COMMENTS

OFAC, THE DEPARTMENT OF STATE, AND THE TERRORIST DESIGNATION PROCESS: A COMPARATIVE ANALYSIS OF AGENCY DISCRETION

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INTRODUCTION

In October 2012, the *Washington Post* published a series of articles entitled "The Permanent War," outlining the Obama Administration's approach to fighting terrorism.[1] The articles discussed the most well-known aspects of the War on Terror, including targeted killings and the Obama Administration's covert operations in Africa. What the articles did not discuss, however, were the equally important, but somewhat less visible, efforts to impose financial sanctions on terrorist entities. The list of Foreign Terrorist Organizations (FTOs), maintained by the Department of State,[2] and the list of Specially Designated Global Terrorists (SDGTs), maintained jointly by the Departments of State and Treasury,[3] govern these sanctions. The lists allow the government to designate certain individuals and groups as terrorists and ultimately prevent those entities from accessing their financial assets within the United States. As a result of these sanction programs, the government has prevented terrorist groups from accessing over $21,000,000.[4] This Comment will compare the different abilities of the Departments of State and Treasury to designate entities under relevant financial sanctions programs. It will also discuss the wide discretion exercised by the Department of the Treasury when implementing financial sanctions, outline the potential harmful consequences of that discretion,

1. *See, e.g.*, Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, WASH. POST, Oct. 23, 2012, http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408fbe6a4b_story.html.

2. *See* BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE, *Foreign Terrorist Organizations* (Sept. 28, 2012), http://www.state.gov/j/ct/rls/other/des/123085.htm.

3. *See* U.S. DEP'T OF STATE, *Terrorism Designation FAQs:* Question 1, 2 (July 10, 2012), http://www.state.gov/r/pa/prs/ps/2012/07/194808.htm.

4. *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, Terrorist Assets Report (2011), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/tar2011.pdf (presenting the amount of blocked funds held by Foreign Terrorist Organizations (FTOs), Specially Designated Global Terrorists (SDGTs), and Specially Designated Nationals, another type of entity designated by the Department of the Treasury).

and suggest ways to limit this discretionary power.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[5] governs FTO designations, while Executive Order 13,224,[6] issued pursuant to the International Emergency Economic Powers Act (IEEPA),[7] governs SDGT designations. Under § 302 of AEDPA,[8] the Secretary of State can designate an organization as an FTO if the organization is foreign; engages in "terrorism" or "terrorist activity,"[9] or has the intent to engage in such activity; and threatens the security of the United States or its citizens.[10] The Secretary of State also has the power to designate certain foreign groups or individuals as SDGTs under Executive Order 13,224 if the groups or individuals threaten the national security of the United States.[11] Under the same executive order, the Secretary of the Treasury has the authority to designate any group or individual as an SDGT if he finds that the entity is "owned or controlled by" a designated terrorist group; assists in, sponsors, or provides material or financial support to a terrorist group; or is "otherwise associated with" a terrorist group.[12] Once an entity has been designated as either an FTO or an SDGT, the Office of Foreign Assets Control (OFAC) at the Department of the Treasury can freeze the entity's assets.[13] OFAC also has the power to block an entity's assets during the pendency of an investigation into an entity's status.[14] The Secretary of

5. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.)

6. Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

7. Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified at 50 U.S.C. §§ 1701–1706 (2006 & Supp. IV 2010)).

8. *See* 110 Stat. at 1248 (codified at 8 U.S.C. § 1189 (2006)) (amending § 219 of the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.)). On its website, the Department of State maintains that it acts pursuant to the Immigration and Nationality Act. *See* U.S. DEP'T OF STATE, *supra* note 2. Because the Antiterrorism and Effective Death Penalty Act (AEDPA) amended the provision of the Immigration and Nationality Act that permits the Secretary of State to designate FTOs, this Comment uses "AEDPA" to describe that provision, 8 U.S.C. § 1189.

9. *See infra* notes 41–42 for the definition of these terms.

10. 8 U.S.C. § 1189(a)(1)(A)–(C) (2006).

11. Exec. Order No. 13,224, 3 C.F.R. 786 (2002). President Bush designated twenty-seven individuals and groups as SDGTs in the executive order, *id.* at 790, leaving future designations to the Secretaries, *id.* at 788–89.

12. *Id.* at 787. "Otherwise associated with" is defined in 31 C.F.R. § 594.316 (2012).

13. *See* 8 U.S.C. § 1189(a)(2)(C) (2006); 31 C.F.R. § 594.201(a) (2012). This Comment will use the words "freeze" and "block" interchangeably when discussing the assets of designated entities, and will also use "blocking orders" to describe the process by which the Office of Foreign Assets Control (OFAC) executes a freeze of an entity's assets.

14. *See* Exec. Order No. 13,224, 3 C.F.R. 786 (2002) (authorizing the Secretary of the Treasury to take all actions the President is authorized to take under the International

the Treasury delegated his ability to designate SDGTs and block assets to OFAC.[15]

While both Departments have legal authority to designate terrorist entities, the Department of the Treasury, acting through OFAC, plays a broader and more discretionary role in the process of imposing financial sanctions on these entities. The Secretary of State's ability to designate an FTO is limited by certain procedural requirements,[16] and her[17] authority to designate an SDGT depends solely on an entity's ability to attack the United States—a factor that is virtually identical to her authority under AEDPA.[18] Under these provisions, the Department of State's authority to designate SDGTs is limited to individuals such as the leaders of terrorist groups.[19] In contrast, OFAC has the authority to designate an entity as an SDGT based on whether the entity provides support to or is associated with terrorist groups[20] and thus can designate entities that do not directly threaten the country's security. In addition, OFAC controls the assets of SDGTs after designation and exercises discretion about whether to freeze the assets of FTOs in the first instance.[21] Thus, OFAC exercises a more discretionary power over both types of designated entities than the Department of State. Because the primary effect of an entity's designation as an SDGT is the blocking of its assets,[22] OFAC's discretionary powers are

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Emergency Economic Powers Act (IEEPA); 50 U.S.C. § 1702(a)(1)(B) (2006) (allowing the President to block assets "during the pendency of an investigation"); *see also* 31 C.F.R. § 594.201 n.1 (describing how OFAC publishes the names of entities with assets blocked pending investigation).

15. *See* 31 C.F.R. § 594.802.

16. *See infra* Part I.A for a discussion of these requirements.

17. This Comment will use feminine pronouns to refer to the Secretary of State because all the actions taken by the Secretary of State that are relevant to this Comment were taken by former Secretary of State Hillary Rodham Clinton.

18. *Compare* 8 U.S.C. § 1189(a)(1)(A)–(C) (allowing the Secretary of State to designate a foreign group as an FTO if the group engages in terrorist activity that threatens national security), *with* Exec. Order No. 13,244, 3 C.F.R. 786 (2002) (allowing the Secretary of State to designate foreign persons that have committed, or pose a threat of committing, a terrorist act that threatens U.S. citizens or the national and economic security of the country as SDGTs).

19. Interview with Jason Blazakis, Dir., Office of Terrorist Designations & Sanctions, U.S. Dep't of State, in Wash., D.C. (Nov. 13, 2012).

20. *See* Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

21. *See* 31 C.F.R. §§ 594.101–.901 (detailing OFAC's procedures for regulating the financial transactions of SDGTs); *id.* §§ 597.101–.801 (describing OFAC's procedures for regulating the financial transactions of FTOs); *see also* 8 U.S.C. § 1189(a)(2)(C) ("Upon [designation], the Secretary of the Treasury *may* require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets . . . ." (emphasis added)).

22. *See* U.S. DEP'T OF STATE, *Terrorism Designation FAQs*, Question 6 (July 10, 2012),

heightened in the SDGT process. In addition, entities affected by this discretionary power frequently cannot challenge OFAC's actions because OFAC's procedures for appealing its designations are less comprehensive than AEDPA's.[23]

OFAC's complete control of the financial sanction process, combined with its ability to both designate entities with only indirect links to terrorism as SDGTs and block their assets pending investigation, has caused some scholars to assert that OFAC violates the constitutional rights of affected entities.[24] Affected entities often make a similar argument based on the sanctions' harsh effects. For example, Mr. Muhammad Salah is the only U.S. citizen designated as a Specially Designated Terrorist,[25] a characterization identical in every way to an SDGT except for the executive order governing his status.[26] As a Specially Designated Terrorist, Mr. Salah cannot access any of his money unless he first obtains a license from OFAC.[27] As the licenses only allow enough money to cover "basic maintenance," he cannot use his money to purchase luxuries such as birthday presents for his children or a newspaper.[28] In addition, he cannot travel outside the country to visit family and friends, and cannot maintain a bank account.[29] He has lived under these conditions since 1995, without being given a statement of reasons for his designation.[30] He argues that

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http://www.state.gov/r/pa/prs/ps/2012/07/194808.htm.

23. *Compare* 31 C.F.R. § 501.807 (allowing an entity to submit "arguments" or "evidence" to OFAC as to why its designation is inappropriate), *with* 8 U.S.C. § 1189(a)(4)(B)–(C) (permitting a group to petition for delisting from the FTO list by showing that circumstances have changed enough so that designation is no longer warranted, and mandating that the Secretary of State decide such a petition within 180 days).

24. *See, e.g.*, David Cole, Essay, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 3, 26–28 (2003) (arguing that administrative actions such as blocking orders constitute a way for the government to avoid the constitutional rights provided by the criminal process); Vanessa Ortblad, Comment, *Criminal Prosecution in Sheep's Clothing: The Punitive Effects of OFAC Freezing Sanctions*, 98 J. CRIM. L. & CRIMINOLOGY 1439, 1448–49 (2008) (explaining how OFAC's lack of an evidentiary standard has resulted in many Muslim charities being designated as terrorist entities).

25. *See* Complaint at 1, 6–7, Salah v. U.S. Dep't of the Treasury, No. 1:12-cv-07067 (N.D. Ill. filed Sept. 5, 2012).

26. *See id.* at 3; Exec. Order No. 12,947, 3 C.F.R. 319 (1998). OFAC's powers under this Executive Order are virtually identical to its powers under Executive Order 13,224. *Compare* Exec. Order No. 12,947, 3 C.F.R. 319, 319 (1998) (allowing the Secretary of the Treasury to block "all property and interests in property" of designated persons), *with* Exec. Order No. 13,224, 3 C.F.R. 786, 787 (2002) (allowing the Secretary of the Treasury to block "all property and interests in property" of designated persons).

27. *See* Complaint *supra* note 25, at 2.

28. *See id*.

29. *See id.* at 8–9.

30. *See id.* at 6.

OFAC's actions violate his First and Fifth Amendment rights.[31]

Some courts have held that OFAC's power to impose such dire consequences on U.S. citizens and legal aliens violates their constitutional rights,[32] while others have upheld OFAC's actions.[33] These differing judicial opinions on the legality of OFAC's powers, combined with the significant impact that OFAC's actions can have on U.S. citizens and legal aliens, imply that the SDGT-designation procedure is ripe for change. This Comment suggests amending the existing process to provide necessary procedural safeguards for entities affected by OFAC's designation decisions and blocking orders, while still allowing OFAC to protect the nation from terrorism.

Part I provides a summary of the relevant laws governing the terrorist designation process, specifically AEDPA, IEEPA, and Executive Order 13,224. Part I also briefly summarizes the powers of both the Department of State and OFAC under the current legal regime. Part II discusses the discretionary nature of OFAC's SDGT designation process in more detail, specifically examining OFAC's own regulations and analyzing how courts review FTO and SDGT designations. Part III examines the impact of OFAC's discretionary powers on affected entities. Finally, Part IV provides possible ways to limit OFAC's discretionary power, concluding that an amendment to IEEPA is the best way to effectively balance the procedural rights of affected entities with OFAC's important sanctioning powers.

I. THE LEGAL AUTHORITY TO DESIGNATE TERRORISTS

The power to designate and impose sanctions on terrorist entities is part of a larger effort to protect the country from terrorism, which is governed by a myriad of different laws.[34] When designating and sanctioning terrorist

31. *See id.* at 12–14.

32. *See*, *e.g.*, Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965, 995 (9th Cir. 2012) (concluding that OFAC's warrantless seizure of an SDGT's assets violated its Fourth Amendment rights); KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner (*KindHearts I*), 647 F. Supp. 2d 857, 872 (N.D. Ohio 2009) (finding that OFAC's asset blocking constituted a Fourth Amendment seizure).

33. *See, e.g.*, Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007) (determining that OFAC's administrative record was sufficient to justify its designation of an American charity as an SDGT); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 163 (D.C. Cir. 2003) (finding that OFAC provided a designated terrorist group sufficient due process by offering it an opportunity to present evidence to rebut its redesignation).

34. *See generally* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004) (codified as amended in scattered provisions of 50 U.S.C.) (amended fourteen times since its enactment); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered

entities, the government primarily relies on AEDPA,[35] IEEPA,[36] and Executive Order 13,224.[37]

A. Antiterrorism and Effective Death Penalty Act of 1996

In 1996, Congress responded to an increasing number of terrorist attacks against U.S. citizens by passing the Antiterrorism and Effective Death Penalty Act of 1996.[38] The law primarily amended federal habeas corpus law,[39] but also amended existing provisions of the Immigration and Nationality Act[40] to allow the Secretary of State to designate certain groups as FTOs.

In its current version, AEDPA allows the Secretary of State to designate a group as an FTO if the group meets three criteria: (1) it is foreign; (2) it engages in "terrorism"[41] or "terrorist activity,"[42] or has the intent to engage in terrorist activity;[43] and (3) it threatens the security of the United States or

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provisions of 8 U.S.C.) (amended six times since its 1996 enactment); Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered provisions of 8 U.S.C.) (amended 168 times since its enactment). Most of these laws were further amended or expanded by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 18 U.S.C.) (amended in 2005 and 2006). The USA PATRIOT Act is itself controversial and has been the subject of numerous academic debates. *See generally* Rebecca A. Copeland, *War on Terrorism or War on Constitutional Rights? Blurring the Lines of Intelligence Gathering in Post-September 11 America*, 35 TEX. TECH L. REV. 1, 2–3 (2004) (concluding that the USA PATRIOT Act's extension of the powers of the Foreign Intelligence Surveillance Act adversely affects constitutional rights). The constitutional validity of the USA PATRIOT Act is beyond the scope of this Comment.

35. 110 Stat. at 1247–48.

36. 50 U.S.C. §§ 1701–1705 (2006 & Supp. IV 2010).

37. Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

38. *See, e.g.*, H.R. REP. No. 104-383, at 37 (1995) ("The origin of this legislation . . . is tied to a series of tragic events that have shocked the civilized world," including the Pan Am bombings, the 1993 World Trade Center bombings, and the Oklahoma City attacks).

39. *See generally* H.R. REP. No. 104-23, at 9 (1995) (advocating passage of a bill to reduce the abuse of habeas petitions and limit the arbitrary imposition of the death penalty).

40. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

41. 8 U.S.C. § 1189(a)(1)(B) (2006) (defining "terrorism" in accordance with 22 U.S.C. § 2656f(d)(2) (2006) as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents").

42. "[T]errorist activity" is defined in 8 U.S.C. § 1182(a)(3)(B)(iii) (2006), and includes, *inter alia*, hijacking, threatening an individual in order to compel action by another individual, and the use of a biological or chemical weapon. *See id.* § 1182(a)(3)(B)(iii)(I)–(II), (V)(a).

43. *Id.* § 1189(a)(1)(B).

its citizens.[44] If the Secretary of State decides to designate a group under AEDPA, she must report her intention to the Speaker and Minority Leader of the House of Representatives, the Senate President pro tempore, the Majority and Minority Leaders of the Senate, and members of certain congressional committees[45]—each via a classified statement.[46] This statement can include hearsay and uncorroborated statements[47] as long as it explains how the group fits within the requirements of the statute.[48] Within seven days of notifying Congress, the Secretary of State must publish the designation in the Federal Register.[49] She must also create an administrative record of the reasons supporting the designation, which can include both classified and unclassified information.[50] The government need not disclose the classified information to the FTO but must disclose the information to a court on judicial review.[51] Once the Secretary of State notifies Congress of her intent to designate a group, OFAC can freeze all of that group's assets held or controlled by a U.S. financial institution[52] but may choose not to.[53] Once designated as an FTO, alien members of the group[54] face possible deportation, third parties who provide material support to the group face possible criminal sanctions, and financial organizations in possession of the group's funds may face penalties for

44. *Id.* § 1189(a)(1)(C). The D.C. Circuit held that determining whether a group threatens the security of the nation is a nonjusticiable political question and lies solely within the Executive Branch's discretion. *See* People's Mojahedin Org. of Iran v. U.S. Dep't of State (*PMOI I*), 182 F.3d 17, 23 (D.C. Cir. 1999) (citing Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948)). Therefore, judicial review of FTO designations is limited to the first two elements of the statute.

45. 8 U.S.C. § 1189(d)(3) (defining the relevant committees as the Senate Committees on the Judiciary, Intelligence, and Foreign Relations and the House Committees on the Judiciary, Intelligence, and International Relations).

46. *Id.* § 1189(a)(2)(A)(i).

47. *See PMOI I*, 182 F.3d at 19 (explaining that the Secretary of State can rely on "third hand accounts, press stories, material on the Internet or other hearsay").

48. The D.C. Circuit distinguished the statutory "findings" in AEDPA from findings made during an ordinary administrative proceeding because the Secretary of State was not required to provide a group with an adversarial hearing or an opportunity to rebut her evidence before making such findings. *See id.*

49. 8 U.S.C. § 1189(a)(2)(A)(ii). As of 2001, the Secretary of State must also notify the FTO of her intention to designate the group *before* she publishes the designation in the Federal Register. *See infra* notes 141–142 and accompanying text.

50. 8 U.S.C. § 1189(a)(3)(A)–(B).

51. *Id.* § 1189(a)(3)(B).

52. *Id.* § 1189(a)(2)(C).

53. *See supra* note 21 and accompanying text.

54. An "alien" is any member of the group who is not a U.S. citizen or national. 8 U.S.C. § 1101(a)(3).

failing to report that possession to OFAC.[55]

Designation as an FTO lasts indefinitely.[56] It can only be revoked by an Act of Congress[57] or by the Secretary of State.[58] To challenge a designation, an FTO must submit a petition for revocation outlining why relevant circumstances have changed so much so that its status as an FTO is no longer appropriate.[59] The FTO can file a revocation petition every two years,[60] and the Secretary of State must decide whether to revoke the designation within 180 days of receipt.[61] If an FTO does not file a revocation petition within five years, the Secretary of State herself must review the designation.[62] She must revoke a designation if the circumstances leading to the designation have sufficiently changed or if "the national security of the United States warrants a revocation."[63] Revocation decisions are subject to the same procedural requirements as designations, including publication in the Federal Register.[64]

A designated FTO may seek judicial review of the Secretary of State's action in the D.C. Circuit no later than thirty days after publication of its designation or the response to its revocation petition.[65] On judicial review, the D.C. Circuit examines only the administrative record created during the designation process, in addition to any classified information submitted by the government.[66] The court can invalidate any designation or denial of a revocation petition if the Secretary of State's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to [a] constitutional right," "in excess of statutory jurisdiction, authority, or limitation," or "lacking substantial support in the

55. *See* U.S. DEP'T OF STATE, *supra* note 22 (stating that U.S. financial institutions may be required to block a designated FTO's transactions); *see also* 31 C.F.R. § 597.701(b) (2012) (allowing OFAC to impose civil penalties on financial institutions that fail to comply with reporting requirements).

56. *See* 8 U.S.C. § 1189(a)(4)(A) ("A designation under this subsection shall be effective for all purposes until revoked by [an Act of Congress or the Secretary of State]."). Prior to 2004, a designation under this section lasted for only two years. 8 U.S.C. § 1189(a)(4)(A) (2000), *amended by* Intelligence Reform and Terrorism Prevention Act of 2004 § 7119, Pub. L. No. 108-458, 118 Stat. 3638, 3801–03 (2004).

57. 8 U.S.C. § 1189(a)(5).

58. *Id.* § 1189(a)(6)(A)–(B).

59. *Id.* § 1189(a)(4)(B)(iii).

60. *Id.* § 1189(a)(4)(B)(ii).

61. *Id.* § 1189(a)(4)(B)(iv)(I).

62. *Id.* § 1189(a)(4)(C)(i).

63. *Id.* § 1189(a)(6)(A)(i)–(ii).

64. *Id.* § 1189(a)(6)(B).

65. *Id.* § 1189(c)(1).

66. *Id.* § 1189(c)(2).

administrative record."[67] Because courts generally defer to an agency head's decision as long as the decisionmaking process complies with statutory requirements,[68] the court gives substantial deference to the Secretary of State's decision if it complies with procedural requirements.[69]

B. International Emergency Economic Powers Act (IEEPA)

In 1977, Congress passed IEEPA—"an Act with respect to the powers of the President in time of war or national emergency."[70] This law modified two older statutes, the National Emergencies Act[71] and the Trading with the Enemy Act,[72] and gave the President the power to declare a national emergency in response to "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."[73] In such a national emergency, the President can issue regulations that "investigate, regulate, or prohibit" certain monetary, credit, or securities transactions involving foreign entities.[74] The President can also nullify or void a transaction involving "*any* property in which any [designated] foreign country or a national thereof has *any* interest."[75] Such regulations apply to all property within the jurisdiction of the United States or its financial institutions.[76] In 2001, Congress amended IEEPA to allow the President to block an entity's assets "during the pendency of an investigation."[77] IEEPA does not provide an explicit standard for judicial review.[78]

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67. *Id.* § 1189(c)(3)(A)–(D).

68. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) (finding that the Secretary of Transportation's actions were "entitled to a presumption of regularity" but that the Court could determine whether his actions exceeded his statutory authority), *abrogated in part by* Califano v. Sanders, 430 U.S. 99, 105 (1977).

69. *See, e.g.*, *In Re* People's Mojahedin Org. of Iran, 680 F.3d 832, 838 (D.C. Cir. 2012) (per curiam) (compelling the Secretary of State to make a final decision on an FTO's petition but reinforcing that her eventual decision would be "entitled to great deference").

70. Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701–1706) (2006 & Supp. IV 2010)).

71. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1751 (2006 & Supp. IV 2010)).

72. Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. App. §§ 1–44 (2006)).

73. 50 U.S.C. § 1701(a).

74. *Id.* § 1702(a)(1)(A)(i)–(iii).

75. *Id.* § 1702(a)(1)(B) (emphases added).

76. *Id.* § 1702(a)(1).

77. Sec. 106, Pub. L. No. 107-56, 115 Stat. 272, 277–78 (2001) (amending 50 U.S.C. § 1702(a)(1)(B) (2000)).

78. *See* 50 U.S.C. §§ 1701–1706 (2006 & Supp. IV 2010). The law does, however,

Whenever the President invokes IEEPA, he must report certain statutory findings to Congress, including the circumstances that necessitated the declaration of an emergency,[79] why the circumstances constitute an "unusual and extraordinary threat,"[80] what specific actions he intends to take, why those actions are necessary to deal with the threat, and which foreign nations or entities will be affected by his actions.[81] After declaring a national emergency, the President must report any changes in the situation giving rise to the emergency to Congress at least once every six months.[82] Presidents frequently exercise their IEEPA authorities through executive orders.[83] These orders declare a national emergency, describe the facts giving rise to the emergency,[84] and outline regulations for mitigating the danger caused by the emergency.[85] Under the National Emergencies Act and IEEPA, national emergencies expire on the anniversary of their issuance unless renewed annually by the President,[86] and thus the President

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allow the government to provide the court with classified information on judicial review, see *id.* § 1702(c), but does not provide a clear standard by which courts should review Executive Branch regulations, other than under the general standards of the Administrative Procedure Act (APA). Because the APA itself does not provide a cause of action, agencies challenging agency action must invoke another statute to challenge that action in court. *See* Califano v. Sanders, 430 U.S. 99, 104 (1977). IEEPA does not provide such a cause of action.

79. 50 U.S.C. § 1703(b)(1).

80. *Id.* § 1703(b)(2). This provision is extremely important because the powers exercised under the law can *only* be executed pursuant to an "unusual and extraordinary threat" to the nation. *See id.* § 1701(b) ("The authorities granted to the President . . . may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be declared for any other purpose.").

81. *Id.* § 1703(b)(2)–(5).

82. *Id.* § 1703(c). The President delegated these reporting requirements to the Secretary of the Treasury for the national emergency created by Executive Order 13,224. *See* Exec. Order No. 13,313, 3 C.F.R. 248 (2004).

83. *See, e.g.*, Exec. Order No. 12,730, 3 C.F.R. 305 (1991), *revoked by* Exec. Order No. 12,867, 3 C.F.R. 649 (1994); Exec. Order No. 12,170, 3 C.F.R. 457 (1980).

84. *See, e.g.*, Exec. Order No. 12,730, 3 C.F.R. 305 (1991) (finding that the "unrestricted access of foreign parties to U.S. goods" constituted an unusual and extraordinary threat to the nation, especially due to the expiration of the Export Administration Act of 1979). *But see* Exec. Order No. 12,170, 3 C.F.R. 305 (1991) (finding an "unusual and extraordinary threat," but not describing why).

85. *See, e.g.*, Exec. Order No. 12,730, 3 C.F.R. 305 (1991) (allowing for the continuations of regulations created by the Secretary of State under the Export Administration Act to "protect the domestic economy from the excessive drain of scarce materials").

86. *See* 50 U.S.C. § 1622(d) (2006) (stating, "Any national emergency declared by the President . . . shall terminate on the anniversary of the declaration of that emergency" unless the President notifies Congress of his intent to continue it within ninety days of its expiration); *id.* § 1706(a)(1)–(2) (maintaining the termination provisions in the National

must specifically authorize the continuance of an emergency. Both President Bush and President Obama have extended the national emergency declared in Executive Order 13,224 every year since its issuance.[87]

C. Executive Order 13,224

On September 23, 2001, President Bush invoked IEEPA and issued regulations to freeze the assets of certain individuals and groups that he believed were responsible for the attacks of September 11, 2001.[88] Bush issued Executive Order 13,224 after finding that "the pervasiveness and expansiveness of the financial foundation of foreign terrorists" necessitated economic sanctions against terrorist entities[89] and showed an increased need for cooperation between domestic and foreign financial institutions.[90] He also found, as required by IEEPA, that the threat of terrorism was ongoing and posed "an unusual and extraordinary threat" to the nation's safety.[91] Bush designated twenty-seven foreign individuals and organizations as terrorist entities in the Annex to the Executive Order[92] and ordered the Secretary of the Treasury to immediately block the assets of those entities.[93]

Executive Order 13,224 also authorized the Secretary of State, after consultation with the Secretary of the Treasury and the Attorney General, to designate foreign persons who had committed or posed "a significant risk

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Emergencies Act).

87. *See, e.g.*, Notice of Sept. 19, 2002, 67 Fed. Reg. 59,447 (Sept. 20, 2002); Notice of Sept. 11, 2012, 77 Fed. Reg. 56,519 (Sept. 12, 2012).

88. *See* Exec. Order No. 13,224, 3 C.F.R. 786 (2002) (blocking "all property and interests in property" belonging to individuals and groups named in the Executive Order or designated under the Executive Order's regulations).

89. *Id.* President Bush may have been responding to the perception that Osama bin Laden was a billionaire who financed the September 11, 2001, attacks largely out of pocket. *See* JOHN ROTH ET AL., NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 20 (2004), *available at* http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf (finding that the U.S. government had long thought that bin Laden financed al-Qaeda through a large inheritance and his successful Saudi business). The *Monograph on Terrorist Financing Report* dispelled this myth. *See id.* at 23 (describing discoveries made by the National Security Council in 1999 and 2000 that the Saudi government divested bin Laden of most of his assets); *id.* at 4 (finding that al-Qaeda received money from "a variety of sources," including fundraising and Islamic charities).

90. *See* Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

91. *Id.*

92. *Id.* at 790.

93. *Id.* at 787.

of committing" terrorist acts against the United States as SDGTs.[94] In addition, the Executive Order authorized the Secretary of the Treasury,[95] after consultation with the Secretary of State and the Attorney General, to block the property of all persons "owned or controlled by, or [who] act for or on behalf of those persons listed in the Annex to this order or [designated by the Department of State]."[96] Once designated as an SDGT, an entity cannot access any of its property or money located within the United States or its financial institutions.[97] These two provisions clearly provide a large amount of power to both the Secretary of State and the Secretary of the Treasury and allow each Secretary to make important national security decisions without significant oversight. As a result, both Departments generally work together to make designation decisions.[98] The Executive Order also vests an additional amount of discretion in the Secretary of the Treasury by allowing him to block an entity's assets during the pendency of an investigation into an entity's final status as an SDGT.[99] The Secretary of the Treasury also has the power to grant licenses to entities for certain specified transactions, such as the payment of lawyers' fees.[100]

As authorized by Executive Order 13,224, OFAC created its own internal regulations to determine what happens to the assets of a designated SDGT or an entity with assets blocked pending investigation.[101] OFAC's regulations, however, do not provide much guidance for entities seeking to challenge OFAC's actions. Only two provisions at the end of the regulations describe how an entity may attempt to change its status as an SDGT,[102] and those options are limited. While an SDGT may request a meeting with OFAC's director, the director has complete discretion

94. *Id.*

95. OFAC makes these designation decisions today on behalf of the Secretary of the Treasury. *See supra* note 15 and accompanying text.

96. Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

97. *See* U.S. DEP'T OF STATE, *supra* note 22.

98. According to the Director of the Office of Terrorist Designations at the Department of State, OFAC, the Department of State, the Department of Justice, and the Department of Homeland Security jointly designate an entity under Executive Order 13,224. Interview with Jason Blazakis, *supra* note 19.

99. *See supra* note 14 and accompanying text.

100. *See* 31 C.F.R. § 501.801 (2012) (authorizing OFAC to issue both general licenses pursuant to the Department of the Treasury's policies, and specific licenses when requested by an affected entity); *id.* § 594.506 (detailing the procedures by which OFAC will approve of accessing blocked accounts for legal fees).

101. *See* 31 C.F.R. §§ 594.101–.901; *see also id.* §§ 501.101–.901 (defining OFAC's general rulemaking procedures and reporting requirements).

102. *Id.* §§ 501.806–.807.

whether to grant or deny the meeting.[103] In addition, the director may hear evidence about why the group should not be designated as an SDGT, but he does not have to.[104] Moreover, the regulations do not provide a way for entities with assets blocked pending investigation to challenge the blocking order.[105] In short, OFAC has virtually complete control over the fate of an SDGT once it has been designated.

D. A Summary of the Designation Abilities of the Department of State and OFAC

Because the roles of the Department of State and OFAC in designating terrorists overlap, it is important to examine each agency's respective role in the process. Under AEDPA, the Department of State has the power to designate a foreign group as an FTO if the group meets certain statutory requirements—most importantly, the fact that it threatens the security of the United States.[106] It has essentially the same power under Executive Order 13,224.[107] Under the same executive order, OFAC has the power to designate any person or group, including a domestic entity, as an SDGT if the entity is either controlled by or provides support to terrorist groups.[108] The difference in what each agency can do is dramatic: OFAC's authority under Executive Order 13,224 only allows it to designate entities that indirectly threaten the country through providing financial support to designated terrorist groups. It is possible that some of these entities could also fall within the State Department's designation powers—if, for example, an entity both threatened terrorist attacks and donated money to other terrorist groups—but OFAC's powers also allow the agency to designate entities such as non-profit groups that do not intend to harm the country.[109]

In addition, OFAC possesses the unique ability to impose financial sanctions on both FTOs and SDGTs, although it does not have to exercise blocking orders against FTOs.[110] The primary consequences of designation as an FTO are criminal sanctions, the possible deportation of alien

103. *Id.* § 501.807(c).

104. *Id.* § 501.807(b); *see also infra* Part II.B (detailing OFAC's regulations).

105. *See* 31 C.F.R. §§ 594.101–.901 (declining to provide guidance for groups with assets blocked pending investigation).

106. *See supra* Part I.A.

107. *See supra* note 18 and accompanying text.

108. *See* Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

109. The Director of the Office of Terrorist Designation and Sanctions at the Department of State explained that OFAC's ability to designate terrorists under Executive Order 13,224 is more flexible than the ability of the Department of State under the same executive order. Interview with Jason Blazakis, *supra* note 19.

110. *See supra* note 21 and accompanying text.

members, and a reporting requirement for financial institutions.[111] Although OFAC may also freeze the assets of the group, designation as an FTO itself does not automatically lead to such an outcome.[112] In contrast, the primary effects of designation as an SDGT are a complete inability to use any assets located within the United States[113] and the imposition of penalties on third parties who violate relevant blocking orders,[114] both of which are imposed by OFAC. The Department of State does not play any role in imposing financial sanctions on SDGTs, and thus OFAC controls the entire process once an entity is designated or its assets are blocked pending investigation.[115] In addition, OFAC's ability to block an entity's assets pending investigation[116] gives the agency a far more flexible power than that exercised by the Department of State when investigating an FTO.

II. A COMPARATIVE ANALYSIS OF FTOS AND SDGTS

OFAC's more flexible and discretionary role in the terrorist designation process becomes even clearer by examining how courts have interpreted OFAC's actions and by examining OFAC's own regulations. While the decisions of both the Department of State and OFAC receive judicial deference, the judiciary has imposed more procedural requirements on the Department of State's FTO designation decisions than it has on OFAC's blocking orders and SDGT designation decisions.[117] In addition, the lack of a concrete procedure governing OFAC's actions makes it more difficult for a court to impose a check on OFAC's powers than to impose a check on the statutorily defined procedures governing the Department of State's FTO decisions.[118]

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111. *See supra* notes 54–55 and accompanying text.

112. *See supra* note 21 and accompanying text.

113. *See* U.S. DEP'T OF STATE, *supra* note 22.

114. *See* 31 C.F.R. § 594.701(a)(1) (2012) (imposing civil penalties on any person who violates a blocking order or license).

115. According to the Director of the Office of Terrorist Designations and Sanctions at the Department of State, OFAC is primarily responsible for the enforcement of financial sanctions. Interview with Jason Blazakis, *supra* note 19.

116. *See supra* note 14 and accompanying text.

117. The Department of State has been sued only three times by a terrorist group and never by an individual. Interview with Jason Blazakis, *supra* note 19. This dearth of litigation most likely arises because the Department of State can only designate *foreign persons* who threaten the national security of the United States. *See supra* Part I.A. Entities designated by the Department of State likely lack sufficient connections with the United States to sue the government, and many may not want to challenge their status as terrorists. Interview with Jason Blazakis, *supra* note 19.

118. *See* 8 U.S.C. § 1189(a)(2)(A)(i)–(ii) (2006).

A. Judicial Review of Agency Action

1. State Department FTO Decisions

The D.C. Circuit, when reviewing an FTO designation or revocation petition, reviews the Secretary of State's action to ensure that it is based on "substantial support in the administrative record."[119] Because courts generally defer to the Executive Branch's reasoning on national security and foreign policy issues,[120] the court has generally upheld the Secretary of State's decision if it was based on a sufficient administrative record.[121] Such judicial deference is not unlimited, however. For example, the D.C. Circuit recently held that the Department of State violated the People's Mojahedin Organization of Iran's (PMOI's) procedural due process rights when it did not provide the group with sufficient notice of the reasons behind its designation as an FTO.[122]

In 1997, the Secretary of State designated the PMOI as an FTO.[123] The PMOI was founded in 1963 by a group of Marxist Iranians opposed to the Shah.[124] The group participated in the Iranian revolution and conducted a series of attacks against the Iranian government during the 1970s.[125] In 1986, the group relocated to Iraq but continued to launch attacks both in Iran and around the world throughout the 1990s, including an attack against the Iranian mission in New York City in 1992.[126] In 1999, the PMOI petitioned the D.C. Circuit for review of its designation, as

119. *Id.* § 1189(c)(3).

120. *See* Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007) ("[W]e reiterate that our review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential."); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.").

121. *See, e.g.*, *PMOI I*, 182 F.3d 17, 24 (D.C. Cir. 1999) (finding that the Secretary of State's decision to designate a group as an FTO was substantially supported by the administrative record).

122. *See infra* notes 146–153 and accompanying text.

123. *See PMOI I*, 182 F.3d at 18. The official name of the group is the Mujahedin-e Khalq Organization, or simply MEK. *See id.* at 20 n.3. Because the People's Mojahedin Organization (PMOI) is the named plaintiff in all cases at issue, this Comment will refer to the group as the PMOI.

124. Joint Appendix, Volume 1, at 5, People's Mojahedin Org. of Iran v. U.S. Dep't of State (*PMOI III*), 613 F.3d 220 (D.C. Cir. 2010) (No. 1205130).

125. *Id.* at 5–6 (listing the terrorist activities as killing several U.S. military and civilian personnel in Tehran, bombing a U.S. diplomatic facility, assassinating the deputy chief of the U.S. Military Mission, and murdering an American executive of Texaco).

126. *Id.* at 6.

authorized by AEDPA.[127]

The D.C. Circuit found that the Secretary of State's decision complied with AEDPA's requirements.[128] Because the PMOI had no presence in the United States, it had no constitutional rights and had only the protections of the statute.[129] Thus, the court's review was limited to determining whether the Secretary of State's decision that the group was a foreign entity engaged in terrorist activity[130] had adequate support in the administrative record.[131] After examining the record, including classified portions, the court concluded that the record supported the determination that the group met the necessary statutory requirements, and thus upheld the designation decision.[132] In the opinion, the court noted that AEDPA was "unique" because it did not require any kind of adversarial process, presentation of evidence, or advance notice to the affected group.[133] The court also emphasized that its role was limited to simply determining whether the Secretary of State complied with the statutory requirements, not to determining the ultimate fairness of her decision.[134]

Two years later, the Secretary of State redesignated the PMOI as an FTO and added its "political front,"[135] the National Council of Resistance of Iran (NCRI), to the designation after concluding that the NCRI was an alias of the PMOI.[136] Both groups again challenged their designation in the D.C. Circuit, arguing that the Department of State violated their Fifth Amendment Due Process rights.[137] Because the court agreed that the NCRI was an alias of the PMOI and found that the NCRI's U.S. bank account constituted presence in the country, it held that the Due Process Clause applied to the group's claims and that the Secretary of State violated the due process rights of both groups.[138] The court disposed of the

127. *PMOI I*, 182 F.3d at 17.

128. *Id.* at 24–25.

129. *Id.* at 22 ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.").

130. *See supra* note 44 and accompanying text for a discussion of the nonjusticiability of the third prong of the Secretary of State's decision.

131. *See PMOI I*, 182 F.3d at 22 (citing AEDPA's statutory provision mandating the court to set aside a designation lacking "substantial support in the administrative record").

132. *Id.* at 25.

133. *Id.* at 19.

134. *Id.* at 25.

135. *See* Nat'l Council of Resistance of Iran v. U.S. Dep't of State (*NCRI I*), 251 F.3d 192, 197 (D.C. Cir. 2001) (noting that, in 1999, the Secretary designated the National Council of Resistance of Iran (NCRI) for the first time); *see also* Joint Appendix, *supra* note 124, at 5 (defining the NCRI as the "political front" of the PMOI).

136. *NCRI I*, 251 F.3d at 197.

137. *Id.* at 200.

138. *Id.* at 200–01.

Government's argument that the NCRI's bank account was too small to trigger constitutional protections[139] and found that the designation amounted to an interference with the group's liberty without due process of law.[140] The court found that, to constitutionally designate the PMOI as an FTO,[141] the Department of State had to notify the group of its upcoming designation *before* the designation's publication in the Federal Register and provide the group with an opportunity to challenge the decision.[142]

The court also rejected the Department of State's argument that providing such pre-designation notice would interfere with its ability to protect national security.[143] Indeed, the court held that informing the group of its impending designation, informing the group of the unclassified information used to make that designation decision, and permitting the group to provide its own information to rebut the designation would not adversely affect the national security of the nation.[144] The court held that the Secretary of State could designate a group without predesignation notice if she could "demonstrat[e] the necessity of withholding all notice and all opportunity to present evidence until the designation is already made" but found that she had not presented such a necessity in this case.[145]

In 2010, the D.C. Circuit, relying on its past decisions, again held that the Department of State violated the due process rights of the PMOI by failing to provide the group with adequate notice of the impending denial of its revocation petition.[146] In 2008, the PMOI had petitioned the Department of State for delisting from the FTO list,[147] citing many different changes in its activities since its initial designation and subsequent redesignation.[148] The Secretary of State denied the group's petition and

139. *Id.* at 202 (refusing to determine how "substantial" an alien's presence in the United States needed to be in order to claim constitutional protections and finding that the NCRI had sufficient connections to raise a constitutional claim).

140. *Id.* at 204.

141. Because the D.C. Circuit refers to the PMOI and the NCRI as the same entity, this Comment uses "PMOI" to refer to both groups.

142. *See NCRI I*, 251 F.3d at 206–07 (rejecting the Government's contention that notifying Congress of the Secretary of State's intention protected against an erroneous designation and finding that post-deprivation remedies did not provide adequate due process for the PMOI).

143. *Id.* at 207–08.

144. *Id.*

145. *Id.* at 208.

146. *PMOI III*, 613 F.3d 220, 227 (D.C. Cir. 2010) (per curiam).

147. *Id.* at 222.

148. *See* Joint Appendix, *supra* note 124, at 58 (explaining that the former and current Secretaries General of the PMOI officially renounced violence and terrorism in 2003 and 2006); *id.* at 59 (describing how the PMOI forces in Iraq entered into a ceasefire with NATO troops); *id.* at 62 (stating how the Department of State's 2007 Country Reports on

informed the group of such denial one day before publishing the final decision in the Federal Register.[149] She did not, however, give the group any notice of the unclassified information on which she relied until *after* her denial of its petition.[150] The court held that, without knowing the relevant information in advance of the Secretary of State's final decision, the PMOI had no way to challenge that decision, and thus had no way to assert its due process rights.[151] The judges were particularly bothered by the Secretary of State's action because they could not determine, by looking at the record, which information formed the primary basis for her decision to deny the petition.[152] Therefore, the court remanded the case back to the Department of State to provide the PMOI with sufficient reasons and an opportunity to respond to those reasons.[153]

Many possible reasons exist for the D.C. Circuit's evolution from finding that the PMOI had no due process rights to finding that those rights were violated. The fact that the PMOI developed a presence within the United States—entitling it to constitutional protections[154]—and the Department of

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Terrorism found that PMOI did not have the intent or capacity to commit terrorist attacks); *id.* at 67–76 (reporting that a tribunal in the United Kingdom removed the PMOI from the list of terrorist organizations in 2008); *id.* at 131–38 (providing testimony from members of the U.S. Congress in support of the PMOI's delisting from the FTO list).

149. *PMOI III*, 613 F.3d at 225–26.

150. *Id.* at 226.

151. *Id.* at 227. The Government tried to argue that the changes in the law since the previous case involving the PMOI justified its lack of predesignation notice. *See supra* note 56 and accompanying text. The court rejected this argument, finding that the amendments to the law did not justify providing a lower standard of due process to the PMOI. *PMOI III*, 613 F.3d at 228.

152. *Id.* at 229.

153. *Id.* at 231. The story did not end on remand, however. Under AEDPA, the Secretary of State has 180 days from the time she receives a petition to make a final decision. *See* 8 U.S.C. § 1189(a)(4)(B)(iv)(I) (2006). In 2012, nearly two years after the remand, Secretary Clinton had yet to make a final decision on the PMOI's petition. The group filed a writ of mandamus in the D.C. Circuit to compel Clinton to delist the group. *See In re* People's Mojahedin Org. of Iran, 680 F.3d 832, 833 (D.C. Cir. 2012) (per curiam). On June 1, 2012, the court ordered the Secretary of State to make a final decision on the PMOI's status within four months; if she failed to do so, the court would order her to remove the group from the FTO list. *Id.* at 838. On September 21, 2012, apparently in response to lobbying efforts ahead of the court-imposed October 1 deadline, Secretary Clinton announced that she would remove the PMOI from the FTO list. *See* Scott Shane, *Iranian Dissidents Convince U.S. to Drop Terror Label*, N.Y. TIMES, Sept. 21, 2012, http://www.nytimes.com/2012/09/22/world/middleeast/iranian-opposition-group-mek-wins-removal-from-us-terrorist-list.html; *see also* U.S. DEP'T OF STATE, OFFICE OF THE SPOKESPERSON, *Delisting of the Mujahedin-e Khalq* (Sept. 28, 2012), http://www.state.gov/r/pa/prs/ps/2012/09/198443.htm.

154. *See supra* notes 138–140 and accompanying text (holding that the NCRI had sufficient connections in the U.S. to trigger constitutional protections).

State's inability to follow the court's instructions on remand likely contributed to the changing opinions. Thus, the ultimate outcome of the PMOI litigation should not necessarily be used to predict any future action by the D.C. Circuit when reviewing FTO designations, especially regarding groups without any presence in the United States.[155] However, the outcome does show that the court is willing to look beyond the procedural requirements of AEDPA and compel the Department of State to provide adequate due process to FTOs.

2. OFAC SDGT Decisions

In contrast to the explicit provision in AEDPA providing for review of an FTO designation in the D.C. Circuit,[156] IEEPA does not provide any standards for judicial review of SDGT designations.[157] However, because OFAC, as an agency, makes the designations, courts review these decisions as they would the decisions of any other agency: under the standards of the Administrative Procedure Act.[158] Thus, courts review an SDGT designation by examining whether the decision was arbitrary and capricious, an abuse of discretion, or in violation of statutory authority.[159] Some courts are reluctant to reverse OFAC's designation decisions on the merits and defer to OFAC's own decisionmaking process.[160] However,

155. According to the Director of the Office of Terrorist Designations and Sanctions, most FTOs are entirely foreign entities. Interview with Jason Blazakis, *supra* note 19.

156. 8 U.S.C. § 1189(c)(1) (2006).

157. *See supra* note 78 and accompanying text.

158. *See* Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965, 976 (9th Cir. 2011) (citing Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 496–97, n.18 (2004)) (finding that the judicial review provisions of the APA govern review of OFAC's SDGT designations).

159. 5 U.S.C. § 706(2)(A)–(C) (2006). While these standards are deferential to all agencies, agencies engaged in decisions about foreign affairs receive an even higher degree of deference. *See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137 (9th Cir. 2000) ("[When a] regulation involves the conduct of foreign affairs, we owe the executive branch even more latitude than in the domestic context."); *KindHearts I*, 647 F. Supp. 2d 857, 917 (N.D. Ohio 2009) (citing Regan v. Wald, 468 U.S. 222, 242 (1984)) ("Although arbitrary and capricious review is highly deferential to agencies, the government asserts an even higher degree of deference in the realm of foreign affairs.").

160. *See, e.g.*, Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 730 (D.C. Cir. 2007) (finding that OFAC's designation was "supported by the record and not contrary to law"); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 162 (D.C. Cir. 2003) ("Treasury's decision to designate [a group] as an SDGT was based on ample evidence in a massive administrative record."); Kadi v. Geithner, 2012 WL 898778, at *13 (D.D.C. Mar. 19, 2012) (finding that the record "as a whole" supported OFAC's conclusion that Kadi was involved with another terrorist group), *appeal dismissed by* No. 12-5076, 2012 WL 3243996 at *1 (D.C. Cir. July 31, 2012).

some courts have held that OFAC's actions violated an affected entity's due process rights.[161] Because of the reluctance of many courts to reverse OFAC's decisions, an entity challenging OFAC's actions is unlikely to win its case on the merits.

In *Islamic American Relief Agency v. Gonzales*, the D.C. Circuit upheld OFAC's designation of an American branch of an international Islamic charity as an SDGT.[162] The group's parent organization had already been designated as an SDGT based on evidence that it financially supported terrorist groups.[163] In upholding the American branch's designation, the court held that OFAC relied on "substantial evidence" in the record to support its decision,[164] and dismissed the group's claims that it was not affiliated with the parent group and not associated with terrorism.[165] In addition, the court did not mention why the parent organization was designated in the first place but relied instead on OFAC's own discretion to make that decision.[166]

In *Holy Land Foundation for Relief & Development v. Ashcroft*, the D.C. Circuit upheld OFAC's redesignation of an American charity as an SDGT based on OFAC's reasonable belief that the charity had ties to Hamas.[167] The court held that OFAC could permissibly redesignate the group based on its "genesis and history," even without any recent evidence of a link between the group and Hamas.[168] The court also found that the evidence in the record was sufficient to support such a redesignation, even though much of it was hearsay and classified information.[169] OFAC's ability to present

161. *See Al Haramain*, 686 F.3d at 985 (concluding that OFAC violated an SDGT's due process rights by failing to provide sufficient notice of reasons behind designation); *KindHearts I*, 647 F. Supp. 2d at 897 (finding that OFAC's asset blocking denied an SDGT its due process rights to notice and an opportunity to be heard).

162. 477 F.3d at 730.

163. *Id.* at 731.

164. *See id.* at 732 (reaching this conclusion without explaining the content of either the classified or unclassified record).

165. *See id.* at 734 (dismissing the Islamic American Relief Agency's argument that the similarity between its name and the Islamic African Relief Agency was "purely coincidental").

166. *See id.* at 733–34 (detailing all the reasons that the Islamic American Relief Agency office was, in fact, the same entity as its parent entity, but declining to explain why the African branch was designated in the first place).

167. Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 159, 162 (D.C. Cir. 2003).

168. *See id.* at 162 (finding that no evidence existed to support the conclusion that the Holy Land Foundation had severed ties with Hamas).

169. *Id.*; *accord Islamic Am. Relief Agency*, 477 F.3d at 734 (upholding OFAC's decision based on the strength of the record as a whole, even though the evidence in the unclassified record by itself was "not overwhelming").

classified information to the court did not violate the group's due process right to receive notice of its redesignation or exceed OFAC's authority because the government had the right, under IEEPA, to rely on classified information in making its designation.[170] Lastly, the court held that OFAC provided the group with sufficient time to rebut its redesignation after informing the group of its intent to redesignate thirty-one days prior to actually taking action.[171]

Even though several other decisions have upheld OFAC's actions,[172] decisions on the constitutionality of OFAC's actions are not consistent among circuits. Although several courts have found that OFAC violated an entity's Fourth Amendment rights, they have disagreed about which actions actually constituted the violation.[173] And while other courts have found that OFAC provided constitutionally inadequate notice of a pending designation,[174] the opinions disagree about the degree of harm suffered by the group as a result of the due process violation.[175] These differences in judicial opinions and outcomes make it difficult for an entity challenging

170. *Holy Land Found.*, 333 F.3d at 164 (citing 50 U.S.C. § 1702(c) (2006)).

171. *Id.* (citing *NCRI I*, 251 F.3d 192, 209 (D.C. Cir. 2001)) (finding that such a notification procedure, even without an actual summary of the relevant *facts* used in the decision, protected the Holy Land Foundation's due process rights). In relying on *NCRI I*, the D.C. Circuit held that even if OFAC violated the notice requirement before the group's initial designation, OFAC did not violate the group's rights during the *redesignation* process. *See id.* at 163 ("Even if Treasury's initial designation arguably violated [the group's] due process rights, [its] funds are blocked currently by a redesignation which Treasury applied in accordance with the requirements we outlined in [*NCRI I*].").

172. *See, e.g.*, Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965, 979 (9th Cir. 2011)*; cf. KindHearts I*, 647 F. Supp. 2d 857, 893–97 (N.D. Ohio 2009) (finding that OFAC's ability to block a group's assets pending a final decision on its status as an SDGT was not unconstitutionally vague).

173. *See Al Haramain*, 686 F.3d at 995 (holding that OFAC's warrantless seizure of a group's assets violated the group's Fourth Amendment right to be free from unreasonable seizures); KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner (*KindHearts III*), 710 F. Supp. 2d 637, 647 (N.D. Ohio 2010) (reiterating that the role of the judiciary is to protect private parties from unreasonable exercises of Executive Branch discretion). *But see* Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 78 (D.D.C. 2002) (finding that OFAC violated the Holy Land Foundation's Fourth Amendment rights by entering its corporate offices and searching the premises without a warrant, but not by blocking the group's assets).

174. *See, e.g.*, *KindHearts I*, 647 F. Supp. 2d at 904–08 (finding that OFAC violated the group's due process rights by failing to provide it with adequate notice of the reasons for its designation).

175. *See Al Haramain*, 686 F.3d at 990 (finding that OFAC's due process violations were harmless, based on an examination of the entire record). *But see KindHearts III*, 710 F. Supp. 2d at 657 (finding that OFAC could not meet its burden of proving the harmlessness of its due process violations beyond a reasonable doubt).

OFAC's actions to predict whether a court will invalidate a particular action, as well as what factors the court will rely on to make its decision.

For example, in *Al Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury*, the Ninth Circuit held that OFAC violated a group's due process rights by failing to provide the group with an adequate summary of the unclassified evidence on which it relied to redesignate the group as an SDGT.[176] The court held that it might be impracticable for OFAC to provide a group with a statement of the reasons for its designation in certain situations, such as if the group presented an imminent national security threat.[177] Because OFAC waited four years before redesignating the group as an SDGT, however, the court found that those national security concerns were clearly not present to justify the lack of notice.[178] The court went on, however, to find that OFAC's due process violations were harmless because the group could not have provided any additional information by which OFAC would have come to a different conclusion, even if it had been provided with the requisite due process.[179] Therefore, the court upheld the SDGT designation based on the administrative record.[180]

In contrast, in *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, the Northern District of Ohio held that OFAC's failure to provide an SDGT with an adequate statement of reasons for its designation constituted a harmful due process violation.[181] However, the court held that OFAC had the burden of proving the harmlessness of its due process violations beyond a reasonable doubt.[182] The Ninth Circuit expressly refused to apply this burden to OFAC in *Al Haramain*, finding that the

176. *See Al Haramain*, 686 F.3d at 988 (finding that OFAC had to provide the group with a statement of the actual reasons behind the designation decision, not just a copy of the administrative record).

177. *Id.* at 986.

178. *Id.*

179. *Id.* at 989–90. The D.C. Circuit rejected this same logic in the case of the PMOI. *See PMOI III*, 613 F.3d 220, 220–29 (D.C. Cir. 2010); *NCRI I*, 251 F.3d 192, 209 (D.C. Cir. 2001) ("Hence, State asks us to assume that nothing the PMOI would have offered—not even evidence refuting whatever *unclassified* material the Secretary may have relied on—could have changed her mind.").

180. *Al Haramain*, 686 F.3d at 990.

181. *See KindHearts III*, 710 F. Supp. 2d 637, 657 (N.D. Ohio 2010). In this particular case, OFAC blocked the assets of the group for three years without making any final decision as to the group's status, and the founder of KindHearts actually relied on OFAC's own published guidelines for charitable groups when he founded the charity. *See KindHearts I*, 647 F. Supp. 2d 857, 864–65 (N.D. Ohio 2009).

182. *See KindHearts III*, 710 F. Supp. 2d at 654–56 (citing Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291, 303 (2007)).

beyond a reasonable doubt standard did not apply to civil litigation.[183] Therefore, even though the district court in *KindHearts* held that OFAC violated an SDGT's due process rights, the fact that other courts have not found a similar due process violation[184] makes it unlikely that an entity challenging OFAC's actions will win a due process challenge.

Although several courts have found that OFAC violated an SDGT's Fourth Amendment rights, the courts disagree about which of OFAC's actions actually constituted the violation.[185] In addition, the district court in *KindHearts* struggled to find an adequate remedy for the Fourth Amendment violation, finally settling on a post hoc probable cause hearing to determine the validity of OFAC's search of a group's offices.[186] Such a remedy is unlikely to satisfy the needs of an entity that cannot access any of its money. Thus, an entity challenging OFAC's actions in court is unlikely to benefit in any meaningful way from its lawsuit, even if a court finds in its favor. The inconsistent outcomes and inadequate remedies for affected entities illustrates OFAC's broad ability to both designate groups as SDGTs and freeze assets with only a limited judicial check. If OFAC's constitutional violations ultimately do not affect the outcome of its designation decisions or blocking orders, and if courts are unable to adequately fix any possible Fourth Amendment or Due Process violations, OFAC likely has little incentive to change its own decisionmaking process. As a result, OFAC's discretion to designate groups through its existing process seems likely to continue.

B. The Lack of Comprehensive Procedural Requirements in OFAC's Regulations

OFAC has promulgated its own regulations detailing how it manages the

183. *See Al Haramain*, 686 F.3d at 989 (citing *Brentwood Acad.*, 551 U.S. at 303) (finding that the Supreme Court's use of the "reasonable doubt" standard in *Brentwood Academy* was merely a rhetorical tool to explain the true harmlessness of the constitutional error, and finding that the standard was inapposite to a civil case).

184. *See* Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 739 (D.C. Cir. 2007) (finding that OFAC's designation was lawful under all relevant laws and the Constitution); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003) ("Therefore, Treasury provided [the Holy Land Foundation] with the requisite notice and opportunity for response necessary to satisfy due process requirements."); Kadi v. Geithner, 2012 WL 898778, at *24 (D.D.C. Mar. 19, 2012) (finding that Kadi's opportunity to submit evidence to OFAC constituted sufficient due process), *appeal dismissed by* No. 12-5076, 2012 WL 3243996, at *1 (D.C. Cir. July 31, 2012).

185. *See supra* note 173 and accompanying text.

186. *See KindHearts III*, 710 F. Supp. 2d at 646–53 (balancing the government's interest in protecting national security with the violations to KindHearts' constitutional rights, and concluding that a post hoc probable cause hearing was the best possible solution).

blocked assets of both SDGTs and FTOs.[187] These regulations contain information ranging from OFAC's general reporting requirements,[188] to its licensing procedures,[189] to the definition of "otherwise associated with."[190] Notably, the regulations do not provide any guidance on how OFAC actually makes its designation or asset-freezing decisions. Therefore, most entities affected by OFAC's actions can only guess at the reasons behind them. Because OFAC can designate or freeze the assets of any entity that it concludes is controlled by, acting on behalf of, providing material or financial support to, or is "otherwise associated" with a designated terrorist entity,[191] it is likely that many entities with only indirect links to terrorism will not know why OFAC blocked their assets. Entities designated as SDGTs by the Department of State, as well as those designated as FTOs, do not face the same problem, because the Department of State can only designate entities that directly threaten terrorism.[192] Therefore, these entities have knowledge of a clearer link between their actions and their designation.

Once OFAC has designated an entity as an SDGT or blocked its assets, the agency adds the entity to the Specially Designated Nationals List, which includes entities designated under all of OFAC's sanctions programs, including FTOs, SDGTs, Specially Designated Terrorists, and other groups and individuals who support terrorism.[193] An entity has only a limited ability to remove itself from that list. To facilitate removal, an entity "may submit arguments or evidence that [it] believes establishes that

187. *See* 31 C.F.R. §§ 594.101–.901 (2012) (outlining procedures for SDGTs); *id.* §§ 597.101–.901 (outlining procedures for FTOs); *see also id.* §§ 501.101–.901 (outlining OFAC's general rulemaking and other procedures).

188. *Id.* §§ 501.601–.606.

189. *Id.* § 501.801.

190. *Id.* § 594.316 (defining "otherwise associated with" as "to own or control" or "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"). This definition was added to OFAC's regulations in 2007, *see* 72 Fed. Reg. 4206, 4207 (Jan. 30, 2007), and the D.C. District Court found that such an addition prevented an entity from claiming that the term, as used in Executive Order 13,224, was unconstitutionally vague. *See* Kadi v. Geithner, 2012 WL 898778, at *34 (D.D.C. Mar. 19, 2012), *appeal dismissed by* No. 12-5076, 2012 WL 3243996, at *1 (D.C. Cir. July 31, 2012).

191. *See* Exec. Order 13,224, 3 C.F.R. 786, 787 (2002).

192. *See supra* notes 18–19 and accompanying text.

193. *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, *Resource Center*: *Frequently Asked Questions*, Question 18 (Mar. 18, 2013, 1:53 PM), http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#17. The Specially Designated Nationals List currently stands at 556 pages. *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, *Resource Center: Specially Designated Nationals List* (Mar. 14, 2013), http://www.treasury.gov/ofac/downloads/t11sdn.pdf.

insufficient basis exists for the designation."[194] The entity may also "propose remedial steps" that would help negate the basis for inclusion on the list.[195] After submitting this evidence in writing, the entity can request a meeting with OFAC's director to discuss the evidence and reasons for the initial listing.[196] The director has complete discretion over whether to grant the request for a meeting and can choose to review the submitted evidence without such a meeting.[197] This discretionary power gives OFAC's director the ability to make a final decision about the status of an affected entity without allowing the entity to participate meaningfully in the process. Such an outcome seems to contradict the ultimate conclusion of the D.C. Circuit in its PMOI litigation: a group cannot adequately respond to a designation if it does not know why it was designated in the first place.[198] Applying the same logic as the D.C. Circuit, entities designated by OFAC lack an adequate way to rebut the evidence behind their status as SDGTs.

Thus, even compared with the deferential judicial review of FTO designations,[199] the procedures governing OFAC's designation and blocking order decisions leave OFAC with a large amount of flexibility and discretion. Although OFAC consults with other Executive Branch officials when making initial designation decisions,[200] its complete control of an entity's assets after designation, as well as its ability to block assets pending investigation,[201] allows it to exercise a large amount of discretion with few procedural or judicial checks.

III. THE REAL IMPACTS OF OFAC'S ACTIONS

The fact that an agency has discretion, of course, does not necessarily mean that an agency violates constitutional rights. Courts allow agencies the flexibility to create and interpret their own rules, and usually uphold an agency's procedures if they comply with the agency's statutory authority.[202] Courts usually review the decisions of agencies engaged in foreign affairs,

194. 31 C.F.R. § 501.807(a).

195. *Id.* (recommending steps such as reorganizing a corporation or other entity or allowing certain blocked persons to resign from a corporation).

196. *Id.* § 501.807(b)–(c).

197. *Id.* The provision does not say whether OFAC must give reasons for its denial of a meeting.

198. *See supra* notes 135–153 and accompanying text.

199. *See supra* Part II.A.1.

200. *See* Exec. Order No. 13,224, 3 C.F.R. 786 (2002) (requiring the Secretary of the Treasury to consult with the Secretary of State and the Attorney General before designating SDGTs).

201. *See supra* note 14 and accompanying text.

202. *See supra* note 68 and accompanying text.

such as OFAC and the Department of State, under an even more deferential standard than agencies engaged in purely domestic decisionmaking.[203] However, OFAC's ability to freeze the assets of entities with only indirect links to terrorism has led it to block the assets of certain groups, such as Muslim charities, that deny their ties to terrorist groups.[204] Entities whose assets are blocked, either after designation or during the pendency of an investigation, suffer harm to both their monetary and non-monetary interests. If such entities actually support terrorism, such harm is likely justifiable to protect the United States. For groups that do not use their resources to support terrorism, however, the lack of adequate procedures behind designations and the blocking of assets increases the possibility that they will suffer long-term deprivations of their property without due process of law.

A. Monetary Impacts of Blocking Orders

Because OFAC can block the assets of a group pending investigation into its status as an SDGT,[205] an entity may lose access to its money before OFAC ever takes any final action on its SDGT designation. In addition, any individual, company, or organization that transfers assets to or from the blocked entity,[206] contributes goods or services to the entity,[207] maintains property owned by the entity,[208] or conducts any kind of secure transaction with the entity[209] can face criminal and civil penalties.[210] Penalties are governed by IEEPA and thus can increase with inflation.[211] As of 2010, IEEPA mandated that the maximum civil penalty for violating an OFAC blocking order or license was $250,000 or twice the amount of

203. *See supra* note 159 and accompanying text.

204. Because the Department of State designates entities as SDGTs based on whether an entity threatens the security of the United States or threatens to commit a terrorist attack, see Exec. Order No. 13,224, 3 C.F.R. 786 (2002), it would not be able to designate a domestic charity as an SDGT, even if the charity financially supported extremist causes. Interview with Jason Blazakis, *supra* note 19.

205. *See supra* note 14 and accompanying text.

206. *See* 31 C.F.R. § 594.202 (2012) (nullifying and voiding any asset transfers after the issuance of a blocking order, subject to certain exceptions).

207. *Id.* § 594.204.

208. *Id.* § 594.206.

209. *Id.* § 594.201(b).

210. *See* 50 U.S.C. § 1705 (Supp. IV 2010) (describing possible penalties for violating any regulations issued pursuant to IEEPA); 31 C.F.R. § 594.701(a).

211. *See* 31 C.F.R. § 594.701(a)–(b)(2) (stating that penalties are governed by IEEPA and are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 and 18 U.S.C. § 3571 (2006)).

the prohibited transaction.[212] In addition, IEEPA imposes a criminal fine of not more than $1,000,000 for willful violations of a license or blocking order, in addition to a possible prison sentence of up to twenty years.[213] Thus, even a suspicion of participating in terrorist activity can have severe financial and punitive consequences for an entity and those it does business with.[214]

The effects of OFAC's blocking orders are not limited to monetary penalties for third parties, however. An entity whose assets are blocked can also suffer severe financial hardship, including the inability to use any of its money to further its organizational goals. For example, the Holy Land Foundation, once the largest Muslim charity in the United States,[215] with an annual budget of $14 million,[216] argued that OFAC "put it out of business" by designating it an SDGT in December 2001[217] and depriving it of any ability to use its U.S. funds. The group's designation and OFAC's subsequent blocking order prevented the group from executing millions of dollars in charitable donations to refugees, orphans, and other groups abroad.[218] Donating to charity, or *zakat*, is one of the five fundamental tenets of the Muslim religion, as well as an important form of political participation and foreign aid.[219] Before designation, the Holy Land Foundation provided relief to victims of the Oklahoma City bombings, victims of earthquakes in Turkey and India, refugees in the Gaza Strip, and victims of the September 11, 2001 attacks.[220] OFAC's blocking order rendered the group incapable of providing its charitable services to those specific clients.[221] Although OFAC alleged that the Holy Land Foundation was controlled by Hamas, the group repeatedly denied that allegation.[222]

In December 2001, OFAC also froze the assets of the Global Relief

212. 50 U.S.C. § 1705(b)(1)–(2) (Supp. IV 2010); *see also* 31 C.F.R. § 594.701(a)(1).

213. 50 U.S.C. § 1705(c); *see also* 31 C.F.R. § 594.701(a)(2).

214. Indeed, Vanessa Ortblad argues that financial sanctions, while not intended to be punitive, have a significant punitive effect on groups subject to them. *See* Ortblad, *supra* note 24, at 1439 ("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.").

215. Brief of Appellant, Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003) (No. 02–5307), 2003 WL 25586053, at *7.

216. *The Holy Land Foundation*, FREEDOMTOGIVE, http://freedomtogive.com/holy-land-foundation-the-hlf/ (last visited May 11, 2013).

217. Brief of Appellant, *supra* note 215, at *7.

218. *Id.* at *7–9.

219. *Id.* at *8–9; *see also* ROTH ET AL., *supra* note 89, at 21 (explaining the importance of *zakat* to the Muslim faith).

220. Brief of Appellant, *supra* note 215, at *8–9.

221. *Id.*

222. *Id.* at *9.

Foundation, an Illinois nonprofit charity.[223] At the time that its assets were blocked, the Global Relief Foundation provided humanitarian aid to needy Muslim individuals in twenty nations and had received over $5 million in donations from its members, many of whom were American.[224] Without access to its American funds, the group could not function as a nonprofit agency.[225] Similarly, Mr. Yassin Abdullah Kadi, a Saudi architect and businessman,[226] lost his ability to execute business transactions when the United States and the United Kingdom simultaneously designated him as a terrorist and froze his assets in October 2001.[227] After the issuance of this joint blocking order, Mr. Kadi, whose net worth is approximately $65 million,[228] could not withdraw any money from his bank accounts to conduct business in either the United States or the United Kingdom.[229] Mr. Kadi's situation, as well as the experiences of the Holy Land Foundation and the Global Relief Foundation, illustrate the severe financial impact of OFAC's blocking orders, whether or not those orders are accompanied by a final SDGT designation. Many of the groups subjected to OFAC's blocking orders may actually be supporting terrorism, and so such harsh financial sanctions are likely necessary to protect national security. However, the very harshness of the sanctions underscores the need for proper procedures before implementing them to ensure that entities that do not deserve such severe monetary deprivations are not mistakenly subjected to such actions.

B. Non-Monetary Impacts of Blocking Orders

Although the financial impact of a blocking order can be devastating to both designated SDGTs and entities with assets blocked pending investigation, the non-monetary impact of blocking orders and SDGT designations can be just as devastating, according to the individuals and groups subjected to those orders. When OFAC designated Mr. Kadi as an SDGT in 2001, for example, the United Nations and the European Union

223. Petition for Writ of Certiorari, at 2–3, Global Relief Found., Inc. v. Snow, 540 U.S. 1003 (2003) (No. 03–46), 2003 WL 23717146.

224. *Id.* at 2.

225. *Id.* at 5.

226. *See* Landon Thomas Jr., *A Wealthy Saudi, Mired in Limbo Over An Accusation of Terrorism*, N.Y. TIMES (Dec. 12, 2008), http://www.nytimes.com/2008/12/13/world/middleeast/13kadi.html?pagewanted=1&_r=2&sq=Yassin%20Kadi&st=cse&scp=1.

227. *See* Complaint at 7, Kadi v. Paulson, No. 1:09–cv–00108 (D.D.C. filed Jan. 16, 2009), *argued sub nom.* Kadi v. Geithner, 2012 WL 898778, at *1 (D.D.C. Mar. 19, 2012).

228. *See* Thomas, *supra* note 226.

229. *See* Complaint, *supra* note 227, at 7.

also added his name to their terrorist designation lists.[230] As a result, Mr. Kadi's international reputation and business interests suffered.[231] He also experienced depression and "the humiliation of having to ask family members for financial help."[232] Although he successfully petitioned the European Court of Justice for removal from its terrorist list in 2008,[233] his inability to successfully access the evidence relied on for his designation by the United States,[234] as well as the lack of criminal charges against him, has left him "caught in a legal limbo."[235]

Like Mr. Kadi, the Holy Land Foundation argued that OFAC refused to consider evidence it presented in an attempt to rebut its SDGT designation.[236] The group also argued that OFAC relied on outdated, uncorroborated, and unreliable evidence, such as statements allegedly elicited from Palestinians after being tortured by the Israeli government.[237] Similarly, the Global Relief Foundation asserted that OFAC relied on "mostly unsworn statements, newspapers articles and innuendo comprised entirely of hearsay presented in a rambling format insulated from cross-examination" when justifying its blocking order.[238] In addition, the Global Relief Foundation claimed that it was incapable of mounting a proper defense to OFAC's designation because OFAC maintained custody of approximately 500,000 of the group's business records.[239]

Government agents also searched the offices of both the Holy Land Foundation and the Global Relief Foundation in an effort to help further OFAC's investigation.[240] During the search of the Global Relief Foundation's offices, the agents seized everything from books to religious texts to computers.[241] The group argued that the search violated its Fourth Amendment rights because the agents did not obtain a warrant.[242] The

230. *See id.* at 13 (noting that the United Nations and the European Union took this action at the request of the United States).

231. *Id.* at 3.

232. Thomas, *supra* note 226.

233. Complaint, *supra* note 227, at 14–16.

234. *See id.* at 17–18 (asserting that Mr. Kadi filed several Freedom of Information Act requests since his initial asset blocking and received no response from OFAC).

235. Thomas, *supra* note 226.

236. Brief of Appellant, Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003) (No. 02–5307), 2003 WL 25586053, at *9 (arguing that OFAC denied repeated requests to meet with the group).

237. *Id.* at *9–10.

238. Petition for Writ of Certiorari, Global Relief Found., Inc. v. Snow, 540 U.S. 1003 (2003) (No. 03–46), 2003 WL 23717146, at *5.

239. *Id.* at *3–4.

240. *Id.* at *3; Brief of Appellant, *supra* note 236, at *7.

241. Petition for Writ of Certiorari, *supra* note 238, at *3.

242. *Id.*

Islamic American Relief Agency, a Missouri-based charity,[243] claimed that the government's search of its offices actually violated not just its Fourth Amendment rights, but its First Amendment rights as well.[244] Government agents searched its offices and seized property on the night before Ramadan, interfering with the group members' ability to make a charitable donation specifically timed to occur during the holiday.[245] Moreover, the group contended that FBI agents conducting the search engaged in "unlawful methods of interrogation, threats and intimidation, on [the Agency's] officers, donors, and employees, and their families despite repeated requests for an attorney to be present."[246] Regardless of the truth of those allegations, the respective experiences of the Islamic American Relief Agency, the Holy Land Foundation, the Global Relief Foundation, and Mr. Yassin Kadi illustrate the very real consequences of OFAC's broad power to freeze assets and designate entities as SDGTs. To ensure that OFAC does not subject undeserving entities to these consequences, proper procedures are needed before OFAC implements such sanctions.

IV. A PLAN FOR THE FUTURE: BALANCING NATIONAL SECURITY AND DUE PROCESS

The power to block the assets of suspected terrorists is an important and powerful weapon in the government's fight against terrorism, but the power is also flawed in its implementation against certain affected entities. Because OFAC's discretionary authority leads to many of the most significant negative impacts,[247] any changes to the process should focus primarily on OFAC, rather than the Department of State. SDGTs and entities with blocked assets currently have no way to meaningfully challenge OFAC's conclusions and actions, and as a result have little chance of changing their status as SDGTs or unfreezing their assets. In order to satisfy due process, entities affected by OFAC's actions must be provided with an opportunity to challenge OFAC's SDGT designation decision, OFAC's blocking order, or both. To meet this due process requirement, OFAC must provide an entity with a statement of the reasons behind the

243. *See* Appellant's Final Brief on Appeal, at 4, Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728 (D.C. Cir. 2007) (No. 05–5447).

244. *Id.* at 2, 36–38; *see also* Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 735–37 (D.C. Cir. 2007) (rejecting the Islamic American Relief Agency's argument that OFAC violated its First Amendment rights).

245. Appellant's Final Brief on Appeal at 9, *Islamic Am. Relief Agency*, 447 F.3d 728 (No. 05–5447).

246. *Id.* at 9.

247. See *supra* Part I.D for a discussion of OFAC's discretionary ability to designate SDGTs.

designation or blocking order, a chance to challenge the action before a neutral decisionmaker, and a limited opportunity for judicial review.[248] Providing designated SDGTs and other affected entities with these due process guarantees would put them in the same position as designated FTOs.[249] Although there are several possible ways to provide SDGTs with these requirements—including amending Executive Order 13,224 and amending OFAC's own regulations—amending IEEPA is the best way to balance the government's interest in protecting the country with the due process rights of entities possessing blocked assets.

A. Amending Executive Order 13,224

As Executive Order 13,224 grants OFAC a wide range of powers to designate SDGTs and block their assets, amending the Executive Order seems, at first blush, to be a good way of limiting some of that discretion and creating procedural rights for affected entities. Executive orders, however, are utilized for the express purpose of allowing the President to control the actions of the Executive Branch[250] and so are inherently discretionary. They allow the President to deal with specific problems affecting the country in any way that he desires, without interference from the other branches of government. Therefore, the President is unlikely to amend Executive Order 13,224 to provide more due process rights for designated entities unless he decides that such action is necessary to deal with ongoing national security threats.

Because the prevention of terrorism and the protection of national security is primarily the domain of the Executive Branch, courts will likely continue to defer to the judgments of the President and the Executive Branch on national security-related issues and are unlikely to nullify an executive order pertaining to national security unless it clearly violates

248. Because OFAC can only block the assets of SDGTs located in the United States, see Exec. Order No. 13,244, 3 C.F.R. 786 (2002) (blocking all the property interests of designated groups "that are in the United States"), designated SDGTs have a right to certain procedural requirements before being deprived of their property. The nature of those procedures will vary depending on the surrounding circumstances. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 570 n.7 (1972) ("Before a person is deprived of a protected interest [such as liberty or property], he must be afforded opportunity for some kind of hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" (quoting Boddie v. Conn., 401 U.S. 371, 379 (1971))).

249. See *supra* notes 138–153 and accompanying text for a discussion of the due process that the Department of State must provide to FTOs.

250. *See* KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 34 (2001).

constitutional rights[251] or the separation of powers.[252] Although the Supreme Court has nullified the use of executive orders in some situations,[253] it has routinely upheld the President's power to make national security decisions through executive orders.[254] As a result, the President has little incentive to amend Executive Order 13,224, even to provide additional procedural protections for affected parties. In addition, even if a future President did amend Executive Order 13,224, such an amendment would not necessarily lessen OFAC's discretion in the SDGT process. Because OFAC has congressional authorization to create and maintain its own regulations,[255] OFAC could continue to maintain its own discretionary procedures for designating SDGTs and blocking assets even if the President amended Executive Order 13,224 to limit its discretion.

B. Amending OFAC's Regulations

Due to the impracticalities inherent in amending Executive Order 13,224, amending OFAC's own regulations seems to provide a simpler way to protect the procedural due process rights of entities affected by OFAC's actions. OFAC has amended its regulations before, and publishes such amendments in the Federal Register.[256] In theory, OFAC could amend its SDGT regulations by creating an evidentiary standard to follow when making designation decisions or issuing blocking orders, publishing its decisionmaking process, or giving affected entities an automatic right to meet with OFAC's director to challenge OFAC's actions. Such changes would make OFAC's decisionmaking process more transparent, and would also provide affected entities with their required due process rights.

However, OFAC currently has little incentive to make significant

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251. *Cf. Ex parte* Endo, 323 U.S. 283, 298–99 (1944) (assuming that laws and executive orders were passed in accordance with constitutional principles).

252. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952) (holding that an executive order authorizing the President to seize all of the steel mills in the country amounted to the President making laws, in violation of Article I of the Constitution).

253. *See, e.g.*, *Youngstown*, 343 U.S. at 659–60 (Burton, J., concurring) (refusing to authorize the use of an executive order to take action that Congress specifically prohibited).

254. *See generally* Korematsu v. United States, 323 U.S. 214 (1944) (upholding an executive order imposing a curfew on Japanese-American citizens based on the President's determination that such an order was necessary to protect the country).

255. *Cf.* 31 U.S.C. § 321(b)(1) (2006) (giving the Secretary of the Treasury the power to promulgate regulations to carry out the functions of his office); *id.* § 321(b)(2) (authorizing the Secretary of the Treasury to delegate duties to another officer within the Department of the Treasury).

256. *See, e.g.*, International Emergency Economic Powers Act Civil and Criminal Penalties, 73 Fed. Reg. 32,650 (June 10, 2008) (codified at 31 C.F.R. pts. 535–42, 545, 560, 585–88, 593–95).

changes to its regulations, because courts generally uphold its decisionmaking process on judicial review.[257] If more courts find that OFAC's actions violate the constitutional rights of SDGTs and entities possessing assets blocked pending investigation, it is possible that OFAC would respond to the resulting pressure by amending its regulations. Until a court reaches such a conclusion, however, OFAC has little incentive to change its regulations and will likely maintain its existing discretionary role in the SDGT designation process.

C. Amending the IEEPA

Because executive orders are discretionary and OFAC has little incentive to change its own regulations, the best option for improving the SDGT-designation process is to impose some kind of statutory check on OFAC, similar to the statutory check on the Secretary of State's power provided by AEDPA.[258] To properly balance the interests of the government in preventing terrorism with the due process rights of SDGTs and other affected entities, the SDGT designation process should be amended to provide more due process protections, and should be codified in IEEPA. Because IEEPA expressly allows the Executive Branch to exercise its discretion to make national security decisions through presidential regulations,[259] codifying the process in a statute would allow the Executive Branch to continue to exercise its discretion, but in a manner limited by certain procedural requirements.[260]

Section 203 of IEEPA[261] describes the regulations the President may create when declaring a national emergency, as well as the limitations on his authority to enact these regulations.[262] Congress should amend IEEPA and add a new provision to this section mandating certain procedural requirements that the President's regulations must meet when they affect

257. *See supra* Part II.A.2 (discussing the amount of deference that courts typically give to OFAC's decisionmaking process).

258. *See supra* Part I.A for a discussion of these requirements.

259. 50 U.S.C. § 1702(a) (2006).

260. Codifying the necessary procedural requirements in a statute such as AEDPA would give Congress complete control over the process, and thus limit the Executive Branch's flexibility to issue regulations governing the designation of terrorists and terrorist entities. According to the Director of the Office of Terrorist Designation and Sanctions at the Department of State, flexibility is important to the success of OFAC's economic sanctions as a national security tool. Interview with Jason Blazakis, *supra* note 19.

261. Pub. L. No. 95-233, 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. § 1702).

262. *See id.* § 1702(a) (allowing the President to create regulations to exercise his IEEPA powers); *id.* § 1702(b)(1), (3) (forbidding the President from regulating postal or telephonic communications between individuals or limiting the importation of "informational materials" such as books, films, and artwork).

persons or groups who are present in the United States.[263] This provision should mandate that agencies implementing these regulations, including OFAC and the Department of State,[264] provide affected entities with a post-deprivation statement of reasons for a designation decision or blocking order, a post-deprivation hearing[265] before a neutral decisionmaker, and an option for judicial review in the D.C. Circuit.[266]

Under the amended section of IEEPA, agencies could continue to exercise their powers under Executive Order 13,224, and so OFAC would retain its ability to designate an entity as an SDGT or block its assets based on the amount of financial or other support the entity provides to other terrorists.[267] However, the regulations issued pursuant to the new IEEPA section should require OFAC to provide an affected entity with an unclassified summary of the reasons behind its designation or blocking order and provide the entity with a realistic way to respond to the information.[268] Such a notification requirement would help limit OFAC's

263. Such a provision would be codified at 50 U.S.C. § 1702(d). Limiting such an amendment to entities with a U.S. presence would be simpler than trying to apply a new law to entities that have no connection to the United States, which have limited due process rights. *See supra* note 129 and accompanying text.

264. Although the Department of State's ability to designate SDGTs does not implicate the same discretionary issues as OFAC's abilities, see *supra* Part I.D, the Department of State's SDGT designations should be governed by the same standards as OFAC's designations because OFAC ultimately controls the financial assets of *all* designated SDGTs. *See supra* note 115 and accompanying text.

265. The importance of protecting the country from terrorist attacks, combined with the possibility that a group given notice of an upcoming blocking order would transfer its assets out of the country, create an "extraordinary situation" in which a predeprivation hearing would not be required. *See supra* note 248 and accompanying text; *see also* Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965, 985 (9th Cir. 2011) (noting that the possibility of "asset flight" justifies denying a group pre-deprivation notice); Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 76 (D.D.C. 2002) (citing Calero Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679–80 (1974)) (finding that the government met all of the requirements of an extraordinary situation, specifically the necessity of the deprivation to serve a compelling interest, the necessity of speed in agency action, and the necessity of acting pursuant to a "narrowly drawn statute"), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

266. Allowing the D.C. Circuit to review the outcome of this hearing would impose a similar standard to that provided in AEDPA, see 8 U.S.C. § 1189(c) (2006), and would also comport with an accepted practice of allowing the courts of appeals to directly review agency action, see The Choice of Forum for Judicial Review of Administrative Action (Recommendation 75–3), 40 Fed. Reg. 27,926, 27,927 (July 2, 1975) (arguing that, in the interests of judicial economy, judicial review in the courts of appeals is generally preferable to review in the district courts).

267. *See* Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

268. Such a requirement would be similar to the protections afforded to FTOs. *See generally supra* Part II.A.1.

ability to impose harsh sanctions on entities linked only indirectly to terrorist activity, especially if such entities do not actually support terrorism. OFAC should provide its statement of reasons concurrently with notification of its intent to designate an entity or block the entity's assets. Concurrent notification of OFAC's action and the reasons behind that action would help prevent OFAC from blocking an entity's assets for several years without making a final decision on an entity's status.[269] In addition, receiving notice of the reasons early in the designation process would provide entities with a more meaningful opportunity to challenge OFAC's actions.

Second, the regulations under the new IEEPA section should require the director of OFAC to meet with an entity challenging either the blocking of its assets or its final designation as an SDGT, and require the Director to respond to the entity's challenge to OFAC's actions.[270] Even though due process requires that entities adversely affected by an agency's action have the ability to challenge that action,[271] OFAC's current regulations allow the director to meet with an entity at his discretion.[272] Such a discretionary provision allows the director to deny some entities the right to challenge his actions without fully listening to their arguments. While such action violates an entity's due process right to be heard, SDGTs and other entities with blocked assets are not entitled to a full evidentiary hearing. Because the primary consequence of designation as an SDGT is a blocking of assets, entities designated as SDGTs—unlike those designated as FTOs[273]—may attempt to transfer their assets overseas.[274] To prevent such a possibility, while still providing an affected entity the right to challenge its actions, OFAC should only have to provide a post-deprivation hearing.[275] Such a

269. *See, e.g.*, *KindHearts III*, 710 F. Supp. 2d 637, 643, 645 (N.D. Ohio 2010) (explaining that the group's assets were first frozen in early 2006, the assets were still frozen in 2010, and the group had not been finally designated as an SDGT).

270. By challenging a blocking order pending final investigation, an entity could conceivably avoid a final SDGT designation and significant deprivation of its property. Thus, allowing an entity to challenge this initial agency action is important to protect the entity's due process rights.

271. *See, e.g.*, Londoner v. City & Cnty. of Denver, 210 U.S. 373, 385 (1908) (holding that when a state legislature delegated its authority to raise taxes to an agency, individuals affected by those taxes were entitled to an opportunity for the agency to hear their objections to the tax).

272. *See* 31 C.F.R. § 501.807(c) (2012).

273. *See supra* notes 54–55 and accompanying text for a discussion of the primary consequences of an FTO designation.

274. *See supra* note 265 and accompanying text.

275. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (finding that because the nature of due process is "flexible" and depends in part on a balance between the interests of government and the affected party, post-deprivation hearings often meet the requirements of

hearing could take the form of a mandatory meeting with OFAC's director or someone he delegates to hear an entity's evidence. Even though the director of OFAC plays a crucial role in the designation process itself, he could still hear evidence and be a neutral decisionmaker,[276] subject to judicial review.

Lastly, the regulations governed by the new IEEPA provision should include a provision for limited judicial review of the outcome of an entity's informal hearing with OFAC in the D.C. Circuit. Under the current legal system, SDGTs and other affected entities have no inherent right to challenge their designation in court,[277] except to argue that the subsequent agency action[278] is arbitrary, capricious, in violation of constitutional rights, or in excess of statutory jurisdiction.[279] Unless provided by statute, individuals challenging an agency's actions can only challenge final agency action. [280] Thus, without an express statutory grant to review the blocking of assets pending investigation, a court cannot review that action. As a result of OFAC's express ability to block an entity's assets pending investigation, however, affected entities may have to wait several years[281] before OFAC issues a final action subject to judicial review. Thus, permitting an entity to seek judicial review of an adverse outcome from the meeting with OFAC's director will allow an affected entity to receive prompt review of the agency action that most affects it—the freezing of its assets, whether or not accompanied by a final designation as an SDGT. The scope of the judicial review should be limited to an analysis of whether OFAC's actions were arbitrary and capricious, an abuse of discretion, in violation of statutory authority, or incompatible with statutory procedure.[282] Allowing an affected entity to challenge OFAC's actions in

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due process).

276. *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 47–53 (1975) (rejecting the argument that an agency head could not also be an impartial decisionmaker).

277. *See* Exec. Order No. 13,224, 3 C.F.R. 786, 789 (2002) ("Nothing contained in this order is intended to create . . . any right, benefit, or privilege, substantive or procedural, enforceable at law . . . ."); *see also supra* note 78 and accompanying text.

278. *See* 5 U.S.C. § 702 (2006) (providing that an individual who suffers harm as a result of agency action is entitled to judicial review of that action).

279. *See id.* § 706(2)(A)–(C).

280. *See id.* § 704 (providing that courts can only review final agency actions and actions explicitly made reviewable by statute).

281. For example, OFAC blocked the assets of KindHearts for Charitable Humanitarian Development, Inc., for three years without making a final decision as to their status as an SDGT. *See supra* note 269 and accompanying text.

282. 5 U.S.C. § 706(2)(A), (C)–(D). By mandating that all regulations issued pursuant to IEEPA provide the procedures described in this section, entities challenging OFAC's actions will have no reason to argue that the agency's actions are "contrary to constitutional right, power, privilege, or immunity," *id.* § 706(2)(B), since the procedures will protect the

court after an unsatisfactory hearing would provide the best way for an entity to assert its due process rights.

Therefore, to properly balance OFAC's important interest in imposing financial sanctions on terrorists with the interests of entities adversely affected by OFAC's actions, Congress should amend IEEPA to ensure that Executive Branch regulations issued pursuant to the law meet certain procedural requirements. Specifically, the law should mandate that all agencies implementing those regulations, including OFAC, provide affected groups with a statement of reasons for their actions, an opportunity to present evidence to a neutral decisionmaker, and an opportunity to challenge the outcome of that presentation in the D.C. Circuit.

CONCLUSION

Although financial sanctions are not as visible an aspect of the War on Terror as targeted killings, the power to impose these sanctions on individuals and groups suspected of terrorist activity has helped keep the country safe in the years since the September 11, 2001 attacks.[283] The imposition of those sanctions, however, also allows OFAC to exercise an extremely flexible and discretionary power that often reaches entities linked only indirectly—if at all—to the individuals and terrorist groups responsible for those attacks. Unlike designation as an FTO, which is based on a concrete link to such dangerous terrorist groups, designation as an SDGT depends on which agency makes the designation decision. If designated by the Department of State, an individual or group must, like an FTO, actually threaten the security of the country. If designated by OFAC, however, an SDGT must only be associated with such a dangerous group in some way. OFAC's ability to characterize an entity as an SDGT is broad, flexible, and discretionary.

Entities designated as SDGTs, as well as entities whose assets are frozen pending investigation into their final status, face severe monetary and non-monetary consequences. At the same time, OFAC's own regulations and the deferential nature of judicial review limit an affected entity's ability to mitigate those consequences. As a result, affected entities lack a meaningful way to challenge OFAC's actions, a right provided to virtually all other entities, including FTOs, challenging adverse agency action. To provide entities affected by OFAC's actions with their required constitutional rights, to ensure that OFAC maintains its ability to block the assets of terrorist

constitutional rights of affected entities.

283. *See* ROTH, *supra* note 89, at 2 ("[Preventing terrorists from accessing money] has been presented as one of the keys to success in the fight against terrorism: if we choke off the terrorists' money, we limit their ability to conduct mass casualty attacks.").

entities, and to protect the safety of the country, Congress should amend IEEPA to require that its regulations provide certain procedural requirements. Any new regulations issued pursuant to the law should provide entities with notice of the reasons behind OFAC's actions, a chance to challenge this action before a neutral decisionmaker, and an opportunity for judicial review. Such an amendment would ensure that OFAC can continue to exercise its flexible powers to implement important financial sanctions, while also protecting the constitutional rights of all entities within the United States.