

IMPROVING THE TERRORIST FINANCE SANCTIONS PROCESS

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I. INTRODUCTION

As part of the global effort to combat terrorism, the United States Department of Treasury's Office of Foreign Assets Control (OFAC) administers an economic sanctions program targeting terrorists. This sanctions regime gives OFAC the power to indefinitely freeze all of a legal person's assets and publicly list it as a financier of terrorism. OFAC uses this tool broadly, sanctioning numerous individuals, banks, companies, and charitable organizations worldwide.¹ OFAC terrorist sanctions are a relatively new phenomenon,² and the effectiveness and accuracy of their use are debatable. Yet, they are extremely important on an international scale. The United States leads the global front in this important area of national security: its sanction decisions are largely adopted by the United Nations, which in turn makes them binding upon all signatory nations. Under the current regime, OFAC exercises unilateral discretion in its designation and asset-blocking actions and affords designated entities minimal due process. This Note proposes two measures designed to increase institutional flexibility and enhance the legitimacy and effectiveness of the Department of Treasury's OFAC sanctions.

First, OFAC should adopt a three-tiered system for sanctioning terrorist financiers. Currently, OFAC offers no institutional flexibility, using only one all-or-nothing sanction tool regardless of the nature of the violation. Indeed, it offers a cliff: entities that OFAC investigates are either labeled "Specially Designated Global Terrorists," with all of their assets indefinitely frozen, or they are not listed at all and no action is taken whatsoever. This Note proposes the creation of three tiers of designation—"Specially Designated Global Terrorist" (SDGT), "Out-of-Compliance," and "Questionable Activity"—in order both to give OFAC enhanced flexibility and to better protect the due process interests of *alleged* terrorism financiers.

Second, this Note proposes the creation of a National Security Sanctions Court (NSSC). OFAC would apply to the

1. To view the current list of sanctioned entities, which stood at 437 pages as of the writing of this Note, please see Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons (Feb. 25, 2010), available at <http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf> (last visited Feb. 28, 2010).

2. For discussion, please see *infra* Part I, Section A.

NSSC, composed of Article III judges, for permission to list an entity under one of the three designation categories depending upon the sufficiency of the administrative evidence. The NSSC would allow OFAC to assume a more traditional administrative regulatory role, working in conjunction with entities listed as “Out-of-Compliance” and “Questionable Activity” to remedy their alleged issues. The NSSC would relieve OFAC of its unilateral burden of blacklisting entities and freezing all of their assets, providing an important outside check on this prosecution-like power. The NSSC would also safeguard national security interests by encouraging the development of judicial expertise and by providing for the protection of classified evidence and sources. Finally, the NSSC would enhance the credibility and legitimacy of the OFAC sanctions program and thereby improve U.S. foreign relations.

Part II of this Note explores the legal background of the current OFAC terrorist sanctions regime. Part III critically evaluates the state of the current terrorist sanctions regime. This section explores the prosecution-like power of OFAC, the effectiveness of the regime, and international perspectives on terrorist sanctions and OFAC. Part IV describes the three proposed designation categories and the NSSC in depth and explains how they would improve upon the current system. This section first examines how the three tiers of designation would provide OFAC with greater institutional flexibility. Then, it turns to the NSSC and the benefits of such an institutional check in this area of national security. Next, it examines how implementation of the three tiers and the NSSC would increase cooperation and information-sharing between OFAC and regulated sectors. Finally, Part V addresses counterarguments and challenges to implementing these recommendations. To conclude, this Note argues that creating a three-tiered designation system in conjunction with a NSSC will greatly enhance the legitimacy of OFAC’s terrorist sanctions program. More importantly, it posits that implementing these measures will allow OFAC to be more effective at stopping the flow of terrorist funds.

II. THE LEGAL BACKGROUND OF THE SANCTIONS REGIME

A. *The IEEPA and Executive Order 13,224*

OFAC's power to designate entities as "terrorists" and freeze their assets derives from a combination of executive orders and an annual executive declaration of a national emergency to prevent the expiration of the powers. The International Emergency Economic Powers Act (IEEPA) gives the President authority to deal with "any unusual and extraordinary threat" to national security, foreign policy, or the economy of the United States by regulating and prohibiting transactions made by the "threat."³ In order to exercise this authority, the President must declare a national emergency with respect to the threat.⁴ The National Emergencies Act (NEA) provides that a presidentially declared national emergency terminates on its anniversary if the President does not declare a continuation.⁵ The IEEPA provides that authority to block transactions does not extend to donations by persons under United States jurisdiction that are intended to relieve human suffering.⁶ However, the President may prevent all such donations if he declares they would seriously impair his ability to deal with the emergency declared under § 1701 of the IEEPA.⁷

The IEEPA power was first used with respect to terrorism by President William Clinton in the mid-1990s and was subsequently expanded greatly by President George W. Bush after the terrorist attacks of September 11, 2001. In 1995, President Clinton issued Executive Order 12,947 (EO 12,947), prohibiting transactions with terrorists threatening to disrupt the Middle East peace process.⁸ Exactly two weeks after September 11,

3. 50 U.S.C. §§ 1701, 1702(a)(1) (2008).

4. *Id.* § 1701(a)-(b).

5. *Id.* § 1622(d). The president must declare a continuation and publish it in the Federal Register within 90 days prior to the anniversary date. *Id.*

6. *Id.* § 1702(b)(2).

7. *Id.* § 1702(b)(2)(A). In *Holy Land Foundation v. Ashcroft*, the District Court for the District of Columbia found that the IEEPA exception for humanitarian aid, 50 U.S.C. § 1702(b)(2), applies only to donations of *articles*, such as food, clothing, and medicine, and not to monetary donations. *Holy Land Found. v. Ashcroft*, 219 F. Supp. 2d 57, 68-69 (D.D.C. 2002).

8. Exec. Order No. 12,947, 60 Fed. Reg. 5,079, 5,079-80 (Jan. 25, 1995). The order included a prohibition against donations to relieve human suffering. *Id.* at 5,080. It provided an annexed list of blocked persons, and allowed the Secretary of the Treasury, in conjunction with the Secretary of

2001, President Bush issued Executive Order 13,224 (EO 13,224), exercising his IIEPA authority to declare a national emergency in order to block access to property and prohibit transactions with persons who commit, threaten to commit, or support terrorism.⁹ The order also prohibited donations to such entities that were intended to prevent human suffering, finding such donations would seriously impair the president's ability to deal with the national emergency, as described in § 1702(b)(2) of the IIEPA.¹⁰ Pursuant to § 1622(d) of the NEA, the national emergency declared in EO 13,224 has been continued by the President each year since 2002.¹¹ President Bush included an annexed list of persons against whom the national emergency applied.¹² EO 13,224 also specified that, in consultation with the Secretary of State and the Attorney General, the Secretary of the Treasury may exercise discretion to designate persons as blocked.¹³

The Secretary of the Treasury has the power to designate and block all the assets of legal persons who "assist in, sponsor, or provide financial, material, or technological support for, or

State and the Attorney General, to designate persons who were found to be disrupting the Middle East peace process through acts of violence, providing material support to such acts of violence, or acting as agents of the violent actors. *Id.* at 5,079. Pursuant to § 1622(d) of the NEA, the national emergency declared in EO 12,947 has been continued by the President each year since 1996. Continuation of the National Emergency with Respect to Terrorists Who Threaten to Disrupt the Middle East Peace Process, 61 Fed. Reg. 1,695 (Jan. 22, 1996); 62 Fed. Reg. 3,439 (Jan. 23, 1997); 63 Fed. Reg. 3,445 (Jan. 22, 1998); 64 Fed. Reg. 3,393 (Jan. 22, 1999); 65 Fed. Reg. 3,581 (Jan. 21, 2000); 66 Fed. Reg. 7,371 (Jan. 22, 2001); 67 Fed. Reg. 3,033 (Jan. 22, 2002); 68 Fed. Reg. 3,161 (Jan. 22, 2003); 69 Fed. Reg. 2,991 (Jan. 21, 2004); 70 Fed. Reg. 3,227 (Jan. 21, 2005); 71 Fed. Reg. 3,407 (Jan. 20, 2006); 72 Fed. Reg. 2,595 (Jan. 22, 2007); 73 Fed. Reg. 3,859 (Jan. 22, 2008); 74 Fed. Reg. 3,961 (Jan. 21, 2009). President Clinton added several persons to the designated list in Executive Order 13,099; among them was Osama bin Laden. Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (Aug. 25, 1998).

9. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

10. *Id.* at 49,080.

11. Continuation of the National Emergency with Respect to Those Who Commit, Threaten to Commit, or Support Terrorism, 67 Fed. Reg. 59,447 (Sept. 20, 2002); 68 Fed. Reg. 55,189 (Sept. 22, 2003); 69 Fed. Reg. 56,923 (Sept. 22, 2004); 50 Fed. Reg. 55,703 (Sept. 22, 2005); 71 Fed. Reg. 55,725 (Sept. 22, 2006); 72 Fed. Reg. 54,205 (Sept. 21, 2007); 73 Fed. Reg. 54,489 (Sept. 22, 2008).

12. Exec. Order No. 13,224, 66 Fed. Reg. at 49,083.

13. *Id.* at 49,079-80.

financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to [EO 13,224] or determined to be subject to this order.”¹⁴ Furthermore, the Secretary of the Treasury may designate and block those persons he determines are “otherwise associated” with persons listed in the Annex or previously listed by Treasury.¹⁵ OFAC defines “otherwise associated with” as “(a) To own or control; or (b) To attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to.”¹⁶

Treasury executes its authority through its Office of Foreign Assets Control (OFAC). OFAC implements sanctions regarding terrorism “as part of its general mission to administer and enforce economic and trade sanctions based on U.S. foreign policy and national security goals.”¹⁷ OFAC designates and lists individuals and entities as “Specially Designated Global Terrorists” (SDGTs) for having met one or more of the criteria set forth in EO 13,224 § 1.¹⁸ In the administration of such sanctions, OFAC is charged with:

identifying persons for designation; assisting U.S. persons in complying with the sanctions prohibitions through its compliance and licensing efforts; assess-

14. *Id.* at 49,080.

15. *Id.*

16. 31 C.F.R. § 594.316 (2007). In a challenge to a Treasury “Specially Designated Global Terrorist” (SDGT) listing, the Central District of California ruled in *Humanitarian Law Project v. United States Department of Treasury* that the phrase “otherwise associated with” was unconstitutionally vague because the term did not provide clear meaning, was not defined by OFAC’s regulations, lacked any identifiable criteria in its application, and its enforcement was therefore subject only to the Government’s “unfettered discretion.” *Humanitarian Law Project v. U.S. Dep’t of Treasury*, 463 F. Supp. 2d 1049, 1070 (C.D. Cal. 2006). The court also found the phrase to be unconstitutionally overbroad because it imposed penalties for “mere association with an SDGT.” *Id.* at 1071. When 31 C.F.R. § 594.316 was challenged again, the court determined that OFAC was within its authority under EO 13,224 § 7 in defining the phrase “otherwise associated with” and that the regulation cured the prior constitutional defects. *Humanitarian Law Project v. U.S. Dep’t of Treasury*, 484 F. Supp. 2d 1099, 1105-06 (C.D. Cal. 2007).

17. TERRORIST ASSETS REPORT, OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPARTMENT OF THE TREASURY 1 (2007) [hereinafter TERRORIST ASSETS REPORT 2007] (emphasis omitted), available at <http://www.ustreas.gov/offices/enforcement/ofac/reports/tar2007.pdf>.

18. *Id.* at 4.

ing civil monetary penalties against U.S. persons violating the prohibitions; working with other U.S. Government agencies, including law enforcement; and coordinating and working with other nations to implement similar strategies.¹⁹

The United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) gave the President the additional power to block assets of designated individuals during the pendency of a civil investigation.²⁰ It also provides that, in the case of judicial review of any designation made under 50 U.S.C. § 1702, classified information may be submitted to the court *ex parte* and *in camera*.²¹

Federal courts have allowed the government to utilize *in camera* and *ex parte* review provided by the IEEPA to protect classified and sensitive law enforcement information in challenges to SDGT listings and the blocking of assets pending investigation. In *Global Relief Foundation v. O'Neill*, a charity had its assets blocked by OFAC pending investigation.²² The Seventh Circuit held that the use of classified evidence in an *ex parte* review by the district court was authorized explicitly under the IEEPA.²³ Additionally, in *Al-Aqeel v. Paulson*, the District Court for the District of Columbia rejected the argument that *ex parte* and *in camera* judicial review of classified portions of the record entitled the defendant to the non-classified portions of the record, including privileged and sensitive law enforcement materials.²⁴

B. *Administrative Procedures and Review of OFAC Terrorist Sanctions*

The Treasury has promulgated regulations detailing the extent of its blocking power and the procedures involved. OFAC blocks the funds of terrorists and entities financing terrorists by listing them as SDGTs pursuant to EO 13,224 or “Specially Designated Terrorists” (SDTs) pursuant to EO

19. *Id.* at 1.

20. USA PATRIOT Act of 2001 § 106, 50 U.S.C. § 1702(a)(1)(B) (2008).

21. USA PATRIOT Act of 2001 § 106, 50 U.S.C. § 1702(c) (2008).

22. *Global Relief Found. v. O'Neill*, 315 F.3d 748, 750 (7th Cir. 2002).

23. *Id.* at 754 (citing 50 U.S.C. § 1702(c)).

24. *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 72 (D.D.C. 2008).

12,947.²⁵ SDGTs are either included in the Annex to EO 13,224 or designated by OFAC pursuant to that Executive Order.²⁶ SDTs are designated as such by OFAC pursuant to EO 12,947 because they are found to have committed or to pose a risk of committing violent acts to disrupt the Middle East peace process, or to have materially supported such acts, or to have acted as agents of such violent actors.²⁷ The regulations governing OFAC actions against SDGTs and SDTs are substantially the same, but are legally separate since they were made pursuant to separate Executive Orders. Generally, OFAC prohibits U.S. persons from engaging in any transaction with a designated SDGT or SDT, with limited exceptions granted under OFAC's discretion in the form of licenses.²⁸ Property and interests in property of entities designated as SDGTs or SDTs "are blocked and may not be transferred, paid, exported, withdrawn or otherwise dealt in."²⁹ OFAC defines "interest" in property as an interest "of any nature whatsoever, direct or indirect."³⁰

A designated entity may seek administrative reconsideration of its designation or seek to have such designation rescinded.³¹ It may do so by submitting arguments to OFAC regarding evidence it believes establishes that an insufficient basis for designation exists, or by proposing remedial steps which

25. OFAC has separate regulations for blockings made pursuant to four distinct designations. Regulations 31 C.F.R. § 594.101-901 cover SDGT blockings. Regulations 31 C.F.R. §§ 595.101-901 cover SDT blockings. Additionally, OFAC prohibits transactions with a "Terrorism List Government" pursuant to § 6(j) of the Export Administration Act, 50 U.S.C. app. § 2045 (2008), covered by 31 C.F.R. § 596.101-901. Finally, OFAC may block the assets of any entity listed as a "Foreign Terrorist Organization" (FTO) by the Department of State. Regulations 31 C.F.R. §§ 597.101-901 cover FTO designations. The Secretary of State designates FTOs pursuant to 31 C.F.R. § 597.309 and under authority granted by the Antiterrorism and Effective Death Penalty Act, 8 U.S.C. § 1189 (2009).

26. 31 C.F.R. § 594.310.

27. *Id.* § 595.311.

28. *Id.* §§ 594.202(a)-(d), 595.202(a)-(d). These exceptions extend to businesses, banks, lawyers, etc. that had prior contractual agreements with the designated entity and are currently unable to obtain payment for services rendered. The licenses provide an opportunity to obtain lawful payments owed by the designated entity.

29. *Id.* §§ 594.201(a), 595.201(a) .

30. *Id.* §§ 594.306, 595.307.

31. *Id.* § 501.807.

it believes would negate the basis for designation.³² “Remedial measures” include such actions as corporate reorganization, resignation of persons from positions, or similar steps.³³ OFAC reviews the submissions and may request clarifying, collaborating, or other additional information.³⁴ The designated entity seeking de-listing and de-blocking may request a meeting with OFAC; however, such meetings are within OFAC’s discretion and are not required.³⁵ Finally, after OFAC has conducted its review of the request for reconsideration, it provides the blocked entity with a written decision.³⁶

Comparatively, OFAC provides substantial due process to entities applying for licenses for specific lawful transactions with SDGTs and SDTs and entities violating such license requirements. OFAC strictly prohibits the transfer of any property or any interest in property to an SDGT or SDT without an OFAC-approved license or explicit written approval from the Director of OFAC.³⁷ Disobedience of these prohibitions is punishable by a civil fine up to \$250,000 per violation under the IEEPA.³⁸ Further, any willful violation, upon conviction, is punishable by a fine of up to \$1,000,000 and imprisonment of up to 20 years.³⁹

However, OFAC provides a license application process for those who seek an exception to the prohibition on transacting with any SDGT or SDT. It grants licenses pursuant to procedures outlined in 31 C.F.R. § 501.801 (2008). The Director of OFAC has discretion to grant transaction-specific licenses for transfers such as normal service charges,⁴⁰ provision of funds

32. *Id.* § 501.807(a).

33. *Id.*

34. *Id.* § 501.807(b).

35. *Id.* § 501.807(c).

36. *Id.* § 501.807(d).

37. *Id.* §§ 594.202(a)-(d), 595.202(a)-(d). Any transaction violating such an OFAC ruling is “null and void” and is not the basis of any asserted right, remedy, power, or privilege. *Id.* Furthermore, any charitable contribution or donation in funds, goods, services, or technology, including those to relieve human suffering, may not be made to or for the benefit of an entity whose property interest is blocked by OFAC pursuant to § 594.201(a) or § 595.201(a). 31 C.F.R. §§ 594.408, 595.409.

38. *Id.* §§ 594.701(a)(1), 595.701(a)(1).

39. *Id.* §§ 594.701(a)(2), 595.701(a)(2).

40. *Id.* §§ 594.505, 595.505.

for certain legal services,⁴¹ emergency medical services,⁴² etc. Obtaining licenses for specific transactions requires filing a form containing information about the date of the blocking, the financial institutions involved in the transfer, the beneficiary, and the amount of the transfer.⁴³ Any license granted has only the effect specifically stated on the license and does not authorize any other transaction.⁴⁴

OFAC also provides explicit procedures for challenging any alleged violations of the prohibition on transacting with SDGTs and SDTs. When OFAC has reasonable cause to believe that a violation of the prohibition has occurred, the Director issues a written “pre-penalty notice” to the alleged violator, containing the alleged facts, laws, and regulations violated.⁴⁵ The recipient has thirty days to respond with an explanation as to why a penalty should not be imposed.⁴⁶ A lack of response is considered a waiver of the right to respond.⁴⁷ The response must contain an admission or denial of each specific allegation, information in defense, and other relevant factors; any claim not denied or any defense not made is deemed waived.⁴⁸ After considering a response to a pre-penalty notice, if the Director determines no violation has occurred, he provides notice in writing of the cancellation of the penalty.⁴⁹ However, if the Director determines there has been a violation, a penalty notice is issued in writing and the violator has thirty days to pay.⁵⁰ This notice constitutes final agency action and from there the respondent has the right to seek judicial review in federal court.⁵¹

C. *Judicial Review of the OFAC Terrorist Sanctions Procedures*

Federal courts have generally deferred to OFAC regarding the timing of hearings and the sufficiency of the adminis-

41. *Id.* §§ 594.506, 595.506.

42. *Id.* §§ 594.507, 595.507.

43. *Id.* § 501.801(b)(2).

44. *Id.* §§ 594.502, 595.501.

45. *Id.* §§ 594.702(a)-(b)(1), 595.702(a)-(b)(1).

46. *Id.* §§ 594.702(b)(2), 595.702(b)(2).

47. *Id.* §§ 594.703(a), 595.703(a).

48. *Id.* §§ 594.703(c)(1)-(3), 595.703(c)(1)-(3).

49. *Id.* §§ 594.704(a), 595.704(a).

50. *Id.* §§ 594.704(b)(1)-(2), 595.704(b).

51. *Id.* § 594.704(b)(4).

trative record. In *Al-Aqeel v. Paulson*, the D.C. District Court held that defendants challenging their designations must exhaust administrative remedies prior to seeking judicial review.⁵² The court noted that the regulations provide for reconsideration and rescission of a designation,⁵³ the submission of arguments and evidence in support of the claim that insufficient basis exists for the designation,⁵⁴ the ability to request a hearing,⁵⁵ and the ability to receive a written determination of a request for reconsideration.⁵⁶ The court concluded that, as required by due process, *Al-Aqeel* was afforded both notice and a meaningful opportunity to be heard.⁵⁷

Federal courts have found that the lack of pre-designation notice is justified by the need to prevent entities from moving their funds prior to the blocking of their assets. In *Holy Land Foundation v. Ashcroft*, the same court rejected the defendant charity's claim that the designation and blocking of its assets violated the Due Process Clause of the Fifth Amendment.⁵⁸ The *Holy Land* court described the "extraordinary situation[s]" in which post-seizure notice and hearing are sufficient for due process:

(1) the deprivation [is] necessary to secure an important governmental interest; (2) there has been a special need for very prompt action; and (3) the party initiating the deprivation was a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.⁵⁹

The court found, respectively, that: (1) the OFAC designation and blocking served the important government interest of combating terrorism, overcoming the lack of pre-designation notice; (2) prompt action and lack of pre-designation notice were necessary because such notice would afford the desig-

52. *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 71 (D.D.C. 2008).

53. *Id.* (citing 31 C.F.R. § 501.807 (2008)).

54. *Id.* (citing 31 C.F.R. § 501.807(a)).

55. *Id.* (citing 31 C.F.R. § 501.807(c)).

56. *Id.* (citing 31 C.F.R. § 501.807(d)).

57. *Id.* (citing *Holy Land Found. v. Ashcroft*, 219 F. Supp. 2d 57, 66 (D.D.C. 2002)).

58. *Holy Land Found.*, 219 F. Supp. 2d at 76-77.

59. *Id.* at 76 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-80 (1974) (internal quotation marks omitted)).

nated entity an opportunity to transfer and conceal its assets, making the IEEPA sanctions meaningless; and (3) the blocking action against HLF was initiated by government officials under a narrowly drawn statute.⁶⁰

Referring to the risk inherent in providing pre-designation notice to an SDGT, the Seventh Circuit has stated that the Constitution “would indeed be a suicide pact . . . if the only way to curtail enemies’ assets were to reveal information that might cost lives.”⁶¹ The court found that the Constitution did not entitle Global Relief Foundation, a purported Muslim charitable organization, to a pre-seizure hearing because such an opportunity “would allow any enemy to spirit assets out of the United States.”⁶² The court explained that although pre-seizure hearing is the constitutional norm, emergencies make postponement acceptable because the risks of error that arise in such deferrals must be balanced against the potential for violent attacks if assets are put to illicit use.⁶³ Furthermore, the *Al-Aqeel* court indicated that even direct post-deprivation notice to the listed SDGT was unnecessary. Al-Aqeel was made aware of his OFAC designation as an SDGT by a Department of Treasury press release posted on the Internet.⁶⁴ The court held that Al-Aqeel’s own admission that he learned of his designation online showed that he had received adequate notice.⁶⁵

D. *OFAC Guidance and Collaboration*

OFAC provides each regulated industry with a set of guidelines and/or a “risk matrix,” both of which serve as guidance for the industry.⁶⁶ Due to the scope of the guidance

60. *Id.* at 76-77. Regarding prong three, it is arguable that the IEEPA, when used in conjunction with the NEA in order to empower OFAC to pursue the financial arm of the indefinite “war on terror,” is not a “narrowly drawn statute.”

61. *Global Relief Found. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)).

62. *Id.*

63. *Id.*

64. *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 67 (citing OFAC List of Specially Designated Nationals and Blocked Persons, *available at* <http://www.treas.gov/offices/enforcement/ofac/sdn/>).

65. *Id.* at 71.

66. OFAC Information for Industry Groups, *available at* <http://www.treas.gov/offices/enforcement/ofac/regulations/index.shtml>. OFAC pro-

material and the particularly acute problems regarding terrorist exploitation of the charitable sector, this Note focuses primarily on OFAC's Voluntary Best Practices for U.S.-Based Charities ("Voluntary Guidelines").⁶⁷

Charities are particularly vulnerable to terrorist exploitation, since they have traditionally been one of the least regulated industries. Further, they provide well-established routes for sending funds to some of the world's poorest and most unstable regions, all under the guise of legitimate activity. Terrorist groups can establish sham non-profit organizations as a cover for their terrorist activities without the knowledge of donors, and even unbeknownst to the officers and managers of such organizations.⁶⁸ Non-profit organizations are especially vulnerable to terrorist financing because: (1) they are tax-exempt and receive less scrutiny from the IRS; (2) their directors are usually volunteers, limiting board oversight; (3) their tax exemption means that they retain more money; (4) charities can provide an easy transfer route from the United States to the rest of the world (especially the world's most vulnerable communities); and (5) non-profits are assumed to be legitimate.⁶⁹ The use of non-profits to smuggle terrorist funds also results in several "unintended" consequences, such as the defrauding of well-intended donors, lack of prosecution for those knowingly exploiting non-profits to fund terrorism, donors' hesitancy to make charitable donations, and a decrease in U.S. charities' international charitable giving.⁷⁰

The goal of the Voluntary Guidelines is to "facilitate legitimate charitable efforts and protect the integrity of the charitable sector and good faith donors" by offering ways to prevent

vides guidance and/or risk matrices for the following regulated sectors: Financial Sector, Money Service Businesses, Insurance Industry, Exporters and Importers, Tourism and Travel Credit Reporting, Nonprofit and Nongovernmental Organizations (including the Charitable sector), and Corporate Registration. *See id.*

67. U.S. Dep't of the Treasury, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* [hereinafter Voluntary Guidelines], available at http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf.

68. Jennifer Lynn Bell, *Terrorist Abuse of Nonprofits and Charities: A Proactive Approach to Preventing Terrorist Financing*, 17 KAN. J.L. & PUB. POL'Y 450, 455 (2008).

69. *Id.* at 456.

70. *Id.* at 456-57.

terrorist exploitation.⁷¹ Terrorists abuse charities in order to raise and move funds, provide logistical support, and encourage terrorist recruitment or otherwise cultivate terrorist support.⁷² The Guidelines are voluntary and do not create, supersede, or modify legal requirements, nor do they constitute a legal defense to any civil or criminal liability for violations of law.⁷³ Recognizing the diversity of needs and capabilities of the charitable sector, Treasury promulgates the Guidelines as a risk-based approach to prevention of terrorist abuse of charities.⁷⁴

The Voluntary Guidelines provide that charities, to the extent feasible, should operate according to basic good governance principles, such as accountability, transparency, maintenance of detailed financial records, independent oversight functions, and avoidance of conflicts of interest.⁷⁵ The Voluntary Guidelines detail particular steps to be taken when conducting overseas charitable giving.⁷⁶ Charities are encouraged to thoroughly research foreign grantees via public searches and list-checking to determine if the grantee has been designated as a terrorist by any national or international body.⁷⁷ However, list-checking alone is not sufficient to guarantee safe and secure delivery of funds. Charities are encouraged to utilize all reasonably available means to determine the risk level of a particular charitable operation.⁷⁸ The Voluntary Guidelines also suggest that charities should require grantees to certify that they are in compliance with all laws as a pre-condition to grant-giving.⁷⁹ Additionally, charities should thoroughly vet their own key employees.⁸⁰ Finally, the Voluntary Guidelines strongly encourage charities to report any violations of law they uncover in vetting grantees and employees.⁸¹

71. Voluntary Guidelines, *supra* note 67, at 3.

72. *Id.* at 2.

73. *Id.*

74. *Id.*

75. *Id.* at 3-9.

76. *Id.* at 9.

77. *Id.* at 9-11.

78. *Id.* at 10 n.11.

79. *Id.* at 12.

80. *Id.* at 12-13.

81. *Id.* at 13.

Treasury created the Voluntary Guidelines through an interactive process with the charitable sector and solicited comments regarding its first version of the Voluntary Guidelines.⁸² Treasury “believes the sector is better served through ongoing dialogue regarding the evolving nature of the terrorist threat [and that] Treasury’s engagement with the sector has also resulted in the evolution of the Guidelines into a more effective, relevant, and applicable resource for the sector.”⁸³ The current Voluntary Guidelines reflect changes made after the solicitation and consideration of those comments.

III. THE STATE OF THE CURRENT REGIME

A. OFAC’s Prosecution-like Power

OFAC’s current terrorist finance sanctions process places significant punitive power in the hands of an administrative agency with no external check on that power. Under the current process, judicial review is “essentially futile” since courts use the arbitrary and capricious standard of review and give extreme deference to executive actions related to national security and foreign policy.⁸⁴ Further, the agency is able unilaterally to keep much of the record classified, making successful challenges even more unlikely.⁸⁵ Facing administrative review as their only reasonable alternative, designated entities are allowed to submit only written requests for review, the granting of which is entirely within the discretion of OFAC.⁸⁶ Even the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) cautioned that the use of the IEEPA to block assets

82. U.S. Dep’t of the Treasury, *Response to Comments Submitted on the U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities 1*, available at <http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/response.pdf>.

83. *Id.*

84. Danielle Stampley, Comment, *Blocking Access to Assets: Compromising Civil Rights to Protect National Security or Unconstitutional Infringement on Due Process and the Right to Hire an Attorney?*, 57 AM. U. L. REV. 683, 719-20 (2008) (citing *Nat’l Council of Resistance of Iran v. U.S. Dep’t of State*, 251 F.3d 192, 207 (D.C. Cir. 2001)).

85. David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1398 (2007).

86. *Id.* at 1407-08.

is a powerful weapon with potentially dangerous applications when applied to domestic institutions. This provision lets the government shut down an organization without any formal determination of wrongdoing. It requires a single piece of paper, signed by a midlevel government official. Although in practice a number of agencies typically review and agree to the action, there is no formal administrative process, let alone any adjudication of guilt.⁸⁷

The use of such unconstrained power by an administrative agency is highly questionable.

Arbitrary and capricious judicial review for OFAC designations is inappropriate due to the severity of consequences of designation. Designated entities are not simply subject to a fine, but publicly stigmatized as “terrorists,” with all of their assets indefinitely frozen. OFAC designations push the bounds of administrative power, blurring into the prosecutorial realm. “The elimination of intent, [the] use of secret evidence and *ex parte* proceedings, and the stigma attached to the label ‘terrorist’ . . . suggest that special care should be taken in freezing and forfeiting assets as part of an anti-terrorist regime.”⁸⁸ A sanctioned organization has more at stake than simple property interests, which have been the primary focus of courts.⁸⁹ Being labeled a “Specially Designated Global Terrorist” and having assets frozen “can be just as devastating as a criminal penalty, given both the economic ruin and social stigma associated with such a label.”⁹⁰ Blocked charities are effectively shut down and become unable to provide humanitarian aid.⁹¹

87. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING 112 (2004) [hereinafter MONOGRAPH ON TERRORIST FINANCING], available at http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

88. Laura K. Donohue, *Anti-terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 406 (2006).

89. Stampley, *supra* note 84, at 713 (citing *Holy Land II*, 333 F.3d 156, 164 (D.C. Cir. 2003) and *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 204-05 (D.C. Cir. 2001)).

90. Nicole Nice-Peterson, *Justice for the “Designated”: The Process That Is Due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L.J. 1387, 1414 (2005).

91. *Id.* at 1404.

Entities designated by OFAC receive minimal procedural protections and are subject to disastrous reputational and financial consequences, raising concerns similar to those that led the Supreme Court to create the “stigma-plus” doctrine.⁹² The doctrine provides a constitutional cause of action under the Fourteenth Amendment for damages to reputation via state action.⁹³ Though the doctrine is not directly applicable to OFAC’s federal terrorist sanctions regime, it offers a compelling point of reference for government-initiated reputational damage.⁹⁴ Under the doctrine, in order to violate the Fourteenth Amendment, the government-initiated damage to reputation must be substantial enough to implicate “liberty” or “property” interests.⁹⁵ The “stigma-plus” test states that “the plaintiff must show the public disclosure of a stigmatizing statement by the government, the accuracy of which is contested, *plus* the denial of ‘some more tangible interest . . . such as employment,’ or the alteration of a right or status recognized by state law.”⁹⁶ Viewing OFAC’s current terrorist sanctions regime under the “stigma-plus” rubric indicates that its unilateral power of designation should be checked by greater procedural protections and external oversight.

OFAC is not the only administrative agency that exercises substantial punitive power over regulated entities, but its power implicates more serious procedural, liberty, and property interests. There are many prominent federal agencies that refer cases to the Attorney General and share evidence

92. See *Paul v. Davis*, 424 U.S. 683, 709 (1976) (holding that “governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation”).

93. *Id.* at 712.

94. However, the doctrine arguably could apply via the equal protection component of the Fifth Amendment’s Due Process Clause, which covers federal action.

95. *Davis*, 424 U.S. at 712.

96. *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002) (citing *Davis*, 424 U.S. at 701, 711). In *Wisconsin v. Constantineau*, the Supreme Court stated, “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” 400 U.S. 433, 434-37 (1971) (holding a Wisconsin statute authorizing the “posting” in liquor establishments of the names of individuals who by excessive drinking produce certain conditions or exhibit certain traits unconstitutional in the absence of any notice or hearing).

that is used against the regulated entities in criminal prosecution, such as the Securities and Exchange Commission (SEC)⁹⁷ and the Environmental Protection Agency (EPA).⁹⁸ Many such agencies also have the discretion to level hefty fines against violators of their statutes and regulations.⁹⁹ However, not only does OFAC freeze all of an *alleged* terrorist financier's assets, it also publicly labels that entity a "terrorist." Moreover, it does so unilaterally, without the direct participation of the Attorney General. This is a significantly more severe penal power than that held by other federal agencies.

The devastating effects of the "terrorist" stigma and the indefinite asset freeze that follow designation make the appropriateness of OFAC's prosecution-like role questionable. The current scheme has put financial regulators in the "odd position" of overseeing, dispossessing, and even prosecuting regulated entities.¹⁰⁰ OFAC's conduct results in inexpert banking supervisors taking on a law enforcement role and has resulted in a drastic change in focus in the agency.¹⁰¹ The failure to define these regulatory powers with precision has negatively affected charitable donations by Muslims.¹⁰²

Further, the government often resorts to OFAC designations precisely because it cannot make a successful criminal case of financial support against an alleged terrorist. Because of the Department of Justice's inability to prove financial sup-

97. See 15 U.S.C. § 77t(b) (2009) (granting the SEC the power to bring an action for an injunction for apparent violations in federal district court and giving it the power to refer such matters to the Attorney General for criminal prosecution).

98. See 42 U.S.C. § 6912 (2009) (authorizing the Environmental Protection Agency to initiate and conduct investigations under the criminal provisions of the pertinent statutes and to refer such matters to the Attorney General). For further examples, see 2 U.S.C. § 437g(a)(5)(C) (2009) (conferring power on the Federal Election Commission, when it determines there is probable cause to believe a willful violation has occurred, to refer the matter to the Attorney General for prosecution). See also 15 U.S.C. § 68h (2009) (compelling the Federal Trade Commission to refer matters to the Attorney General for prosecution "[w]henever the Commission has reason to believe any person is guilty of a misdemeanor" under the pertinent statutes).

99. For one example, see 15 U.S.C. § 77t(d) (authorizing the SEC to bring actions in federal district court to impose civil penalties up to \$500,000).

100. Zaring & Baylis, *supra* note 85, at 1400-01.

101. *Id.* at 1405.

102. *Id.* at 1404.

port to terrorists, the government resorts to collateral, or indirect, use of the terrorist designation to shut down organizations via OFAC when it does not have the means to prove the organization actually funds terrorism.¹⁰³ Investigators often choose to err on the side of caution and freeze assets before evidence has been fully developed, to the ultimate detriment of any hopes of prosecution.¹⁰⁴ In addition, the government increasingly uses an OFAC designation in lieu of criminal prosecution because it allows the Office to act against an alleged terrorist entity without disclosing evidence to justify the designation, subjecting evidence to cross-examination, or providing the blocked entity with an opportunity for discovery.¹⁰⁵ Unlike a criminal defendant, who has the right to appointed counsel when his assets are frozen, a designated SDGT has no right to counsel because OFAC sanctions do not constitute criminal prosecution.¹⁰⁶ Further, OFAC is able to utilize the lack of a clear evidentiary standard to base the complete shutdown of an organization on evidence consisting entirely of hearsay, newspaper articles, and/or unsubstantiated intelligence.¹⁰⁷ The lack of any check external to Treasury heightens these due process concerns.

B. *The Effectiveness of the Current OFAC Sanctions Regime*

Current OFAC SDGT designations of Muslim charities may induce observant Muslims to continue to give via less-regulated and harder-to-detect means, such as *hawala* or cash remittance, networks, or alternative remittance systems. Charita-

103. In November of 2008, the Department of Justice finally did win its first prosecution of an entity which had previously been designated as an SDGT by OFAC, when Holy Land Foundation and its five leaders were convicted on all 108 counts, including providing material support to terrorists and money laundering. Gretel C. Kovach, *Five Convicted in Terrorism Financing Trial*, N.Y. TIMES, Nov. 25, 2008, at A16, available at <http://www.nytimes.com/2008/11/25/us/25charity.html>.

104. Kathryn A. Ruff, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 466 (2005-2006).

105. Nice-Peterson, *supra* note 90, at 1404.

106. Stampley, *supra* note 84, at 699 (citing Engel, *infra* note 114, at 251-54).

107. Vanessa Ortblad, *Criminal Prosecution in Sheep's Clothing: The Punitive Effects of OFAC Freezing Sanctions*, 98 J. CRIM. L. & CRIMINOLOGY 1439, 1445 (2008) (citing MONOGRAPH ON TERRORIST FINANCING, *supra* note 87, *passim*).

ble giving, or *zakat*, is one of the five pillars of Islam, making charitable contributions a religious obligation for Muslims.¹⁰⁸ The burden on donors to ensure the innocence of the final use of their charitable contribution may be too high to meet.¹⁰⁹ Noted drops in donations to Muslim charities have occurred because Muslims are afraid of being labeled as terrorists due to connections with a charity that comes under investigation, in addition to the real fear of actually funding terrorism.¹¹⁰ Such restrictions render Muslims unable to fulfill their religious duty.¹¹¹ A study of 30 mosques found that all had suffered a loss of funds since September 11.¹¹² However, freezing assets and introducing sweeping regulations may actually harm important national security interests because they induce terrorists and their financiers to move funds out of the regulated sector and into informal, unregulated networks utilizing *hawaladars* and couriers.¹¹³ Encouraging Muslim-Americans to give openly to established and institutional charities deters them from giving through less formal networks such as *hawalas*, which are extremely difficult to monitor.¹¹⁴

The SDGT listing process may be more about the idea that the government is doing something to stop the flow of money to terrorist organizations than it is about actually stopping that flow. The United States needs to put more emphasis on using signals intelligence and human intelligence to elaborate the financial picture of the ways in which money flows to terrorist organizations. Sweeping actions that push money out of the Western regulated sector only hurt our understanding of how money flows to terrorism.¹¹⁵ In spite of claimed successes with respect to the blocking or freezing of assets, enforcement is erratic and appears not to be a priority.¹¹⁶

108. Ruff, *supra* note 104, at 471-72.

109. *Id.* at 473.

110. *Id.*

111. *Id.* at 484.

112. Donohue, *supra* note 88, at 403-04.

113. *Id.*

114. Montgomery E. Engel, Note, *Donating "Blood Money": Funding for International Terrorism by United States Charities and the Government's Effort to Constrict the Flow*, 12 CARDOZO J. INT'L & COMP. L. 251, 287 (2004) (citations omitted).

115. Donohue, *supra* note 88, at 406.

116. Peter L. Fitzgerald, *Smarter "Smart" Sanctions*, 26 PENN. ST. INT'L L. REV. 37, 51-52 (2007).

Although the OFAC SDGT designation process may provide a sense that the government is taking positive action, that action may not actually be serving the goals intended. While announcements of the number of entities whose assets have been seized and the value of money frozen “may prove helpful for public relations purposes,” they do not indicate whether the regime targets the “right” people nor how important those people are to the flow of terrorist funds.¹¹⁷ Blacklists are inherently under- and over-inclusive.¹¹⁸ Zaring and Baylis argue that the effectiveness of OFAC’s sanctions probably lies mostly in the mere sense that the government is doing something about terrorism.¹¹⁹ While this is probably an overstatement, it highlights the lack of critical oversight of the process.

C. *Europe and Terrorist Sanctions*

The United States and the European Union are the primary actors driving counter-terrorism policy throughout the world. Despite their shared responsibility and largely cooperative and integrated efforts in this regard, important differences exist between the United States and European Union countries regarding terrorist sanctions programs. For example, OFAC designated Hezbollah as an SDGT and froze all of its accounts within U.S. jurisdiction, while the E.U. has not designated the group because it views Hezbollah as a primarily political organization.

The U.S. is the driving force behind the U.N. sanctions list.¹²⁰ Once the U.N. places an entity on its terrorist sanctions list, implementation of the corresponding asset freeze and country-specific listing is binding upon all signatories to the U.N. Charter.¹²¹ Thus, the OFAC process for listing entities as financiers of terrorism has substantial international implications.

117. Donohue, *supra* note 88, at 405.

118. Fitzgerald, *supra* note 116, at 41-42.

119. Zaring & Baylis, *supra* note 85, at 1408.

120. See Ortblad, *supra* note 107, at 1456 (“The majority of the individuals on the [U.N.] Sanctions list were placed there by the Sanctions Committee as a result of recommendations by the United States.”) (citing Per Cramer, *Recent Swedish Experiences with Targeted U.N. Sanctions: The Erosion of Trust in the Security Council*, in *REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES* 85, 88 (Erika de Wet & Andre Nollkaemper eds., 2003)).

121. S.C. Res. 1267 (1999) ¶¶ 7-9.

Important U.S. allies, such as Sweden and France, have criticized the U.N. sanctions regime as over-inclusive.¹²² The European Court of Justice (ECJ) recently decided *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, a case regarding the automatically binding character of the U.N. terrorist sanctions list. The ECJ held that when European Union countries list entities without evidence or any hearing, it violates both the “right of defense” and the “fundamental right to respect for property” under the European Convention on Human Rights.¹²³ The ECJ called the fight against terrorism by all means, including the freezing of funds, “fundamental to the international community.”¹²⁴ It also pointed out that requiring pre-designation notice to listed entities would render the sanctions useless.¹²⁵ However, the court found that the “right of defense,” in particular the right to be heard, had been violated when the Security Council did not make available to the alleged terrorist financiers, Kadi and Al Barakaat, the evidence used against them to justify the sanctions, and moreover failed to do so within a reasonable period after the measures were enacted.¹²⁶ In determining whether the “right to respect for property” had been violated, the ECJ performed a balancing test, as required by the case law of the European Court of Human Rights, and weighed the demands of the public interest against the individual interest implicated. It did so while recognizing that the European legislature “enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest for the purpose of achieving the object of the law in question.”¹²⁷ Nevertheless, it determined that the right to respect for property had been violated because the European Community regulation implementing the Security Council listing and sanctioning Kadi provided no guarantee “ena-

122. See Ortblad, *supra* note 107, at 1457-58.

123. Joined Cases C-402/05 and C-415.05, *Yassin Abdullhah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 2008 E.C.R. I-06351 at *139-40.

124. *Id.* at *143.

125. *Id.* at *134-35.

126. *Id.* at *137-38.

127. *Id.* at *141-42.

bling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him.”¹²⁸ Further, the ECJ noted that freezing is designed to be temporary but results in serious property restrictions not typical of temporary measures:

[It] undeniably entail[s] a restriction of the exercise of Mr. Kadi’s right to property that must . . . be classified as considerable, having regard to the general application of the freezing measure and the fact that it has been applied to him since 20 October 2001.¹²⁹

Thus, the Court recognized that although such freezings are technically “temporary,” they are in practice indefinite and entail a substantial infringement of property rights.

The ECJ’s decision is an important commentary on the U.S. terrorist sanctions process. First, it is a direct rebuke to the largely U.S.-driven Security Council sanctions process. Kadi remains listed as an SDGT by the U.S. Treasury.¹³⁰ Second, the principal court of the E.U., the most important U.S. ally in the war on terrorism, rejected the sanctions as a violation of due process. The ECJ showed great deference to the need for terrorist sanctions but could not allow the freezing to occur with no opportunity for Kadi to see or contest the evidence against him.¹³¹ This decision implies that the severity of terrorist sanctions requires greater respect for fundamental due process rights; the sanctioned entity should be able to view the evidence compiled against it and have a meaningful opportunity to challenge that evidence.¹³²

Whether the E.U. finds a way to address these issues is of critical importance to the United States. It is critical for the U.S. to coordinate counterterrorist sanctions with its European counterparts, since a freeze in the U.S. without a corre-

128. *Id.* at *145-46.

129. *Id.* at *141.

130. U.S. Dep’t of the Treasury, Alphabetical Listing of Specially Designated Nationals and Blocked Persons (as of Dec. 22, 2009), *available at* <http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>.

131. Joined Cases C-402/05 and C-415.05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 2008 E.C.R. I-06351 at *145-46.

132. *Id.*

sponding freeze in the E.U. would seriously undermine the effectiveness of U.S. sanctions. It remains to be seen how detrimental to the U.N. sanctions program the *Kadi* decision will prove to be.

D. *The “Hearts and Minds” Variable*

Critical to winning the so-called “War on Terror” is winning the propaganda and recruitment battle against terrorist groups. Terrorist organizations target some of the most socioeconomically vulnerable members of society, villainizing the United States and Western culture as a scapegoat for such communities’ problems. When OFAC shuts down primarily beneficent charities that provide critical social and humanitarian assistance to communities vulnerable to terrorist rhetoric, it risks fanning the flames of recruitment. OFAC walks a fine line as it seeks to shut down the social welfare programs of terrorist groups without further igniting resentment of U.S. policy.

The highly publicized blacklisting of charities and the “collateral” use of the terrorist designation marginalize Muslims, leading to resentment and susceptibility to anti-American extremist rhetoric.¹³³ People may be involved in raising money for Islamic causes, they may share the Muslim faith, and they may even disagree with U.S. foreign policy, but this does not make them terrorists.¹³⁴ Ethnic targeting caused by financial counterterrorism regimes and the refusal to separate humanitarian issues from terrorist finance bolsters terrorists’ arguments to vulnerable populations that the United States is “solely interested in targeting individuals on the basis of race and religion with little regard for their rights.”¹³⁵ Overzealous enforcement of financial restrictions to combat terrorism jeopardizes and endangers the rights of Muslim communities, undermining the legitimacy of antiterrorism efforts and reducing the chances for necessary international cooperation.¹³⁶ Although financing restrictions express condemnation of terrorist tactics and may promote accountability and reduce ter-

133. Ruff, *supra* note 104, at 495-96.

134. Donohue, *supra* note 88, at 410-11.

135. Donohue, *supra* note 88, at 417-18.

136. Peter Marguiles, *Laws of Unintended Consequences: Terrorist Financing Restrictions and Transitions to Democracy*, 20 N.Y. INT’L L. REV. 65, 69 (2007).

rorists' capabilities, they can also be unfair and ineffective, "undermining transitions to nonviolence and rule of law values."¹³⁷ Subordinated people throughout the world who feel displaced or threatened by globalization tend to blame the U.S., and "restrictions on terrorist financing can exacerbate this trend, by wrongly stigmatizing or penalizing organizations that provide legitimate philanthropic support to the international Muslim community."¹³⁸ When global audiences doubt the legitimacy of enforcement, it makes sanctions regimes inconsistent and ineffective because an effective regime requires international, multilateral commitment.¹³⁹

The United States "has an interest in ensuring that many of these regions remain economically viable and tied to U.S. influence as a way to prevent the creation of a vacuum into which extremist movements can move."¹⁴⁰ Further, while blocking orders deplete the assets of targeted organizations, they also "effectively confiscat[e] good-faith donations solicited fraudulently from Muslim-Americans."¹⁴¹ Fully enfranchising the growing Muslim-American community in our social and political cultures is an essential tool in our counterterrorism efforts and a potent propaganda weapon.¹⁴²

An example of the cost of such over-inclusive sanctions is the case of al-Barakaat, a large alternative remittance system that also served as the principal banking system in Somalia. The United States vigorously pursued freezing the assets of all those with ties to al-Barakaat, and ultimately proved to have done so with woefully inadequate evidence, creating a serious credibility gap in the eyes of many other countries.¹⁴³ Islamic states depend upon alternative remittances for the health and welfare of their communities.¹⁴⁴ Shutting down an important remittance company, like al-Barakaat in Somalia, does not marginalize fundamentalists; it makes them more powerful, because the humanitarian costs are so widespread.¹⁴⁵

137. *Id.* at 75.

138. *Id.* at 83.

139. *Id.* at 86.

140. Donohue, *supra* note 88, at 423-24.

141. Engel, *supra* note 114, at 283.

142. *Id.* (citations omitted).

143. Donohue, *supra* note 88, at 419-21.

144. *Id.* at 423.

145. *Id.* at 424.

IV. MOVING TO A THREE-TIERED DESIGNATION PROCESS AND CREATING A NATIONAL SECURITY SANCTIONS COURT

This Note proposes two reforms to address the due process concerns discussed in Part II and to enhance the effectiveness of OFAC terrorist sanctions. These steps will make OFAC more effective at its primary objective: reducing the terrorist threat. First, OFAC should move from a single, inflexible designation category to a three-tiered system. Second, a federal National Security Sanctions Court (NSSC) should be established by Congress. Although ideally the three-tiered designation process would be complemented by the creation of an NSSC, OFAC could implement the three-tiered designation process unilaterally should an NSSC lack legislative backing.

Assuming both changes are made, OFAC would need to meet one of three established evidentiary burdens in order to designate an entity either for the “SDGT,” “Out-of-Compliance,” or “Questionable Activity” lists for terrorist sanctions. It would present this evidence to the NSSC, an Article III federal court. The NSSC would preside over two forms of hearings: OFAC petitions to designate entities and those entities’ challenges to such designations. When reviewing OFAC applications for designation, the NSSC would implement procedures to account for the government’s national security interest in protecting classified and sensitive evidence. The NSSC judges would develop substantial expertise in dealing with terrorist sanctions and national security matters. OFAC would no longer be the *de facto* judge, jury, and sentencing body but would instead have its prosecution-like power checked by specialized federal judges. OFAC’s regulators could thus focus their energies on building evidence against true terrorist financiers and establishing relationships with regulated industries such as banks and charities—as occurs in the vast majority of other administrative agencies—rather than maintain the current adversarial environment that discourages the sharing of information critical to efficient regulation.

A. *Moving to a Three-Tiered Designation Process*

Critical to improving the relationship between OFAC and regulated entities is a move to a multi-tiered designation process. There is an “enormous” difference between making contributions that eventually find their way into terrorists’ hands

and intentionally funding terrorism.¹⁴⁶ The United States should establish an independent process that would give more consideration to claims that particular individuals intentionally contribute to terrorist movements, allowing the U.S. to freeze the assets of those it determines are the real threat.¹⁴⁷ Such due process protections would ensure that we find and punish those truly responsible for promoting and financing terrorist violence.¹⁴⁸ Fitzgerald argues that in order to achieve a better process, multiple blacklisting categories, which would trigger different levels of restrictive measures, must be created.¹⁴⁹ Under the current regime there is no differentiation between a secondary or tertiary target and a primary target, such as Osama bin Laden. Such a system chills communication between the regulators and the regulated.¹⁵⁰ This Note builds upon Fitzgerald's suggestion of multiple categories by laying the foundation for a three-tiered designation process with distinct evidentiary burdens and distinct penalties.

Under this Note's proposals, OFAC would make applications to the NSSC for permission to designate an alleged terrorist financier, corresponding with the sufficiency of the evidence OFAC has compiled. Similar to warrant applications for surveillance made to the Foreign Intelligence Surveillance Court (FISC), the applications made by OFAC would be in a closed, non-adversarial setting. This would prevent the exposure of classified information and also prevent notice to the designated entity, which might otherwise try to move or hide its assets.

The highest designation level would carry the "Specially Designated Global Terrorist" label currently in effect. Individuals and entities that are primary targets of OFAC sanctions, and against which OFAC can make a criminal-standard showing of "clear and convincing evidence" to the National Security Sanctions Court, will be placed on the SDGT list. This way, even primary targets of the OFAC sanctions will receive at least some further due process in the form of a designation applica-

146. *Id.* at 412.

147. *See id.* at 412-13 (arguing that there is an important distinction between those knowingly funding terrorism and those who do so unknowingly).

148. Nice-Peterson, *supra* note 90, at 1419.

149. Fitzgerald, *supra* note 116, at 52.

150. *Id.* at 52-53.

tion to a neutral federal judge. However, OFAC will be able to maintain the necessary secrecy and surprise needed to effectively freeze terrorist assets. Entities placed on the SDGT list will be dealt with under the current program and will be subject to an indefinite blocking of their assets. Finally, individuals and entities directly funding terrorism will be appropriately labeled as “Specially Designated Global Terrorists.”

Where OFAC cannot meet the “clear and convincing evidence” standard in its showing to the National Security Sanctions Court, it can apply for an “Out-of-Compliance” designation. This secondary level of sanctions would target institutions whose problem appears to be more a matter of compliance than willful funding of terrorism. In order to fine and list an entity as “Out-of-Compliance,” OFAC would have to make an evidentiary showing of a “balance of probabilities”¹⁵¹ to the National Security Sanctions Court that the funds of the regulated individual or entity are winding up in the hands of terrorists. This process would involve a temporary freeze, perhaps 120 days,¹⁵² on the institution’s assets pending resolution of the problems via communication and cooperation with OFAC. The “Out-of-Compliance” entity would receive an immediate and significant civil penalty. The fine should be more than a “slap on the wrist” but not enough to destroy the institution; it might be based upon a percentage of the institution’s total assets. Placement on a list devoid of the word “terrorist” would ameliorate tensions with affected communities and increase the overall credibility of the program, as would the willingness of OFAC to work with the “Out-of-Compliance” entities to remedy their issues. Further, the organization would be appropriately fined for failure to monitor funds, not for funding terrorism. If the institution responds positively and cooperates thoroughly and swiftly to remedy the problems, it could apply to the NSSC to have its name removed from the list. However, if the institution does not implement the OFAC-re-

151. “Balance of probabilities,” also known as “preponderance of the evidence,” is a civil standard.

152. A longer or shorter period may be appropriate. The essential task will be to balance the time necessary to allow for cooperation between OFAC and the designated entity to remedy the funding issues against the fact that freezing the assets for too long will defeat the goal of increasing cooperation and the three-tiered process by rendering the entity defunct.

quested measures, the freeze would become permanent at the end of the 120-day period, and it would be listed as an SDGT.

Finally, a third “Questionable Activity” list would be populated by entities that are not yet “Out-of-Compliance” but must immediately remedy or provide substantial information explaining certain transactions, interactions, or patterns of behavior. In order to place an entity on the “Questionable Activity” list, OFAC would have to show “probable cause” that some of the entity’s assets go to funding terrorism. Landing on the “Questionable Activity” list would entail an immediate temporary freeze with a 120-day period to remedy the problem. Unlike the “Out-of-Compliance” list, no automatic fine would accompany a “Questionable Activity” list designation. The low evidentiary standard would allow OFAC to act with necessary discretion in an important area of national security. At the same time, OFAC would not impose crippling fines or indefinite sanctions on the designated entity based on minimal evidence that the entity funds terrorism. OFAC could assist the designated entity in implementing superior monitoring and governance structures, removing responsible individuals, or shutting down isolated programs by freezing the assets of individuals linked to the specific questionable activity, rather than simply freezing all of the institution’s assets. If the institution provides sufficient information and takes appropriate action to remedy its issues, it could apply within the 120-day period to have its name removed from the “Questionable Activity” list. However, failure to cooperate with OFAC and remedy the problem within the given time period would necessitate a move to the “Out-of-Compliance” list coupled with the automatic fine. The entity would then move through the processes of the “Out-of-Compliance” sanctions category and could eventually be removed from the lists altogether or designated as an SDGT, depending upon its level of cooperation and its efforts to remedy the problems.

B. *The National Security Sanctions Court*

Although the NSSC would be distinct from the Foreign Intelligence Surveillance Court (FISC), the NSSC would borrow some of its features. Like the FISC, the NSSC would be composed of Article III judges. Additionally, the initial application process would be a closed proceeding, with only the

government presenting its case for designation to the SDGT, Out-of-Compliance, or Questionable Activity lists. However, the NSSC is likely to hear significantly more petitions for review than the FISC. Yet the three-tiered designation process should eventually lead to fewer challenges of designations in court and more cooperation between regulated entities and OFAC.

Like the FISC, the NSSC would be created under Congress' Article III power to "ordain and establish" lower federal courts when it deems necessary.¹⁵³ The FISC is composed of eleven U.S. district court judges publicly designated by the Chief Justice of the United States from seven circuits, with at least three of those judges residing within twenty miles of Washington, D.C.¹⁵⁴ A similar appointment procedure would be appropriate for the NSSC.¹⁵⁵ The Foreign Intelligence Surveillance Act (FISA) also provides for a FISC Court of Review, composed of three judges publicly designated by the Chief Justice.¹⁵⁶ The NSSC could adopt a similar appeals structure. However, the NSSC will see more petitions for review than the FISC precisely because those that are subject to FISA surveillance usually do not know they are being surveilled and thus bring few challenges. Conversely, the names of entities designated by OFAC are publicly listed and such entities are generally very cognizant of the fact that all of their assets have been frozen. The NSSC Court of Review would serve a much more prominent role than the FISA Court of Review, then, which has only heard one case to date.¹⁵⁷ The NSSC would primarily relieve OFAC of its role in reviewing the sufficiency of its own evidence, while the NSSC Court of Review would relieve other federal courts of the difficult task of reviewing often highly sensitive classified evidence in OFAC sanctions challenges.

153. U.S. CONST. art. III, § 1.

154. ELIZABETH B. BAZAN, *THE U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT AND THE U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW: AN OVERVIEW* 5 (2007) (citing 50 U.S.C. § 1803(a) (2008)), available at <http://www.fas.org/sgp/crs/intel/RL33833.pdf>.

155. The NSSC might be composed entirely of judges from the Court of Appeals for the District of Columbia Circuit. The proximity of the court to OFAC makes this practical. Additionally, the D.C. Circuit is accustomed to reviewing administrative appeals and records and is potentially more amenable to developing expertise in such an area.

156. BAZAN, *supra* note 154, at 5.

157. *See In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

Despite the recognition that the NSSC Court of Review will assuredly sit in review of more petitions than the FISC Court of Review, the NSSC will eventually review a narrow range of petitions—mainly challenges to SDGT listings. Even in the case of an SDGT designation, the heightened evidentiary requirement of “clear and convincing evidence” necessary to designate an entity as an SDGT under the three-tiered designation system makes it less likely that such a designation will be overturned. Yet, SDGT designation challenges will be the most frequent since the blocking accompanying that designation is indefinite and there is no other avenue for removal from that list. In contrast, entities designated “Out-of-Compliance” should find it more expedient and less expensive to work with OFAC towards compliance and removal from the lists rather than litigating their temporary blockings in the NSSC. Further, the low “Questionable Activity” standard of “probable cause” makes litigation relatively futile in comparison with cooperating with OFAC to remedy the compliance problem.

C. *Protecting Classified Information*

When the NSSC Court of Review hears petitions challenging designations made under the three-tiered application process, it should implement the procedures outlined in the Criminal Intelligence Procedures Act (CIPA). Pre-deprivation notice is unnecessary, but more notice must be provided than simply the unclassified portions of the administrative record in order for a blocked U.S. entity to present a meaningful challenge to the charges against it.¹⁵⁸ Procedures should be created to allow a blocked entity to learn of the nature of the classified evidence compiled against it; at the very least the entity should receive a summarized report.¹⁵⁹ The Classified Information Procedures Act (CIPA) provides a useful model.¹⁶⁰

The Sixth Amendment requires that a defendant “be informed of the nature and cause of the accusation [and] confronted with the witnesses against him.”¹⁶¹ Thus, “the evidence used to prove the Government’s case must be disclosed

158. Nice-Peterson, *supra* note 90, at 1413.

159. *Id.*

160. *Id.* at 1413-14.

161. U.S. CONST. amend. VI.

to the individual so that he has an opportunity to show that it is untrue.”¹⁶² When the government wishes to use secret information obtained by classified sources to make a criminal case, it is often confronted with the choice of either disclosing the information or dropping the prosecution.¹⁶³ Even in cases where the government has sufficient unclassified information to successfully prosecute, the defendant may invoke constitutional, statutory, and rule-based rights of discovery to gain access to classified information. Thus, the defendant may be able to “greymail” the government into a “disclose-or-dismiss dilemma.”¹⁶⁴

The CIPA was enacted in large part to remedy the “disclose-or-dismiss dilemma” in certain government prosecutions. It provides for *in camera* pre-trial determinations regarding the exposure of sensitive information during trial and summarized substitutes of classified information, safeguarding the government’s interest and allowing it to weigh the costs and benefits of prosecution against the disclosure of specific information. At the same time, it provides relief (including the possible dismissal of the suit) for any defendant who would not obtain substantially the same defense when the government refuses disclosure.¹⁶⁵

The NSSC Court of Review should apply the CIPA when it hears challenges to OFAC designations. Doing so will protect the highly sensitive and classified information underpinning OFAC designation listings, while at the same time providing a mechanism through which entities are provided meaningful review of their challenges to OFAC designations.

D. *More Sophisticated Oversight and Cooperation*

Through implementation of the three-tiered designation process and review by the National Security Sanctions Court,

162. *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

163. STEPHEN DYCUS, WILLIAM C. BANKS & PETER RAVEN-HANSEN, *COUNTERTERRORISM LAW* 529 (Wolters Kluwer ed., 2007).

164. *Id.* at 529-30.

165. Classified Information Procedures Act §6(e)(2), 18 U.S.C. app. §§1-16. Where the government refuses to divulge information to the defendant, the court may dismiss the indictment, dismiss specific counts, find against the U.S. on any issue, or strike all or part of the testimony of a witness. Thus, secrecy and justice may be balanced by the implementation of these robust procedural protections.

OFAC will develop into a more sophisticated oversight body, working with and learning from regulated industries. This will require a commitment to communication with regulated entities in order to develop expertise, provide well-informed advice, and establish a clearer picture of the flow of terrorist funds. OFAC currently provides regulated industries with guidance that could benefit from the increased sharing of information. The creation of the NSSC would allow OFAC to shift from an adversarial relationship with regulated entities towards a more cooperative one, develop a refined oversight function, and ensure greater compliance.

Although OFAC has developed admirable guidance for regulated industries, in practice its one-size-fits-all approach to terrorist sanctions discourages collaboration. Adherence to the Voluntary Guidelines may provide useful information to charities generally, but if a charity has not sufficiently vetted a single employee abroad and that employee siphons off funds in order to aid terrorists, the entire charity will be lumped into the same category as Osama bin Laden. Although OFAC solicited comments from the charitable sector, the Voluntary Guidelines for U.S.-based charities sending aid overseas are extremely onerous for small charities and even full compliance would not prevent civil and criminal liability.¹⁶⁶ OFAC's Voluntary Guidelines for charities are reactive, rather than proactive, involve onerous information-gathering responsibilities which are difficult for many non-profits to perform, and are exceedingly costly.¹⁶⁷

The U.S. Treasury Department should provide charities with workable guidelines for complying with existing federal regulations, offer technical assistance, and support charities to facilitate compliance. Treasury should assume the diligence burden because it has the most expertise and resources.¹⁶⁸ OFAC's existing pre-penalty notice procedure for entities applying for licenses to pursue specific, lawful transactions with SDGTs shows that OFAC is already capable of sophisticated collaboration with regulated entities.

166. Ruff, *supra* note 104, at 497.

167. Bell, *supra* note 68, at 461-66 (citing Voluntary Guidelines, *supra* note 67).

168. *Id.* at 468.

OFAC currently provides regulated industries with a risk matrix, but greater cooperation will enhance the accuracy and effectiveness of that guidance. For instance, OFAC could provide entities on the “Questionable Activity” and “Out-of-Compliance” lists with report cards specifying how they measure up in specific financial areas and where improvements need to be made to effectuate removal from the list. Fitzgerald argues that there is a need for “some official avenue” for regulated entities to definitively determine whether parties with whom they are dealing are sanctions targets. He adds that the absence of a communication process between regulators and the regulated community is the single most significant compliance issue with current sanctions programs.¹⁶⁹ Not every failure to identify or block a transaction with a blacklisted party should lead to an enforcement action, and compliance standards should be adjusted for the industry involved and the risk presented.¹⁷⁰ OFAC currently does provide guidance to various industries, yet greater cooperation will only enhance the accuracy and effectiveness of that guidance.

Additionally, it may be appropriate to release funds for attorneys’ fees for an organization attempting to improve compliance. OFAC could offer a presumption for the release of funds for reasonable attorneys’ fees to all organizations that provide it with sufficient information to facilitate the monitoring of such funds.¹⁷¹ The principal argument against such a measure is that money is fungible, so that it could be difficult to monitor if the released funds were actually being used for attorneys’ fees or if they were going to fund terrorism. However, sufficient monitoring should ease such concerns. For example, the court could simply require that any funds be administered through OFAC and paid directly to the attorneys. Such a provision would impose only a minimal additional administrative burden on OFAC, which already performs such monitoring under the license application program.¹⁷² Under such a process, OFAC would have to provide an administrative hearing to justify its decision to deny access to funds, such as

169. Fitzgerald, *supra* note 116, at 44.

170. *Id.*

171. Stampley, *supra* note 84, at 717 (citing *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 730 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 92 (2007)).

172. *Id.* (citing 31 C.F.R. § 585.506 (2007)).

evidence of national security risks.¹⁷³ Finally, *in camera* and *ex parte* review of classified information, along with public review of the administrative record, would be sufficient to support a decision to deny access to funds without jeopardizing national security and foreign policy concerns.¹⁷⁴

V. OBSTACLES TO IMPLEMENTATION

A. *Alternative Remedies*

The most commonly referenced potential improvement to the OFAC designation process is to create a “white list” of entities that are in compliance with OFAC regulations.¹⁷⁵ Additionally, several authors have recommended that review of SDGT designations take place in adversarial hearings before an administrative law judge.¹⁷⁶ Further, at least one author has suggested that Congress act as the overseer of the OFAC sanctions regime.¹⁷⁷ This section explores why the Three-Tiered Designation Process and the NSSC are preferable to these other proposed improvements.

Although the idea of a “white list” has been praised in the literature, the creation of a three-tiered designation process and an NSSC are highly preferable improvements. Donohue calls the creation of “white lists” rewarding regions, states, or entities that prove particularly helpful in tracing terrorist assets an “intriguing approach.”¹⁷⁸ Ruff argues that the U.S. Treasury Department should provide a “white list” of compliant charities to supply donors with information about which charities are working with OFAC, the extent to which they are being reviewed, and the areas of compliance in which they are lacking.¹⁷⁹ Finally, Ruff argues that the creation of a “white list” of charities would signal a “paradigmatic shift” in OFAC’s

173. *Id.* at 717-18.

174. *Id.* at 721.

175. Donohue, *supra* note 88, at 428 (citing Jonathan Winter, *How to Clean up Dirty Money*, FIN. TIMES (London), Mar. 23, 2002, at 1); Ruff, *supra* note 104, at 450.

176. See Nice-Peterson, *supra* note 90, at 1388 (arguing that blocked U.S. entities have a constitutional right to such a hearing).

177. Ortblad, *supra* note 107, at 1464.

178. *Id.* at 428 (citing Jonathan Winter, *How to Clean up Dirty Money*, FIN. TIMES (London), Mar. 23, 2002, at 1).

179. Ruff, *supra* note 104, at 450.

relationship with charities, from adversarial to cooperative.¹⁸⁰ Although this may be true, a “white list” is not a panacea for the challenges inherent in the current SDGT designation process. A “white list” does nothing to solve the problems inherent in the current “blacklisting” system. The problems noted above—namely, a lack of meaningful review, a blurred line between prosecution and regulation, and a heightened risk of error—all remain. Furthermore, a white list does nothing to stop an entity from turning around the next day and funding terrorism, with the full protection of the “white list” label. In other words, the “white list” runs the significant risk of creating counterterrorism officials’ worst nightmare: providing safe harbor for an organization to fund terrorism with the government’s blessing of its “legitimacy.” Ruff, at least, acknowledges that a “white list” should ideally include areas in which the charities are lacking.¹⁸¹ Yet, such an approach suggests that “white list” might be a misnomer and potentially misleading since charities on that Ruff’s white list might still have compliance issues.

Under the Three-Tiered Designation Process and the NSSC, the nightmare-scenario of providing safe harbor to a group funding terrorism would not occur. These improvements would never provide safe harbor to a terrorist group because they provide no mechanism to create such a scenario. Whether an entity is listed as “SDGT,” “Out-of-Compliance,” or “Questionable Activity,” its assets are frozen for at least 120 days. Other than an SDGT listing, which remains indefinite, the entity is then compelled to work with OFAC as much as possible to have its name removed from a list, rather than to get its name included on a safe harbor list. Thus, an entity that successfully cooperates with the government and achieves removal from the “Out-of-Compliance” or “Questionable Activity” lists will be required to continue to report its activities in order to avoid being placed back on the list; under a “white list” regime, terrorist financiers are incentivized to report legitimate activities (and cover up illegal activities) in order to potentially gain safe harbor. Further, OFAC could continue its current procedure of compelling de-listed entities to sign a

180. *Id.* at 501.

181. *Id.* at 450.

statement renouncing the funding of terrorism on penalty of perjury to provide added protection.¹⁸²

Another argument is to make alleged terrorist financiers eligible for hearing before an Administrative Law Judge (ALJ), but the NSSC is preferable. Nice-Peterson argues that entities designated by OFAC have a constitutional right to sufficient notice, an adversarial hearing before a neutral arbiter, and access to the information used against them.¹⁸³ She adds that a blocked U.S. entity should be provided with a hearing before an ALJ in order to remedy the lack of a meaningful opportunity to be heard inherent in the current designation process.¹⁸⁴

The use of an ALJ would do little to alleviate the core due process concerns about the current regime, however. An ALJ would work within the Treasury Department and would not provide the judicial expertise of an appointed Article III federal judge. An ALJ might be more susceptible to problems of institutional inertia and protecting their own position, and thus less willing to deny a designation for lack of sufficient evidence or to de-list entities presenting compelling evidence as to their compliance. Any adversarial process should take place in an Article III court, not within the Treasury Department.

Ortblad persuasively argues for the establishment of clear evidentiary standards for OFAC sanctions. She also suggests that Congress should impose reporting requirements on OFAC to show that it is meeting evidentiary standards.¹⁸⁵ Although this suggestion is laudable for its attempt to provide external oversight, Ortblad focuses on the wrong institutional actor. As a political actor, Congress has an incentive to avoid appearing “soft” on terrorist financing. Political inertia might compel Congress to accept OFAC’s evidentiary determinations regarding terrorist sanctions with great deference, and it is unlikely this would do much to enhance the procedural protec-

182. Adam Szubin, Director of OFAC, Lecture at NYU School of Law (Nov. 14, 2008).

183. Nice-Peterson, *supra* note 90, at 1388.

184. *See id.* at 1415-16 (“OFAC’s current procedures, which provide the blocked entity with only a written review process, without prior full access to the agency record and with no guaranteed opportunity for a hearing or meeting with an OFAC official, fall far short of meeting [an acceptable] standard.”).

185. Ortblad, *supra* note 107, at 1464.

tions. The NSSC would provide a more neutral and appropriate institution to play the oversight role.

B. *Other Challenges*

Under the current OFAC terrorist sanctions regime, the evidentiary standard for designating entities as terrorists and blocking all of their assets is internal and publicly unknown. Under the Three-Tiered Designation Process, the evidentiary levels would be public and the NSSC's opinions granting those designations would be published to the extent they are not classified for national security reasons. Thus, actors would be able to develop a much clearer understanding of just what activity and/or lack of controls could generate OFAC sanctions. While this Note argues that such public knowledge would serve to improve OFAC's relationship with regulated actors, OFAC itself may not be so keen on opening up this highly sensitive process to such public scrutiny.

The principal defense for the secrecy of the current program is the argument that it is *necessarily* over-inclusive and secretive. The NSSC might prevent OFAC from acting with the discretion necessary to stop the flow of terrorist funding. For the sake of avoiding a terrorist attack, it is better for OFAC to be over-inclusive in its sanctions program than under-inclusive. This argument goes on to reason that OFAC needs the ability to act quickly with discretion in order to stem the flow of terrorist funds and, since money is fungible, any additional procedural obstacles may simply give terrorist groups more time to move money and cover their tracks.¹⁸⁶ However, sanctions that are over-inclusive run the great risk of being counter-productive. The ultimate aim of OFAC designations, or any terrorist sanctions program for that matter, is to decrease the flow of funds to terrorist groups and thereby reduce the terrorism threat. Over-inclusive sanctions may alienate vulnerable communities around the world and fan the flames of terrorist rhetoric. By providing more cooperation, more robust procedures, and judicial review, the three-tiered designation process

186. See James B. Conn, *When Democracy Gives the Purple Finger: An Examination of the Proper International Legal Response When a Citizenry Elects a Terrorist Organization to Lead its Government and Seeks International Aid*, 23 J.L. & POL. 89, 105-06 (2007) (arguing that “[i]n many ways, anti-terrorist financing laws are justifiably over-inclusive”).

and the NSSC can help fine-tune the sanctions process and reduce its over-inclusiveness.

Conversely, critics might argue, much as they have with respect to the FISA Court, that the NSSC will be a rubber stamp for executive branch determinations about what is “necessary” for counterterrorism policy. However, the NSSC will improve the status quo regarding due process rights and the accuracy of the terrorist sanctions regime. The Three-Tiered Designation Process alone will not only dramatically improve relations between regulators and the regulated, but it will also provide a more accurate description of what a designated entity is actually culpable for; rather than calling everybody a terrorist, there will be the less-stigmatizing categories of “Out-of-Compliance” and “Warning.” Further, the National Security Sanctions Court of Review will hear adversarial appeals of its determinations, in contrast to the FISA Court of Review. It will directly engage designated entities’ challenges, principally those designated as SDGTs. Most fundamentally, the rubber stamp argument is weaker when made against the NSSC than the FISC because the NSSC will be significantly less secretive than the FISC. The FISC must maintain secrecy in order to prevent individuals from knowing they are subject to surveillance, but the NSSC faces no such necessity. After an entity is designated, it is explicitly notified.

Finally, opponents of the NSSC may echo some of arguments put forth in opposition to a “National Security Court,” as proposed by the likes of Jack Goldsmith and Neal Katyal.¹⁸⁷ Principally, there may be fears that by sanctioning the program under the auspices of a federal court that conducts mainly secretive proceedings, the NSSC might legitimize executive action of questionable constitutionality. In fact, such an argument proves too much, since legitimacy is precisely the aim of the NSSC: legitimizing an ongoing practice that is largely cloaked in administrative secrecy via the use of more robust procedures, better due process protections, more cooperation between the regulators and the regulated, and hearings before an Article III court. OFAC sanctions are ripe for legal critique yet very few commentators offer constructive sug-

187. See generally Jack Goldsmith & Neal Katyal, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, available at <http://www.nytimes.com/2007/07/11/opinion/11katyal.html>.

gestions as to how to improve the process apart from generalizations about improved constitutional standards. The Three-Tiered Designation Process and the NSSC provide two large steps towards bringing these actions into the realm of transparency and oversight and ensuring that Treasury alone is not the prosecutor, judge, and sentencing body.

VI. CONCLUSION

OFAC undoubtedly operates the most sophisticated terrorist sanctions program in the world, but it is also a program that was put together hastily and rests upon an awkward legal edifice. It unnecessarily sacrifices due process and transparency objectives for national security goals. The creation of a Three-Tiered Designation Process and a National Security Sanctions Court are institutional improvements that will alleviate many of the constitutional and practical concerns inherent in the current OFAC designation process.

The creation of a three-tiered designation process and the NSSC are institutional improvements to the current OFAC terrorist sanctions program that should be appealing to OFAC and the government generally. Nothing is lost if the government adopts this institutionally flexible system and much is gained. Of course, the government might argue that secrecy is lost, but adopting the CIPA procedures would do much to alleviate such a concern. The creation of the three-tiered system does not open up the government or the American people to new risks, since OFAC retains almost unfettered discretion to place entities on the Questionable Activity list and impose a temporary asset freeze as it compiles an administrative record. Moreover, the NSSC would place the OFAC sanctions regime on more solid statutory and constitutional footing by enhancing procedural protections and checks.

However, with media coverage of international and domestic counterterrorism resting almost squarely upon rendition and Guantánamo, there may not be enough political interest to address the inefficiencies and due process concerns in the OFAC terrorist sanctions process anytime soon. Despite the potential for insufficient executive and/or legislative momentum in support of an NSSC, the three-tier designation system can always be adopted internally by OFAC via regulation.

OFAC must at the very least adopt more robust and transparent internal procedures for its terrorist sanctions regime.¹⁸⁸

The NSSC would be a significant improvement over the current OFAC terrorist designation and blocking process. In spite of the serious power that it wields, OFAC currently designates entities as SDGTs in a process that is entirely within its discretion and control. OFAC has power over every step of the process; from the decision to investigate, to the designation of entities and indefinite blocking of assets, to the decision whether or not to review the designation, OFAC wields authority to label entities and individuals as “terrorists” and block all of their assets for indefinite periods of time. Such power should not be vested in a single, unelected organ of our federal government without any true checks. An NSSC would provide enhanced legitimacy to the process by putting the burden on federal judges, and not OFAC alone, to determine

188. If Congress does create an NSSC, it might also consider a realignment of national security courts on a larger scale. The creation of the National Security Sanctions Court may help lay the foundation for a broader National Security legal framework. The FISC is already established as an Article III court specializing in national security intelligence matters. The NSSC would serve a similar function for financial sanctions. President Obama has signed an executive order authorizing the closure of Guantanamo Bay within the upcoming year. Various prominent commentators have called for the creation of a national security court over the past few years to handle just such detainees. Rather than maintain three separate national-security-related court systems, the legitimacy of each court and the efficacy of the judicial branch in dealing with such matters may be enhanced by placing them under the same umbrella. The court handling detainee designations as “enemy combatants” or the like would be an Article III court, yet would operate on the same institutional level as the FISC and the NSSC; we will call it the National Security Detainee Court (NSDC). A National Security Court of Appeals would operate as an appellate body serving all three national security courts: the FISC, the NSSC, and the NSDC. This would eliminate the need for the FISC Court of Review and the NSSC Court of Review. Instead, all reviews of FISC grants of warrants would occur at the National Security Court of Appeals. Appeals of detainee designations and secondary appeals of NSSC designations would occur at the National Security Court of Appeals as well. Finally, decisions of the National Security Court of Appeals could be appealed to the Supreme Court of the United States. This altered framework would provide a coherent institutional landscape for Article III courts handling matters of national security. It would allow for the development of judicial expertise in ways not possible if the three systems are maintained separately. It would provide for greater transparency and legitimize what has been a very secretive and ad hoc process of development on all fronts.

whether OFAC has compiled sufficient evidence to justify the use of its extraordinary sanctions power.

A Three-Tiered Designation Process would rectify the lack of flexibility inherent in the current system, which discourages cooperation and results in the somewhat random application of sanctions. Under the current process, OFAC either labels entities as terrorists and authorizes an immediate, indefinite, and crippling asset freeze, or leaves them alone altogether. A Three-Tiered Designation Process would provide much needed flexibility by allowing OFAC to list entities and begin to work with them towards compliance in conjunction with a temporary freezing rather than the blunt all-or-nothing current regime, which discourages cooperation.

A Three-Tiered Designation Process and an NSSC would not remedy all of the infirmities in the current process; no system could. Determined terrorist financiers will always work to thwart whatever controls are adopted. However, the Three-Tiered Designation Process and the NSSC provide a more effective method of achieving the ultimate goal of the sanctions program: reducing the terrorist threat. The Three-Tiered Designation Process could allow OFAC to engage the regulated industries and the communities most vulnerable to terrorist recruitment. OFAC's terrorist sanctions program, like many other actions in the "War on Terror," has been widely criticized but very little has been offered as a legitimate alternative or improvement. A Three-Tiered Designation Process and an NSSC provide two ways to legitimize a necessary sanctions program, enhance relations with the regulated industries, improve relations with vulnerable populations around the world, and augment the constitutional legitimacy of sanctions in our global battle against terrorism.