine that provides an analytical framework for determining “when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.”<sup>74</sup> The Court determined that the CFC, not the federal workplace, was the forum in which speech took place<sup>75</sup> and that the CFC was a “non-public forum.”<sup>76</sup> The government is afforded broad discretion in restricting speech in a non-public forum;<sup>77</sup> speech regulations in a non-public forum need only be “reasonable,” as long

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<sup>67</sup>*Id.*

<sup>68</sup>*Cornelius*, 473 U.S. at 799.

<sup>69</sup>473 U.S. 788.

<sup>70</sup>*Id.* at 813.

<sup>71</sup>*Id.* at 795 (citing Exec. Order No. 12,353, 47 Fed. Reg. 12,785 (Mar. 25, 1982)).

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>*Id.* at 800; *see also* O’Neill, *infra* note 77, at 284.

<sup>75</sup>*Cornelius*, 473 U.S. at 801.

<sup>76</sup>*Id.* at 806; *see also* O’Neill, *infra* note 77, at 286-87.

<sup>77</sup>Kevin Francis O’Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 Sw. U. L. REV. 225, 287 (2000).

as the government is not attempting to restrict the content of speech because it disagrees with the message.<sup>78</sup> Upon recognizing that the purpose of excluding groups that engage in political advocacy, lobbying, or litigation was to minimize disruption in the workplace, *Cornelius* determined the government's exclusion of these organizations from the CFC to be reasonable.<sup>79</sup>

*B. The CFC Requirement is Distinct From the Issue Addressed in Cornelius*

Until recently, the courts have not been presented with a constitutional question arising from the CFC since *Cornelius*. On November 10, 2004, the ACLU along with twelve other organizations sued the OPM and the CFC Director on the grounds that the new CFC requirement is unconstitutional.<sup>80</sup> The plaintiffs assert that the requirement violates their rights under the First and Fifth Amendments, specifying that the condition places "a vague, unreasonable, and unconstitutional burden on [their] expressive and associational activities."<sup>81</sup>

While the courts may be tempted to apply the First Amendment analysis used in *Cornelius*, the attendant facts do not invoke the same issues addressed in that opinion. In *Cornelius*, the federal government excluded groups from participating in the CFC based on the manner by which these groups provided services.<sup>82</sup> The issue before the Court was whether the federal government suppressed speech by excluding certain groups from the CFC.<sup>83</sup> The present fact pattern is distinct from *Cornelius* in that the federal government is not implementing an outright exclusion of any particular group from participating in the CFC based on the manner in which an organization provides services. Instead, the government is conditioning CFC participation on the group's willingness to compare private employee lists to names on terrorist watch lists and to turn over the names of employees matching those names on the lists.<sup>84</sup> The result of this factual distinction is that the CFC requirement is not placing an outright restriction on an organization's free speech rights; rather, it is placing a condition on the privilege of exercising of those rights. Thus, the issue is one of an unconstitutional condition rather than a direct infringement of free speech.

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<sup>78</sup>*Id.*

<sup>79</sup>*Cornelius*, 473 U.S. at 813.

<sup>80</sup>Salmon, *supra* note 8. The twelve additional plaintiffs are the Advocacy Institute in Washington, DC; Amnesty International USA in New York, NY; Asian American Legal Defense and Education Fund in New York, NY; Brennan Center for Justice at New York University School of Law in New York, NY; Electronic Frontier Foundation in San Francisco, CA; NAACP Special Contribution Fund in Baltimore, MD; NAACP Legal Defense and Educational Fund in New York, NY; Natural Resources Defense Council in New York, NY; Focus Project d/b/a OMB Watch in Washington, DC; Our Bodies Ourselves in Boston, MA; People for the Ethical Treatment of Animals in Norfolk, VA; and the Unitarian Universalist Service Committee in Cambridge, MA. See ACLU Complaint, *supra* note 20, at 1-2.

<sup>81</sup>ACLU Complaint, *supra* note 20, at 26.

<sup>82</sup>*Cornelius*, 473 U.S. at 795.

<sup>83</sup>*Id.* at 797.

<sup>84</sup>Wolverton, *supra* note 3.

## IV. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

## A. Background

The unconstitutional conditions doctrine holds that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.”<sup>85</sup> The doctrine reflects the principle that the government may not command indirectly what it is forbidden to command directly.<sup>86</sup> For example, the Supreme Court determined that a federal law prohibiting educational broadcasting stations from editorializing in order to receive federal grant dollars was an unconstitutional condition.<sup>87</sup> In *Federal Communications Commission v. League of Women Voters of California*,<sup>88</sup> the Supreme Court reasoned that just as Congress could not directly command a broadcasting station to relinquish its First Amendment right to editorialize, Congress could not do so indirectly by conditioning a federal grant on the grantee’s willingness to surrender its right to Free Speech.<sup>89</sup> In essence, the doctrine prevents the government from pressuring or coercing citizens into relinquishing a constitutional right in exchange for a gratuitous benefit.<sup>90</sup>

The unconstitutional conditions doctrine evolves each time the government devises an innovative means for conditioning benefits or privileges. At the turn of the twentieth century, the Supreme Court first invoked the doctrine to prohibit states from conditioning economic liberties enjoyed by corporations on the corporations’ willingness to relinquish constitutional rights.<sup>91</sup> Fifty years later, the doctrine reemerged to safeguard personal liberties. For example, the Court ruled that the

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<sup>85</sup>*Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Although *Perry* refrains from using the term “unconstitutional condition,” the opinion is subsequently cited by later Supreme Court decisions when defining the doctrine of unconstitutional conditions. See generally *O’Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 716-17 (1996); *Rutan v. Republican Party*, 497 U.S. 62, 69 (1990); *FCC v. League of Women Voters*, 468 U.S. 364, 408 (1984) (White, J., dissenting).

<sup>86</sup>*Sullivan*, *supra* note 11, at 1415.

<sup>87</sup>*League of Women Voters*, 468 U.S. at 402.

<sup>88</sup>*Id.*

<sup>89</sup>*Id.* at 384. The Supreme Court recently ruled that in some circumstances, the government can constitutionally condition how government grant money is spent. In upholding a congressional mandate prohibiting a health care clinic from using federal dollars to counsel patients on abortion, the Court concluded that the Constitution did not prohibit Congress from choosing to fund one form of speech and not another. See *Rust v. Sullivan*, 500 U.S. 173 (1991). Although this ruling seems to veer from the doctrine of unconstitutional conditions doctrine, it does not affect this note’s topic as the CFC funding is not designated from the federal budget; CFC dollars are raised from the income earned from federal employees.

<sup>90</sup>*Speiser v. Randall*, 357 U.S. 513, 519 (1958) (holding that the denial of a tax exemption for veterans who engage in protected speech will have the effect of coercing the veterans into relinquishing their First Amendment rights).

<sup>91</sup>*Sullivan*, *supra* note 11, at 1415. Accord Cass. R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U.L. REV. 593, 597 (1990).

government could not condition tax exemptions on the surrender of protected political speech, condition public employment on one's association with a particular political party, or condition welfare benefits on consent to work on a religious Sabbath.<sup>92</sup>

The most recent development of the unconstitutional conditions doctrine, and one bearing direct relevance to the focus of this note, involves a government condition that individuals relinquish one constitutional right as a condition for exercising another right. In *Bourgeois v Peters*,<sup>93</sup> the Eleventh Circuit ruled that the City of Columbus, Georgia imposed an unconstitutional condition when it required individuals to submit to an unreasonable body search, by means of metal detectors, as a condition of protesting a controversial military training school.<sup>94</sup> *Bourgeois* developed the traditional doctrinal analysis by expanding the applicability of the doctrine to include not just conditions placed on gratuitous benefits, but to also conditions placed on constitutional rights.

### B. Doctrinal Elements & Analytical Framework

An unconstitutional conditions analysis begins with identifying two key elements: (1) a gratuitous government benefit, and (2) a threatened constitutional right.<sup>95</sup> The "benefit" in an unconstitutional conditions problem encompasses any benefit that the government is "permitted but not compelled to provide,"<sup>96</sup> such as federal grants, public employment, or social services.<sup>97</sup> Although the government may withhold a gratuitous benefit altogether, it may not deny the benefit "on the basis that infringes [one's] constitutionally protected interests . . . ."<sup>98</sup> In the past

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<sup>92</sup>Sullivan, *supra* note 11, at 1416; *see generally* Branti v. Finkel, 445 U.S. 507 (1980) (using the doctrine of unconstitutional conditions to prohibit a county public defender from terminating public employees because the employees were not affiliated with or sponsored by the Democratic Party); Sherbert v. Verner, 374 U.S. 398 (1963) (employing the unconstitutional conditions doctrine to protect religious freedom in holding that the State of South Carolina unconstitutionally conditioned unemployment benefits on citizens' willingness to work on a religious Sabbath); Speiser, 357 U.S. 513 (holding that the denial of a tax exemption for veterans who engage in protected speech will have the effect of coercing the veterans into relinquishing their First Amendment rights).

<sup>93</sup>387 F.3d 1303 (11th Cir. 2004).

<sup>94</sup>*Id.* at 1324.

<sup>95</sup>Sullivan, *supra* note 11, at 1422.

<sup>96</sup>*Id.* Sullivan notes that "current constitutional law treats most governmental benefits as 'gratuities:' matters of political grace to be deferentially reviewed." *Id.*

<sup>97</sup>*See generally* League of Women Voters, 468 U.S. at 402 (recognizing that an Act which conditions receipt of a federal grant on the relinquishment of the right to editorialize imposes an unconstitutional condition on an educational broadcasting station); Perry, 408 U.S. at 597 (ruling that a state requirement is an unconstitutional condition when the state required a non-tenured professor to cease criticizing the Board of Regents in order to maintain his employment with a state college); Sherbert, 374 U.S. 398 (1963) (employing the unconstitutional conditions doctrine to protect religious freedom when it held that the State of South Carolina unconstitutionally conditioned unemployment benefits on citizens' willingness to work on a religious Sabbath).

<sup>98</sup>Perry, 408 U.S. at 597.

half-century, government gratuities in unconstitutional conditions problems have fallen into one of two categories: exemptions from regulations, such as tax exemptions and land variances, or direct subsidies and other “government largesse,” such as unemployment benefits and federal grants.<sup>99</sup> As explained above, in October 2004, the Eleventh Circuit identified a third category of benefits subject to the unconstitutional conditions doctrine—the privilege of exercising a constitutional right, such as the freedom of speech and assembly.<sup>100</sup>

The second component of the unconstitutional conditions doctrine is a “constitutional right” such as speech, religion, and property rights.<sup>101</sup> These rights and the unconstitutional conditions by which they are burdened typically possess certain characteristics. First, the condition used to limit the constitutional right presents an “either-or” choice, putting the benefit recipient in the position of having to choose either the constitutional right or the benefit.<sup>102</sup> Thus, a situation in which federal grant dollars are distributed based on discriminatory criteria such as race or gender will not invoke the doctrine, as these are characteristics to which the benefit recipient has no choice.<sup>103</sup> Accordingly, the second characteristic is that the choice to relinquish the right or forego the benefit be a “fork in the road [which lies] ahead rather than behind.”<sup>104</sup> The doctrine is therefore more likely to emerge in situations where the condition takes on the form of a prerequisite.<sup>105</sup> Finally, the constitutional interest that is being threatened must be a recognized constitutional right normally guarded by judicial review.<sup>106</sup> Based on these doctrinal elements and characteristics, an unconstitutional condition is best summarized as a circumstance in which “the [g]overnment offers a benefit that it is constitutionally permitted but not compelled to offer, on condition that the recipient undertake (or refrain from) future action that

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<sup>99</sup>Sullivan, *supra* note 11, at 1424-25; *see also* sources cited *supra* note 97; *see generally* Dolan v. City of Tigard, 512 U.S. 374 (1994) (holding that a municipal mandate which required a landowner to donate land to the city as a condition of receiving a variance violated the Fifth Amendment under the doctrine of unconstitutional conditions); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding the state could not condition a tax exemption on a publisher's willingness to only publish religious, professional, trade, or sports periodicals).

<sup>100</sup>*Bourgeois*, 387 F.3d at 1324. This additional category contradicts Sullivan's observation that the benefit in an unconstitutional condition is a gratuity that the government is not compelled to provide. *See* Sullivan, *supra* note 11, at 1422. However, the Eleventh Circuit poignantly noted that it was committed to barring any government condition which has the effect of chilling free speech. 387 F.2d at 1324.

<sup>101</sup>*Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996) (finding an unconstitutional condition when a municipality conditions the benefit of receiving government contracts on the contractor's willingness to cease criticizing the local government). *See* sources cited *supra* notes 97, 99.

<sup>102</sup>Sullivan, *supra* note 11, at 1426.

<sup>103</sup>*Id.*

<sup>104</sup>*Id.* at 1427.

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

is legal for him to undertake (or to refrain from) but that government could not have constitutionally compelled (or prohibited) without especially strong justification.”<sup>107</sup>

Following this definition, there are three steps in an unconstitutional condition analysis. First, identify the benefit and determine whether the government is permitted but not constitutionally compelled to provide that benefit.<sup>108</sup> Second, identify the constitutional right the individual is expected to relinquish in order to receive the benefit.<sup>109</sup> In this step, make certain that the beneficiary is presented with a choice; if the condition is based on unalterable trait, such as race or gender, then the unconstitutional condition doctrine is not the appropriate analysis.<sup>110</sup> Finally, determine whether constitutional standards would prohibit the government from directly restricting the constitutional right in question.<sup>111</sup> If the analysis concludes that the government may not restrict the right directly, then the unconstitutional conditions doctrine holds that the government may not condition receipt of the benefit on the relinquishment of the constitutional right.<sup>112</sup>

#### V. ANALYSIS OF CFC REQUIREMENT AS AN UNCONSTITUTIONAL CONDITION

The new CFC requirement imposes an unconstitutional condition by demanding charitable organizations sacrifice judicial supervision over administrative searches of their private business records as a condition of participating in the federal fundraising program.<sup>113</sup> This condition evades the Fourth Amendment by coercing organizations into voluntarily producing information for which the government would otherwise need a subpoena.<sup>114</sup>

Federal law prohibits any U.S. employer from employing or transacting with terrorists or terrorist organizations.<sup>115</sup> If federal law enforcement officials reasonably suspect that any of the organizations participating in the CFC are employing a terrorist or transacting with terrorist organizations, the Federal Bureau of Investigations is fully authorized to investigate this alleged criminal conduct.<sup>116</sup> Federal agencies typically investigate suspected wrongdoing by issuing an administrative subpoena to compel production of information and documents relevant to the inquiry.<sup>117</sup> The subpoenas are subject to judicial review as a means of

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<sup>107</sup>*Id.*

<sup>108</sup>Sullivan, *supra* note 11, at 1423-25.

<sup>109</sup>*Id.* at 1426-27.

<sup>110</sup>*Id.* at 1427.

<sup>111</sup>*Id.*

<sup>112</sup>*Dolan*, 512 U.S. at 385.

<sup>113</sup>*See generally* Wolverton, *supra* note 3.

<sup>114</sup>*Doe v. Ashcroft*, 334 F.Supp.2d 471, 495 (S.D.N.Y. 2004).

<sup>115</sup>Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

<sup>116</sup>Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, H.R. 3162, 108th Cong., 115 Stat. 272, § 501(a) (2001) [hereinafter USA PATRIOT Act].

<sup>117</sup>*Id.*; *see also* Bailey, 228 F.3d at 346.



ensuring compliance with Fourth Amendment standards.<sup>118</sup> The agency issuing the subpoena may either seek judicial approval prior to serving the subpoena, or, in the alternative, it may issue the subpoena without judicial approval, and the individual or company upon whom the subpoena is served may appeal the enforceability of the subpoena to a court.<sup>119</sup>

Because the government has no reasonable belief that any of the organizations participating in the CFC are in fact employing terrorists,<sup>120</sup> a government subpoena would not likely withstand a Fourth Amendment challenge. Therefore, if the Fourth Amendment prohibits the OPM from obtaining this information directly, the doctrine of unconstitutional conditions prohibits the agency from obtaining the information indirectly.

The paradigm unconstitutional condition is a government mandate requiring an individual to give up a constitutional right, such as speech or protection against an unreasonable search, in order to receive a benefit, such as a tax exemption, welfare benefits, or even a federal grant. To fit neatly within this model, the CFC requirement would demand that the CFC charitable organizations permit the OPM to conduct ongoing searches of their private employee records without a subpoena. The OPM, however, was far more clever in devising its condition. Here, the government itself is not searching the private business records of the charitable agencies planning to participate in the CFC, but rather it is requiring the organizations to conduct the searches themselves and to turn over the names of individuals whose names match those on terrorist watch lists. Notwithstanding this distinction, the result is the equivalent to the paradigm problem in that the government is achieving an ends that the Constitution otherwise prohibits.

Using the framework provided in Part IV, the following analysis identifies participation in the CFC as the “benefit,” and the freedom from unreasonable searches as the “constitutional right.” The analysis establishes that the Fourth Amendment would prohibit such government conduct if the requirement took on the form of a direct order rather than the form of a condition. In sum, the analysis concludes that the OPM is offering the benefit of participating in the CFC, on condition that the recipient consent to an unreasonable search, an action that is legal for the organizations to consent to, but that the government could not constitutionally compel without violating Fourth Amendment protections.<sup>121</sup>

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<sup>118</sup>*Ashcroft*, 334 F.Supp.2d at 495.

<sup>119</sup>*Id.*

<sup>120</sup>Tim Kauffman, *Dozen Charities Join ACLU in Protesting Watch-List Requirement*, FED. TIMES, Aug. 16, 2004, at 8; *see also* CFC MEMORANDUM, *supra* note 41. The OPM has not expressed any belief that organizations participating in the CFC are more likely to employ or fund terrorists than any other charitable organization. Instead, the agency justifies the new rule as a means to ensure charities follow “best practices endorsed by the Administration’s anti-terrorism efforts and to provide information that will aid charities in achieving compliance with the law.” *Id.*

<sup>121</sup>*See* Sullivan, *supra* note 11, at 1427.

A. *Step #1: Participation in the CFC is a “Benefit”*

The “benefit” component in an unconstitutional conditions problem is a gratuitous benefit that the government is permitted but not compelled to provide.<sup>122</sup> In the present fact pattern, the “benefit” is participation in the CFC. The CFC is a charitable program offered by the federal government with the gratuitous purpose of “support[ing] and facilitat[ing] fund-raising on behalf of voluntary agencies through on the job solicitations of Federal employees.”<sup>123</sup> Although the administration of the CFC is authorized by executive order,<sup>124</sup> the Constitution does not mandate that the government host the fundraising drive.<sup>125</sup> Therefore, the benefit of participating in the CFC satisfies the first component of the unconstitutional conditions analysis because it is a gratuitous program that the government is permitted, but not compelled, to provide.

The typical “benefit” in an unconstitutional conditions problem is generally some form of a government largesse or exemption from a regulation. In the present fact pattern, the benefit takes the form of the constitutional right to free speech.<sup>126</sup> Although the benefit of participating in the CFC appears to deviate from a benefit in a typical unconstitutional conditions problem, the Eleventh Circuit recently ruled that conditioning the benefit of protected speech is particularly deserving of heightened protection for the very reason that it is a constitutional right.<sup>127</sup> In *Bourgeois v. Peters*,<sup>128</sup> the City of Columbus, Georgia instituted a policy that required individuals to submit to a metal detector search prior to demonstrating on public property, outside of the gates of a U.S. Army base.<sup>129</sup> In addition to ruling that this requirement violates both the First and Fourth Amendments, the court also described this requirement as a “classic ‘unconstitutional condition,’ in which the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional

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<sup>122</sup>*Id.* at 1422.

<sup>123</sup>Exec. Order No. 12,353, 47 Fed. Reg. 12,785 (Mar. 23, 1982).

<sup>124</sup>*Id.*

<sup>125</sup>*Cornelius*, 473 U.S. at 791-92. The CFC does not fulfill any constitutional obligation imposed on the executive branch. Rather, it is the product of President Eisenhower’s forward thinking objective to simplify the fundraising process for both the donors and the solicitors in the federal workplace. *See supra* text accompanying notes 24-33.

<sup>126</sup>*Cornelius*, 473 U.S. at 799.

<sup>127</sup>*Bourgeois*, 387 F.3d at 1324.

<sup>128</sup>*Id.* at 1303.

<sup>129</sup>*Id.* at 1307. “The plaintiffs in this case are an organization called ‘School of the Americas Watch’ (SAW) and several of its members, including SAW’s founder, Rev. Roy Bourgeois. The group engages in various forms of nonviolent protest, seeking to pressure the federal government to cut funding to the Western Hemisphere Institute for Security Cooperation, better known as the ‘School of the Americas’ (SOA). The SOA is run by the United States Army and housed at Fort Benning, Georgia. It trains military leaders from other countries throughout the Western Hemisphere in combat and various counterinsurgency techniques. SAW contends that the SOA bolsters military dictatorships by training their leaders how to kill, to torture, and otherwise to suppress their citizens.” *Id.* at 1306.

right.”<sup>130</sup> The court noted that the city’s new search requirement was an “especially malignant unconstitutional condition” because not only did the city require citizens to relinquish a constitutional right in order to receive a governmental benefit, the city required citizens to relinquish a constitutional right, freedom from unreasonable searches, in order to exercise other constitutional rights, the freedoms of speech and assembly.<sup>131</sup>

Like the City of Columbus, the OPM is conditioning the benefit of one constitutional right, protected speech in the form of CFC fundraising, on the groups’ willingness to relinquish Fourth Amendment protections. Following the rationale of the Eleventh Circuit, the OPM is, in effect, coercing the CFC organizations into choosing one constitutional right over another. This type of coercion is prohibited under the doctrine of unconstitutional conditions.<sup>132</sup>

#### *B. Step #2: Requirement to Relinquish Fourth Amendment Rights*

The “constitutional right” component in an unconstitutional conditions analysis is a recognized constitutional right that the beneficiary must forego in order to receive the gratuitous governmental benefit.<sup>133</sup> Although an individual or organization may waive their constitutional rights on their own accord, the government may not command or coerce individuals into relinquishing these fundamental rights.<sup>134</sup> In the past 50 years, the federal courts have considered unconstitutional condition cases involving rights guaranteed by the First,<sup>135</sup> Fourth,<sup>136</sup> and Fifth Amendments.<sup>137</sup>

In the present fact pattern, the OPM is seeking information from private business records in violation of the Fourth Amendment. The “condition” in this fact pattern requires organizations to compare the names of their employees to names listed on terrorist watch lists, and to then to notify the OPM when there is a match.<sup>138</sup> This requirement is the equivalent of the OPM issuing an administrative subpoena to all 10,000 organizations who participate in the CFC each year, ordering the organizations to continuously report personnel information contained in private business records for as long as the groups opt to participate in the CFC. Such a subpoena is subject to a Fourth Amendment reasonableness standard by means of judicial review.<sup>139</sup> However, by conditioning a governmental benefit on the

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<sup>130</sup>*Id.* at 1324.

<sup>131</sup>*Id.*

<sup>132</sup>*Id.*

<sup>133</sup>Sullivan, *supra* note 11, at 1427.

<sup>134</sup>*Id.*

<sup>135</sup>*See supra* note 92.

<sup>136</sup>*Bourgeois*, 387 F.3d at 1324; *see also* Wyman v. James, 400 U.S. 309 (1971) (using the unconstitutional conditions doctrine to analyze the constitutionality of a condition which required home visits in order to receive welfare benefits; the Court ultimately ruled that the home visit was not a search within the meaning of the Fourth Amendment).

<sup>137</sup>*Dolan*, 512 U.S. 374.

<sup>138</sup>Liptak, *supra* note 5.

<sup>139</sup>*Ashcroft*, 334 F. Supp. 2d at 495.

organizations' willingness to voluntarily produce information that would otherwise require a subpoena, the OPM has effectively side-stepped the judicial hurdles that the Fourth Amendment would otherwise pose in the government's quest for this information. Consequently, this new condition for continued participation in the CFC emulates that of an unconstitutional condition because the condition requires the organizations to voluntarily surrender Fourth Amendment protections by producing information that the government would otherwise need a subpoena to obtain.

The condition of comparing employee records against terrorist watch lists encompasses the characteristics typically seen in unconstitutional conditions.<sup>140</sup> The condition presents a choice to the organizations: compare employee lists to terrorist watch lists or forego future participation in the CFC. The choice to relinquish the right or forego participation is a decision the organizations will face every year, thus the "fork in the road" lies ahead.<sup>141</sup> And finally, the constitutional interest, freedom of unreasonable government searches, amounts to a preferred right subject to judicial review.<sup>142</sup>

### *C. Step #3: Constitutional Analysis of the CFC Requirement Under the Fourth Amendment*

Before embarking upon the constitutional analysis of the new CFC requirement under the Fourth Amendment, it is useful to review the first two steps of the unconstitutional conditions analysis. The first component of the analysis is the "benefit," or "privilege" as described by the Eleventh Circuit, of exercising protected speech by participating in the CFC. The second component, the "constitutional right," is the Fourth Amendment right to be free from an unreasonable search. The final stage of analysis in the unconstitutional conditions doctrine is to determine whether or not the OPM is indeed violating the Constitution when it requires certain non-profit organizations to voluntarily "search" their business records without judicial oversight, or whether this search is reasonable under the Fourth Amendment. If the act is reasonable, then the doctrine of unconstitutional conditions does not bar its enforcement. However, as the following analysis concludes, the search is not reasonable within the parameters of the Fourth Amendment, and the courts have no choice but to prohibit further enforcement of the regulation.

#### 1. The Fourth Amendment and Administrative Searches

Americans cherish their right to privacy, a right which, in part, stems from the Fourth Amendment.<sup>143</sup> The Fourth Amendment "safeguard[s] the privacy and security of individuals against arbitrary invasions by governmental officials,"<sup>144</sup> by protecting against "unreasonable searches and seizures."<sup>145</sup> To ensure that law

<sup>140</sup>See Sullivan, *supra* note 11, at 1426-27.

<sup>141</sup>*Id.*

<sup>142</sup>*Id.*

<sup>143</sup>William C. Banks and M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 2 (2000).

<sup>144</sup>*Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528 (1967).

<sup>145</sup>U.S. CONST. amend. IV.

enforcement agencies comply with the Fourth Amendment, the Supreme Court has interpreted the Fourth Amendment as mandating “adherence to judicial processes.”<sup>146</sup> To determine the reasonableness of a search, courts typically balance the privacy interests of the individual being searched against the promotion of a legitimate governmental interest.<sup>147</sup> Typically, this balance is reached by requiring law enforcement agents to obtain judicial warrants based on probable cause prior to searching a person or her property.<sup>148</sup> Searches conducted in the absence of a warrant or probable cause are per se unreasonable under the Fourth Amendment unless the search falls within one of the Amendment’s few exceptions.<sup>149</sup> An administrative subpoena is one of those exceptions.<sup>150</sup>

Administrative subpoenas are searches conducted for administrative reasons rather than the purpose of investigating a crime.<sup>151</sup> Although still subject to the Fourth Amendment, the courts hold these types of searches to the less stringent standard of “reasonableness,” rather than the probable cause standard to which a typical search warrant is subject.<sup>152</sup> In order for an administrative subpoena to comply with the reasonableness standard, the subpoena must, (1) fall within the authority of the agency, (2) not make too indefinite a demand, and (3) seek only reasonably relevant information.<sup>153</sup> This reasonableness requirement ensures that administrative subpoenas are used for a legitimate governmental purpose, as mandated by the Fourth Amendment, and not exploited as “arbitrary fishing expeditions.”<sup>154</sup>

## 2. The New CFC Requirement is Unreasonable Under the Fourth Amendment

If the OPM used an administrative subpoena as the means to identify employees whose names match those on terrorist watch lists, rather than seeking the information by conditioning a gratuitous benefit, the agency’s subpoena would not satisfy the Fourth Amendment reasonableness standard. It is helpful to understand the nature of administrative subpoenas when considering this reasonableness standard. Administrative subpoenas fuel the government’s investigative power, but they are strictly limited by the fact that they are only enforceable by a court.<sup>155</sup> Thus, when an agency issues a subpoena to compel documents in relation to an investigation of

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<sup>146</sup>Katz v. United States, 389 U.S. 347, 357 (1967).

<sup>147</sup>Delaware v. Prouse, 440 U.S. 648, 654 (1979).

<sup>148</sup>*Id.*

<sup>149</sup>Katz, 389 U.S. at 357.

<sup>150</sup>Ashcroft, 334 F.Supp. 2d at 495.

<sup>151</sup>Michigan v. Tyler, 436 U.S. 499, 506 (1978); *see generally* Ashcroft, 334 F.Supp. 2d at 495 (explaining that the Fourth Amendment is not confined to literal searches of private homes, but it extends also to constructive searches such as administrative subpoenas).

<sup>152</sup>Gimbal v. Fed. Deposit Ins. Corp., 77 F.3d 593, 596 (2d Cir. 1996).

<sup>153</sup>United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

<sup>154</sup>United States v. Bailey (*In re* Subpoena Duces Tecum), 228 F.3d 342, 349 (4th Cir. 2000) (citing United States v. R. Enters., Inc., 498 U.S. 292, 299 (1991)).

<sup>155</sup>Morton Salt Co., 338 U.S. at 642-43.

possible wrongdoing, the subpoena recipient is entitled to appeal the subpoena and obtain a judicial opinion before the recipient is obligated to comply with the subpoena mandates.<sup>156</sup> Most commonly, these subpoenas are used by agencies with investigative and enforcement powers, such as the Federal Bureau of Investigations,<sup>157</sup> the Occupational Health and Safety Administration,<sup>158</sup> and the Federal Trade Commission.<sup>159</sup>

The Supreme Court observes that the Fourth Amendment reasonableness standard for administrative subpoenas (“within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant”<sup>160</sup>) should not be reduced to a formula, because “relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.”<sup>161</sup> Using the analysis provided by the Supreme Court, it is unmistakably clear that if the OPM had used a subpoena to compel information rather than threatening to revoke the privilege of participation in the CFC, the agency would not satisfy the reasonableness standard.

*a. The Information Sought is Not Within the Authority of the Agency*

Neither Congress nor the Constitution confers the OPM the authority to command private employers to produce information regarding which of their employees have names appearing on terrorist watch lists. The OPM is an independent executive agency, created in 1978 to replace the United States Civil Service Commission.<sup>162</sup> The agency functions as the human resources department for the executive and legislative branches by “serving as the main portal for employment information and connecting job applicants with Federal agencies and departments.”<sup>163</sup> The agency’s director serves as an advisor to the President of the United States on matters concerning civilian employment, and is generally charged with executing Civil Service Rules.<sup>164</sup> When the agency assumed the tasks of the Civil Service Commission, it took on the responsibility of overseeing the CFC.<sup>165</sup> The OPM has no regulatory authority over private corporations in this country, non-profit or otherwise, other than to validate that certain charitable organizations meet

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<sup>156</sup>*Bailey*, 228 F.3d at 348.

<sup>157</sup>*See* USA PATRIOT Act, *supra* note 116, at § 501(a).

<sup>158</sup>*United States v. Sturm, Ruger & Co., Inc.*, 84 F.3d 1, 6 (1st Cir. 1996) (finding that the Occupational Safety and Health Administration has the authority to issue an administrative subpoena against an employer for the purpose of investigating violations of workplace health and safety laws).

<sup>159</sup>*Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 199 (1946) (noting that Congress conferred subpoena powers to the Federal Trade Commission for investigative purposes).

<sup>160</sup>*Morton Salt Co.*, 338 U.S. at 652.

<sup>161</sup>*Bailey*, 228 F.3d at 347 (citing *Oklahoma Press Publ’g Co.*, 327 U.S. at 209).

<sup>162</sup>*Cornelius*, 473 U.S. at 792-93.

<sup>163</sup>OPM GOALS, *supra* note 19.

<sup>164</sup>5 U.S.C.A. § 1103(a)(7) (West 1996).

<sup>165</sup>*Cornelius*, 473 U.S. at 793.

the definition of a “health and welfare organization” in order to satisfy the CFC eligibility requirements.<sup>166</sup>

Noticeably absent from the authority and duties assigned to the OPM is any law enforcement or intelligence gathering powers, specifically, the authority to identify terrorists working for private non-profit corporations.<sup>167</sup> The courts have placed considerable importance on the fact that agencies that do issue administrative subpoenas only do so under the express authority of Congress and for a purpose that Congress may order.<sup>168</sup> Here, the OPM is not operating under the authority of Congress. Instead, it derives its authority to implement this requirement from an executive order and its plenary authority to administer the CFC.<sup>169</sup>

*b. Requirement is Too Indefinite and Not Reasonable in Scope*

The Supreme Court maintains that in order to comply with Fourth Amendment standards, administrative searches and subpoenas will be disallowed if they are not “suitably specific and properly limited in [their] scope.”<sup>170</sup> The requirement of actively comparing employee names against terrorist watch lists is too indefinite in time and unduly burdensome to satisfy the reasonableness requirement of the Fourth Amendment. First, the mandate, whether by subpoena or as a condition of participating in the CFC, is quite literally indefinite in time, as the non-profit groups who participate in the CFC must regularly comply with this requirement for as long as they choose to continue to fundraise through the program. Second, under this new requirement, the charitable organizations participating in the CFC are expected to assume an unduly burdensome task that no other non-profit agency is required to undertake. Although the OPM asserts that this requirement is consistent with the Treasury Guidelines for charitable organizations,<sup>171</sup> just the opposite is true. The Treasury Guidelines do not suggest that charitable organizations compare their employee lists to names on terrorist watch lists. Rather, the Guidelines advise that only those agencies distributing funds to foreign organizations verify that the foreign

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<sup>166</sup>5 C.F.R. §§ 950.201 – 950.203 (2005).

<sup>167</sup>5 C.F.R. § 950; *see also* OPM GOALS, *supra* note 19.

<sup>168</sup>*Bailey*, 228 F.3d at 349; *see also* *United States v. Lockheed Martin Corp.*, 995 F. Supp. 1460 (M.D. Fla. 1998) (ruling the Department of Defense Inspector General was within its authority to subpoena documents from Lockheed Martin Corp. that directly related to an investigation of possible overcharges in connection with a government contract to which Lockheed Martin was a party); *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984) (holding that the Equal Employment Opportunity Office could lawfully subpoena private business records which directly related to an authorized agency investigation; the Court noted that the EEOC is only entitled to subpoena documents that are relevant to the unlawful practice the agency is investigating under Title VII of the Civil Rights Act).

<sup>169</sup>CFC MEMORANDUM, *supra* note 41; Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (providing that the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General shall promulgate rules and regulations to carry out the order, and that all other agencies shall take appropriate measures within their authority to carry out the provisions of the order).

<sup>170</sup>*Bailey*, 228 F.3d at 347 (quoting *Wilson v. United States*, 221 U.S. 361, 376 (1911)).

<sup>171</sup>CFC MEMORANDUM, *supra* note 41; *see also* TREASURY GUIDELINES, *supra* note 46.

organizations do not appear on terrorist watch lists.<sup>172</sup> With regard to maintaining personnel records on employees, the Treasury Guidelines advise that U.S. charitable organizations maintain basic personnel records that include home addresses and social security records—information that most organizations already keep on file.<sup>173</sup>

Although federal law prohibits employing or transacting in any way with terrorists, Congress has not yet imposed an affirmative duty on all employers to continuously compare their private employee records to terrorist watch lists and to report any possible matches to the federal government.<sup>174</sup> The charities fundraising in the CFC are being held to an unduly burdensome standard simply because they are exercising their constitutionally protected right to participate in the CFC. This requirement, both indefinite in time and burdensome in scope, is far too sweeping to meet the reasonableness requirement guaranteed by the Fourth Amendment.

*c. The Information Sought Lacks Relevancy*

The reasonableness standard of the Fourth Amendment requires that administrative searches not exceed purposes relevant to the inquiry.<sup>175</sup> The CFC requirement, whether in the form of a subpoena or an unconstitutional condition, contains no relevance to the purpose of the OPM or its administration of the CFC. As stated above, this agency serves as the human resources department for the executive and legislative branches.<sup>176</sup> In carrying out the duties of this role, the director of the OPM is authorized by the President to “make arrangements for voluntary health and welfare agencies to solicit contributions from Federal employees.”<sup>177</sup> Federal regulations authorize the OPM to collect certain information relevant to the eligibility and financial accountability of the groups participating in the CFC, such as verification of the organizations’ tax-exempt status and overhead costs.<sup>178</sup> The new requirement of comparing employee names to those on terrorist watch lists bears no relevance to either an organization’s eligibility to participate in the CFC, or an organization’s financial accountability, and therefore falls outside the parameters of the Fourth Amendment.

<sup>172</sup>TREASURY GUIDELINES, *supra* note 46, at 6.

<sup>173</sup>*Id.* at 3. Employers will have the full names, addresses and social security numbers of their employees on employee taxation forms (“W-4 form”) required by the Internal Revenue Service, and Employment Eligibility Verification forms (“I-9 form”) required by the Department of Justice, Immigration and Naturalization Service.

<sup>174</sup>*See* 31 C.F.R. §595 (2005). U.S. persons are prohibited from dealing in property or property interests of a “specially designated terrorist,” including making any contribution of funds to such individuals. 31 C.F.R. § 595.204 (2005). Employers have no general affirmative duty to actively compare names of employees against terrorist watch lists. *But see* Shawna S. Baker, *9/11 Executive Order has Bigtime Consequences for Oklahoma Employers*, 11 OKLA. EMP. L. LETTER 8 (Aug. 2003) (interpreting Executive Order No. 13,224 to require “employers to actively fight the war on terrorism by crosschecking their employees’ names against those identified by U.S. authorities”).

<sup>175</sup>*Bailey*, 228 F.3d at 349 (quoting *Oklahoma Press Publ’g Co.*, 327 U.S. at 209).

<sup>176</sup>OPM GOALS, *supra* note 19.

<sup>177</sup>Exec. Order No. 12,353, 47 Fed. Reg. 12,785 (Mar. 25, 1982).

<sup>178</sup>5 C.F.R. § 950.202(b) (2004).



For the abovementioned reasons, the new condition placed on non-profit organizations participating in the CFC is unconstitutional. By conditioning an organization's participation in the CFC on its willingness to produce information for which a federal agency would otherwise need a subpoena, the OPM has effectively evaded its obligations imposed by the Constitution. As the government could not otherwise obtain this information directly, the doctrine of unconstitutional conditions forbids it from obtaining the information indirectly. The doctrine of unconstitutional conditions stands as a bar to this type of government coercion, and courts should recognize this act as an "arbitrary fishing expedition"<sup>179</sup> and prohibit the OPM from further enforcing the rule.

#### VI. JUSTIFICATION FOR DECLARING THE NEW CFC REQUIREMENT UNCONSTITUTIONAL

There are three additional arguments which lend further support to the conclusion that this new requirement is unconstitutional: (1) this type of condition is particularly malignant, (2) the Constitution governs equally in times of peace and war, and (3) the terrorist watch lists are wholly unreliable.

##### A. "[A]n Especially Malignant Unconstitutional Condition"<sup>180</sup>

As the Eleventh Circuit so aptly declared, when the government mandates citizens to relinquish one constitutional right as a condition of exercising another constitutional right, that condition "presents an especially malignant unconstitutional condition."<sup>181</sup> While the unconstitutional conditions analysis revealed that participation in the CFC is a benefit that the government is permitted but not constitutionally compelled to provide, the Supreme Court has ruled that the act of participating in the CFC is also protected speech.<sup>182</sup> By conditioning the charitable organizations' exercise of this right on the willingness to relinquish protections of the Fourth Amendment, the OPM has devised a plan to subtly pressure these organizations into surrendering a constitutionally protected freedom.

The OPM stated that the purpose of this new requirement is to "ensure that charities follow best practices endorsed by the Administration's anti-terrorism efforts and to provide information that will aid charities in achieving compliance with the law."<sup>183</sup> To the contrary, this requirement re-designates a far more expansive interpretation of the *voluntary* guidelines issued by the Department of Treasury into a condition of exercising protected speech. The Department of Treasury specifically notes that its guidelines "do not supersede or modify legal requirements applicable to non-profit institutions."<sup>184</sup> Furthermore, the Treasury Guidelines do not recommend

<sup>179</sup>*Bailey*, 228 F.3d at 349.

<sup>180</sup>*Bourgeois*, 387 F.3d at 1324.

<sup>181</sup>*Id.*

<sup>182</sup>*Cornelius*, 473 U.S. at 799.

<sup>183</sup>CFC MEMORANDUM, *supra* note 41; *see also* TREASURY GUIDELINES, *supra* note 46.

<sup>184</sup>OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT. OF THE TREASURY, INTRODUCTION TO TREASURY'S ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES, *available at* <http://www.treas.gov/offices/enforcement/keyissues/protecting/charities-intro.shtml> (last visited Aug. 1, 2005).

that charities actually engage in an ongoing comparison of employee names to names found on terrorist watch lists, but rather that any organization who distributes funds to foreign recipient organizations be prepared to “demonstrate that it verified that the foreign recipient organization does not appear on any [terrorist watch list] of the U.S. Government, the United Nations, or the European Union.”<sup>185</sup> Using this glaring misinterpretation of the Treasury’s Guidelines as the justification to coerce charitable organizations into surrendering either their First or Fourth Amendment protections is an egregious act, and courts should be vigilant in prohibiting the OPM from further enforcing the rule.

*B. The Constitution is Equal in Times of War and Peace*

The Constitution serves the purpose of balancing government authority and citizens’ rights.<sup>186</sup> Defending against the threat of future terrorist attacks presents a delicate challenge to a free society, namely “how to prevent and punish ideologically-motivated violence without infringing on political freedoms and civil liberties.”<sup>187</sup> This clash between liberties and national defense sprung to life most recently after the attacks on September 11, 2001. The executive branch vigorously sought to expand its intelligence gathering and law enforcement powers as a means to better equip itself to hunt and capture terrorists.<sup>188</sup> The legislative branch, in an effort to show its unwavering support of deterring and punishing terrorist acts in the United States, enacted the USA PATRIOT Act,<sup>189</sup> which provided the executive branch with the powers it sought.<sup>190</sup> The judiciary is now left with the most vital role of determining what government acts fall within the parameters of the Constitution and what government acts do not. This notion of “emergency constitutionalism”<sup>191</sup> is not a new debate, and will likely continue as the nation decides what liberties it will sacrifice in the interest of national security. Nevertheless, longstanding Supreme

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<sup>185</sup>TREASURY GUIDELINES, *supra* note 46, at 6.

<sup>186</sup>Mark G. Young, Note, *What Big Eyes and Ears You Have!: A New Regime for Covert Governmental Surveillance*, 70 *FORDHAM L. REV.* 1017, 1020 (2001).

<sup>187</sup>DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION* 1 (2002).

<sup>188</sup>*Id.* at 15. In reference to the USA PATRIOT Act, the authors write, “Attorney General John Ashcroft, its principal proponent, exerted extraordinary pressure, essentially threatening Congress that the blood of the victims of future terrorist attacks would be on its hands if it did not swiftly enact the Administration’s proposals.” See J.M. Lawrence, *War on Terrorism; Anti-terror Laws in Place; Feds Urgently Implement Crackdown*, *BOSTON HERALD*, Oct. 27, 2001, at 5 (reporting that the USA PATRIOT Act was introduced just five days after the 9/11 attacks and was one of the “swiftest-moving” bills in federal legislative history).

<sup>189</sup>The Act’s introduction states, “To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.” USA PATRIOT Act, *supra* note 116; see also Bob Kemper & Jeff Zeleny, *President Signs Bill Widening Powers for Police*, *CHI. TRIB.*, Oct. 27, 2001, at N1.

<sup>190</sup>See USA PATRIOT Act, *supra* note 116.

<sup>191</sup>Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029 (2004) (contending that because terrorist attacks are more likely to occur again with the development of technology, it is more important than ever to determine whether an actual attack is necessary to trigger a state of emergency or whether the looming threat is enough).

Court precedent holds that the Constitution rules “equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”<sup>192</sup>

The OPM is not only governing outside its authority as permitted by Congress, but it is imposing a condition that falls outside the parameters of the Constitution. Notwithstanding the agency’s goal to support the Administration’s effort to curb future terrorist attacks, the OPM, administering the CFC under the powers of executive branch, is bound by the limitations imposed by the Constitution. If the OPM, or any government agency, suspects that a non-profit agency is employing or funding terrorists, then any effort to thwart this illegal activity must be conducted solely within the powers afforded by the Constitution.

### C. Terrorist Watch Lists are Wholly Unreliable

The reliability of the terrorist watch lists have posed dreadful problems for citizens who have the misfortune of having their name appear on one of these lists, either by coincidence or mistake.<sup>193</sup> As described above, problems with these lists include common names without specific identification such as birth dates, addresses, or social security numbers,<sup>194</sup> non-uniform standards to update the lists and maintain list privacy,<sup>195</sup> and finally, no effective procedure for having a name removed once it is discovered that a name has been mistakenly added to a list.<sup>196</sup> The gravest concern of the use of these lists as a means for determining which charitable organizations can participate in the CFC is the known possibility of a false positive.<sup>197</sup> If an organization finds that a job applicant or an employee has a name matching one of the names on these lists, the organization is put in the position of either not hiring or terminating the individual, or foregoing the opportunity to participate in the CFC.<sup>198</sup> Given the number of problems that the Department of Homeland Security Inspector General has identified in compiling and maintaining a list of individuals and organizations known to pose terrorist threats, it is unsound policy to permit the OPM to use these lists as an impediment to free speech.

## VII. CONCLUSION

The efforts of the U.S. government to curb terrorism, particularly after the devastating attacks on September 11, 2001, have given rise to numerous debates over

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<sup>192</sup>Ex Parte Milligan, 71 U.S. 2, 120-21 (1866).

<sup>193</sup>See Romero, *supra* note 1; Sara Kehaulani Goo, *Hundreds Report Watch-List Trials; Some Ended Hassles at Airports by Making Slight Change to Name*, WASH. POST, Aug. 21, 2004, at A08 (reporting that in the month of July 2004 alone, more than 250 airline passengers filled out forms notifying the government that their names are mistakenly listed on the Transportation Security Administration no-fly list).

<sup>194</sup>See *supra* text accompanying notes 62-67.

<sup>195</sup>DHS INSPECTOR GEN. REPORT, *supra* note 57, at 27.

<sup>196</sup>See Goo, *supra* note 193 (reporting on the numerous problems individuals have faced in clearing up the misidentification of their names on terrorist watch lists).

<sup>197</sup>See *supra* text accompanying notes 1-3.

<sup>198</sup>*Id.*

how best to protect American citizens within Constitutional boundaries.<sup>199</sup> In an effort to support the Administration's anti-terrorism efforts, the OPM decided to condition participation in the nation's largest workplace fundraising drive<sup>200</sup> on charitable organizations' agreement to search private business records for names of employees matching those listed on terrorist watch lists. Notwithstanding the unreliability of these lists, and the Fourth Amendment standards governing the acquisition of such information, the OPM stands firm that this new requirement is a necessary safeguard to securing Americans from terrorism. This recent mandate of the OPM sparks yet another constitutional debate in the ongoing deliberation of how best to provide security from future terrorist acts while properly protecting our civil liberties.<sup>201</sup>

Central to the constitutional discussions revolving around the war on terror is the fundamental question of whether anti-terrorism measures, such as the CFC requirement, truly make us safer as a society. Given that the government has no grounds to suspect CFC organizations are more likely to employ or fund terrorists than those organizations not participating in the CFC, there is no compelling justification for imposing this requirement on these particular charities. Rather than making a meaningful contribution to securing freedom, this new requirement is more likely to result in the blacklisting of innocent people from employment,<sup>202</sup> and the drainage of resources from the organizations that provide much needed health and human services to our communities.

The doctrine of unconstitutional conditions prohibits the government from conditioning a gratuitous benefit on the requirement that the beneficiary relinquish a constitutional right.<sup>203</sup> Since the OPM could not directly obtain the information it seeks without violating the Fourth Amendment, then the doctrine forbids the agency from acquiring the information indirectly by commanding groups to produce it as a condition of participating in the CFC. Because the OPM imposed an unconstitutional condition on the 10,000 CFC charities when it implemented the new requirement, the federal courts should declare the requirement unconstitutional and prohibit further enforcement of the rule.

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<sup>199</sup>COLE & DEMPSEY, *supra* note 187, at ix.

<sup>200</sup>U.S. OFFICE OF PERSONNEL MANAGEMENT (2005), <http://www.opm.gov/cfc> (last visited Aug. 1, 2005).

<sup>201</sup>Salmon, *supra* note 8.

<sup>202</sup>*See* Romero, *supra* note 1.

<sup>203</sup>Sullivan, *supra* note 11.

<sup>204</sup> The author thanks Professor Kevin Francis O'Neill for his invaluable support and enthusiasm throughout the writing of this paper. A special thanks to JPW for his endless support and patience.