

# THE OFAC LIST

*Due process challenges  
in designation and delisting.*

JULY 2014

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area, founded in 1968, works to advance, protect and promote the legal rights of communities of color, low-income persons, immigrants, and refugees. Assisted by hundreds of pro bono attorneys, LCCR provides free legal assistance and representation to individuals on civil legal matters through direct services, impact litigation, and policy advocacy.

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LAWYERS' COMMITTEE FOR  
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# EXECUTIVE SUMMARY

Imagine going to the bank only to discover that your account is frozen because the government has branded you a “terrorist.” The Office of Foreign Assets Control (OFAC) of the U.S. Department of Treasury has the power to do this – behind closed doors, without notice, and with no adequate procedures in place for you to effectively challenge the designation.

OFAC is responsible for implementing economic sanctions against individuals and organizations suspected of terrorism.<sup>1</sup> In this role, OFAC designates and maintains a list of those it considers to be “global terrorists.”<sup>2</sup> Once on the list, a designee’s “property and interests in property” in the United States are immediately blocked.<sup>3</sup> The designee is prohibited from conducting any financial transaction in the U.S. OFAC also has the ability to block the assets of those who have not even been designated but are only under “investigation.”<sup>4</sup> Freezing assets is an important tool to help prevent the funding of terrorism. Unfortunately, however, OFAC’s blocking powers are essentially unchecked. There are no specific criteria governing how an entity is designated or any evidentiary standards to ensure that a designation is proper. An individual or group is not provided sufficient notice of the violation allegedly committed or adequate access to the evidence upon which OFAC’s decision to freeze assets is based. Nor is OFAC under any deadline to respond to requests to unblock assets. Individuals or groups can be forced to wait *years* until a determination is made, during which time their assets remain frozen.

OFAC’s designation procedure has already been found unconstitutional by the United States District Court for the Northern District of Ohio and the Ninth Circuit Court of Appeals as applied to two charity organizations. Although federal court decisions condemning OFAC’s procedure as a violation of due process rights have highlighted the need for reform, more needs to be done at the legislative and regulatory levels to ensure that OFAC’s procedures are made transparent and fair – an objective that will lead to a more

accurate designation of terrorists and, ultimately, a more effective way to help combat terrorism.

In 2007, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("LCCR") published a report addressing the difficulties encountered by consumers with names similar or identical to individuals on OFAC's list.<sup>5</sup>

To uncover further information about the workings of OFAC's designation procedures, LCCR brought a federal court action against the Treasury Department under the Freedom of Information Act, seeking the disclosure of records of those contesting OFAC's designation.<sup>6</sup> In the course of this litigation, LCCR succeeded in obtaining copies of more than 100 delisting petitions, further revealing the injustices and challenges faced by those who were intentionally, but erroneously, designated by OFAC.<sup>7</sup> Interviews with defense counsel have also shed light on the often insurmountable legal challenges their clients encounter when attempting to be "delisted" by OFAC.

This report explores those challenges and offers the following recommendations for reforming OFAC's process:

- Provide specific criteria on what activity is proscribed to merit a designation.
- Develop evidentiary standards for determining designations.
- Provide a statement of reasons to the designee for violations that have been allegedly committed.
- Provide access to the evidence that allegedly forms the basis for the designation, including a non-classified summary of any classified evidence or access to classified evidence under procedures established by other laws.
- Establish a deadline by which OFAC must respond to a designee's petition to be removed from OFAC's list.
- Establish a deadline by which any investigation must be completed so assets are not frozen indefinitely.

- Establish deadlines for responding to license requests allowing the use of blocked funds for specified purposes, and make the process more transparent.
- Make the delisting process more transparent and accessible, including the addition of specific guidance on the delisting process in OFAC's Frequently Asked Questions on the OFAC website.
- Establish an online redress program in which individuals can submit delisting petitions via a website to facilitate processing.
- Provide for an independent administrative review of OFAC's designation.
- Designate an Ombudsperson to oversee the processing of delisting requests.

# INTRODUCTION

*“OFAC is the judge, jury and hangman.”<sup>8</sup>*

**G**arad Nor<sup>9</sup> is a Somali-born U.S. citizen. He opened a financial wire transfer business in Minnesota to help individuals send money to relatives in Somalia. The receipt of such funds in Somalia often means the difference between life and death for families who are facing starvation.<sup>10</sup> This lifeline was abruptly cut off when, without any prior notice, OFAC designated Mr. Nor and his business as “global terrorists” and immediately froze Mr. Nor’s personal and business assets.<sup>11</sup> Without a search warrant, the government raided Mr. Nor’s office and shut down his business. Ironically, during the raid federal agents came upon Mr. Nor’s red, white and blue “United We Stand” sign on his office wall.<sup>12</sup>

As a result of OFAC’s action, Mr. Nor was unable to work to support his family, was shunned by his friends and, as explained by his lawyer, “couldn’t even buy a cup of coffee” without being in violation of OFAC’s order.<sup>13</sup> Mr. Nor “faced the unenviable choice of starving or being in criminal violation of the OFAC blocking order.”<sup>14</sup>

Mr. Nor petitioned OFAC to remove his name from the list and unblock his assets.<sup>15</sup> He also requested a license to use funds from his blocked account for the payment of legal fees and other expenses. Despite Mr. Nor’s repeated calls and letters, OFAC refused to respond.<sup>16</sup> Only after Mr. Nor filed a lawsuit against the government in the United States District Court of Minnesota did OFAC finally acknowledge Mr. Nor’s request for relief.<sup>17</sup> Mr. Nor was eventually removed from OFAC’s list but not before his business was lost and families in Somalia went without urgently needed money.<sup>18</sup>

This is but one example of an individual erroneously designated a “global terrorist” by OFAC.

*“This whole episode has been a Kafkaesque nightmare for myself and my family. It has also been a severe financial burden and done irreparable harm to our family name.”<sup>19</sup>*



## CHARITY INTERRUPTED

**K**indHearts for Charitable Humanitarian Development (“KindHearts”) was a non-profit charity based in Toledo, Ohio seeking to provide humanitarian aid abroad and at home, including assistance to the victims of Hurricane Katrina.<sup>20</sup> KindHearts’ giving came to an abrupt end when – without any prior notice – OFAC indefinitely froze all of KindHearts’ assets and property pending an investigation as to whether KindHearts should be designated as a “global terrorist.”<sup>21</sup> Simultaneously, the government raided KindHearts’ headquarters and the home of its president, seizing records and computers.<sup>22</sup>

OFAC’s freeze of KindHearts’ assets was particularly unexpected since KindHearts had already been implementing the Treasury Department’s voluntary guidelines for charitable organizations as part of its due diligence.<sup>23</sup> After its assets were frozen, KindHearts filed a response contesting the asset freeze and sought information on why it was being investigated as a potential “terrorist.” OFAC did not respond to the request for over a year, at which point it notified KindHearts that it had “provisionally determined” that KindHearts was to be designated as a “specially designated global terrorist.”<sup>24</sup> OFAC’s notice did not provide any explanation of the specific charges under consideration against KindHearts.<sup>25</sup> KindHearts fought for another two years to obtain access to its own documents that had been seized by the government.<sup>26</sup>

In the meantime, OFAC’s block of KindHearts’ assets had effectively shut

down the charity for good.<sup>27</sup> KindHearts was in the untenable position of trying to defend itself against charges, but with little knowledge of the reasons, or access to any evidence, behind the charges.

This failure to inform KindHearts of the rationale and evidence supporting the asset freeze was found unconstitutional by a federal court in Ohio.<sup>28</sup> In a lengthy and well-reasoned opinion, Chief Judge James Carr of the United States District Court for the Northern District of Ohio concluded that the Treasury Department’s seizure of KindHearts’ assets was a violation of the Fourth and Fifth Amendments. The Court held that:

OFAC violated KindHearts’ fundamental right to be told on what basis and for what reasons the government deprived it of all access to all its assets and shut down its operations.<sup>29</sup>

KindHearts eventually reached a settlement with the government and its assets were unblocked.<sup>30</sup> But it took more than five years with the involvement of multiple non-profit organizations and teams of lawyers to reach this result.<sup>31</sup> Unfortunately, the charity had to close its doors years before.

KindHeart’s experience with OFAC is not unique. Over the past several years, many organizations have been forced to shut their doors and individuals have been stigmatized and endured severe hardship as a result of OFAC’s actions and the lack of adequate procedures to challenge them.

## DOING MORE HARM THAN GOOD

**T**he wide discretion accorded to OFAC to designate entities as terrorists, combined with the lack of transparency in the process, has given rise to abuse and discriminatory enforcement of the law.<sup>32</sup> There is a disparate impact on minority groups, particularly Muslim charities, penalizing the innocent beneficiaries of their aid, without doing anything to stem terrorism. In fact, it has been shown that charitable giving actually helps in the fight against terrorism by improving America's image overseas.<sup>33</sup> OFAC has unnecessarily hindered these worthwhile initiatives.<sup>34</sup>

Between 2001 and 2010, OFAC designated eight U.S. based charities as "global terrorists."<sup>35</sup> Of those eight, six were Muslim-based charities and two were Tamil charities providing aid in Sri Lanka.<sup>36</sup> Because of their designations, these organizations can only use funds if OFAC grants them a license to do so. OFAC, however, often denies these license requests without a sufficient explanation.<sup>37</sup> For example, organizations seeking to help Pakistani earthquake refugees and provide other disaster aid have had their license requests denied.<sup>38</sup> At the same time, for-profit

companies are regularly granted licenses to do business in countries that have been designated as state sponsors of terrorism.<sup>39</sup> OFAC has justified the granting of these licenses as advancing legitimate foreign policy interests, even though the issuance of a license or its expedited processing often seems to be the result of political influence.<sup>40</sup>

This disparate treatment is also reflected by the Treasury Department's practice of allowing for-profit corporations to simply pay fines for violations, rather than freezing the corporate assets while the corporations are under investigation for terrorist financing.<sup>41</sup> For example, Essie Cosmetics, Ltd. exported products to Iran in violation of the Iranian Transactions Regulations and the IEEPA yet was allowed to pay a penalty to settle the case. Its assets were never frozen.<sup>42</sup> Moreover, when the defense contractor Halliburton was investigated by the government for doing business with Iran, OFAC took no action to freeze Halliburton's assets.<sup>43</sup> A double standard exists between treatment of charities and for-profit corporations, where only corporate interests are preserved.

*In May 2012, Sue Eckert, a former Assistant Secretary of Commerce and senior fellow of the Watson Institute for International Studies, testified about this problem at a congressional hearing on terrorist financing. Ms. Eckert noted that the "blanket condemnation of groups providing social welfare services alienates Muslim constituencies and prevents aid from reaching those in need." She thus called for a more transparent process and "clarifying what constitutes financing of terrorism and association."*<sup>44</sup>

Investigations of charitable organizations have also revealed that the government's allegations are often without sufficient grounds. The Benevolence International Foundation ("BIF") and the Global Relief Foundation ("GRF") were two Islamic charities that were investigated by the FBI prior to September 11, 2001 regarding suspected ties to Al-Qaida.<sup>45</sup> OFAC froze the assets of these organizations pending its investigation on whether they should be designated as terrorists. The 9-11 Commission Staff found that the government's investigation yielded "little compelling evidence" that either organization had actually provided financial support to Al-Qaida.<sup>46</sup> The Commission Staff reported:

[D]espite unprecedented access to the U.S. and foreign records of these organizations, one of the world's most experienced and best terrorist prosecutors has not been able to make any criminal case against GRF and resolved the investigation against BIF without a conviction for support of terrorism. Although the OFAC action shut down BIF and GRF, that victory came at considerable cost of negative public opinion in the Muslim and Arab communities, who contend that the government's destruction of these charities reflects bias and injustice with no measurable gain to national security.<sup>47</sup>

Indeed, there is no clear measure of whether the implementation of OFAC policies actually deters terrorism. The Treasury Department's annual Terrorist

Asset Report simply identifies the dollar amount in assets that have been blocked and the source. That is not a metric of success.<sup>48</sup> For good reason, terrorist watchlists have been described as "pointlessly overbroad."<sup>49</sup>

## ZAKAT

Blocking funds intended for the needy is particularly problematic for Muslim charities since, charitable giving is a requirement of the Islamic faith.

"Zakat," one of the five fundamental pillars of Islam, represents the giving of a fixed portion of one's income to charity.<sup>50</sup> President Barack Obama has acknowledged the adverse effect of the "financial war on terror" on Muslim groups. In his 2009 speech at Cairo University, the President declared:

"[I]n the United States, rules on charitable giving have made it harder for Muslims to fulfill their religious obligation. That's why I'm committed to working with American Muslims to ensure that they can fulfill zakat."<sup>51</sup>

# CURRENT LEGAL FRAMEWORK FOR DESIGNATION AND DELISTING

*“Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”<sup>52</sup>*

## HOW WE GOT HERE: A BRIEF HISTORY OF THE LAW AUTHORIZING OFAC’S SDN LIST

**T**he International Emergency Economic Powers Act (“IEEPA”), enacted by Congress in 1977, authorizes the President to declare a national emergency “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>53</sup>

In the wake of the September 11, 2001 attacks, and pursuant to the IEEPA, President George W. Bush issued Executive Order 13224, “Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism” (“E.O. 13224”).<sup>54</sup> The order froze the assets of, and forbade transactions with, people determined to have committed, threatened to commit, or support terrorism, or to be “otherwise associated” with such persons.<sup>55</sup> President Bush designated 27 individuals and groups in the order, including Al-Qaida and Osama bin Laden, as Specially Designated Global Terrorists (“SDGT”), and delegated

authority to the Secretary of State and the Secretary of Treasury to designate others.

As amended by the Patriot Act in October 2001, the IEEPA also authorizes the President to “block during the pendency of an investigation” any transaction “with respect to . . . any property in which any foreign country or national thereof has any interest . . . subject to the jurisdiction of the United States.”<sup>56</sup> That is, OFAC is empowered to block an entity’s assets indefinitely without even designating the entity as a SDGT.<sup>57</sup> Specifically, the “property and interests in property” are “blocked and may not be transferred, paid, exported, withdrawn or otherwise dealt in.”<sup>58</sup>

Since E.O. 13224 was issued, hundreds of additional individuals and organizations have been deemed “Specially Designated Global Terrorists” and added to OFAC’s List of Specially Designated Nationals and Blocked Persons (“SDN List”).<sup>59</sup> The list is comprehensive as it contains the names of individuals and companies owned or controlled by specific countries targeted for sanctions, as well as entities designated under programs that are not specific to a particular country.<sup>60</sup> As of December 2013, approximately 800 individuals and groups

designated pursuant to E.O. 13224 were on the list.<sup>61</sup>

## HOW IS ONE LABELED A “GLOBAL TERRORIST?”

**T**his is a crucial question, yet not easily answered. The IEEPA does not define “Specially Designated Global Terrorist”<sup>62</sup> and E.O. 13224 grants broad powers to the Treasury and State Departments to add entities to the list without any specific criteria for designation or evidentiary standards.<sup>63</sup> Indeed, the regulations that were issued pursuant to the statute define the term “Specially Designated Terrorist” so broadly as to grant the government wide discretion in designating entities and individuals as “terrorists.”<sup>64</sup>

Under 31 C.F.R. § 595.311, “Specially Designated Terrorist” includes any entity or individual found to “have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of disrupting the Middle East peace process” or anyone found to “assist in, sponsor or provide financial, material, or technological support for, or services in support of, such acts of violence.” Entities or individuals who are “owned or controlled by” or “act for or on behalf of, any other specially designated terrorist” are also included in the definition.<sup>65</sup> Unfortunately, the regulations fail to shed any light on how an individual or group is actually designated a “global terrorist” to warrant the blocking or freezing of its assets. The process for designation, therefore, is mostly left in the discretion of the Treasury Department, resulting in

arbitrary and often erroneous decision-making and a lack of transparency or notice to those affected.

The lack of specific standards in the designation process was made further apparent by testimony at congressional hearings on the issue of terrorism financing. In May 2010, the House Committee on Financial Services Subcommittee on Oversight and Investigations held hearings on the effect of the Treasury Department’s blocking of terrorist financing on charitable organizations. Among those testifying was Daniel Glaser, the Deputy Assistant Secretary for Terrorist Financing and Financial Crimes of the Treasury Department.<sup>66</sup> Mr. Glaser’s written testimony contained only vague and conclusory statements on what occurs during the designation process.<sup>67</sup> According to Mr. Glaser, the Treasury Department first prepares an “evidentiary package” or “administrative record” for each potential designee. This record is then reviewed by the Treasury Department, along with the Departments of State and Justice to ensure it is “legally sufficient.”<sup>68</sup> The record must demonstrate “a reasonable basis” to determine if the designee meets “the criteria for designation.” The Treasury Department also consults with other federal agencies on the proposed designation.<sup>69</sup> Upon designation, the name of the designee is added to the SDN List, which is then posted on the OFAC website and published in the Federal Register. At that time, OFAC makes a “good faith” effort to explain the effect of the designation to those designees in the



United States and to provide information on procedures for challenging the designation and seeking a license to conduct transactions that would otherwise be prohibited with U.S. funds (e.g., payment of legal fees).<sup>70</sup>

According to Mr. Glaser, the government usually also releases a public statement that “sets forth the reasons for the designation.”<sup>71</sup> However, this does not appear to be what always happens in practice. According to KindHearts, OFAC typically

only issues a press release announcing its action without any statement of reason for its blocking order or designation.<sup>72</sup>

Further, according to one practitioner, the designee is not provided any statement of reason. Rather, the entity typically just receives a stack of public documents with no indication of what is relevant to the designation.<sup>73</sup> Indeed, neither the IEPPA, the Executive Order, nor any of the regulations require that the designee be provided with a statement of reason as to why the entity has been designated.<sup>74</sup>

## THE CURRENT DELISTING PROCESS

**D**espite the dire consequences of being designated by OFAC, there is little published on the procedure for removal from OFAC’s list. As of this writing, a visitor to OFAC’s website will find scant “FAQ” guidance on how to petition for removal.<sup>75</sup> The procedure is instead buried in the Code of Federal Regulations.

Under 31 C.F.R. § 501.807, a designee may submit to OFAC “arguments or evidence that the person believes establishes that insufficient basis exists for the designation.”<sup>76</sup> The individual may also “propose remedial steps . . . which the person believes would negate the basis for designation.”<sup>77</sup> That information is then reviewed by OFAC, which may request additional information from the designee

for clarification or corroboration.<sup>78</sup>

According to OFAC, designees must “credibly demonstrate” that they no longer engage in the activity for which they were designated or that the circumstances for designation no longer apply.<sup>79</sup> According to OFAC, entities are delisted most often when they are able to provide new information demonstrating a change in circumstances.<sup>80</sup>

A designee may request a meeting with OFAC, but OFAC is not required to agree to such a meeting.<sup>81</sup> Under existing OFAC procedures, a designee is not entitled to any type of meeting, hearing or trial to contest designation. After its review, OFAC is required to provide a written decision to the designee.<sup>82</sup> Because there is no deadline for OFAC to act, designees sometimes must wait years before knowing whether they will be removed from the list.

*“OFAC’s potential reach is extensive . . . OFAC can issue a blocking order against any person within the United States or elsewhere. And, of course, OFAC does so without warning.”<sup>83</sup>*

## NO NOTICE OF BLOCKING

**O**FAC does not provide any prior notice of a pending investigation or designation on the theory that an entity could transfer or hide its property.<sup>84</sup> But even after an individual or organization is placed on the list, and its assets are already blocked, the designee usually is still not notified by the government about the designation. Instead, the designee usually only discovers the problem when attempting to use funds or conduct business and is prevented from doing so.<sup>85</sup>

### “Down The Rabbit Hole”

**G**etting ensnared by OFAC can happen to anyone. Just ask Ann Jones, a Fulbright scholar working overseas as a goodwill ambassador for the United States.<sup>86</sup> Ms. Jones was awaiting the receipt of funds via wire transfer to pay her rent in Norway. When the funds did not come through, she contacted her bank. After some back and forth, she eventually discovered that OFAC had blocked the transaction. She contacted the U.S. Embassy in Norway, but they were unable to help. She checked the OFAC list but did not see her name. She then contacted OFAC directly. OFAC agreed to help but only if she provided additional information.<sup>87</sup> Ultimately, the bank itself contacted Ms. Jones to let her know that

her funds had arrived in Norway. Befuddled by the incident, Ms. Jones wrote:

So I have to send my apologies to the long-dead Senator J. William Fulbright: I’m sorry indeed that certain changes in the spirit and operations of the United States have occurred since that day in 1948 when you launched your farsighted program of grants to encourage open international educational and cultural exchange. And I apologize that some of those changes may have temporarily cramped my style as a goodwill ambassador; I’ll try to get back on the job if I can just figure out what hit me.<sup>88</sup>

This citizen emerged from the situation relatively unscathed. But for the many others who are erroneously designated “terrorists” or under investigation, it is not that simple.

Take for instance the “unprecedented embargo” imposed on Mohammed Salah, an American citizen living in Illinois.<sup>89</sup> Mr. Salah first learned of his designation when his wife was unable to withdraw funds from their bank account and the bank notified them of the asset freeze.<sup>90</sup> For more than seventeen years, Mr. Salah was designated a “specially designated terrorist” and unable to purchase even the most basic of necessities without OFAC’s approval.<sup>91</sup> In September 2012, Mr. Salah

eventually filed a complaint against the Treasury Department in the Northern District of Illinois, alleging violation of his constitutional right to due process.<sup>92</sup> OFAC delisted Mr. Salah before Treasury's answer to the complaint was due.<sup>93</sup>

*“The practical consequence of being touched by one of the OFAC economic sanctions programs may be the economic equivalent of capital punishment. By virtue of these restrictions, the blacklisted business may cease to exist as a viable entity.”<sup>94</sup>*

Despite the tremendous impact a designation has on one's life, little information is provided by the government to explain the charges, leaving the designee without any guidance whatsoever. What is often presented to the designee is a file containing only boilerplate conclusions and no evidence to warrant designation.<sup>95</sup> One individual petitioning OFAC for removal from the list expressed his bewilderment:

I have never understood why my name was put on this list. I was never interviewed by you or had any communication from you or any of your officers or representatives. I have no doubt that had you chosen to interview me . . . you would have not taken the decision you did at the time.<sup>96</sup>

According to the Treasury Department, “all U.S. persons have an obligation to identify and block property, including financial property, of individuals and enti-

ties appearing on the SDN list.”<sup>97</sup> To accomplish this objective, “[m]ost large U.S. companies and nearly all U.S. financial institutions have implemented procedures to electronically screen transactions for references to designated parties.”<sup>98</sup> It is a crime to engage in any financial transaction with a person listed on OFAC's list. As a result, that individual is prevented from conducting business, getting a job, getting health insurance, selling their home, or buying anything with U.S. funds.<sup>99</sup> As OFAC put it: “Designating individuals or organizations as SDGTs . . . notifies the U.S. public and the world that these parties are either actively engaged in or supporting terrorism or that they are being used by terrorists and their organizations. Notification exposes and isolates these individuals and organizations, denies them access to the U.S. financial system . . . Furthermore, banks and other private institutions around the world frequently consult OFAC's SDN list and report denying listed persons access to their institutions.”<sup>100</sup> Indeed, a designee's funds are frozen at a crucial time when such funds are needed to hire counsel to challenge the freeze. A designee is essentially forced to put his or her life on hold indefinitely.

One individual seeking to be delisted described the adverse consequences of being on OFAC's list:

The loss of prestige, goodwill and credibility, causing my children an emotional trauma; without mentioning the discrimination they face at educational establishments. This could lead to the destruction of my home, since it leaves us emotionally and economically unstable . . . Cut-



ting off all sources of income, severing me by said decision by clearly violating my due process and the right to defend myself from the accusations made against me by publicly judging me, and not even serving a prior notice of this matter; has led to my not being able to develop, as I should, at a professional level.<sup>101</sup>

Another individual wrote that OFAC's listing "has caused me some hefty damages and harm not only to my family, but emotionally, morally and also economi-

cally since this situation led to the closing of my company and to fire personnel."<sup>102</sup>

While the delisting process itself is vague (particularly when the government refuses to provide information on the alleged misconduct at issue), it also does not adequately account for those who were erroneously listed in the first place and have no behavior to change. Moreover, without knowledge of their purported wrongful activity, the designees are essentially operating in the dark. They are unable to "credibly demonstrate" their innocence because they do not know what they allegedly did wrong.

*"Although an entity can seek administrative reconsideration and limited judicial relief, those remedies take considerable time, as evidenced by OFAC's long administrative delay in this case and the ordinary delays inherent in our judicial system. In sum, designation is not a mere inconvenience or burden on certain property interests; designation indefinitely renders a domestic organization financially defunct."*<sup>103</sup>

## NO REMEDY FOR BEING WRONGED

If OFAC refuses to remove a designee's name from the list, the only recourse is to challenge OFAC's designation by filing a lawsuit in federal court<sup>104</sup> – an expensive and time consuming process that is simply not an option for most designees.

Unlike many other contexts, where the law requires administrative appeal within an agency, the IEEPA does not provide for administrative appeal of OFAC's decision.<sup>105</sup> In its report to Congress in 2001,

the Judicial Review Commission on Foreign Asset Control ("Judicial Review Commission") expressed concern about the lack of procedural safeguards and recommended that Congress enact legislation to establish a system of administrative review.<sup>106</sup> Witnesses who testified during Judicial Review Commission hearings found OFAC's procedure "unsatisfactory" because a designee is forced to petition "the same decision-maker (instead of a neutral arbiter) to reconsider its earlier decision."<sup>107</sup>

Further, even if a designee does have the resources to fight the government in federal court, the lack of administrative review still puts the designee at great disadvantage by rendering any court action “ineffective” for a number of reasons. First, a court only has the record of decision by OFAC to review. Such a record likely does not contain any evidence submitted by the designee challenging the decision.<sup>108</sup> Second, the scope of review of the court under the Administrative Procedure Act (“APA”) is limited to determining whether OFAC’s decision was “arbitrary and capricious” as opposed to whether the decision was based on “substantial evidence.”<sup>109</sup> As one Commissioner put it: “Providing a right to judicial review under the arbitrary and capricious standard would be almost meaningless without affording the black-listed entity an adequate opportunity to present evidence and to subject the government’s case to adversarial testing.”<sup>110</sup>

The unacceptable consequence is that designees are left without any effective recourse when they are erroneously designated as “terrorists” by OFAC.

*“By design, a designation by OFAC completely shuts down all domestic operations of an entity. All assets are frozen. No person or organization may conduct any business whatsoever with the entity, other than a very narrow category of actions such as legal defense . . . For domestic organizations, a designation means that it conducts no business at all. The designation is indefinite.”<sup>111</sup>*

# LEGAL QUAGMIRE

*“The procedure is classically and monumentally unfair.”<sup>112</sup>*

## OFAC DESIGNATION PROCESS FOUND UNCONSTITUTIONAL BY THE COURTS

**T**here is very little case law addressing the adequacy of OFAC’s procedures.<sup>113</sup> Only in recent years have courts held that OFAC procedures violate a citizen’s right to due process. Two leading judicial decisions highlight the problems inherent in OFAC’s current practices and why reform is urgently needed.<sup>114</sup>

### **KindHearts for Charitable Humanitarian Development v. Geithner<sup>115</sup>**

**I**n *KindHearts*,<sup>116</sup> the charity argued that OFAC’s block of its assets pending investigation violated its Fourth Amendment right to be free of unreasonable seizure. The United States District Court for the Northern District of Ohio agreed. After concluding that OFAC’s blocking actions constitute a “seizure” under the Fourth Amendment,<sup>117</sup> the Court went on to hold that neither the history of the IEEPA, the Trading With the Enemy Act (the statute amended by the IEEPA), nor the Fourth Amendment justify excluding OFAC’s blocking action from Fourth Amendment scrutiny. The Court distinguished the cases relied upon by OFAC as those involving foreign governments and assets, explaining:

KindHearts is an American corporation based in Toledo, Ohio. Its assets, presumably, came from persons resident in this country. Those assets were in this country when the government seized them . . . *KindHearts is indisputably one of “the people” protected by the Fourth Amendment.* If the Constitution affords KindHearts no protection from unreasonable searches and seizures, whom among “the people” does it protect, and who among the people can be certain of its protection?<sup>118</sup>

Analyzing OFAC’s warrantless blocking of assets actions under the Fourth Amendment, the Court held that OFAC’s actions did not fall within the “special needs” exception to the requirement of a warrant and probable cause.<sup>119</sup> Nor did any “exigency” excuse the lack of warrant since the government made no showing that KindHearts “was about to dispose of its assets in an unlawful manner.”<sup>120</sup>

The Court also found that OFAC failed to provide to KindHearts any meaningful notice and opportunity to be heard. Over a year after OFAC initiated its investigation into KindHearts, the government merely provided its unclassified records consisting of 35 exhibits, 20 of which did not even mention KindHearts. Other portions of the record included newspaper articles, press releases, and court opinions.<sup>121</sup> *More*

than two and a half years after KindHearts' assets were frozen, OFAC still only provided KindHearts with redacted versions of the memorandum upon which it based its provisional designation. OFAC declassified portions of the memorandum a month later.<sup>122</sup> This, the Court found, was insufficient: "KindHearts remains largely uninformed about the basis for the government's actions. To the extent that it has become usefully informed, that information came only after long, unexplained and inexplicable delay and following multiple requests for information."<sup>123</sup> The Court held that OFAC's "notice" was woefully inadequate and unconstitutional, declaring: "OFAC violated KindHearts' fundamental right to be told on what basis and for what reasons the government deprived it of all access to all its assets and shut down its operations."<sup>124</sup>

Likewise, the Court found that OFAC failed to provide KindHearts with a prompt post-deprivation hearing. KindHearts did not receive any response from OFAC to its request for reconsideration for over a year. KindHearts was denied any meaningful opportunity to be heard:

On balancing the pertinent factors, I conclude that OFAC has failed to provide a meaningful hearing, and to do so with sufficient promptness or moderate or avoid the consequences of delay. OFAC did not provide timely or sufficient notice to enable KindHearts to prepare an effective challenge. OFAC ignored KindHearts' initial response. What reply OFAC made to KindHearts' responses and requests was delayed and did not cure the deficiencies of

its earlier notice. Even if OFAC may ultimately show that it had an adequate basis for the blocking order, that does not justify the length of the government's delay in giving KindHearts an opportunity to be heard.<sup>125</sup>

The Court later ordered a post-hoc probable cause showing as the remedy for OFAC's violation of KindHearts' due process rights.<sup>126</sup> The parties subsequently entered into a settlement agreement in which the government agreed to remove all block orders against KindHearts and pay the charity's legal fees.<sup>127</sup> The government also agreed to grant licenses to KindHearts to allow it to distribute its charitable assets to other organizations, including the United Nations World Food Programme, United Nations Children's Fund, United Nations Relief and Works Agency for Palestinian Refugees.<sup>128</sup>

*"The Constitution does require that the government take reasonable measures to ensure basic fairness to the private party and that the government follow procedures reasonably designed to protect against erroneous deprivation of the private party's interests."<sup>129</sup>*

**Al Haramain Islamic Foundation, Inc.  
v. United States Dept. Of Treasury**<sup>130</sup>

**A**l Haramain Islamic Foundation-Oregon (AHIF) was a non-profit charity based in Ashland, Oregon.<sup>131</sup> In February 2004, without any prior notice, OFAC blocked AHIF's assets pending its investigation on whether AHIF should be designated as a "terrorist." OFAC's press release did not explain why AHIF was being investigated, nor did OFAC provide its reasons to AHIF.<sup>132</sup> Several months later, in September 2004, OFAC decided to designate AHIF.<sup>133</sup> Denying any wrongdoing, AHIF requested reconsideration in early 2005 of OFAC's decision to designate it. However, despite AHIF's repeated requests for an explanation as to why it was designated and a decision on its request for reconsideration, OFAC did not respond *for another two years*, essentially forcing AHIF to file suit in 2007.<sup>134</sup> Six months after AHIF brought its suit, OFAC notified AHIF that its request for reconsideration of the designation had been denied.<sup>135</sup> The reasons alleged by OFAC in support of the designation were: AHIF was owned or controlled by Al-Aqil (an individual designee on OFAC's list); that AHIF was owned or controlled by Al-Buthe (another designee); and that AHIF provided support to Al-Qaida and other designees as a branch office of AHIF-Saudi Arabia.<sup>136</sup> Under the highly deferential standard of "arbitrary, capricious" or an "abuse of discretion, or otherwise not in accordance with law" that is applied by courts to agency decisions,<sup>137</sup> the district court and the Court of Appeals upheld OFAC's designation of AHIF.<sup>138</sup>

The Ninth Circuit next evaluated procedural due process under the Fifth

Amendment concerning OFAC's use of classified information and denial of AHIF's access to it. The Court pointed out that OFAC could have provided AHIF with an unclassified summary of the information or allowed the designee's attorney with proper security clearance to view the information – all without compromising national security.<sup>139</sup> The Court rejected OFAC's argument that doing so would be "unduly burdensome," declaring: "We acknowledge the agency's abstract concerns but find that they have little practical reality. Here, for instance, OFAC eventually presented a list of unclassified reasons to AHIF-Oregon, which could have been augmented by a short unclassified summary of classified evidence. *The small expenditure in time and resources would not outweigh the entity's interest in knowing the charges and evidence against it.*"<sup>140</sup>

The Court next addressed AHIF's claim that it was provided inadequate notice and had no meaningful opportunity to respond to OFAC's designation and determination on its request for reconsideration. The Court criticized OFAC's failure to provide AHIF with any reasons for its investigation for the first seven months. The Court also noted that "in the entire *four-year* period, *only one document* could be viewed as supplying some reasons for OFAC's investigation and designation decision."<sup>141</sup> Relying on the well-known *Mathews v. Eldridge* balancing test,<sup>142</sup> the Court held that AHIF's due process rights were violated:

First, OFAC's blocking notice deprived AHIF-Oregon of its ability to use any funds whatsoever, for any purpose. Second, because AHIF-Oregon could only *guess* (partly

incorrectly) as to the reasons for the investigation, the risk of erroneous deprivation was high. Finally, and perhaps most importantly, although national security might justify keeping AHIF-Oregon in the dark, OFAC makes no effort to demonstrate that its failure to provide AHIF-Oregon with reasons for its investigation promoted national security.<sup>143</sup>

The Court concluded that these violations were “harmless error” because, it found, even if AHIF had proper notice and access

to information, it would not have succeeded in altering OFAC’s designation.<sup>144</sup> The Court, however, went on to hold that OFAC’s failure to obtain a warrant for freezing AHIF’s assets violated AHIF’s Fourth Amendment right to be free of unreasonable seizure. Rejecting OFAC’s arguments to the contrary, the Court found that the seizure neither fell within the “special needs” exception to obtaining a warrant,<sup>145</sup> nor the “general reasonableness” test.<sup>146</sup> The Court remanded the case to the district court to determine a potential remedy for OFAC’s violation of AHIF’s Fourth Amendment rights.<sup>147</sup>

*“It’s like fighting with one hand behind your back.”<sup>148</sup>*

## SUMMARY OF LEGAL CHALLENGES

**T**he following is a summary of the most common challenges facing those erroneously designated by OFAC:<sup>149</sup>

### Lack of Adequate Notice of Charges

**A**mong the greatest concerns identified by practitioners is the lack of adequate notice of the charges. When designated, a designee receives a copy of the government’s public administrative record, usually consisting of general information and a press release with boilerplate conclusions.<sup>150</sup> No statement of

reasons is provided because the statute does not require it. OFAC also generally refuses to provide access to the classified information that it claims supports the designation.<sup>151</sup> As a result, the designee remains largely ignorant of the grounds for OFAC’s action and unable to adequately defend itself. As one attorney put it, responding to OFAC is like “shooting in the dark.”<sup>152</sup> Indeed, the 9-11 Commission Staff Report acknowledged that “use of IEEPA authorities against domestic organizations run by U.S. citizens . . . raises significant civil liberty concerns because it allows the government to shut down an organization on the basis of classified evidence, subject only to a deferential after-the-fact judicial review.”<sup>153</sup>



*“To the extent that OFAC contends, or might contend, that KindHearts knew itself what it was doing, where its funds were going and the unlawfulness of their of classified evidence, such response on its part is unavailing. Notice is to come from the government because it alone knows what it believes, and why what it believes justifies its actions.”<sup>154</sup>*

### **Limited Access to Classified Information**

**T**his lack of notice is particularly frustrating since OFAC has failed to make use of existing procedures that allow access to necessary information while ensuring national security is not compromised. For example, under the Classified Information Protection Act,<sup>155</sup> criminal defendants are allowed access to classified information under protective orders or are provided an unclassified summary of the information.<sup>156</sup> The 9-11 Commission Staff noted that OFAC refused to give counsel for the Benevolence International Foundation any of the classified information allegedly supporting

charges against the charity, even though BIF was already receiving some of the same classified information under a protective order in the government’s separate criminal case against BIF.<sup>157</sup>

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) is a potential model for such reform.<sup>158</sup> Under that law, parties challenging their designation must be granted access to unclassified information while classified information is supplied only to the court. This approach would protect the confidentiality of classified information while giving the challenger access to all other unprivileged information on which OFAC relied, along with the benefit of an independent review by a court to ensure that OFAC’s reliance on classified information is warranted.<sup>159</sup> Indeed, the Judicial Review Commission had earlier recommended to Congress that it develop procedures, like those under the AEDPA, to protect confidential information while also giving the petitioner access to any unprivileged information relied upon by OFAC.<sup>160</sup> The Ninth Circuit Court of Appeals in *Al-Haramain* also recognized the availability of means to provide information to entities without implicating national security concerns, such as providing unclassified summaries.<sup>161</sup>

*“It is hard to argue that affording blocked entities an opportunity to hear the evidence against them, mount a defense, and present it at an adversarial hearing would not increase the likelihood that the truth will be discovered and errors avoided.”<sup>162</sup>*

## THE CONUNDRUM OF “CLASSIFIED” INFORMATION

One has to wonder whether the government’s claim that information is “classified” is always justified and not so overbroad as to unnecessarily impinge on the transparency of the proceedings.

In *Ibrahim v. Department of Homeland Security*, a case in which plaintiff brought suit for being wrongfully listed on the government’s “No Fly” list, U.S. District Court Judge William Alsup of the Northern District of California admonished the government for its “stubborn resistance to letting the public and press see the details of [the] case,” including an “overbroad” request for dismissal of the case based on “state secrets.”<sup>163</sup> While recognizing the need to maintain the secrecy of some law enforcement information, Judge Alsup also emphasized the importance of public access to the courts as a way to oversee the government:

“The public has a well-recognized right to access its courts . . . This presumption is strong because the public has an interest in ‘understanding the judicial process’ as well as ‘keeping a watchful eye on the workings of public agencies.’ Public oversight of courts and therefore public access to judicial operation is foundational to the functioning of government. Without such oversight, the government can become an instrument for injustice.”<sup>164</sup>



## Lack of Specific Criteria on What Activities are Proscribed

Compounding the problem of lack of notice of the charges is the fact that the law itself fails to adequately specify what activities are proscribed.<sup>165</sup> The definition of “specially designated terrorist” is unduly broad and innocent people can be unfairly penalized as a result.<sup>166</sup> The lack of clear standards provides fertile grounds for abuse of discretion by government employees when deciding who should be investigated or put on the list. The disproportionate application of OFAC designations to Muslim charities is indicative of possible abuse of discretion.<sup>167</sup>

Lack of guidance has not only led to unnecessary designations, but has decreased charitable giving.<sup>168</sup> In an attempt to remedy the situation, in 2002, the Treasury Department issued “voluntary guidelines” intended to assist charities to comply with the law.<sup>169</sup> These guidelines, however, have been criticized as unduly burdensome and ineffective at rooting out “terrorists.”<sup>170</sup> In response to public comment, the Treasury Department later amended the guidelines and also created a “risk based” matrix for charities to use.<sup>171</sup> The amended guidelines, however, are still considered by many as unworkable and too vague.<sup>172</sup> In addition, a charity’s compliance with the guidelines does not guarantee that it will not be designated by OFAC or have its assets frozen pending an investigation.<sup>173</sup>

## No Deadline by Which OFAC Must Respond To Delisting Requests

Also problematic is that there is no time frame by which OFAC must respond to designation challenges. As a result, OFAC can take *years* to act on a delisting request.<sup>174</sup> This delay greatly increases the harm sustained by delisting petitioners since their lives and businesses are essentially on hold during this time.<sup>175</sup> Counsel for one designee writing to OFAC expressed frustration with OFAC’s lack of responsiveness: “Despite repeated attempts to contact your office, we have received no information to enable us to understand the reasons for . . . designation and have been unable to move forward with the petition for delisting.”<sup>176</sup> The Judicial Review Commission recognized this problem and suggested that specific deadlines be imposed to help alleviate the harm sustained by those awaiting OFAC’s decision.<sup>177</sup>

It took five years for Professor Mohamed Mansour and his wife to remove their names from OFAC’s list.<sup>178</sup> At the time of his designation in 2001, Professor Mansour was a Professor Emeritus at the Swiss Federal Institute of Technology and taught and performed research at various universities in the U.S. The Mansours were placed on the list as a result of their association with al-Taqwa Management Organization, a group deemed a “terrorist organization” by the U.S. Department of State.<sup>179</sup> According to their delisting petition, the Mansours were board members responsible for reviewing the organization’s audit report. After the Mansours responded to a series of questions propounded by OFAC, the couple

was finally removed from OFAC's list in 2006.<sup>180</sup>

Indeed, OFAC's lack of response to a delisting request formed the basis for a lawsuit recently brought in federal court. In January 2014, retired Croatian lieutenant general Ante Gotovina filed a complaint in the U.S. District Court for the District of Columbia to be removed from OFAC's list after he was acquitted of war crimes in November 2012 by the appeals division of the International Criminal Tribunal for the Former Yugoslavia.<sup>181</sup> The U.S. Department of State accepted the acquittal ruling, yet OFAC never responded to Mr. Gotovina's April 2013 delisting request. Counsel renewed Mr. Gotovina's request in August 2013, but OFAC still did not respond.<sup>182</sup> In his complaint, Mr. Gotovina alleged that OFAC violated the Administrative Procedure Act by "unreasonably delaying the removal of [him] from the SDN List, and by unreasonably delaying a written response to [his] request that he be removed from the SDN List."<sup>183</sup> A month after the complaint was filed, OFAC removed Mr. Gotovina from the list and the litigation was dismissed.<sup>184</sup>

### **No Time Restraint on Asset Freeze Pending Investigation**

**F**or each day an individual or organization continues to be investigated, its assets remain blocked. Despite that heavy burden on the designee, there is no time limit on how long an investigation can last.<sup>185</sup> The 9-11 Commission Staff Report criticized OFAC's unlimited power to freeze assets pending investigations as a "particular concern in that it can shut

down a U.S. entity indefinitely without the more fully developed administration record necessary for a permanent IEEPA designation."<sup>186</sup> The same report concluded that when "interim blocking lasts 10 or 11 months . . . real issues of administrative due process and fundamental fairness arise."<sup>187</sup> Indeed, KindHearts was under scrutiny for almost *three years*, during which time it was forced to close its doors.<sup>188</sup>

The Ninth Circuit Court of Appeals in *Al-Haramain* has also condemned this unlimited power: "Interest in being free from blocking orders is great . . . There is no limited scope or scale to the effect of the blocking order. The only limit is temporal, and that limitation is quite small . . . In the meantime, the entity's doors are closed."<sup>189</sup> Furthermore, the 9-11 Commission Staff Report warned that the government should "exercise great caution in using these [blocking] powers."<sup>190</sup> Indeed, the Treasury Department itself had proposed a six month limit for investigation for discussion purposes and offered a "clear recommendation that temporary blocking orders be pursued with due diligence and an anticipated end date."<sup>191</sup>

*"OFAC need only claim that it is 'investigating' a target entity to seize all of its assets . . . Neither IEEPA nor E.O. 13224 places any substantive limits on this power to seize. OFAC has broad power to block any and all assets of an entity subject to United States jurisdiction at any time, for any amount of time, and on virtually any level of suspicion."*<sup>192</sup>

The 9-11 Commission Staff Report warned that an interim blocking order

“is a powerful weapon with potentially dangerous applications when applied to domestic institutions. This provision lets the government shut down an organization without any formal determination of

wrongdoing. *It requires a single piece of paper, signed by a mid-level government official.* Although in practice a number of agencies typically review and agree to the action, there is no formal administrative process, let alone any adjudication of guilt.”<sup>193</sup>

*“Due to articles printed in some Italian and Swiss newspapers, the United States chose to place my name on said list . . . This was done without any investigation into these allegations. Your judicial system says an individual is innocent until proven guilty. However, that is obviously not the case here.”*<sup>194</sup>

### **Reliance on Faulty Intelligence or Mere Speculation as “Evidence” To Support a Designation**

**A**nother flaw in the designation process is OFAC’s reliance on inaccurate information. As one practitioner commented, OFAC operates under a “shoot first, ask questions later mentality.”<sup>195</sup> There are no evidentiary standards set forth in the regulations. As a result, OFAC is susceptible to relying on incorrect news reports and discredited “sources” as a basis for designations.<sup>196</sup> Much of the “evidence” relied on by OFAC is also unreliable hearsay.<sup>197</sup>

In reviewing OFAC’s designation of the Benevolence International Foundation (“BIF”) and the Global Relief Foundation (“GRF”), the 9-11 Commission Staff noted: “BIF’s counsel was stunned to see that the administrative record supporting BIF’s designation included newspaper articles and other rank hearsay. To BIF and GRF’s counsel, experienced lawyers steeped in

the federal courts rules of evidence and due process, the OFAC designation process seemed manifestly unfair.”<sup>198</sup>

These problems were also illustrated in *Kadi v. Geithner*.<sup>199</sup> In that case, Mr. Kadi challenged his OFAC designation in part on grounds that several other governments had already found him innocent of any wrongdoing.<sup>200</sup> Although the court later granted the government’s motion to dismiss,<sup>201</sup> the briefing submitted by Mr. Kadi’s counsel was revealing.<sup>202</sup> Several of the news reports referenced in OFAC’s record purporting to support Mr. Kadi’s designation had been discredited as unreliable or false.<sup>203</sup> For example, the government claimed that Mr. Kadi had a brother who was the director of another humanitarian group. Mr. Kadi, however, does not have a brother.<sup>204</sup>

The case of U.S. citizen Garad Nor, previously discussed, provides another example of faulty intelligence. Mr. Nor was accused of conducting business with Al-

Barakaat International Foundation (“Al-Barakaat”).<sup>205</sup> The 9-11 Commission Staff, however, reported that an FBI agent had expressed unease that “much of the evidence for Al-Barakaat’s terrorist ties rested on unsubstantiated and uncorroborated statements of domestic FBI sources.”<sup>206</sup> OFAC’s reliance on unsubstantiated information was also identified as a concern.<sup>207</sup>

Another example involved Kamel Darraji, a Tunisian living in Italy. Despite his acquittal of terrorist charges in Italy, Mr. Darraji remained on both the OFAC and U.N. lists.<sup>208</sup> The U.S., apparently, did not have sufficient evidence to continue his designation as a “terrorist.” An intercepted

U.S. embassy cable stated: “After careful and detailed review and analysis of all available information, the [U.S. government] has determined that it currently lacks information sufficient to conclude that Darraji continues to engage in the activities for which he was originally listed or other activities that would provide a basis for continued listing.”<sup>209</sup> The U.N. Security Council removed Mr. Darraji from its list in May 2012.<sup>210</sup> Incredibly, as of this writing, Mr. Darraji remains on OFAC’s list.<sup>211</sup>

The lack of evidentiary standards in OFAC’s procedure raises serious questions about the accuracy of the OFAC list.<sup>212</sup>

*“We are glad to have helped Mr. Darraji get off [the U.N.list] and out of the legal ‘black hole’ which it creates. But if his case is indicative, there must be scores of others who remain unjustifiably blacklisted in this way, victims of the global ‘war on terror’ who are rarely spoken about.”*<sup>213</sup>

### **No Independent Review of OFAC Designation or Interim Blocking Orders**

**B**ecause the risk of error is great, procedural safeguards must be strong. Here, they are not. As discussed above, there is currently no administrative appeal of OFAC’s decision. As a result, a designee is forced to petition OFAC for reconsideration, rather than an independent administrative tribunal, and has no right to a meeting with OFAC, much less an evidentiary hearing.<sup>214</sup> OFAC designations and blocking orders are only reviewable in court under the “arbitrary and capricious” standard under the

Administrative Procedure Act. Because the deference accorded to the government in these cases is high<sup>215</sup> and the court only reviews the OFAC record (without the benefit of evidence that the petitioner could have put forth to an independent arbiter), a challenge is often rendered virtually meaningless.<sup>216</sup>

## Inadequate Licensing Procedure

**B**ecause assets are frozen pending an investigation and continue to be frozen if the individual or group is designated, one must apply to OFAC for a license to engage in transactions or expend funds for legal representation.<sup>217</sup> However, there is an arbitrary limit on how much an entity or individual can spend in legal fees.<sup>218</sup> This is problematic because the defendant (OFAC) is deciding how much money can be spent in litigation against it. The law does not provide for any procedural safeguards for issuance of a license. Moreover, any denial of a license is final and cannot be appealed.<sup>219</sup> Like the OFAC investigative period, there is no time frame by which licensing decisions must be made and is subject to OFAC's discretion. According to OFAC, the time depends on the "complexity of the transaction under consideration, the

scope and detail of interagency coordination, and the volume of similar applications awaiting consideration."<sup>220</sup>

Another adverse consequence of OFAC's designation is that it could lead to the erroneous designation as a "terrorist" on a different watch list.

For example, Iribis, a Kazakshtan air carrier, was named on the OFAC list, then later included on the U.N. list. Iribis complained that the Security Council "without verification, copied names from OFAC's list and placed them on its own Assets Freeze List."<sup>221</sup>

*"An agency that makes decisions in secret, without the benefit of hearings or any sort of adversarial process, will make more errors than most."*<sup>222</sup>

## REFORM OF DESIGNATION PROCESS AT THE UNITED NATIONS

**T**he U.N. procedure for designating terrorists has also been criticized for its lack of adequate due process protections.<sup>223</sup> However, recent reforms in that body have helped address some of these concerns and should serve as a basis for discussion here in the United States.

The U.N. Security Council's Resolution 1267 ("UNSCR 1267") was adopted in 1999 and requires member states to freeze the assets of, prevent entry into or transit through their territories by, and prevent the direct or indirect supply, sale and transfer of arms and military equipment to anyone associated with Al-Qaeda or the Taliban.<sup>224</sup>

The U.N. procedure implementing UNCR 1267 was initially criticized because, among other things, individuals and entities were not allowed to petition the U.N. Sanctions Committee (“Committee”) directly for delisting or granted a hearing.<sup>225</sup> Member states had no obligation to provide detailed information to the designated person or entity concerned about their listing.<sup>226</sup> In 2002, the Committee adopted guidelines for listing and delisting.<sup>227</sup>

More significant reform, however, did not come about until after the European Court of Justice (“ECJ”) handed down *Kadi & Al Barakaat v. Council of the European Union and EC Commission* in September 2008.<sup>228</sup> In that decision, the ECJ overruled a judgment that had frozen the assets of Yassin Abdullah Kadi, a Saudi national, due to his alleged support of terrorism. The ECJ held that the taking of Mr. Kadi’s property without providing advance notice and without a hearing to contest any alleged evidence him was a violation of fundamental human rights.<sup>229</sup>

Prompted by this ruling, the U.N. Security Council a year later adopted Resolution 1904 to improve the listing and delisting process.<sup>230</sup> Among the most significant changes was the establishment of the

independent Ombudsperson office to assist the Committee in delisting requests.<sup>231</sup> Other improvements include setting deadlines for issuing delisting decisions, the requirement that a “narrative summary of reasons for listing” be posted on the Committee website and a requirement that member states provide the U.N. with more relevant information to ensure an accurate listing.<sup>232</sup>

*“The rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.”*<sup>233</sup>

The U.N. Secretary-General appointed Kimberly Prost to serve as the Ombudsperson.<sup>234</sup> At first, the Ombudsperson only could process delisting requests and had no role in decision-making. However, a resolution was later passed, giving the Ombudsperson increased authority to make delisting decisions.<sup>235</sup> The United States was a driving force in accomplishing this reform at the U.N., yet has thus far failed to implement due process safeguards in OFAC’s procedures at home.<sup>236</sup>



## IMPLEMENTING REFORM IN THE UNITED STATES

Indeed, the framework for improving OFAC's procedures here in the U.S. exists. In 2007, a number of federal agencies, including the Treasury Department, entered into a Memorandum of Understanding on Terrorist Watchlist Redress Procedures ("MOU").<sup>237</sup> The purpose of the MOU is to standardize redress procedures for the various watchlists administered by the agencies "allowing individuals an opportunity to receive a timely, fair and accurate review of their case."<sup>238</sup> However, to date, only the Department of Homeland Security has instituted such a formal redress program – the Traveler Redress Inquiry Program ("TRIP") for those persons who have been denied or delayed in their travel due to watch list issues.<sup>239</sup> Under TRIP, an individual submits a complaint online and is assigned a control number to track the progress of the complaint.<sup>240</sup> As the Treasury Department is also a signatory to the MOU, it should take action to streamline OFAC's procedures to provide for a "timely, fair and accurate review" of delisting petitions.

This is not to say that TRIP procedures are adequate. On June 24, 2014, the United States District Court for the District of Oregon held that the TRIP "No-Fly" list redress program violates an individual's

due process rights by failing to provide any notice of the reasons for placement on the "No-Fly" list.<sup>241</sup> The Court ordered the government to "fashion new procedures that provide Plaintiffs with the requisite due process described herein without jeopardizing national security."<sup>242</sup>

Likewise, the government should take action to revise OFAC's procedures to meet the criteria set forth in *KindHearts* and *Al-Haramain*.

In August 2013, Congressman Steve Cohen initiated such an effort. He sent a letter to Treasury Secretary Jacob Lew urging review of OFAC's listing and delisting procedures to address the constitutional issues raised by the *KindHearts* and *Al-Haramain* decisions.<sup>243</sup> In its February 2014 response, the Treasury Department declined to review its procedures, claiming that it has a "robust listing and delisting process, which is rigorously applied to all administrative actions."<sup>244</sup> The Treasury Department also claimed that it had removed more than 1,000 names from OFAC's list "upon credible and verifiable demonstrations by people listed that they *no longer meet* the criteria for which they were originally listed."<sup>245</sup> These statistics reveal nothing about the attempts of those individuals who should never have been listed in the first place. OFAC's "shoot first ask questions later" attitude must be overcome if proper reform of the system is to occur.

*"A review of current Treasury regulations would benefit the Department by demonstrating respect for the rule of law in acknowledging the court rulings and increase the credulity and integrity of the terrorist listing process by making it more transparent and accountable."*<sup>246</sup>

# RECOMMENDATIONS FOR REFORM

- Provide specific criteria on what activity is proscribed that merits a designation.
- Develop evidentiary standards for determining designations.
- Provide a statement of reasons to the designee for violations that have been allegedly committed.
- Provide access to the evidence that allegedly forms the basis for the designation, including a non-classified summary of any classified evidence or access to classified evidence under procedures established by other laws.
- Establish a deadline by which OFAC must respond to a designee's petition to be removed from OFAC's list.
- Establish a deadline by which any investigation must be completed so assets are not frozen indefinitely.
- Establish deadlines for responding to license requests allowing the use of blocked funds for specified purposes, and make the process more transparent.
- Make the delisting process more transparent and accessible, including the addition of specific guidance on the delisting process in OFAC's Frequently Asked Questions on the OFAC website.
- Establish an online redress program in which individuals can submit delisting petitions via a website to facilitate processing.
- Provide for an independent administrative review of OFAC's designation.
- Designate an Ombudsperson to oversee the processing of delisting requests.



## CONCLUSION

**T**he U.S. Constitution demands fair and equal treatment by the government. Designated U.S. persons are entitled to due process of law, including proper notice and opportunity to challenge designations and the freezing of assets and other property. OFAC's procedures must be reformed to comport with these key principles. Such reform will also help ensure that actions taken by OFAC actually serve to deter terrorism. An unfair process greatly harms those wrongfully targeted individuals and organizations, and undermines the credibility and accuracy of the designation process as a whole.

# ENDNOTES

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<sup>1</sup> U.S. Dep't of Treasury, Office of Foreign Assets Control (OFAC), <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx> (last visited Apr. 28, 2014).

<sup>2</sup> U.S. Dep't of Treasury, Specially Designated Nationals List (SDNL), <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (last visited Apr. 28, 2014).

<sup>3</sup> 31 C.F.R. § 501.201 (2014); *see also* Office of Foreign Assets Control, Guidance on Entities Owned by Persons Whose Property and Interests in Property Are Blocked, February 14, 2008, <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#160> (last visited Apr. 28, 2014).

<sup>4</sup> 50 U.S.C.A. § 1702 (2014).

<sup>5</sup> *See* LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, THE OFAC LIST, HOW A TREASURY DEPARTMENT WATCHLIST ENSNARES EVERYDAY CONSUMERS (MAR., 2007) [hereinafter LCCR, THE OFAC LIST], *available at* [http://media.washingtonpost.com/wp-srv/business/documents/ofac\\_list\\_march07.pdf](http://media.washingtonpost.com/wp-srv/business/documents/ofac_list_march07.pdf).

<sup>6</sup> *Lawyers' Committee for Civil Rights of San Francisco Bay Area v. United States Department of Treasury*, No. C 07-2590 PJH (N.D. Cal., filed May 2007).

<sup>7</sup> Pursuant to a series of orders issued by the court, the Treasury Department released nearly 600 records through January 2011. LCCR has made these documents available in an electronic database for public review at LCCR Admin, Scribd, <http://www.scribd.com/LCCR%20Admin> (last visited June 25, 2014).

<sup>8</sup> Interview with Jihad M. Smaili, Sept. 22, 2011. [hereinafter Smaili Interview]. Mr. Smaili was counsel to KindHearts for Charitable Humanitarian Development and is the brother of its co-founder. The KindHearts case is discussed at pages 12-13.

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<sup>9</sup> Mr. Nor also goes by the name Garad Jama.

<sup>10</sup> *See* Jean Hopfensperger, *Somalia's Money Lifeline is in Limbo*, STAR TRIB., Sept. 5, 2006, [http://www.somaliweyn.com/pages/news/Sep\\_06/5Sep18.html](http://www.somaliweyn.com/pages/news/Sep_06/5Sep18.html); Joy Powell & Dee DePass, *Money-transfer Businesses Answer a Need, Owners Say*, STAR TRIB., Nov. 18, 2000, <http://www.startribune.com/nation/11609431.html>.

<sup>11</sup> *Aaran Money Wire Service, Inc. v. Ashcroft*, 2003 WL 22143735, \*1 (D. Minn. 2003).

<sup>12</sup> *Arrests Made Throughout U.S.*, FOXNEWS.COM, Nov. 7, 2001, <http://www.foxnews.com/story/0,2933,38272,00.html>.

<sup>13</sup> JOHN ROTH, ET AL., NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES: MONOGRAPH ON TERRORIST FINANCING 81 (2004), *available at* [http://govinfo.library.unt.edu/911/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf) [hereinafter 9-11 COMMISSION STAFF REPORT].

<sup>14</sup> *Id.*

<sup>15</sup> *Aaran Money Wire Service, Inc.*, 2003 WL 22143735 at \*2.

<sup>16</sup> Jake Tapper, *A Post-9/11 American Nightmare*, SALON.COM, Sept. 4, 2002, <http://www.salon.com/2002/09/05/jama>.

<sup>17</sup> *Aaran Money Wire Service, Inc.*, 2003 WL 22143735 at \*2.

<sup>18</sup> *Id.* at \*3-4. After the lawsuit was filed, OFAC contacted Mr. Nor for further information concerning his alleged terrorist connections. After Mr. Nor responded to OFAC's inquiry, OFAC removed him from the list, unblocked his assets and returned his seized property. Mr. Nor's complaint was then dismissed by the court as moot. *See also* Scott Canon, *Money-Transfer Hurdles Add to Woes for Families Abroad*, KANSAS CITY STAR, Nov. 26, 2005, at C13. Mr. Nor has since opened a new money transfer company. *See* Allie Shah, *Cash Lifeline to Somalia: Restored but Precarious*, STAR TRIB., Jan. 25, 2012.

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<sup>19</sup> LCCR Admin, Scribd, 000189-190 (March 10, 2005 delisting petition), *available at* LCCR Admin, Scribd, <http://www.scribd.com/LCCR%20Admin>.

<sup>20</sup> KindHearts was formed to provide “humanitarian aid without regard to religious or political affiliation.” *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner (KindHearts I)*, 647 F. Supp. 2d 857, 864 (N.D. Ohio 2009).

<sup>21</sup> *KindHearts I*, 647 F. Supp. 2d at 866.

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

<sup>23</sup> *Id.* at 865-66. *See, supra* at 18, for discussion on the Treasury Department’s Voluntary Guidelines for Charitable Organizations.

<sup>24</sup> *KindHearts I*, 647 F. Supp. 2d at 867.

<sup>25</sup> *Id.* at 868.

<sup>26</sup> Memorandum of Points and Authorities in Support of Plaintiff’s Motion for a Temporary Restraining Order and Preliminary Injunction, *KindHearts I*, 647 F. Supp. 2d 857 (No. 3:08-cv-2400) (KindHearts requested access to its records on June 14, 2007, but did not receive a response until April 11, 2008).

<sup>27</sup> *KindHearts I*, 647 F. Supp. 2d at 870.

<sup>28</sup> *See, supra*, at 12-13 for a complete discussion of the court’s holding.

<sup>29</sup> *KindHearts I*, 647 F. Supp. 2d at 906.

<sup>30</sup> Settlement Agreement, *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, *available at* [https://www.aclu.org/files/assets/kindhearts\\_v\\_geithner\\_-\\_settlement.pdf](https://www.aclu.org/files/assets/kindhearts_v_geithner_-_settlement.pdf).

<sup>31</sup> Ten non-profit organizations filed amicus briefs on behalf of KindHearts.

<sup>32</sup> When interviewed for the 9-11 Commission Report, one attorney commented that the government’s treatment of her client, an Islamic charity, felt “McCarthyesque” as “the government overreached, seemingly driven for political goals and the need to do something about terrorism.” *See 9-11 Commission Memorandum for the Record, Interview with Mary M. Rowland and Jill Groenenboom, counsel for Benevolence International Foundation, at 6, April 5, 2004 [hereinafter Rowland Interview], available at*

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<http://media.nara.gov/9-11/MFR/t-0148-911MFR-00997.pdf>.

<sup>33</sup> *Anti-Money Laundering: Blocking Terrorist Financing and Its Impact On Lawful Charities: Hearing Before the H. Comm. on Fin. Serv., Subcomm. On Oversight and Investigations, 111th Cong. 4 (May 26, 2010)* (written testimony of Kay Guinane, Program Manager, Charity and Security Network) [hereinafter Guinane Testimony]; *Terror Free Tomorrow, Poll: Major Change of Public Opinion in Muslim World, available at* <http://www.terrorfreetomorrow.org/articlenav.php?id=56> (summarizing results of survey in Indonesia conducted in February 2005, finding support for U.S. efforts against terrorism increased as a result of U.S. humanitarian aid in response to the tsunami in 2004); Jim VandeHei, *Bush Says Tsunami Aid Benefits U.S.*, WASH. POST, Mar. 9, 2005, at A3.

<sup>34</sup> Indeed, some financial experts question the effectiveness of the government’s “financial war on terror,” arguing that blocking assets is not an effective strategy and has cost the private sector “billions of dollars” to implement. *See KAY GUINANE ET AL., COLLATERAL DAMAGE, HOW THE WAR ON TERROR HURTS CHARITIES, FOUNDATIONS AND THE PEOPLE THEY SERVE, at 36-37 (OMB Watch & Grantmakers Without Borders eds., July 2008) [hereinafter GUINANE, COLLATERAL DAMAGE], available at* <http://www.foreffectivegov.org/files/npadv/PDF/collateraldamage.pdf>.

<sup>35</sup> U.S. Dept. of Treasury: Protecting Charitable Giving, Frequently Asked Questions (June 4, 2010), at 8-9.

<sup>36</sup> In addition to these designations, KindHearts was “provisionally” designated a SDGT pending investigation. *Id.*; *see also Anti-Money Laundering: Blocking Terrorist Financing and Its Impact On Lawful Charities: Hearing Before the H. Comm. on Fin. Serv., Subcomm. On Oversight and Investigations, 111th Cong., at 7-8 (May 26, 2010)* (written testimony of Daniel L. Glaser, Deputy Assistant Secretary, Terrorist Financing and Financial Crimes, U.S. Department of Treasury) [hereinafter Glaser Testimony]; AMERICAN CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE “WAR ON TERRORISM FINANCING” 11 (June 2009)

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[hereinafter, ACLU, BLOCKING FAITH], *available at* <https://www.aclu.org/files/pdfs/humanrights/blockingfaith.pdf>.

<sup>37</sup> Guinane Testimony, *supra* note 33, at 9. Ms. Guinane testified, “Treasury has repeatedly said that allowing transfers for humanitarian and disaster aid is not in the national interest, without explaining how or why.” *Id.*

<sup>38</sup> *Id.* at 8-9.

<sup>39</sup> Jo Becker, *U.S. Approved Business With Blacklisted Nations*, N.Y. TIMES, Dec. 23, 2010, at A1; *Licenses Granted to U.S. Companies Run the Gamut*, N.Y. TIMES, Dec. 24, 2010, <http://www.nytimes.com/interactive/2010/12/24/world/24-sanctions.html> (reprinting selected list of companies granted licenses, noting that U.S. Senators contacting OFAC on behalf of certain constituent companies appeared to prompt the issuance of a license).

<sup>40</sup> Becker, *supra* note 39; *see also* Teresa Odendahl, *Guest Commentary, Philanthropic Patriot Games: How the U.S. Government Targets Charities in its War on Terror*, PUB. EYE MAG., Fall 2005 (“There is some question as to the political motivations behind new entries on the lists, with foreign governments such as Columbia, Indonesia and Mexico allegedly lobbying the Bush Administration to add opposition groups and insurgents from their countries.”).

<sup>41</sup> GUINANE, COLLATERAL DAMAGE, *supra* note 34, at 38; Charity & Security Network, *Double Standard: Chiquita Banana Fined, Not Shut Down, for Transactions With Designated Terrorists*, Apr. 3, 2007, [http://www.charityandsecurity.org/news/Chiquita\\_Banana\\_Fined\\_Not\\_Shut\\_Down\\_Transactions\\_Designated\\_Terrorists](http://www.charityandsecurity.org/news/Chiquita_Banana_Fined_Not_Shut_Down_Transactions_Designated_Terrorists) [hereinafter Charity & Security Network, *Double Standard*]; Jordy Yager, *Chiquita Fined for Columbia Payments*, L.A. TIMES, Sept. 18, 2007; Edward Iwata & Donna Leinwand, *Chiquita Agrees to Fine for Paying Terrorists*, USA TODAY, Mar. 15, 2007; *see also* U.S. Department of Treasury, Release of Civil Penalties Information, *J.P. Morgan Chase Bank N.A. Settles Apparent Violations of Multiple Sanctions Programs*, Aug. 25, 2011, *available at* <http://www.treasury.gov/resource-center/sanctions/ofac-enforcement/pages/20110825.aspx>.

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<sup>42</sup> U.S. Department of Treasury, Release of Civil Penalties Information, *Essie Cosmetics Ltd. and Individual Corporate Officer Settle Iranian Transactions Regulations Allegations*, Apr. 10, 2012, *available at* [http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20120410\\_2.aspx](http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20120410_2.aspx).

<sup>43</sup> William Fisher, *In Terror War, Not All Names Are Equal*, INT’L PRESS SERV., Apr. 20, 2006; OMB WATCH, MUSLIM CHARITIES AND THE WAR ON TERROR: TOP TEN CONCERNS AND STATUS UPDATE 7-8 (Mar. 2006), *available at* <http://www.foreffectivegov.org/files/npadv/PDF/MuslimCharitiesTopTenUpdated.pdf>.

<sup>44</sup> *Terrorist Financing Since 9/11: Assessing an Evolving al Qaeda and State Sponsors of Terrorism: Hearing Before the H. Comm. on Homeland Sec, Subcomm. on Counterterrorism and Intelligence*, 112th Cong., at 8 (May 18, 2012) (written testimony of Sue E. Eckert, Senior Fellow, The Watson Institute for International Studies) [hereinafter Eckert Testimony].

<sup>45</sup> 9-11 COMMISSION STAFF REPORT *supra* note 13, at 99.

<sup>46</sup> *Id.* at 111.

<sup>47</sup> *Id.*; *see also* GUINANE, COLLATERAL DAMAGE, *supra* note 34, at 31-37.

<sup>48</sup> U.S. DEP’T OF THE TREASURY, OFAC, TERRORIST ASSETS REPORT: CALENDAR YEAR 2013, at 8-9 (June 25, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/tar2013.aspx> [hereinafter 2013 TERRORIST ASSETS REPORT]. *See also* U.S. GENERAL ACCOUNTABILITY OFFICE, TERRORIST FINANCING, BETTER STRATEGIC PLANNING NEEDED TO COORDINATE U.S. EFFORTS TO DELIVER COUNTER-TERRORISM FINANCING TRAINING AND TECHNICAL ASSISTANCE ABROAD, Oct. 2005, at 3-4 (concluding that the Treasury reports fail to “provide the reader the ability to assess achievements made” and that Treasury “lacks meaningful performance measures to assess its terrorist designation and asset blocking efforts.”).

<sup>49</sup> The Opinion Pages, Editorial, *A Rebuff to Overbroad Watch Lists*, N.Y. TIMES, Jan. 21, 2014, <http://www.nytimes.com/2014/01/22/opinion/a-rebuff-to-overbroad-watch-lists.html>.

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<sup>50</sup> ACLU, BLOCKING FAITH, *supra* note 36, at 83.

<sup>51</sup> Press Release, The White House, Office of the Press Secretary, Remarks by the President On A New Beginning (June 4, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-at-Cairo-University-6-04-09](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Cairo-University-6-04-09). “Zakat,” one of the five fundamental pillars of Islam, represents the giving of a fixed portion of one’s income to charity. *See also* ACLU, BLOCKING FAITH, *supra* note 36, at 8; Glaser testimony, *supra* note 36, at 8. Mr. Glaser acknowledged that the Treasury Department’s actions “have had the unfortunate and unintended consequence of causing a chilling effect on well-intentioned donor activity within Muslim-American communities.”

<sup>52</sup> *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring).

<sup>53</sup> 50 U.S.C.A. § 1701 (a) (West 2014).

<sup>54</sup> Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). E.O. 13224 was preceded by Executive Order 12,947, 60 Fed. Reg. 5,079 (Jan. 23, 1995) (“Prohibiting Transactions With Terrorists Who Threaten To Disrupt The Middle East Peace Process”) issued by President William Clinton in 1995 pursuant to the IEEPA.

<sup>55</sup> A federal court in *Humanitarian Law Project v. Department of Treasury*, found “otherwise associated with” unconstitutionally vague on its face and overbroad. 463 F. Supp. 2d 1049, 1070-71 (C.D. Cal. 2006). The court later reconsidered and reversed its ruling, finding that the subsequent clarification of “otherwise associated with” in 31 C.F.R. § 504.316 was sufficient. *Humanitarian Law Project v. Department of Treasury*, 484 F. Supp. 2d 1099, 1105-07 (C.D. Cal. 2007). The regulation defines “otherwise associated with” to mean: “(a) To own or control; or (b) To attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to.” 31 C.F.R. § 504.316 (2014).

<sup>56</sup> 50 U.S.C.A. § 1702(a)(1)(B). OFAC interprets the term “interest” broadly to include a property “interest of any nature whatsoever, direct or indirect.” 31 C.F.R. § 594.306; *see, e.g.*, 2013 TERRORIST ASSETS REPORT, *supra* note 48, at 2;

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Declaration of Adam Szubin, Defendants’ Memorandum In Opposition to Plaintiff’s Motion for Summary Judgment And In Support of Defendant’s Motion To Dismiss, In Support of Defendant’s Motion To Dismiss, Or In The Alternative, For Summary Judgment, KindHearts For Charitable Development, Inc. v. Paulson (KindHearts I), 647 F. Supp. 2d 857 (N.D. Ohio Dec. 12, 2008) (No. 3:08-cv-2400) [hereinafter Szubin Declaration].

<sup>57</sup> 50 U.S.C.A. § 1702(a)(1)(B); *see also* *KindHearts I*, 647 F. Supp. 2d 857, 866 (N.D. Ohio 2009).

<sup>58</sup> 31 C.F.R. § 594.201(a).

<sup>59</sup> U.S. Dep’t of the Treasury, Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons List, July 2, 2014, *available at* <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> [hereinafter SDN List as of July 2, 2014]. Additions to or removals from the list are published in the Federal Register. *E.g.*, Actions Taken Pursuant to Executive Order 13,382, 79 Fed. Reg. 9,049 (Feb. 14, 2014).

<sup>60</sup> *See* U.S. Dep’t of the Treasury, Office of Foreign Assets Control, Resource Center, *available at* <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> OFAC’s list includes individuals and organizations designated under the different sanctions programs. It reads like a phone book and is over 900 pages long. SDN List as of July 2, 2014, *supra* note 59. This list also includes alleged drug traffickers and those foreign organizations designated by the Department of State as “Foreign Terrorist Organizations” (“FTOs”) under the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>61</sup> 2013 TERRORIST ASSETS REPORT, *supra* note 48, at 6 n.7.

<sup>62</sup> Complaint at ¶ 15, *KindHearts I*, 647 F. Supp. 2d 857 (N.D. Ohio Oct. 9, 2008) (No. 3:08-cv-2400) [hereinafter *KindHearts I* complaint]. 31 C.F.R. § 594.310 merely defines “Specially Designated Global Terrorist” as any person “whose property and interests in property are blocked.”

<sup>63</sup> ACLU, BLOCKING FAITH, *supra* note 36, at 34.

<sup>64</sup> *See* 31 C.F.R. § 595.311.



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<sup>65</sup> *Id.* In June 2013, OFAC amended the regulations to define the term “financial, material, or technological support.” See 31 C.F.R. § 595.317.

<sup>66</sup> See Glaser Testimony, *supra* note 36; see also U.S. Dep’t of the Treasury: Protecting Charitable Giving, Frequently Asked Questions 3 (June 4, 2010), available at <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/Treasury%20Charity%20FAQs%206-4-2010%20FINAL.pdf>.

<sup>67</sup> Glaser Testimony, *supra* note 36, at 4-5. Mr. Szubin’s description of the designation process in his declaration submitted in the KindHearts case is virtually identical to Mr. Glaser’s written testimony. Szubin Declaration, *supra* note 56.

<sup>68</sup> Glaser Testimony, *supra* note 36, at 5.

<sup>69</sup> *Id.* at 5.

<sup>70</sup> The use of blocked funds for the provision of certain legal services is allowed pursuant to 31 C.F.R. § 594.506.

<sup>71</sup> Glaser Testimony, *supra* note 36, at 4-5.

<sup>72</sup> Complaint at ¶ 31, *KindHearts I*, 647 F. Supp. 2d 857 (N.D. Ohio Oct. 9, 2008) (No. 3:08-cv-2400).

<sup>73</sup> David D. Cole, Statement at Charity & Security Network Telebriefing, What’s In a Name? Comparing Terrorist Listing/Delisting Procedures in the U.S., E.U. and U.N. (April 17, 2013), transcript available at <http://www.charityandsecurity.org/system/files/Delisting%20Telebriefing%204-17.pdf>.

<sup>74</sup> See 50 U.S.C.A. § 1701 (2014); Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

<sup>75</sup> See U.S. Dep’t of the Treasury, OFAC Frequently Asked Questions and Answers, *supra* note 3.

<sup>76</sup> 31 C.F.R. § 501.807(a) (2014).

<sup>77</sup> *Id.*

<sup>78</sup> 31 C.F.R. § 501.807(b).

<sup>79</sup> Glaser Testimony, *supra* note 36, at 6.

<sup>80</sup> Szubin Declaration, *supra* note 56, at 7.

<sup>81</sup> 31 C.F.R. § 501.807(c). In contrast, an individual facing, for example, the termination of utilities, a situation involving far more limited consequences than an OFAC designation, is entitled to a face to face meeting with the utility company before

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termination of services. See Danielle Stampley, *Blocking Access to Assets: Compromising Civil Rights To Protect National Security Or Unconstitutional Infringement On Due Process and the Right to Hire An Attorney?*, 57 AM. U. L. REV. 683, 714 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978)).

<sup>82</sup> 31 C.F.R. § 501.807(d).

<sup>83</sup> *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 992 (9th Cir. 2012) (emphasis in original).

<sup>84</sup> Szubin Declaration, *supra* note 56, at 5; Exec. Order No. 13,628 § 14 (Oct. 9, 2012), 77 Fed. Reg. 62,139 (Oct. 12, 2012).

<sup>85</sup> LCCR, THE OFAC LIST, *supra* note 5, at 3; see also Anna Yukhananov & Warren Strobel, *U.S. Sanctions Net Snares the Innocent, Burdens Business*, REUTERS, June 21, 2014, <http://www.reuters.com/article/2014/06/22/us-usa-sanctions-list-idUSKBN0EW10A20140622>.

<sup>86</sup> Ann Jones, *Me and OFAC and Ahmed the Egyptian, One Citizen’s Misadventure in Securityland*, TOMDISPATCH.COM, Nov. 3, 2011, <http://www.tomdispatch.com/archive/175462>.

<sup>87</sup> *Id.*

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

<sup>89</sup> Complaint at ¶ 1, *Salah v. U.S. Dep’t of Treasury*, No. 1:12-cv-07067 (N.D. Ill. Sept. 5, 2012) (internal quotation marks omitted).

<sup>90</sup> *Id.* at ¶ 16.

<sup>91</sup> Mr. Salah was believed to be the only U.S. citizen residing in the U.S. subject to OFAC’s designation Mr. Salah was designated under E.O. 12947. *Id.* at ¶ 18.

<sup>92</sup> *Id.* at ¶¶ 36-39.

<sup>93</sup> U.S. Dep’t of Treasury, Anti-Terrorism Designations; Anti-Terrorism Designations Removal, Nov. 5, 2012, <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20121105.aspx> (last visited Apr. 29, 2014).

<sup>94</sup> Final Report of Judicial Review Commission on Foreign Asset Control, Additional Views of Commissioner David B. Smith, Jan. 23, 2001, at 35 [hereinafter *Judicial Review Commission*], (quoting

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Professor Peter L. Fitzgerald's Written Statement before the Commission, at 135).

<sup>95</sup> Interview with David D. Cole, counsel for plaintiffs Al Haramain Islamic Foundation, Inc. and Multicultural Association of Southern Oregon, Aug. 10, 2011; see *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner* (KindHearts I), 647 F. Supp. 2d 857, 867-68 (N.D. Ohio 2009).

<sup>96</sup> LCCR Admin, Scribd, 000301 (2007 delisting petition), available at LCCR Admin, Scribd, <http://www.scribd.com/LCCR%20Admin>.

<sup>97</sup> Glaser Testimony, *supra* note 36, at 5.

<sup>98</sup> *Id.*

<sup>99</sup> See LCCR, THE OFAC LIST, *supra* note 5, at 5-7.

<sup>100</sup> 2013 TERRORIST ASSETS REPORT, *supra* note 48, at 7.

<sup>101</sup> July 25, 2005 delisting petition at Bates No. 002367, attached as Exhibit C to the Declaration of Thomas R. Burke In Support of LCCR'S Response to OFAC's Status Report [Docket No. 70-3], filed on April 20, 2009 in *Lawyers' Committee for Civil Rights of San Francisco Bay Area v. United States Department of Treasury*, No. C 07-2590 PJH (N.D. Cal.).

<sup>102</sup> LCCR Admin, Scribd, 000364 (Nov. 4, 2003 delisting petition), available at LCCR Admin, Scribd, <http://www.scribd.com/LCCR%20Admin>.

<sup>103</sup> *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012).

<sup>104</sup> In reality, there is no way for a designee to be removed from the list short of court action. Smaili Interview, *supra* note 8.

<sup>105</sup> For example, due process requires that the government provide a post-termination administrative hearing to individuals before depriving them of employment. See *Stampley*, *supra* note 81, at 714 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546-47 (1985)).

<sup>106</sup> Judicial Review Commission, *supra* note 94, at 129. The Judicial Review Commission was established by the Foreign Narcotics Kingpin Designation Act of 1990. The Commission held hearings on the sanctions programs administered by OFAC and issued its recommendations to Congress in the 2001 report.

<sup>107</sup> *Id.* at 113.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Judicial Review Commission, *supra* note 94, at 43.

<sup>111</sup> *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012).

<sup>112</sup> Interview with Thomas H. Nelson, counsel for plaintiffs Al Haramain Islamic Foundation, Inc. and Multicultural Association of Southern Oregon, Nov. 2, 2011 [hereinafter Nelson Interview].

<sup>113</sup> The dearth of case law may be due to the limited number of cases filed due to the prohibitive expense of litigation. Also, most of the designated entities are foreign citizens or organizations that are not entitled to constitutional protections. Among the few cases addressing, and rejecting, a designee's due process claims are *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), *cert denied*, 158 L. Ed. 2d 153, 124 S. Ct. 1506 (2004); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002); and *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008).

<sup>114</sup> The cases discussed here focus on the issue of post-deprivation notice, as opposed to pre-deprivation notice. The courts cite the possibility of "asset flights" as justification for not providing notice before freezing an entity's assets. See *Al Haramain*, 686 F.3d at 993.

<sup>115</sup> 647 F. Supp. 2d 857 (N.D. Ohio 2009).

<sup>116</sup> The facts of the case are summarized in the Introduction.

<sup>117</sup> "An OFAC block interferes with possessory rights, and is in Fourth Amendment terms a seizure." *KindHearts for Charitable Humanitarian Development, Inc. v. Geither* (KindHearts I), 647 F. Supp. 2d 857, 872 (N.D. Ohio 2009) (emphasis in original).

<sup>118</sup> *Id.* at 874 (emphasis in original). The Court likewise rejected OFAC's argument that deference to the Executive Branch exempted OFAC's blocking action from compliance with the Fourth Amendment. *Id.* at 878.

<sup>119</sup> *Id.* at 881-82; see, *infra*, at note 145 for definition of "special needs" exception.

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<sup>120</sup> *Id.* at 883-84.

<sup>121</sup> *Id.* at 900-903 n.19, 21.

<sup>122</sup> *Id.* at 903-04.

<sup>123</sup> *Id.* at 904.

<sup>124</sup> *Id.* at 906.

<sup>125</sup> *Id.* at 907-908. Although the Court rejected KindHearts' challenge of OFAC's authority to block assets pending an investigation and to designate as unconstitutionally vague, *see id.* at 893-87, the Court declared: "In this case, OFAC failed to follow the Fourth Amendment in imposing the block pending investigation. Thus, as applies to KindHearts, OFAC's authority under the IEEPA and E.O. 13224 was unconstitutionally vague." *Id.* at 893 n.15. The Court also ruled that OFAC's limitation on KindHearts' use of blocked funds to pay its counsel was "arbitrary and capricious" under the APA. *Id.* at 919.

<sup>126</sup> KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner (KindHearts III), 710 F. Supp. 2d 637 (N.D. Ohio 2010).

<sup>127</sup> *See* American Civil Liberties Union, *Government Settles Charity's Lawsuit Over Unconstitutional Terrorism Probe*, May 1, 2012, <http://www.aclu.org/national-security/government-settles-charity-lawsuit-over-unconstitutional-terrorism-probe>. A copy of the settlement agreement is available at [https://www.aclu.org/files/assets/kindhearts\\_v\\_geithner\\_-\\_settlement.pdf](https://www.aclu.org/files/assets/kindhearts_v_geithner_-_settlement.pdf).

<sup>128</sup> *Id.* The settlement also provides for KindHearts removal from the list "within 60 days after disposition of all KindHearts assets and dissolution of KindHearts . . ." On July 11, 2014, KindHearts was removed from the list. *See* Department of Treasury Update to OFAC's List of Specially Designated Nationals (SDN) and Blocked Persons, July 11, 2014, available at <http://www.treasury.gov/ofac/downloads/tusdnew.pdf>.

<sup>129</sup> *Al Haramain*, 686 F.3d at 980. The Judicial Review Commission also recommended that OFAC revise its licensing procedures to be more responsive to legitimate needs. *See also* Judicial Review Commission, *supra* note 94, at 138.

<sup>130</sup> *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965 (9th Cir. 2012).

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<sup>131</sup> *Id.* at 970. AHIF's stated purpose was "to promote greater understanding of the Islamic religion through operating prayer houses, distributing religious publications, and engaging in other charitable activities." *Id.* at 971. The other plaintiff in the case, Multicultural Association of Southern Oregon ("MCASO"), objectives include "promote understanding and appreciation between cultures in order to reduce racism, promote and support multicultural education, and provide forums for problem solving related to intercultural differences." *Id.* at 975. MCASO was not designated by OFAC, but challenged OFAC's regulations on First Amendment grounds. *See id.* at 995.

<sup>132</sup> *Id.* at 973.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 974.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 974-75.

<sup>137</sup> *Id.* at 976.

<sup>138</sup> As previously discussed, challenges to OFAC designations under the APA are often for naught given this highly deferential standard and the lack of a full record for courts to review designations due to inadequate OFAC procedures. *See, infra*, at 11. Specifically, the *Al Haramain* court found while there was no evidence to support OFAC's determination that Al-Aqil "owned or controlled" AHIF (since he had since resigned from the organization), the other reasons supplied by OFAC were enough to support the designation; Al-Buthe was on the AHIF's board of directors and AHIF-Oregon was, in OFAC's view, a branch office of AHIF-Saudi Arabia, to which funds were transmitted. Although AHIF denied that funds were diverted to terrorism and instead were intended for humanitarian relief, AHIF did acknowledge "the underlying facts of those financial transactions." However, quoting *Islamic Am. Relief Agency v. Gonzalez*, the Court noted, "We acknowledge that the unclassified record evidence is not overwhelming, but we reiterate that our review – in an area at the intersection of national security, foreign policy, and administrative law – is extremely deferential." 477 F. 3d 728, 979 (D.C. Cir. 2007).

<sup>139</sup> *Id.* at 983 n.10.



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<sup>140</sup> *Id.* at 983 (emphasis added). The Court also noted that most designees are not U.S. citizens with due process protections to which AHIF, a U.S. citizen, was entitled. Thus, it is unlikely that OFAC would be overwhelmed with requests. *Id.* at 984.

<sup>141</sup> *Id.* at 985 (emphasis added).

<sup>142</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

<sup>143</sup> *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 985-86 (9th Cir. 2012) (emphasis in original); *see also id.* at 988.

<sup>144</sup> *Id.* at 990.

<sup>145</sup> *Id.* at 993. The “special needs” exception applies to “important non-law enforcement purposes in contexts where adherence to the warrant-and-probable cause requirement would be impracticable.” *Id.* at 990 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000)).

<sup>146</sup> *Id.* at 994-95. The Court explained: “We reiterate that OFAC’s interest in preventing terrorism is extremely high. But we cannot accept OFAC’s contention that its blocking orders are per se reasonable in all circumstances, solely by virtue of that vital mission.” *Id.* at 994. The Court further clarified that its decision only applied to the facts of the instant case. *Id.* at 995 n 18. The Ninth Circuit also reversed the district court’s dismissal of AHIF and MCASO’s First Amendment claim, finding that MCASO has a First Amendment right to engage in “coordinated advocacy” for the benefit of AHIF, such as holding a joint press conference with AHIF. *Id.* at 1000-01.

<sup>147</sup> *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 2012 WL 6203136 at \*6-7 (D. Or. Dec. 12, 2012). On remand, the AHIF conceded that the Fourth Amendment violation was harmless error and submitted proposed language for the judgment, which was entered by the district court. *Id.* (“Defendants violated AHIF-Oregon’s Fourth Amendment rights by blocking its assets indefinitely without obtaining a warrant. However, because on the existing administrative record Defendants’ blocking of AHIF-Oregon’s assets is lawful under E.O. 13,224, the Fourth Amendment violation was harmless error.”). The district court denied AHIF’s motion to file a supplemental complaint alleging an ongoing Fourteenth Amendment due process violation. *Id.* at \*10-11.

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<sup>148</sup> Interview with practitioner in Washington, D.C., Oct. 6, 2011.

<sup>149</sup> This summary is based on interviews with practitioners and advocates for reform, as well as an analysis of court decisions on the OFAC process, government and public policy reports, and the delisting petitions obtained by the LCCR through litigation.

<sup>150</sup> *See KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner* (KindHearts I), 647 F. Supp. 2d 857, 867-68 (N.D. Ohio 2009). A party usually receives even less information when its assets are blocked pending investigation. *See Nicole Nice-Petersen, Justice for the “Designated: The Process That Is Due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L.J. 1387, 1413 (2005).

<sup>151</sup> OFAC did eventually declassify portions of the administrative record against KindHearts. *KindHearts I*, 647 F. Supp. 2d at 903-04.

<sup>152</sup> Interview with Erich C. Ferrari of Ferrari & Associates, P.C., Oct. 27, 2011 [hereinafter Ferrari Interview].

<sup>153</sup> 9-11 COMMISSION STAFF REPORT *supra* note 13, at 8.

<sup>154</sup> *KindHearts I*, 647 F. Supp. 2d at 904 n.25.

<sup>155</sup> An Act to provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C.A. app. 3, §§ 1-16).

<sup>156</sup> Sameer Hossain, *Freezing Terrorism Assets: Increasing International Cooperation by Observing Procedural Due Process*, 54 HOW. L.J. 437, 460-62 (2011).

<sup>157</sup> Rowland Interview, *supra* note 32, at 3.

<sup>158</sup> Judicial Review Commission, *supra* note 94, at 88.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 983 n.10 (9th Cir. 2012).

<sup>162</sup> Nice-Petersen, *supra* note 150, at 1409.

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<sup>163</sup> Findings of Fact, Conclusions of Law, and Order for Relief, *Ibrahim v. Dept. of Homeland Security*, No. C 06-00545 WHA, at 36 (Jan. 14, 2014).

<sup>164</sup> *Id.* at 35-36 (citing *Kamakana v. City and County of Honolulu*, 447 F. 3d 1172, 1178, 1180 (9th Cir. 2006)).

<sup>165</sup> See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); see also David Cole, *Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror' in COUNTERTERRORISM: DEMOCRACY'S CHALLENGE* 240 (Andrea Bianchi & Alexis Keller eds., Hart Pub. 2008).

<sup>166</sup> Nice-Petersen, *supra* note 150, at 1393.

<sup>167</sup> *Supra* pages 3-4; see also Kirsty Weakley, *Muslim Charities 'Disproportionately' Affected By Anti-Terror Laws*, CIVIL SOC'Y, May 9, 2014, [http://www.civilsociety.co.uk/governance/news/content/17451/muslim\\_charities\\_disproportionately\\_affected\\_by\\_anti-terro\\_laws](http://www.civilsociety.co.uk/governance/news/content/17451/muslim_charities_disproportionately_affected_by_anti-terro_laws).

<sup>168</sup> See ACLU, BLOCKING FAITH, *supra* note 36, at 14.

<sup>169</sup> U.S. DEP'T OF TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2006) [hereinafter TREASURY ANTI-TERRORIST FINANCING GUIDELINES] available at <http://www.treasury.gov/press-center/press-releases/Documents/0929%20finalrevised.pdf>.

<sup>170</sup> See Center for Public & Nonprofit Leadership, Georgetown University, *Panel Discussion: Safeguarding Charity in the War on Terror* (June 14, 2005), available at [http://cpnl.georgetown.edu/document/1242781108158/Safeguarding+Charity\\_Transcript+2005.pdf](http://cpnl.georgetown.edu/document/1242781108158/Safeguarding+Charity_Transcript+2005.pdf); ACLU, BLOCKING FAITH, *supra* note 36, at 35.

<sup>171</sup> TREASURY ANTI-TERRORIST FINANCING GUIDELINES *supra* note 169; U.S. Dep't of Treasury, Office of Foreign Assets Control, Risk Matrix for the Charitable Sector [hereinafter OFAC Risk Matrix], available at [http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/charity\\_risk\\_matrix.pdf](http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/charity_risk_matrix.pdf); see also Glaser Testimony, *supra* note 36, at 11-12; U.S. DEP'T OF TREASURY, RESPONSE TO COMMENTS SUBMITTED ON THE U.S. DEPARTMENT OF THE TREASURY ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2006), available at

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<http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/response.pdf>.

<sup>172</sup> For further discussion on why the guidelines are inadequate, see ACLU, BLOCKING FAITH, *supra* note 36, at 35-36.

<sup>173</sup> See OFAC Risk Matrix, *supra* note 171, at 4 n.3; see also Smaili Interview, *supra* note 8.

<sup>174</sup> See *Al Haramain*, 686 F.3d at 974; *infra* notes 178, 180.

<sup>175</sup> See *supra*, pages 9-10.

<sup>176</sup> LCCR Admin, Scribd, 000269, (May 16, 2007 letter), available at LCCR Admin, Scribd, <http://www.scribd.com/LCCR%20Admin>; see also redacted delisting petition at 0010981 ("We really do not understand, why the decision process in the U.S. Department of the Treasury takes so long, although our client has sent all the required forms and information and even requested his application as an [sic] request for reconsideration . . .").

<sup>177</sup> Judicial Review Commission, *supra* note 94, at 88. The Judicial Review Commission noted that the Export Administration Act (50 U.S.C.A. app. § 2409), provides for specific deadlines on the processing of licenses that could be used as a model for OFAC.

<sup>178</sup> LCCR Admin, Scribd, 001237 (October 12, 2001 delisting petition), available at LCCR Admin, Scribd, <http://www.scribd.com/LCCR%20Admin>.

<sup>179</sup> U.S. Dep't of State, Determination Pursuant to Section 212(a)(3)(B) of the Immigration and Nationality Act (INA), Placing Entities on the Terrorist Exclusion List, Pub. Notice No. 4279 (Nov. 6, 2002), 68 Fed. Reg. 7836 (Feb. 18, 2003).

<sup>180</sup> The file contains correspondence from OFAC confirming Professor Mansour's removal from the list. Presumably, Mrs. Manour was removed from the list at this time, as well. See LCCR Admin, Scribd, 013889 (date of letter from OFAC to Dr. Mansour is redacted), available at LCCR Admin, Scribd, <http://www.scribd.com/LCCR%20Admin>.

<sup>181</sup> Complaint for Injunctive and Declaratory Relief In the Nature of Mandamus, *Gotovina v. United States Department of Treasury, Office of Foreign Assets Control*, Case No. 1:14-cv-00016-ESH (D.D.C.

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2014), ¶¶ 10-11, 14 [hereinafter Gotovina Complaint].

<sup>182</sup> *Id.* at ¶¶ 11, 15-16.

<sup>183</sup> *Id.* at ¶ 24.

<sup>184</sup> Unblocking of Three Individuals Blocked Pursuant to Executive Order 13219, as Amended, 79 Fed. Reg. 7,280 (Feb. 6, 2014); *see also* Stipulation of Dismissal, Case No. 14-cv-00016, filed February 10, 2014.

<sup>185</sup> *See* 50 U.S.C.A. § 1702(a)(1)(B) (2014) (authorizes blocking “during the pendency of an investigation.”).

<sup>186</sup> 9-11 COMMISSION STAFF REPORT *supra* note 13, at 8.

<sup>187</sup> *Id.* at 51.

<sup>188</sup> KindHearts for Charitable Humanitarian Development, Inc. v. Geithner (KindHearts I), 647 F. Supp. 2d 857, 870 (N.D. Ohio 2009).

<sup>189</sup> Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury, 686 F.3d 965, 992 (9th Cir. 2012).

<sup>190</sup> 9-11 COMMISSION STAFF REPORT *supra* note 13, at 50.

<sup>191</sup> *Id.* at 50 n.45 (internal quotation marks omitted).

<sup>192</sup> KindHearts for Charitable Humanitarian Development, Inc. v. Geithner (KindHearts III), 710 F. Supp. 2d 637, 647 (N.D. Ohio 2010).

<sup>193</sup> *Id.* at 112 (emphasis added).

<sup>194</sup> LCCR Admin, Scribd, 000311 (undated delisting petition), *available at* LCCR Admin, Scribd, <http://www.scribd.com/LCCR%20Admin>.

<sup>195</sup> Ferrari Interview, *supra* note 152.

<sup>196</sup> Nelson Interview, *supra* note 112.

<sup>197</sup> *See* Memorandum in Opposition to Defendants’ Motion to Dismiss or, in the Alternative for Summary Judgment, and Motion In Support of Plaintiff’s Motion for Discovery Under Rule 56(f), filed on Aug. 14, 2009 in Kadi v. Geithner, No. 09-0108 (D.D.C.) [hereinafter Kadi Memorandum], at 47.

<sup>198</sup> 9-11 COMMISSION STAFF REPORT *supra* note 13, at 107; BIF’s attorney expressed frustration with the

“lack of standards and rules of evidence which governed the OFAC process,” stating that she was “surprised that OFAC seemed to reply heavily on . . . historic ties . . . , which predated formation of BIF.”

<sup>199</sup> Kadi v. Geithner, No. 09-0108, 2012 WL 898778 (D.D.C. Mar. 19, 2012) (mem.), *appeal dismissed*, No. 12-5076, 2012 WL 3243996 (D.C. Cir. July 31, 2012).

<sup>200</sup> *Id.* at \*5.

<sup>201</sup> *Id.* at \*36.

<sup>202</sup> *See* Kadi Memorandum, *supra* note 197.

<sup>203</sup> The author of one of the articles cited in the record resigned after an investigation finding that he had fabricated several high profile stories. *See id.* at 10. In addition, the FBI agent who submitted an affidavit in support of the designation was subject to disciplinary charges brought by the FBI over allegations of insubordination and unprofessional conduct resulting in termination. *Id.*

<sup>204</sup> *Id.* at 11.

<sup>205</sup> Aaron Money Service, Inc. v. Ashcroft, 2003 WL 22143735 (D. Minn. Aug. 21, 2003); *see supra* note 18.

<sup>206</sup> 9-11 COMMISSION STAFF REPORT *supra* note 13, at 82.

<sup>207</sup> *Id.* at 107; *see also* ACLU, BLOCKING FAITH, *supra* note 36, at 46.

<sup>208</sup> Charity & Security Network, *Eight Year Battle for Removal from U.N. Terrorism Blacklist Succeeds*, May 16, 2012, *available at* [http://www.charityandsecurity.org/news/Removal\\_from\\_UN\\_Terrorism\\_Blacklist\\_Succeeds](http://www.charityandsecurity.org/news/Removal_from_UN_Terrorism_Blacklist_Succeeds).

<sup>209</sup> *Id.*

<sup>210</sup> Press Release, Security Counsel Al-Qaida Sanctions Committee Deletes One Individual From Its List, U.N. Doc. SC/10639 (May 7, 2012), *available at* <http://www.un.org/News/Press/docs/2012/sc10639.doc.htm>.

<sup>211</sup> *Id.*

<sup>212</sup> *See also* FBI Director Robert Mueller testimony to the 9-11 Commission, Apr. 14, 2004, at 126 (cited in 9-11 COMMISSION STAFF REPORT *supra* note 13, at 48 n.41) (“If there’s one concern I have about

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intelligence, it is that often there are statements made about an uncorroborated source with indirect access and then there is a stating of a particular fact . . . I think there has to be a balance between the information we get and the foundation of that information.”).

<sup>213</sup> Statement by Wolfgang Kaleck, General Secretary of the European Center for Constitutional & Human Rights, Press Release, European Center for Constitutional and Human Rights, ECCHR Succeed In Removing Client From the U.N. Security Council 1267 Al-Qaida Blacklist, (May 8, 2012).

<sup>214</sup> 31 C.F.R. § 501.807(c) (2014); *see also* Nice-Petersen *supra* note 150, at 1407-08.

<sup>215</sup> The Judicial Review Commission has noted that OFAC’s decision is usually entitled to a “presumption of validity” by the courts. Judicial Review Commission, *supra* note 94, at 28-30.

<sup>216</sup> Allowing independent review of OFAC’s listing decision would also shield OFAC from criticism of a public exposure (rather than a lawsuit) and protect OFAC from criticism for any alleged inconsistent application of the law. *Id.* at 115.

<sup>217</sup> *See* 31 C.F.R. §§ 594.501, 594.506 (2014); ACLU, BLOCKING FAITH, *supra* note 36, at 44; *see also* Stampley, *supra* at note 81, at 691-92.

<sup>218</sup> *See* U.S. Dep’t of Treasury, Guidance On The Release Of Limited Amounts Of Blocked Funds For Payment Of Legal Fees And Costs Incurred In Challenging The Blocking Of U.S. Persons In Administrative Or Civil Proceedings, July 23, 2010, *available at* [http://www.treasury.gov/resource-center/sanctions/Documents/legal\\_fee\\_guide.pdf](http://www.treasury.gov/resource-center/sanctions/Documents/legal_fee_guide.pdf); *see also* 31 C.F.R. §§ 594.501, 594.506.

<sup>219</sup> 31 C.F.R. § 501.802. OFAC can reconsider any denial of its license if “good cause” can be shown, e.g., the applicant can demonstrate that circumstances have changed or submit additional relevant material that was not previously available. *See* U.S. Dep’t of the Treasury, OFAC Frequently Asked Questions and Answers, *supra* note 3.

<sup>220</sup> *Id.*

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<sup>221</sup> LCCR Admin, Scribd, 000247 (December 7, 2005 delisting petition), *available at* LCCR Admin, Scribd, <http://www.scribd.com/LCCR%20Admin>.

<sup>222</sup> Judicial Review Commission, *supra* note 94, at 24.

<sup>223</sup> *See, e.g.*, U.N. Terrorist Listing Regime Lacks Due Process Guarantees, Charity & Security Network, Nov. 5, 2012, [http://www.charityandsecurity.org/news/UN\\_Terrorist\\_Listing\\_Regime\\_Lacks\\_Due\\_Process\\_Guarantees](http://www.charityandsecurity.org/news/UN_Terrorist_Listing_Regime_Lacks_Due_Process_Guarantees); Adeno Addis, *Targeted Sanctions as a Counterterrorism Strategy*, 19 TUL. J. INT’L & COMP. L. 187, 193-99 (2010) (stating there is a “serious lack of due process and transparency inherent in the listing and delisting process”); Andrew Hudson, *Not a Great Asset: The UN Security Council’s Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT’L L. 203 (2007); *cf.* THOMAS J. BIERSTEKER & SUE E. ECKERT, WATSON INST. TARGETED SANCTIONS PROJECT, BROWN UNIV., STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES 3 (2006), *available at* [http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf).

<sup>224</sup> S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

<sup>225</sup> Jared Genser & Kate Barth, *When Due Process Concerns Become Dangerous: The Security Council’s 1267 Regime and the Need for Reform*, 33 B.C. INT’L & COMP. L. REV. 1, 3-6 (2010); BIERSTEKER & SUE E. ECKERT, *supra* note 223, at 21.

<sup>226</sup> S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); *see* Biersteker & Eckert, *supra* note 223, at 3-6.

<sup>227</sup> U.N. Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities, Guidelines of the Committee for the Conduct of Its Work, Apr. 15, 2013 (*adopted* S.C. Res. 1390, U.N. Doc. S/RES/1267 (Jan. 28, 2002) *as amended by* S.C. Res. 2083, U.N. Doc. S/RES/2083 (Dec. 17, 2012)), *available at* [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf).

<sup>228</sup> Joined Cases C-402/05 & C-415/05, Kadi & Al Barakat v. Council of the European Union, 3 C.M.L.R. 41 (2008).



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<sup>229</sup> *Id.* at ¶ 370. The ruling extended the sanctions for three months, allowing the U.N. time to correct its error. Case T-85/09, *Kadi v Commission*, 2010 E.C.R. II-5177, ¶ 48. The U.N. sent a summary of reasons for listing Mr. Kadi, who sent a reply responding to the U.N.’s allegations. *Id.* at ¶49-61. In late October 2008, the E.U. implemented sanctions against Mr. Kadi. *Id.* Once again, Mr. Kadi petitioned the E.U. General Court, alleging that the E.U. sanction provided inadequate judicial review and was a disproportionate restriction on his property. *Id.* at 63. In an opinion on September 30, 2010, the Court sided with Mr. Kadi. Case T 85/09, *Kadi v Commission*, 2010 E.C.R. II 5177. On July 18, 2013, the ECJ upheld the lower court’s ruling and ordered that Mr. Kadi’s sanctions be annulled. See Joined cases C-584/10 P, C-593/10 P and C-595/10, *European Commission v. Kadi*, (July 18, 2013), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0584&qid=1403207111043>.

<sup>230</sup> S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009).

<sup>231</sup> The Ombudsperson is considered to be an independent expert, not a U.N. official. *Id.* at 5 ¶ 20.

<sup>232</sup> *Id.* at 4 ¶ 11.

<sup>233</sup> *Id.* at ¶ 334.

<sup>234</sup> On January 1, 2013, Ms. Prost’s tenure was extended for another 30 months. United Nations, U.N. Office of the Ombudsperson, <http://www.un.org/en/sc/ombudsperson> (last visited Apr. 30, 2014). Among other positions, Ms. Prost previously served as an ad litem judge of the International Criminal Tribunal for the Former Yugoslavia and worked as a prosecutor for the Canadian Department of Justice. United Nations, U.N. Office of the Ombudsperson, Biography of Judge Kimberly Prost, <http://www.un.org/en/sc/ombudsperson/bio.shtml> (last visited Apr. 30, 2014).

<sup>235</sup> S.C. Res. 1989, U.N. Doc. S/RES/1989 (June 17, 2011).

<sup>236</sup> Charity & Security Network, *U.N. Approves Reforms for Listing and Delisting on Terrorist List*, Feb. 1, 2010, [http://www.charityandsecurity.org/news/UN\\_Approves\\_Reforms\\_Listing\\_Delisting\\_Li](http://www.charityandsecurity.org/news/UN_Approves_Reforms_Listing_Delisting_Li)

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st; see also Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, on Security Council Resolution 1904, Sudan and the Middle East, at the Security Council Stakeout, United States Mission To the United Nations (Dec. 17, 2009), available at “<http://usun.state.gov/briefing/statements/2009/133836.htm> (“We think this ombudsman is a very important step because it will ensure that the information and the data – that those who seek delisting may be able to provide, are understood by the committee, assessed by the committee, and that the committee’s transparent and fair assessment is communicated back to those individuals.”).

<sup>237</sup> Federal Bureau of Investigation, “Watchlist Redress Memorandum of Understanding TSC leads Federal Inter-Agency Cooperation to Enhance Existing Redress Roles and Responsibilities,” Oct. 24, 2007, available at <http://www.fbi.gov/about-us/nsb/tsc/tsc-watchlist-redress-m.o.u>.

<sup>238</sup> *Id.*

<sup>239</sup> Marwa Elzankaly, “Staying off the ‘No-Fly’ List,” *The Recorder*, November 9, 2010.

<sup>240</sup> Dept. of Homeland Security, DHS Trip Application Process FAQ, available at <https://trip/dhs.gov/FAQ.aspx>.

<sup>241</sup> *Latif v. Holder*, Case No. 3:10-cv-00750 (D. Or. 2014), at 59-60. The Court further noted that the TRIP process fell “substantially short of even the notices that the courts found insufficient in *KindHearts* and *Al Haramain*. *Id.* at 59.

<sup>242</sup> *Id.* at 61.

<sup>243</sup> Congressman Cohen’s August 21, 2013 letter and the Treasury Department’s February 21, 2014 response are accessible via the Charity & Security Network’s press release, “Treasury Declines Review of ‘Constitutionally Flawed’ Terrorist Listing Procedures After Letter from Congress,” Apr. 21, 2014, available at [www.charityandsecurity.org/print/1083](http://www.charityandsecurity.org/print/1083).

<sup>244</sup> *Id.* Letter from Alastair M. Fitzpayne, Assistant Secretary for Legislative Affairs, U.S. Dep’t of Treasury, to Congressman Steve Cohen, U.S. House of Representatives (Feb. 21, 2014) (emphasis added).

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<sup>245</sup> *Id.* (emphasis added).

<sup>246</sup> Letter from U.S. Congressman Steve Cohen to Treasury Department Secretary Jacob Lew, Aug. 21, 2013.



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