

CRIMINAL PROSECUTION IN SHEEP'S CLOTHING: THE PUNITIVE EFFECTS OF OFAC FREEZING SANCTIONS

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The post-September 11th expansions to the asset-freezing power of the Office for Foreign Assets Control (OFAC), coupled with executive branch pressure to “show results” in the financial war on terror, has caused the agency to freeze the assets of several U.S. entities and individuals with as little evidence as hearsay and newspaper articles. Not surprisingly, in at least one case the Federal Bureau of Investigation (FBI) later found that there was no direct link between the blocked entity and terrorist finance. Furthermore, the government has never successfully prosecuted a frozen individual or entity for financing terrorism.

While freezing assets is intended to be a preventative measure, the effects are punitive. The sanctions indefinitely deprive an individual or an entity of property without meaningful due process and indefinitely label OFAC's target as a supporter of terrorism. To appeal OFAC's decision to freeze assets, one must contest the freeze by appealing directly to the agency, without the right to review the evidence OFAC relied upon to support its action. In every court case a designee has brought against an OFAC freezing action, the courts have consistently deferred to OFAC's decision under the umbrella of deference to agency decisions pursuant to the Administrative Procedures Act and deference to executive decisions relating to foreign policy and national security.

Only strengthened congressional oversight can limit OFAC's broad powers to exercise judicial powers without due process. Congress should require that OFAC meet a clearly defined minimum evidentiary standard prior to freezing assets and impose reporting requirements to demonstrate compliance with this standard. Such oversight would help ensure that OFAC can continue to freeze assets, a necessary action to block terrorist

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finance transactions, without jeopardizing the civil liberties of individuals and entities that have no direct link to terrorist activities.

I. INTRODUCTION

The first response to the September 11, 2001 terrorist attacks on New York and Washington D.C. (9/11) was the financial war on terror. On September 23, 2001, President Bush exercised his authority pursuant to the International Emergency Economic Powers Act (IEEPA)¹ to issue Executive Order 13,224² in which he declared a national emergency and drastically expanded his abilities to freeze assets in order to cut off funding that would support terrorist activity. The Bush Administration used its expanded powers liberally to achieve quick results in its war on terror. While it is not uncommon to hear criticism of the United States' war against terrorism in Afghanistan or Iraq, the United States' financial war on terror has not received much scrutiny. A lack of oversight in the financial war has resulted in the government freezing assets of individuals and entities with minimal supporting evidence, without notice, and without due process.

Prior to 9/11, the IEEPA gave the President authority to designate a person or entity he considered a national security threat, freeze their assets, and block transactions between them and U.S. persons.³ Executive Order 13,224 and later the USA PATRIOT Act expanded Presidential powers such that the executive branch can freeze assets of persons or entities that supported or otherwise associated with terrorists; the executive branch can submit classified evidence in camera and ex parte; and the executive branch can block assets during the *pendency* of an investigation.⁴ The effects of this expansion of power have been unfairly punitive.

This is not to say that freezing assets is not effective against terrorist funding. This tool can be very effective because it can be quickly deployed without warning. Furthermore, the administration views asset freezing as a preventive measure rather than a punitive measure.⁵ Richard Newcomb, OFAC's Director, has stated that "[e]conomic sanctions are intended to deprive the target of the use of its assets and deny the target access to the U.S. financial system and the benefits of trade, transactions and services

¹ 50 U.S.C. §§ 1701-02 (1977).

² 66 Fed. Reg. 49,079 (Sept. 25, 2001).

³ 50 U.S.C. §§ 1701-02.

⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, 50 U.S.C. § 1701 (2000 & Supp. V 2005); Exec. Order No. 13,224.

⁵ See *Oversight of the Dep't of Treasury Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. 27 (2004) (statement of R. Richard Newcomb, Dir., Office of Foreign Assets Control, U.S. Dep't of the Treasury).

involving U.S. markets.”⁶ Once OFAC freezes an entity’s or individual’s assets, they are no longer accessible for use for any purpose, terrorist or otherwise. In effect, the freezing of assets is immediately punitive to the designated person, entity, or individual or individuals employed by the sanctioned entity.

The punitive effects would not be so controversial if every entity or individual that OFAC sanctioned had demonstrably been shown to be a terrorist or terrorist entity or to be otherwise intentionally financing a terrorist group. However, OFAC has frozen the assets of at least one entity that was later deemed to have no direct link to any terrorist group, a finding made in a monograph on terrorist financing prepared by the staff of the National Commission on Terrorist Attacks Upon the United States (hereinafter 9/11 Commission Financing Monograph).⁷ Furthermore, as of this writing the United States has failed to convict any of the individuals targeted in post-9/11 freezing actions of actually financing terrorism. On October 24, 2007, the government’s latest criminal prosecution against the largest Islamic charity in the United States, the Holy Land Foundation, resulted in a mistrial.⁸ Remarkably, the government’s goals may not include winning trials. In response to the Holy Land Foundation trial outcome, former United States Attorney for the Eastern District of Texas Matthew D. Orwig said, “I think the government won when it froze the assets and shut down the organization.”⁹ Mr. Orwig may be right about the irrelevance of a trial verdict because of the difficulty in reversing an OFAC designation and asset-freeze.

Although a designee may appeal his case by writing to OFAC, he has no access to the information OFAC has used as a basis for freezing and, therefore, no ability to rebut this evidence.¹⁰ Moreover, if a designee appeals his case in court, OFAC’s actions are afforded extremely high deference under both the Administrative Procedure Act (APA) and executive decision-making procedures regarding foreign policy and national security.¹¹ Furthermore, any evidence the prosecution may have is only

⁶ *Id.* at 1.

⁷ JOHN ROTH ET AL., NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES: MONOGRAPH ON TERRORIST FINANCING 82 (2004), available at http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

⁸ Adam Liptak & Leslie Eaton, *Financing Mistrial Adds to U.S. Missteps in Terror Prosecutions*, N.Y. TIMES, Oct. 24, 2007, at A16.

⁹ *Id.*

¹⁰ See *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 45 (D.D.C. 2005); ROTH ET AL., *supra* note 7, at 50.

¹¹ See *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732, 734 (D.C. Cir. 2007); *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 163-64 (D.C. Cir. 2003).

presented *ex parte* and *in camera*.¹² Any semblance of a fair trial in this instance appears to be illusory.

What is most troubling about OFAC's power is that it may freeze an entity's assets with extremely little evidence. OFAC may freeze an entity's or individual's assets even when the supposed financier is merely *under investigation* for potentially financing terrorists.¹³ When an individual or entity is under investigation, this means that OFAC does not have enough evidence to designate an entity or individual as a financier of terrorism. Nevertheless, OFAC may freeze assets based on suspicion alone.¹⁴

This Comment will focus on the evidentiary standard OFAC uses in freezing assets. Although OFAC does not publish its evidentiary standard, the standard may be inferred through several recent cases. This Comment will discuss: (1) the implications of using a minimal evidentiary standard in OFAC's freezing process, through several case studies; (2) the punitive effects of the freezing process on individuals whose assets have been frozen or who are collaterally affected; and (3) the effectiveness of the freezing process as a whole. The Comment argues that OFAC lacks adequate evidentiary criteria for establishing that an individual or entity should be sanctioned, and proposes that this failure can be remedied through implementation by Congress of a clear evidentiary standard and of reporting requirements.

II. BACKGROUND OF OFAC'S STATUTORY AND ADMINISTRATIVE AUTHORITY

OFAC is a subdivision of the Treasury Department tasked with administering and enforcing economic and trade sanctions based on U.S. foreign policy and national security goals. OFAC directs its activities against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction.¹⁵ OFAC derives its authority to freeze assets from general presidential power and specific legislation.¹⁶ IEEPA grants

¹² See *Holy Land Found.*, 333 F.3d at 164 (holding that Holy Land Foundation "ha[d] no right" to procedures approximating a judicial trial or to review classified information that OFAC had presented *in camera* and under *ex parte* review).

¹³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, 50 U.S.C. § 1701 (2000 & Supp. V 2005).

¹⁴ See ROTH ET AL., *supra* note 7, at 99.

¹⁵ United States Department of the Treasury, Office of Foreign Assets Control, <http://www.treas.gov/offices/enforcement/ofac/mission.shtml> (last visited Nov. 16, 2007).

¹⁶ *Id.*; International Emergency Economic Powers Act (IEEPA) of 1997, Pub. L. No. 95-223, 91 Stat. 1625 (codified as amended in USA PATRIOT Act).

the President the authority to freeze the assets of an individual or organization designated a national security threat which had its source in whole or in substantial part outside the United States only if the government had declared a national emergency.¹⁷

Under IEEPA, once the President designates an individual or entity a threat, he must report it within ten days to OFAC. OFAC then places the individual or organization on its Specially Designated Terrorist List and informs banks or other financial institutions to freeze any assets they may hold on behalf of this individual or organization.¹⁸ A bank's refusal to comply may result in criminal or civil penalties.¹⁹ Although Congress originally enacted IEEPA to limit the President's power during peacetime, the President's decisions have undergone little scrutiny from the courts.²⁰

After the 1998 East Africa bombings, the Clinton Administration added Osama bin Laden and several of his associates to OFAC's Specially Designated Terrorist List.²¹ However, prior to the 1990s OFAC had only frozen funds associated with Libya and Cuba, and had just begun to transition toward the handling of non-state activities.²² This may explain why OFAC froze few funds related to non-state actor terrorism prior to 9/11.²³ The 9/11 Commission Financing Monograph observed that this restraint might be attributed to OFAC's reluctance to rely on shaky classified intelligence,²⁴ but it may also have been a result of the fact that al Qaeda money flowed through an informal network of *hawalas*²⁵ and Islamic institutions, which were not linked to the traditional U.S. financial system.²⁶

¹⁷ Trading With the Enemy Act, 50 U.S.C. §§ 1701-02(a)(1) (2000), *amended by* 50 U.S.C. § 1701 (Supp. V 2005).

¹⁸ Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 352 (2006).

¹⁹ USA PATRIOT Act § 1705 (2000).

²⁰ Donohue, *supra* note 18, at 352; *see also* Milena Ship Mgmt. Co. v. Newcomb, 995 F.2d 620, 625 (5th Cir. 1993) (holding that OFAC acted reasonably under the APA and under executive orders to seize Yugoslavian assets when it detained four vessels owned and operated by subsidiaries of a Montenegrin company in which the Yugoslavian government had a residual interest); Havana Club Holding v. Galleon, 961 F. Supp. 498, 503 (S.D.N.Y. 1997) (holding that OFAC's decision to license a Cuban company's trademark was unreviewable by the court because judicial review is precluded by "foreign policy considerations and judgments of the Executive Branch that should not be disturbed by the courts" or the APA).

²¹ Exec. Order No. 13,099, 3 C.F.R. 208 (1998), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001).

²² ROTH ET AL., *supra* note 7, at 37.

²³ *Id.*

²⁴ *Id.*

²⁵ A *hawala* is an informal money remittance agency. *Id.* at 68. A *hawala* is different from a formal money remittance agency because instead of using the formal financial system

In 1999, the President placed the Taliban on the Specially Designated Terrorist List.²⁷ The Taliban, which then headed Afghanistan's official government, proved an easy target for OFAC to penalize; OFAC blocked more than \$34 million in Taliban assets held in U.S. banks.²⁸ Ironically, under the pre-9/11 Bush Administration, former Secretary of the Treasury Paul O'Neill attempted to quash the National Security Council's proposed terrorist asset tracking center, announcing that he would reduce the U.S. regulatory regime and depend on international cooperation to stem illicit money flows.²⁹

Of course, 9/11 produced the opposite result, due to the enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act).³⁰ The USA PATRIOT Act expanded several executive powers under IEEPA.³¹ The USA PATRIOT Act amended IEEPA to allow the executive branch to submit classified evidence in camera and ex parte in court proceedings against alleged financiers of terrorism; to allow OFAC to block assets during the pendency, rather than after the conclusion, of an investigation; and to allow the President to confiscate any property subject to the jurisdiction of the United States of any foreign person, organization, or country he determines planned, authorized, aided, or engaged in terrorist hostilities or attacks against the United States.³²

Although keeping all of these amendments in mind is important in order to appreciate the extreme expansion of executive power that took place, this Comment will focus on the civil liberties implications and effectiveness of the second amendment, which expanded OFAC's ability to freeze assets before a complete investigation of an individual's or organization's involvement in terrorist financing. The Comment will then

to remit money, it does not use a negotiable instrument or other commonly recognized method for the exchange of money. *Id.* *Hawalas* employ several methods to remit money, such as settling preexisting debt, paying or receiving money from third party accounts, importing or exporting both legal and illegal goods, and physically moving currency or precious metals or stones. *Id.*

²⁶ *Id.*

²⁷ Exec. Order No. 13,129, 3 C.F.R. 200 (1999), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001).

²⁸ ROTH ET AL., *supra* note 7, at 38.

²⁹ Stephen Fidler & Haig Simonian, *IMF Chief Urges United Response to Slowdown*, FIN. TIMES (London), Oct. 6, 2001, at Fight Against Terror Economy 4.

³⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 § 106, 50 U.S.C. § 1701 (2001).

³¹ *Id.*

³² *Id.*

propose several steps that may be taken so as to mitigate the government's infringement on civil liberties, including imposing a minimum evidentiary standard that must be satisfied prior to a freezing action and corresponding reporting requirements.

III. OFAC'S LACK OF A CLEAR EVIDENTIARY STANDARD HAS RESULTED IN UNFAIRLY TARGETING SEVERAL U.S. ORGANIZATIONS

OFAC's ability to freeze assets during the pendency of an investigation has the potential effect of shutting down an entity indefinitely, without the more fully developed administrative record necessary for an IEEPA designation according to IEEPA's pre-9/11 evidentiary standards.³³ OFAC can and has frozen assets based on remarkably little evidence. OFAC does not collect its own intelligence; rather, it relies on the intelligence community to collect and often analyze the evidence, which it then uses to make designations.³⁴ Recent cases have involved the shutdown of organizations based on hearsay, newspaper articles, and unsubstantiated intelligence.³⁵

Not surprisingly, the lack of an evidentiary threshold has resulted in OFAC mistakenly freezing assets of entities that the United States later found had no direct link to terrorists. In addition, no amount of freezing has led the U.S. government to secure a single terrorist-related conviction.³⁶ This Part will analyze the effects of the lack of a clear evidentiary standard by evaluating several recent problematic OFAC freezes: (1) the al Barakaat money remittance case, (2) Islamic charities, and (3) the case of Enaam Arnaout.

A. THE CASE OF AL BARAKAAT

The government committed its biggest gaffe when OFAC froze the assets of numerous U.S. and overseas branches of the al Barakaat money remittance agency. The 9/11 Commission Financing Monograph stated that OFAC acted hastily in freezing al Barakaat's money shortly after the 9/11 attacks in order to "show the world community and [U.S.] allies that the United States was serious about pursuing the financial targets."³⁷ Upon further investigation of al Barakaat, OFAC found no evidence of the direct link to bin Laden that it had previously suspected.³⁸

³³ ROTH ET AL., *supra* note 7, at 8.

³⁴ *Id.* at 37.

³⁵ *See id.* at 79, 82, 85, 99, 104, 111, 113.

³⁶ *Id.* at 113.

³⁷ *Id.* at 79.

³⁸ *Id.* at 82-83.

Al Barakaat was a money remittance agency used by the Somalian community in the United States and in other parts of the world to remit earnings to relatives in Somalia.³⁹ The al Barakaat network played a major role in supporting Somalia's economy because Somalia had no banking system or central bank and, therefore, al Barakaat was the sole entity through which foreign exchange could be made.⁴⁰ In addition, al Barakaat was the largest business group in Somalia, with subsidiaries also involved in telecommunications and construction.⁴¹

Prior to 9/11, al Barakaat attracted some money laundering suspicion by the FBI based on the large amounts of money it funneled from the United States to Somalia via a single account in the United Arab Emirates.⁴² However, the FBI was never able to develop enough evidence against al Barakaat to press criminal charges, largely because it obtained most of its information from uncorroborated sources within the American Somali community.⁴³ Intelligence officials could not rely on much of this information because they considered many of these tips to be rumors started by political and business rivals within the community.⁴⁴

After the attacks on the World Trade Center and the Pentagon, the White House's and Treasury Department officials' intense pressure on OFAC to "show results" resulted in designating and freezing the assets of entities based on weak evidentiary foundations.⁴⁵ In fact, the intelligence community's evidence often consisted only of data "linking" entities and individuals to terrorist groups "primarily through common acquaintances, group affiliations, historic relationships, phone communications, and other such contacts."⁴⁶ However, as the 9/11 Commission Financing Monograph observed, "It proved far more difficult to actually trace the money from a suspected entity or individual to the terrorist group, or to otherwise show complicity, *as required in defending the designations in court.*"⁴⁷ A source described the post-9/11 approach to freezing as "so forward leaning we almost fell on our face."⁴⁸ Some believed the government's hasty approach

³⁹ *Id.* at 67.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 98.

⁴³ *Id.* at 75.

⁴⁴ IBRAHIM WARDE, *THE PRICE OF FEAR: THE TRUTH BEHIND THE FINANCIAL WAR ON TERROR* 98 (Univ. of Cal. Press 2007).

⁴⁵ ROTH ET AL., *supra* note 7, at 79.

⁴⁶ *Id.* at 47.

⁴⁷ *Id.* (emphasis added).

⁴⁸ *Id.* at 79.

to cracking down on terrorist finance would result in a high level of false designations, which proved to be true in the case of al Barakaat.⁴⁹

In this case, the government's haste certainly made waste. In developing evidentiary support for the freezing of al Barakaat's assets:

The [OFAC] analysts were told that they did not need to have evidence that each al-Barakaat entity took part in terrorist financing; it was sufficient to show only that the main entity itself was involved to be able to close all of the branches and freeze all of the money. Thus, the analysts needed only to refer to the seized telephone lists or a commercial index of businesses such as Dun & Bradstreet to justify the closing of each al-Barakaat branch office.⁵⁰

In addition, despite OFAC analysts' requests to continue investigations for sixty to ninety days prior to freezing, "the OFAC management, apparently reacting to external demands, told them they could not have it,"⁵¹ which resulted in the immediate freezing of al Barakaat's assets. This pace continued as the executive branch set aggressive goals of making a major designation every four weeks, followed by derivative designations throughout each month.⁵² Treasury officials have admitted that this pressure resulted in weak evidentiary foundations in freezing actions.⁵³

After al Barakaat's designation, U.S. investigators traveled to the United Arab Emirates on two separate occasions to review al Barakaat bank records to establish support for its claim that the entity was engaged in terrorism funding activities.⁵⁴ Despite incredible cooperation on the part of the United Arab Emirates and access to "thousands of pages of documents culled from ten accounts held by" al Barakaat, investigators "could find no direct evidence at all of any real link between al-Barakaat and terrorism of any type."⁵⁵ OFAC had frozen al Barakaat's assets based on the suspicion that bin Laden was an early investor in al Barakaat and that al Barakaat had diverted money to al Qaeda, but investigators were not able to substantiate either claim.⁵⁶

Furthermore, Secretary O'Neill had originally estimated that al Barakaat had diverted \$25 million per year to terrorist activities, but investigators found that al Barakaat's profits totaled only about \$700,000 per year and "could not conclude whether *any* of that money had been

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 81-82.

⁵⁵ *Id.* at 81-83.

⁵⁶ *Id.* at 83.

skimmed.”⁵⁷ This experience led one investigator to believe that “much of the evidence [used by OFAC] for al-Barakaat’s terrorist ties rested on unsubstantiated and uncorroborated statements of domestic FBI sources,”⁵⁸ perhaps the very sources that were earlier deemed rumors started by political and business rivals.

From a policy perspective, the government likely chose this course because it is much easier to penalize a rooted institution than a disparate, mobile network of individual terrorists. The Bush Administration may have found freezing al Barakaat’s assets a convenient way to give the impression of being tough on terror. Less than two months after the 9/11 attacks, President Bush proclaimed that the freeze would “disrupt the murderers’ work . . . interrupt[] al Qaeda’s communications, . . . block[] an important source of funds, [and] provide[] [the government] with valuable information.”⁵⁹ Incredibly, the Bush Administration has continued to hold this view despite the FBI’s conclusion that there was no direct link between al Barakaat and bin Laden or al Qaeda, and despite the 9/11 Commission’s criticisms.⁶⁰

B. ISLAMIC CHARITIES

The al Barakaat case is not the only situation in which OFAC froze an entity’s assets based on questionable evidence. Many mainstream Islamic charities have also been easy targets.⁶¹ Several of these charities have brought cases against OFAC in court, but have had little success in reversing freezing sanctions. However, the charities’ inability to obtain relief has not been based on proof of guilt, but rather the great procedural difficulties in reviewing OFAC’s actions.

OFAC is not required to show any evidence of a suspect’s intent to support or knowledge of support for terrorism when an individual or entity

⁵⁷ *Id.*

⁵⁸ *Id.* at 82.

⁵⁹ Global Security.Org, News from the Washington File (Nov. 7, 2001), <http://www.globalsecurity.org/military/library/news/2001/11/mil-011107-usia12.htm>.

⁶⁰ WARDE, *supra* note 44, at 102.

⁶¹ Charitable giving, or the tradition of *zakat*, is one of the five pillars of faith in Islam and consequently a religious obligation. Laila Al-Marayati, *American Muslim Charities: Easy Targets in the War on Terror*, 25 PACE L. REV. 321, 321-22 (2005). Many Muslims choose to donate money to American Muslim charities to fulfill this obligation. *Id.* at 322. Despite the government’s inability to establish a “money trail” between financing terrorism and these charities, a “cloud of suspicion continues to grow despite modest efforts on the part of the Treasury Department . . . to convince the community otherwise.” *Id.* at 329.

appeals the freezing of assets to a court.⁶² Furthermore, the government can introduce secret evidence that can only be viewed *ex parte* and *in camera*,⁶³ and OFAC's decisions are twice-protected, both by high deference to agency decisions through the APA and by extremely high deference to the Executive's national security and foreign relations decisions.⁶⁴ Accordingly, courts have routinely dismissed all challenges to OFAC's freezing decisions with regard to Islamic charities without analyzing the fairness or public policy implications of such actions.⁶⁵

In a recent case, the government failed to successfully prosecute the leaders of an entity OFAC had sanctioned, in large part because there was little evidentiary support. The government alleged that the largest U.S.-based Islamic charity, the Holy Land Foundation (HLF), financially supported the Hamas terrorist organization. The government attempted to establish that HLF indirectly funded Hamas by funding Islamic "charitable groups" called "zakat committees, which build hospitals and feed the poor,"⁶⁶ alleging that these committees were controlled by Hamas and facilitated Hamas's goals of "spread[ing] its ideology and recruit[ing] supporters" to its terrorist cause.⁶⁷ Despite the government's years of investigation and preparation for the trial, the jury did not convict any of the HLF leaders and acquitted one of the five defendants on all but one charge.⁶⁸ A mistrial was declared for the other defendants after the jury reported after nineteen days that it could not continue deliberations.⁶⁹

After the trial, one juror told the Associated Press that "[t]here was so little evidence" that the case "was strung together with macaroni noodles" and that the government should not retry the case.⁷⁰ David Cole, a professor of constitutional law at Georgetown University, also criticized OFAC's lack of evidentiary support for decisions to freeze charities' assets,

⁶² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, 50 U.S.C. § 1702 (2000 & Supp. V 2005).

⁶³ *Id.* § 1702(c).

⁶⁴ Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

⁶⁵ See *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 739 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 92 (2007); *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002), *cert. denied*, 540 U.S. 1003 (2003).

⁶⁶ Leslie Eaton, *U.S. Prosecution of Muslim Group Ends in Mistrial: A Jury Is Deadlocked*, N.Y. TIMES, Oct. 23, 2007, at A1.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Leslie Eaton, *No Conviction in Trial Against Muslim Charity*, N.Y. TIMES, Oct. 22, 2007, <http://www.nytimes.com/2007/10/22/us/22end-holyland.html>.

stating that the HLF jury verdict “suggests the government is really pushing beyond where the law justifies them going.”⁷¹ Finally, Matthew D. Orwig, a partner at Sonnenschein Nath & Rosenthal LLP and former U.S. Attorney for the Eastern District of Texas, deemed the verdict “a stunning setback for the government.”⁷²

Perhaps the government’s biggest mistake was introducing faulty evidence, including transcripts that incorrectly translated quotations from HLF officials.⁷³ These transcripts included supposed anti-Semitic remarks that were not actually reflective of the HLF executive director’s speech, and declarations by another HLF member allegedly showing his support for Hamas when he was actually denying such support.⁷⁴ The government tacitly conceded the errors when United States Attorney Richard B. Roper argued that “the government’s case came from thousands of intercepts and surveillance transcripts and it would be unfair to throw out the case based on a couple of transcript errors.”⁷⁵

In another case, *Islamic American Relief Agency v. Gonzales*, the D.C. Circuit Court of Appeals ruled in favor of OFAC’s freezing action against a U.S. charity and recipient of grants from the U.S. Agency for International Development,⁷⁶ the Islamic American Relief Agency, based on the government’s theory that it is the “same organization” as the Islamic African Relief Agency in Sudan, an alleged financier of terrorist activities.⁷⁷ The court applied the APA’s “highly deferential standard of review” that requires the court to rule in favor of OFAC as long as OFAC’s actions were not “arbitrary and capricious” and were based on “substantial evidence.”⁷⁸

After reviewing the government’s evidence in support of the designation, 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.”⁷⁹ The court, thus, deemed the evidence “sufficient” to support OFAC’s freezing based on such deference.⁸⁰

⁷¹ Eaton, *supra* note 66.

⁷² *Id.*

⁷³ Shawn Zeller, *Islamic Charities Await Their Day in Court*, CQ WEEKLY (D.C.), May 25, 2007, at 1573.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Dave Helling, *Hulshof’s Campaign Says Money from Donor Facing Terror Charges Was Handled Properly*, KANSAS CITY STAR, Apr. 12, 2008, at B6.

⁷⁷ *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 739 (D.C. Cir. 2007).

⁷⁸ *Id.* at 732 (citing 5 U.S.C. § 706(2)(A)).

⁷⁹ *Id.* at 734 (emphasis added).

⁸⁰ *Id.*

Since this ruling, a federal grand jury has indicted the Islamic American Relief Agency on charges of sending money to an orphanage in Pakistan owned by an Afghan *mujahideen* leader; and included in the indictment charges of money laundering, conspiracy, and obstruction of justice in the indictment against former U.S. Congressman Mark Siljander.⁸¹ The government charged Siljander based on his representation of the Islamic American Relief Agency in a lobbying campaign to protest its OFAC designation.⁸² The trial will take place in 2009⁸³ and will reveal whether the government's case supported by evidence used by OFAC in its freezing action will fare any better than the Holy Land Foundation criminal prosecution.

C. THE CASE OF ENAAM ARNAOUT

The government's case against the Chicago-based Benevolence International Foundation's (BIF) founder Enaam Arnaout provides an additional example of want of evidence. BIF was a tax-exempt organization that originally provided support to the *mujahideen* fighting the Soviets in Afghanistan and humanitarian aid to refugees of the war in Afghanistan.⁸⁴ BIF came under the scrutiny of the FBI in the early 1990s when it allegedly began supporting jihad movements "outside of approved channels."⁸⁵ However, despite intelligence gathered from surveillance and from going through BIF's garbage, the FBI "believed they still could not come close to proving a criminal case against Arnaout or BIF."⁸⁶ Shortly after 9/11, OFAC received word from the General Counsel of Treasury that it needed to act against BIF immediately even though it "had not yet developed the evidence necessary for a designation under IEEPA."⁸⁷ Therefore, OFAC relied on the USA PATRIOT Act to freeze assets "during the pendency of an investigation."⁸⁸

After freezing BIF's assets, the government attempted to develop a criminal case against BIF and Arnaout based upon a copy of the meeting minutes for the founding of al Qaeda and handwritten messages between

⁸¹ Mark Morris, *Islamic Charity Faces New Charges*, KANSAS CITY STAR, Jan. 17, 2008, at A1.

⁸² *Id.*

⁸³ The Associated Press, *Siljander to Face Trial*, GRAND RAPIDS PRESS, Aug. 23, 2008, at A6.

⁸⁴ ROTH ET AL., *supra* note 7, at 94.

⁸⁵ *Id.* at 94-95.

⁸⁶ *Id.* at 97.

⁸⁷ *Id.* at 99.

⁸⁸ *Id.*

bin Laden and Arnaout, both obtained from the Bosnian branch of BIF.⁸⁹ BIF's lawyers argued that this evidence dated from the 1980s and early 1990s, when the United States and bin Laden were aiding the Afghans in their war against the Soviet Union.⁹⁰ In fact, before the trial began, the presiding U.S. District Judge, Suzanne B. Conlon, criticized the way that the prosecutors had indicted Arnaout, noting in particular that they had failed under the rules of evidence to show why many of the accusations should be brought to a jury.⁹¹

Although the prosecution was able to get Arnaout to plead guilty to the lesser offense of diverting funds to provide boots, blankets, and other goods to militants in Bosnia and Chechnya, Judge Conlon observed that Arnaout's alleged ties to al Qaeda were from a time "when [the United States] wasn't necessarily opposed to bin Laden."⁹² In handing down a lesser sentence than that recommended for Arnaout by the government, the sentencing judge also noted that the government had not proven:

[T]hat the Bosnian and Chechen recipients of BIF aid were engaged in a federal act of terrorism Nor does the record reflect that he attempted, participated in, or conspired to commit any act of terrorism The government failed to connect the dots.⁹³

While the government may have won a small victory in this case, the court was evidently uncomfortable with the evidentiary basis for OFAC's targeting of Arnaout.

IV. OFAC SANCTIONS ARE PUNITIVE TOWARD AFFECTED INDIVIDUALS AND ENTITIES

Several politicians and academics have made the argument that the effect of freezing assets is a penalty akin to criminal punishment. A recent journal article analyzes the U.N. sanctions regime, which the United States, as a member of the U.N. Security Council, helped to create in response to the bombings in East Africa and implemented through OFAC.⁹⁴ The article argues that:

⁸⁹ WARDE, *supra* note 44, at 140.

⁹⁰ *Id.*

⁹¹ *Id.* at 141.

⁹² John Mintz, *Head of Muslim Charity Sentenced: Ill. Man Diverted Funds to Militants; No Proof of Terror Link, Judge Says*, WASH. POST, Aug. 19, 2003, at A2.

⁹³ WARDE, *supra* note 44, at 141.

⁹⁴ Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT'L L. 203, 218 (2007); see Exec. Order No. 13,129, 3 C.F.R. 200 (1999), reprinted in 50 U.S.C. § 1701 (Supp. I 2001); The Al-Qaida and Taliban Sanctions Committee, Resolution 1267, <http://www.un.org/sc/committees/1267/information.shtml> (last visited Dec. 8, 2008).

[T]he nature and severity of the sanctions should bring the regime within the criminal sphere. The sanctions are imposed on those adjudged to be involved in financing terrorism, a serious criminal activity under both international and national law. Moreover, the severity of the sanctions suggests a punitive element. Sanctions have dire economic consequences because they deny an individual his or her livelihood and remain in place indefinitely. Finally, there is the irreparable stigma of being labeled a terrorist supporter.⁹⁵

The severity of the sanctions is also evident from the fact that the freeze is applied to all of an individual's assets regardless of how much may have been funneled toward terrorist causes. Further, the sanctions may apply indefinitely.⁹⁶

Sanctioned individuals have, in fact, experienced the effect of the criminal penalties described above. In November 2001, a Minneapolis-based money remitter who was part of the al Barakaat network was designated, along with the al Barakaat entity, as a supporter of terrorism.⁹⁷ As a result, anyone in the United States was prohibited from engaging in any financial transaction with him.⁹⁸ Only after he filed suit against the government did OFAC grant him a license to withdraw funds to make such basic purchases as groceries.⁹⁹

In the case of the al Barakaat network asset freeze, the government effectively shut down the business. This closure, of course, put anyone employed by the business out of work and even affected those who simply used the business for remittance. Because al Barakaat was used by the Somali community as a primary way to remit money to their family in Somalia, the blocked money "represented [the loss of] their life savings and an economic lifeline to an impoverished country."¹⁰⁰ Somali nationals also would have felt the effect, because at this time al Barakaat was the largest business group in the country.¹⁰¹

Not only does an actual freeze punish an entity, but the threat of a freeze, or mere suspicion that an entity may have its assets frozen, creates punitive effects. The government has subjected KinderUSA, a U.S. charity that provides humanitarian aid to children in war zones that include Palestine, to surveillance since at least 2004, but has never designated the

⁹⁵ Hudson, *supra* note 94, at 218 (footnote omitted).

⁹⁶ See Peter Guthrie, Note, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491, 505 (2004).

⁹⁷ ROTH ET AL., *supra* note 7, at 81.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ WARDE, *supra* note 44, at 97.

charity a financier of terrorism.¹⁰² However, the effects of surveillance alone have caused the same defamatory effects that accompany actual asset freezing. Matthew Levitt recently published a book, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad*, which alleges that KinderUSA funds Hamas.¹⁰³ KinderUSA responded by filing a libel suit, complaining that the book's allegations have damaged "its ability to raise funds and to recruit and retain volunteers for its charitable mission, and caused irreparable harm to its reputation."¹⁰⁴

The President has also recently increased penalties for violations of economic sanctions against designated terrorist organizations when he signed significant amendments to IEEPA into law.¹⁰⁵ In addition, the punitive effects are virtually irreversible because OFAC's freezing actions are essentially non-reviewable. A decision by OFAC to freeze assets is doubly damning: not only can it base its designation on "less evidence than is required in a criminal or even civil trial," if an entity appeals OFAC's action to any court, OFAC is protected by the triple threat of the APA, extremely high deference to executive actions regarding foreign policy, and extremely high deference to executive actions regarding national security. If this is not enough to dissuade a party to challenge an OFAC freezing action, the affected party is also barred from reviewing the evidence on which OFAC has based its freezing action, which, not knowing OFAC's exact allegations, eliminates any possibility of rebutting the designation.

In addition, although the effects of an OFAC sanction are similar to forfeiture, a designated person or entity does not have the same rights available in a civil forfeiture action. In seizures unrelated to OFAC, the government must file a lawsuit and bear the burden of proof by a preponderance of evidence.¹⁰⁶ When OFAC freezes a person's or entity's assets, it may do so based merely on suspicion of terrorism financing or pending an investigation,¹⁰⁷ which imposes little, if any, burden of proof on the government and certainly no requirement to file a lawsuit before a court.

¹⁰² *Muslim Charity Files Libel Suit over Allegations of Terrorist Ties*, OMB WATCH, May 15, 2007, <http://www.ombwatch.org/article/articleview/3829/1/84/?TopicID=2>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ International Emergency Economic Powers Act (IEEPA) of 1997, Pub. L. No. 95-223, 91 Stat. 1625 (codified as amended in USA PATRIOT Act); *Congress Misses Oversight Opportunity on Charities and Anti-Terrorist Financing Laws*, OMB WATCH, Oct. 10, 2007, <http://www.ombwatch.org/article/articleview/4042/1/84/?TopicID=2>.

¹⁰⁶ ROTH ET AL., *supra* note 7, at 50.

¹⁰⁷ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, 50 U.S.C. § 1702 (2000 & Supp. V 2005).

A person subject to civil forfeiture is also better protected than someone subject to an OFAC freeze because the owner of the property has a right to conduct discovery of the government's evidence and to avoid forfeiture by demonstrating that she had no knowledge of the illegal character of the property.¹⁰⁸ In OFAC freeze cases, the owner does not have the right to review the government's evidence either through an administrative process or when challenging the designation before a court.¹⁰⁹ In addition, since there is no intent requirement for charges of terrorism financing, a designee has no right to the defense that his or its transactions were not intended for that purpose.¹¹⁰

V. THE EFFECTIVENESS OF OFAC'S CURRENT FREEZING PROCESS IS QUESTIONABLE

Notwithstanding the OFAC freezing process's civil liberties infringements, OFAC's heavy-handed approach to terrorist finance has produced questionable results. It is often unclear, even according to OFAC, how effective the freezing process is. In a 2006 General Accounting Office (GAO) report on the effectiveness of current counter-terrorism-financing activities, OFAC admitted that its reliance on "totaling an amount of blocked assets at the end of the year" in its annual report to Congress to show its "progress" in deterring terrorist finance did not actually measure the effectiveness of its efforts.¹¹¹ In fact, effectiveness may not be measurable at all, as Treasury officials have responded to GAO criticism by noting that measuring the deterrent value of its sanctions program "is problematic, in part because the direct impact on unlawful activity is unknown and because precise metrics for illegal and clandestine activities are hard to develop."¹¹²

Even if OFAC freezes successfully deter some funds from reaching terrorists, the impact on preventing terrorism generally may be negligible. The cost of preparation for the attacks on the World Trade Center, including pilot-training and travel expenses, was reportedly no more than \$500,000.¹¹³ The staff of the 9/11 Commission also reported that the funds al Qaeda used for the 1998 East Africa embassy bombings were held in an informal

¹⁰⁸ ROTH ET AL., *supra* note 7, at 50-51.

¹⁰⁹ *See id.* at 50.

¹¹⁰ Donohue, *supra* note 18, at 307.

¹¹¹ U.S. GEN. ACCOUNTING OFFICE, GAO-06-632T, TERRORIST FINANCING: AGENCIES CAN IMPROVE EFFORTS TO DELIVER COUNTER-TERRORISM-FINANCING TRAINING AND TECHNICAL ASSISTANCE ABROAD 19 (2006) [hereinafter GAO REPORT].

¹¹² *Id.*

¹¹³ Andrew Anthony, *The Price of Peace*, OBSERVER (London), Mar. 6, 2005, at 20.

network of *hawalas* and Islamic institutions located outside the United States.¹¹⁴ OFAC only has jurisdiction over U.S. individuals and entities, which provides it with an extremely limited enforcement arena.¹¹⁵ Nevertheless, OFAC reported in 2004 that it had frozen \$3.9 million in al Qaeda assets.¹¹⁶ Although it is not clear how OFAC identified these assets as al Qaeda's, these monies are likely comprised largely of the assets of the Islamic charities discussed in Part III.

Finally, a central component of the fight against terror is international cooperation, particularly in light of jurisdictional limits on OFAC. When OFAC is unable to freeze the assets of an entity outside its jurisdiction, it often relies on the institutional framework of the United Nations to extend its reach.¹¹⁷ The U.N. Security Council has a Sanctions Committee that oversees state implementation of measures against terrorist financing.¹¹⁸ The Sanctions Committee maintains a list, similar to OFAC's, of "individuals and entities designated as being associated with [O]sama bin Laden."¹¹⁹ Security Council Resolution 1333 requires state parties to enforce freezing procedures against designated entities and imposes penalties on those who violate the asset freeze.¹²⁰ The majority of the individuals on the Sanctions List were placed there by the Sanctions Committee as a result of recommendations by the United States.¹²¹ The United States' guiding role in this process suggests that the United States relies heavily on the international community to fight global terrorism financing.

However, the international community is concerned by the methods by which OFAC freezes assets.¹²² These concerns began to arise as early as the al Barakaat designation. Based on U.S. intelligence regarding al Barakaat, the U.N. Sanctions Committee added three Swedish citizens employed with the Swedish branch of al Barakaat to its list.¹²³ European Commission regulations require E.U. members to freeze the assets of listed

¹¹⁴ ROTH ET AL., *supra* note 7, at 37.

¹¹⁵ *Id.*

¹¹⁶ GAO REPORT, *supra* note 111, at 21.

¹¹⁷ Guthrie, *supra* note 96, at 498 n.35.

¹¹⁸ *Id.* at 493-94.

¹¹⁹ S.C. Res. 1333, ¶ 16(b), U.N. Doc. S/RES/1333 (Dec. 19, 2000).

¹²⁰ *Id.* ¶¶ 17-18.

¹²¹ See Per Cramér, *Recent Swedish Experiences with Targeted U.N. Sanctions: The Erosion of Trust in the Security Council*, in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 85, 88 (Erika de Wet & André Nollkaemper eds., 2003).

¹²² ROTH ET AL., *supra* note 7, at 48, 84.

¹²³ Case T-306/01, *Aden v. Council*, 2002 E.C.R. II-02387, ¶ 24.

individuals and entities.¹²⁴ As a result, Sweden, an E.U. member, froze the assets of the three men and of al Barakaat without notice.¹²⁵

One of the men, Mr. Aden, discovered the action when he awoke to find reporters camped outside his apartment; they followed him to withdraw money from an ATM that would not allow him any access to its services.¹²⁶ Mr. Aden and his lawyer appealed their case to the Swedish government, presenting a “thick stack of business records,” which the government deemed to present no sign of any link to terrorism or any other impropriety.¹²⁷

After the Swedish government learned that the U.N. had received its target list from the United States, Sweden asked the U.S. Treasury to provide it with the evidence it had used to determine that its citizens' assets should be blocked.¹²⁸ The United States sent a packet of information that consisted almost entirely of news articles regarding al Barakaat, a statement by President Bush on al Qaeda, and a briefing transcript by then-Secretary of State Colin Powell.¹²⁹ The only mention of Mr. Aden and his colleagues was in a flowchart of al Barakaat's structure.¹³⁰

The Swedish government was finally able to convince the United States to remove Mr. Aden and one of his colleagues from the list after a series of diplomatic negotiations.¹³¹ It is unclear why the third individual, Youssef Ali, was not also removed from the list, but it may be because Ali refused to resign from the defunct al Barakaat despite his two colleagues having done so.¹³² Mr. Ali has said, “Show me the evidence that what I did was wrong and I will resign. Without the evidence, I cannot do it.”¹³³

The public reaction to this situation was a “general feeling that the three had been in effect convicted of a crime without due process and that injustice had been done.”¹³⁴ This was particularly so because the sanctions regime lacked an appeals or review mechanism.¹³⁵ In addition to advocating on behalf of its citizens, Sweden requested that the Sanctions

¹²⁴ Commission Regulation 2199/2001, art. 1, 2001 O.J. (L 295).

¹²⁵ Christopher Cooper, *Shunned in Sweden: How Drive to Block Funds for Terrorism Entangled Mr. Aden*, WALL ST. J., May 6, 2002, at A1.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Cramér, *supra* note 121, at 94-95.

¹³² Cooper, *supra* note 125.

¹³³ *Id.*

¹³⁴ Elin Miller, *The Use of Targeted Sanctions in the Fight Against International Terrorism—What About Human Rights?*, 97 AM. SOC'Y INT'L L. PROC. 46, 48 (2003).

¹³⁵ *Id.*

Committee review the list in its entirety, but this request was denied.¹³⁶ The Swedish government further suggested that the Sanctions Committee adopt a criminal evidentiary standard in evaluating which entities to block, but the Sanctions Committee also rejected this suggestion.¹³⁷

Finally, five years after Ali was included in the U.N. Sanctions Committee List, the Swedish government was able convince the United States to de-list him.¹³⁸ Regarding this situation, Swedish State Secretary for Foreign Affairs Hans Dahlgren commented that “[w]hat has happened illustrates that the [U.N.] sanctions need reform, that better legal security is needed in the system and that it must become easier to remove individuals from the sanctions list who obviously do not belong there.”¹³⁹ It is unclear how many other people on the list also fall into this category.

France has also expressed concerns about the current sanctions process. Emanuel Lenin, a French U.N. Diplomat, has stated, “For the first time in the history of the U.N., we are using a system of punishment against people who don’t have a clear link to a [rogue] country . . . We need to adopt clear criteria to make sure we’re not targeting innocent people.”¹⁴⁰

Although never explicitly stated, these protests against the current system may be considered a criticism of the U.S. system, as most of the persons and entities listed are submitted by the United States. Furthermore, the Sanctions Committee is composed only of members of the U.N. Security Council.¹⁴¹ Since the United States is on the Security Council, it is likely that the United States may also be behind the reluctance to de-list individuals such as Mr. Ali, despite lack of a clear evidentiary basis for his inclusion on the list.

These protests are not limited to this particular case. Five cases challenging the validity of this system have been raised before the European Court of Justice as well as several legal challenges in national courts in Europe, North America, Turkey, and Pakistan.¹⁴² The U.N. Analytical Support and Sanctions Monitoring Team has reported that:

¹³⁶ *Id.*

¹³⁷ Donohue, *supra* note 18, at 420.

¹³⁸ *Sweden: Ahmed Yusuf May Be Deleted from UN Sanctions List*, U.S. FED. NEWS, Aug. 17, 2006, <http://www.highbeam.com/doc/1P3-1097160631.html>.

¹³⁹ *Id.*

¹⁴⁰ Cooper, *supra* note 125.

¹⁴¹ Guidelines of the Committee for the Conduct of Its Work at ¶ 2 (Nov. 7, 2002, as amended on Nov. 29, 2006), http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf.

¹⁴² Watson Inst. for Int’l Studies, Watson Inst. Targeted Sanctions Project, Annex to the letter dated 19 May 2006 from the Permanent Representatives of Germany, Sweden and Switzerland to the United Nations: Strengthening Targeted Sanctions Through Fair and Clear Procedures (Mar. 30, 2006), 9, U.N. Doc. S/2006/331.

Some Member States [of the U.N.] have indicated an increasing reluctance to add names to the lists of individuals and entities targeted by Security Council sanctions because of . . . concerns [regarding unfairness in the application of targeted sanctions]. More than fifty Member States have expressed concerns about the lack of due process and absence of transparency associated with listing and delisting.¹⁴³

Perhaps the central issue that creates concern among the public is that the targeted sanctions often have the effect of criminal penalties, but these people are not protected by the same standards of evidence, burdens of proof, and access to remedies of legal processes under the U.N. regime.¹⁴⁴

These protests have not gone unheeded. The European Court of Justice (ECJ) ruled on September 3, 2008 that the E.U.'s application of U.N. sanctions against a Saudi Arabian businessman and the Swedish branch of al Barakaat infringed their basic rights and was, therefore, illegal under E.U. law in *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*.¹⁴⁵ This ruling is particularly groundbreaking as the ECJ overturned the lower court's decision that it did not have the jurisdiction to review the Council of the European Union (EC) regulations implementing the U.N. sanctions regime's alleged violations of the petitioners' fundamental rights.¹⁴⁶ The U.N. sanctions regime was promulgated under the U.N. Security Council's emergency Chapter VII powers, which has historically meant that member states are obligated to comply with such resolutions without a right to review.¹⁴⁷

Despite these jurisdictional limitations, the ECJ *annulled* the EC regulation implementing the sanctions regime and challenged by Yadi and al Barakaat, because the regulation violated the petitioners' "right to defence, in particular the right to be heard, and of the right to effective judicial review."¹⁴⁸ The ECJ found of central importance to the petitioners' violation of their right to defense the European Council's failure to inform the petitioners of the evidence used against them to justify their inclusion on the U.N. sanctions list and its failure to afford them the right to be

¹⁴³ *Id.* (citing Third and Fourth Reports of the 1267 Monitoring Teams).

¹⁴⁴ *Id.* at 10.

¹⁴⁵ Joined Cases C-402/05 P & C-415/05 (Sept. 3, 2008), <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05>.

¹⁴⁶ Case T-306/1, *Yusuf v. Council of the Eur. Union*, 2005 E.C.R. II-3533. The lower court did qualify its lack of power of judicial review to lack of power to review under the laws of the European Community, but not under *jus cogens*. *Id.* ¶ 277. The court held that the U.N. sanctions regulations did not violate *jus cogens* based on the ability of sanctioned persons and entities to petition their governments to request their removal from the sanctions list. *Id.* ¶¶ 307, 309, 312.

¹⁴⁷ See Michael Matheson, *ICJ Review of Security Council Decisions*, 36 GEO. WASH. INT'L L. REV. 615, 622-23 (2004).

¹⁴⁸ *Kadi and Al Barakaat*, C-402/05 P & C-415/05, ¶ 334.

informed of that evidence within a reasonable period after those measures were enacted.¹⁴⁹ The ECJ, however, afforded the EC the opportunity to remedy the current regulation's lack of due process by permitting the effects of the regulation to be maintained for three months subject to remedy of the infringements.¹⁵⁰ Nevertheless, if the EC does not satisfy the ECJ's requirements, the U.N. sanctions regime could collapse.¹⁵¹ It is not clear at this stage what steps the EC or the U.N. has taken to remedy this situation. What is clear is that this case is in stark contrast to the rulings of U.S. courts regarding violation of due process rights of sanctioned individuals and entities. While U.S. courts may continue routinely to dismiss due process challenges to OFAC freezing actions, a potential lack of continued international cooperation is a stimulus for the United States to reevaluate its evidentiary standards.

VI. RECOMMENDATIONS FOR A MORE EFFECTIVE OFAC FREEZING PROCESS

Despite the concerns raised in this Comment, OFAC sanctions are the best immediate option for stopping and deterring individuals and entities from financing terrorism. However, as this Comment has shown, it is questionable whether many of OFAC's most recent targets actually are guilty of this crime. The fact that OFAC can freeze assets before the government has actually made this determination is particularly troubling because the effects of asset freezing are so severe and the process of unfreezing can take years. Although no U.S. court has ruled that this procedure is a violation of the right to property, the indefinite freezing of an individual's assets without any finding of guilt certainly appears to be a de facto violation.

Concerns of this nature have fueled reforms of the U.N. sanctions procedures, but in the United States OFAC's approach to terrorism finance has consistently been lauded by Democratic and Republican politicians alike.¹⁵² In addition, U.S. courts have consistently deferred to its authority despite stated reservations about the quality of evidence used when blocking assets.¹⁵³ Why should the government care about the collateral

¹⁴⁹ *Id.* ¶ 348.

¹⁵⁰ *Id.* ¶¶ 375-76.

¹⁵¹ Richard Barrett, *Al-Qaeda and Taliban Sanctions Threatened*, 2008 POLICY WATCH 1409 (The Wash. Inst. for Near E. Pol'y, Washington D.C.), Oct. 6, 2008, available at <http://www.washingtoninstitute.org/templateC05.php?CID=2935>.

¹⁵² Drake Bennett, *Small Change—Why We Can't Fight Terrorists by Cutting Off Their Money*, BOSTON GLOBE, Jan. 20, 2008, at K1.

¹⁵³ *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007).

costs of OFAC's actions if the Judiciary and other independent monitors of OFAC approve of its actions?

The government should be concerned because of the precedents set by OFAC's actions. The executive branch has delegated to OFAC the power to essentially confiscate assets of an individual or entity with as little evidence as newspaper clippings and Dun & Bradstreet listings, as demonstrated in the case of al Barakaat.¹⁵⁴ OFAC has at times used this power imprudently and created a widespread perception, in the United States and overseas, of discriminatory treatment of Muslim charities.¹⁵⁵ Shutting down these charities has also dried up funding for numerous legitimate relief efforts abroad without ever resulting in a single conviction for financing terrorism.

Unfortunately, U.S. courts have not considered any of the policy implications of OFAC's actions because of its extreme deference to executive actions. Furthermore, Congress has amplified the Executive's current powers through the USA PATRIOT Act and IEEPA, so no argument can be made that the President is acting "in a zone of twilight."¹⁵⁶ Congress currently seems most concerned with verifying that OFAC's blocking actions are actually effective in countering terrorism financing by demanding better quantitative and qualitative measures for assessing OFAC's efforts.¹⁵⁷

But Congress should especially take note of the effect of OFAC's actions on civil liberties. In the face of the expansion of executive power to combat the war on terror, it is particularly important for Congress to also focus its attention on safeguarding civil liberties, especially in light of past excesses during wartime. OFAC sanctions tend to fly below the radar when competing for attention with abuses at Abu Ghraib, debates over whether water-boarding is actually torture, and discussions regarding the possible closure of Guantanamo Bay. In light of these other pressing policy concerns, OFAC has largely escaped the media scrutiny and public policy discussion it merits.

However, non-profit organizations, such as OMB Watch, and several academics have been monitoring OFAC and its missteps. OMB Watch recently published a report called *Muslim Charities and the War on Terror*

¹⁵⁴ ROTH ET AL., *supra* note 7, at 79.

¹⁵⁵ Shukri Abu Baker, former CEO of Holy Land Foundation has stated, "It's open season on American Muslims in this country" based on suspicions that the FBI "falsified evidence and fabricated a case, against the organization." Eric Lichtblau, *Islamic Charity Says F.B.I. Falsified Evidence Against It*, N.Y. TIMES, July 27, 2004, at A12.

¹⁵⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

¹⁵⁷ GAO REPORT, *supra* note 111, at 21.

that lists ten concerns regarding the effectiveness and civil liberty implications of OFAC's actions.¹⁵⁸ The report highlights many of the issues already addressed in this Comment and further expands on some of these concerns:

- (1) Drastic sanctions in anti-terrorist financing laws are being used to shut down entire organizations, resulting in the loss of badly needed humanitarian assistance around the world and creating a climate of fear in the nonprofit sector.
- (2) Despite sweeping post-9/11 investigative powers, authorities have failed to produce significant evidence of terror financing by U.S.-based charities.
- (3) Questionable evidence has been used to shut down the largest U.S.-based Muslim charities.
- (4) Anti-terrorist financing policies deny charities fundamental due process.
- (5) There are no safe harbor procedures to protect charities acting in good faith or to eliminate the risk of giving to Muslim charities or charitable programs working with Muslim populations.
- (6) Government action has created the perception of ethnic profiling and negatively impacted Muslim giving.
- (7) Organizations and individuals suspected of supporting terrorism are guilty until proven innocent.
- (8) Charitable funds have been withheld from people in need of assistance and diverted to help pay judgments in unrelated lawsuits, violating the intentions of innocent Muslim donors.
- (9) There is unequal enforcement of anti-terrorist financing laws.
- (10) Treatment of Muslim charities hurts, not helps, the war on terrorism.¹⁵⁹

So what can Congress do to reign in these excesses? Congress should (1) require OFAC to meet a clear minimum evidentiary standard prior to freezing a person's or entity's assets, and (2) report to Congress on its compliance with this standard in conjunction with current reporting on the effectiveness of sanctions.

With regard to developing a clear minimum evidentiary standard, Congress should take note of recent U.N. Security Council efforts to reform its evidentiary criteria and sanctions program in evaluating OFAC's current criteria. Several U.N. member states commissioned a report by the Watson

¹⁵⁸ OMB WATCH, MUSLIM CHARITIES AND THE WAR ON TERROR: TOP TEN CONCERNS AND STATUS UPDATE (Kay Guinane ed., Feb. 2006), available at http://www.ombwatch.org/pdfs/muslim_charities.pdf.

¹⁵⁹ *Id.* at 2.

Institute for International Studies of Brown University to “analyze current sanctions committee practices and recommend proposals to strengthen United Nations targeted sanctions procedures.”¹⁶⁰ With regard to its evidentiary standards analysis, the Watson Institute recommended that “consistent norms and general standards for the content of statements of case [used in proposing sanctions] be established to ensure that targeted sanctions are applied to individuals and entities in a manner that is nonarbitrary and impartial.”¹⁶¹

Consistent with the Watson Institute’s recommendations, the first requirement for OFAC’s evidentiary standard should be OFAC’s compliance with a consistent and “nonarbitrary” standard when designating an entity or individual for freezing sanctions. Allegations have arisen that OFAC has targeted certain groups while giving other entities free passes. In particular, OMB Watch has noted that OFAC turned a blind eye to activities by Halliburton in Iran, a country that is an OFAC-listed state sponsor of terrorism.¹⁶² Although Halliburton was officially under investigation by OFAC, the agency did not freeze its assets.¹⁶³ Instead OFAC sent an inquiry to the company requesting “information with regard to compliance.”¹⁶⁴ OFAC has also been known to work with Saudi charities to help them restructure to avoid designation and freezing of assets.¹⁶⁵ Therefore, the new standard should prevent OFAC from applying inconsistent treatment to entities that OFAC is considering sanctioning.

Second, if Congress continues to allow hearsay to be used as part of the evidence for designation and as support for the designation in a court hearing, it should be corroborated by additional substantial evidence. Even in administrative proceedings, which allow “oral or documentary evidence,” hearsay documentary evidence must be considered as part of the “whole record . . . supported by and in accordance with the reliable, probative, and substantial evidence.”¹⁶⁶ It may be difficult to define “substantial evidence” when intelligence information can take so many different forms. However, the corroborating evidence in the al Barakaat case—statements by President Bush on al Qaeda, a transcript of a briefing led by Secretary of State Powell

¹⁶⁰ U.N. GAOR & SCOR, *Follow-up to the Outcome of the Millennium Summit: Identical Letters from the Permanent Rep. of Germany, Swed. and Switz. to the U.N. Addressed to the President of the GAOR and the President of the SCOR*, U.N. Doc. A/60/887-S/2006/331 (May 19, 2006).

¹⁶¹ Watson Inst. for Int’l Studies, *supra* note 142, at 42.

¹⁶² OMB WATCH, *supra* note 158, at 7.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Administrative Procedure Act, 5 U.S.C. § 556 (d) (2006).

and a Dun & Bradstreet report—would not meet the standard.¹⁶⁷ Substantial corroborating evidence would provide specific support of the activities alleged in the hearsay. This seems only reasonable in satisfying the standard set forth in the APA that has protected OFAC's actions thus far.¹⁶⁸

Third, Congress should require that any evidence used in support of a designation of possible support for al Qaeda is not based solely on an alliance with Osama bin Laden during the Soviet occupation of Afghanistan. Although historical ties may create suspicion of current support for terrorist activity, they are not dispositive of such support. Furthermore, reliance solely on this type of evidence can later ruin credibility in front of a judge, as seen in the BIF case.¹⁶⁹

Not only would these reforms better safeguard the liberties of those who do not have any actual connection to terrorist activities, but they would also add legitimacy to the counter-terrorist-financing process. In court, prosecutors could present evidence of these evidentiary requirements to create a presumption of legitimacy to the evidence used to convict financiers of terrorism. Additionally, many of our allies, particularly those in Europe, would be more likely to accept the entities the United States proposes for listing without skepticism if they know OFAC has first met a minimum evidentiary standard. Currently, Europe has chosen not to list a number of the charities the United States has designated due to concerns that “too broad an approach will affect innocent people or legitimate political movements.”¹⁷⁰

Finally, Congress should impose reporting requirements on OFAC to show that it is meeting its evidentiary standards. This will actually help Congress to better evaluate the effectiveness of the sanctions. Effectiveness cannot be measured simply by looking at the increase in the amount of money frozen, which is Congress's current focus.¹⁷¹ How much money OFAC freezes does not matter if it is freezing assets that were not actually used to fund terrorism. Evaluating whether OFAC has legitimately frozen assets that would otherwise go to terrorist organizations could either supplement its current reporting requirements or, more likely, help Congress to better evaluate OFAC's progress.

Concerns over keeping the evidentiary standards secret are not merited because OFAC's compliance could be reviewed by the House Permanent

¹⁶⁷ ROTH ET AL., *supra* note 7, at 85; Cooper, *supra* note 125.

¹⁶⁸ Administrative Procedure Act § 556 (d).

¹⁶⁹ WARDE, *supra* note 44, at 140.

¹⁷⁰ ANNE C. RICHARD, *FIGHTING TERRORIST FINANCING: TRANSATLANTIC COOPERATION AND INTERNATIONAL INSTITUTIONS* 36 (2005).

¹⁷¹ GAO REPORT, *supra* note 111, at 21.

Select Committee on Intelligence, which is not authorized to disclose classified information unless the President approves.¹⁷² While OFAC currently reports to the Foreign Affairs Committee, the Committee on Intelligence also oversees intelligence-related activities of the Treasury Department, so a switch to its oversight of OFAC would not be outside its expertise.¹⁷³ Furthermore, all Members of the House, which naturally include those on the Committee, must take an oath not to disclose classified information.¹⁷⁴

VII. CONCLUSION

In summary, Congress should take leadership in developing a more effective freezing process because the courts' hands are tied by deference to the APA and executive decisions regarding foreign policy and national security. In addition, it is within Congress's authority, not the courts', to develop evidentiary criteria for agencies to which it has delegated power. It is Congress's job to provide a check on executive decision-making when the courts cannot. Although OFAC is probably not currently acting outside of its authority—as granted by IEEPA and the USA PATRIOT Act—in freezing assets while entities or individuals are under investigation, it is simply unconscionable for Congress to allow OFAC to freeze assets with little more than suspicion as a basis. Although OFAC has a delisting process for those who believe their funds have been wrongly blocked, this process is not subject to independent review. It is essentially asking OFAC to judge its own actions.

Congress can prevent OFAC from wrongfully freezing the assets of persons or entities that are not directly linked to terrorist activities by imposing a clear evidentiary standard and the reporting requirements proposed above. The Executive's pressure on OFAC to "show results" and its expansion of OFAC's freezing powers must be balanced against oversight of the freezing process that only Congress can provide. The above recommendations provide a framework for such oversight.

¹⁷² CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: CURRENT STRUCTURE AND ALTERNATIVES, at CRS-4 (2007).

¹⁷³ Permanent Select Committee on Intelligence, FAQs, <http://intelligence.house.gov/faqs.aspx> (last visited Dec. 8, 2008).

¹⁷⁴ *Id.*

