Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism

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I. INTRODUCTION

On November 7, 2001, FBI agents conducted six major raids in Minneapolis, Seattle, Columbus, Boston, Falls Church, and Alexandria.[1] The target of each of those raids was the Al-Barakaat organization—believed by Treasury and Justice Department officials to be one of many informal financial lending networks operating in the United States and channeling funds to various terrorist organizations.[2] On December 4, Al-Aqsa Islamic Bank and Beit el-Mal Holdings, an investment group, had their assets frozen under the authority of an Executive Order issued earlier that day.[3] As a result of that same order, the Bush Administration froze the assets of Texas-based Holy Land Foundation for Relief and Development, identified by officials as a key source of financing for the terrorist group HAMAS.[4] On December 14, as federal agents searched the premises of the Benevolence International Foundation office in Newark, agents that same day could be seen carting materials from Global Relief Foundation in Bridgeview and the Benevolence International Foundation in Palos Hills in Chicago.[5]

In the aftermath of the terrorist attacks of September 11, 2001 (9/11), many focused their attention on the potential impact the U.S. response would have on civil liberties. Few, if any, took note or even treated seriously this other dimension of the U.S. response to the 9/11 attacks.[6] The Bush Administration is currently waging an "economic

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1. *See* Dana Milbank & Kathleen Day, *Businesses Linked to Terrorists Are Raided; Allies Target Two International Financial Networks*, WASH. POST, Nov. 8, 2001, at A1.

2. *See id.* Known more commonly in the Middle East as *hawalas*, these organizations have been successfully funneling funds out of the United States under the cover of seemingly innocuous, unrelated small-store fronts. *See* Kathleen Day, *U.S. Islamic Cash Outlets Investigated; 'Hawalas' Suspected in Terror Funding*, WASH. POST, Nov. 7, 2001, at A1, A16.

3. *See* Mike Allen & Steven Mufson, *U.S. Seizes Assets of 3 Islamic Groups*, WASH. POST, Dec. 5, 2001, at A1, A22.

4. "Treasury Department officials said Bush's order immediately froze $1.9 million in [Holy Land] foundation funds in at least five U.S. banks. The foundation's offices in California, Illinois and New Jersey also were raided." *Id.* at A22.

5. *See* Hanna Rosin, *U.S. Raids Offices of 2 Muslim Charities; Groups Accused of Funding Terror*, WASH. POST, Dec. 16, 2001, at A28.

6. The administration's immediate response of freezing assets was quickly parodied on television shows like *Saturday Night Live*. Comedian, Will Ferrell, impersonated the President with the following address to the American people:

war" against those who provide financial assistance to terrorist groups.[7] While economic sanctions and asset freezes are not unfamiliar ground to the executive branch,[8] such actions have accelerated at break-neck speed in the post-9/11 response period. President Bush signed Executive Order 13,224 on September 23, 2001, listing those individuals and foreign entities whose assets will be frozen.[9] Since that order, the U.S. Treasury Department has substantially expanded the list threefold in an effort to disrupt the financial network of the terrorist organizations.[10] But as aggressive as the Administration may be in identifying terrorists' support sources, the current policy of simply freezing assets is undoubtedly myopic with respect to the long-term consequences of such actions. The process by which assets are frozen may be better suited in the context of trade policy than the routing of terrorists, for it places broad discretion in the hands of an executive agency without any real judicial oversight or any regard to other interests. Keeping assets in limbo for an indefinite period may be a convenient form of leverage for the U.S. State Department, but it has never proven to be a consistent deterrent against terrorist activity by rogue nation states or even worse, transient, underground terrorist cells. Ultimately, such assets may be put to better use by compensating the victims of terrorism.

The purpose of this Comment is twofold: after an Executive Order establishes which assets are to be frozen, Part I of this Comment seeks to identify the actual administrative process that is used to deal with those foreign assets, as well as to explain the legal basis for such promulgations by the U.S. Treasury Department. After explaining this broad, discretionary power exercised by the Executive, Part II seeks to demonstrate the contradictory approach often employed by the Executive when it

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> Good evening, America. I'd like to address my remarks tonight to Mr. Osama bin Laden. . . . [I]f there's one thing I'm good at, it's punishing evil-doers . . . I'm sorry I wasn't there to see your face when you went to the Kabul ATM to get some Quick-Cash. I bet it said "Insufficient Funds." That's right—we froze your assets. It probably ate your card, too." *Saturday Night Live* (NBC television broadcast, Oct. 6, 2001) *at* http://www.snltranscripts.jt.org/scripts/01bbush.phtml.

7. To clarify, the military action in Afghanistan is known as "Operation Enduring Freedom." The massive domestic and international effort to assess the financial network supporting terrorism is known as "Operation Greenquest."

8. Even a week prior to the 9/11 attacks, FBI agents in Richardson, Texas performed a raid on InfoCom Corp., a Palestinian-owned internet company suspected of funneling funds to Middle East Terrorist organizations. *See* Karen DeYoung, *Past Efforts to Stop Money Flow Ineffective; Coordination of U.S. Approach May Be Key*, WASH. POST, Sept. 25, 2001, at A8.

9. *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001); *see also* John Mintz & David S. Hilzenrath, *Bush's Target List Draws Path to Bin Laden's Backers*, WASH. POST, Sept. 25, 2001, at A9.

10. *See supra* notes 1-5 and accompanying text.

attempts to bar claims by Americans against the same foreign entities whose assets have been frozen. This Comment questions the utility of this double standard pursued by the current and past administrations of persistently blocking U.S. citizens claims against assets that are to be held as bargaining chips against foreign states. It is the author's contention that the time has come for the Executive to adopt a more consistent approach across the board when dealing with particular nations and foreign entities that consistently have failed to curb their involvement in activities against U.S. interests. It is further the contention of this Comment that the current enactment of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), including the recent Flatow Amendment, arguably signals a shift away from what was once a consistent period of congressional acquiescence to the Executive Branch in this area of the law.

II. ECONOMIC SANCTIONS AND ASSET FREEZES

A. The U.S. Treasury Department's Office of Foreign Assets Control (OFAC)

Upon signing the Executive Order, the President gives official notice of the U.S. government's intent to seize a specific entity's assets. But the bulk of the administrative work that ensures the order is followed occurs outside of the Oval Office in the U.S. Department of Treasury.[11] More specifically, it is the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) that coordinates both the prohibition on designated economic transactions between "target nations" and U.S. citizens, as well as the seizure or "freezing" of specific assets.[12]

These two broad functions of OFAC are perhaps best explained if introduced in the form of a pyramid formulation. Starting with the top point of the pyramid, one finds highly specific proscriptions on transactions with certain financial assets.[13] These proscriptions on assets,

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11. *See generally* Havana Club Holding, S.A. v. Galleon, S.A., 961 F. Supp. 498, 500 (S.D.N.Y. 1997) (citing Sardino v. Fed. Reserve Bank of N.Y., 361 F.2d 106, 109 n.2 (2d Cir. 1996). The President's power to order foreign assets seized originated in the Trading with the Enemy Act (TWEA). *Id.* In 1942, this power was delegated specifically to the U.S. Department of Treasury. *Id.* Twenty-four years later, the Treasury Department specifically assigned the administration of foreign assets to the Office of Foreign Assets Control (OFAC). *Id.*

12. *See id.*; *see also* R. Richard Newcomb, *Office of Foreign Assets Control*, *in* COPING WITH U.S. EXPORT CONTROLS 1998, at 115, 120-21 (PLI Comm. Law & Practice Course, Handbook Series No. A-782, 1998).

13. *See* Peter L. Fitzgerald, *If Property Rights Were Treated Like Human Rights, They Could Never Get Away With This": Blacklisting and Due Process in U.S. Economic Sanctions Programs*, 51 HASTINGS L.J. 73, 105-06 (1999).

more commonly known as "freezing,"[14] occur after OFAC has determined that: (1) targeted nations and/or individuals have an interest in these assets and (2) these assets are "subject to U.S. jurisdiction, or are in the possession or control of U.S. persons."[15] The consequence of freezing an asset is that financial property such as a bank deposit "cannot be paid out, withdrawn, set off, transferred or dealt in in any manner without a Treasury license."[16] Financial accounts are not the only form of property susceptible to economic sanctions. Arguably any form of property, ranging from real to intellectual property, may be seized by the government if it falls within the assets criteria noted above.[17]

Prohibitions on economic activity with targeted countries and individuals exist above the tier of frozen assets. At this level, either the importation/purchase of "certain goods, services, or technology" from a designated country may be barred, or the exportation of products and services from the United States to such a country may be similarly barred.[18] The ultimate action then, exists at the base of the pyramid, which is an all-out comprehensive ban on any economic transaction with the designated nation.[19]

The underlying motivations behind these OFAC promulgations are what the Bush Administration and prior administrations have determined will further foreign policy and national security goals.[20] Thus, with these

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14. *See id.* at 79 n.25. While the term "freezing" is commonly used to describe actions taken against foreign assets by OFAC, Fitzgerald is highly critical of the agency's failure to uniformly define the obligations and rights for those owners of frozen assets. He suggests that OFAC's occasional use of the term "blocking" implicates different rights for owners of "blocked assets." By interchanging these terms without any explanation, Fitzgerald laments that OFAC has needlessly complicated an already confusing set of regulations.

15. Newcomb, *supra* note 12, at 120.

16. *Id.*

17. *See* Fitzgerald, *supra* note 13, at 74-83 (detailing the seizure of a New York corporation whose majority shareholders were associated with the Federal Republic of Yugoslavia and therefore "targeted" by OFAC). In this case, the building and all equipment came under the possession of the U.S. government. *Id.* As no surprise, litigation has arisen with each newly "designated target" by OFAC. Shipping vessels have been seized. *See* Milena Ship Mgmt. Co. v. Newcomb, 995 F.2d 620 (5th Cir. 1993). Ownership and use of trademarks have been contested as violating OFAC regulations. *See* Havana Club Holding, S.A. v. Galleon, S.A., 961 F. Supp. 498, 500 (S.D.N.Y 1997).

18. Newcomb, *supra* note 12, at 120-21.

19. *Id.*

20. *Id.* As broad as these stated goals may appear, language in President Bush's recent Executive Order No. 13,224, allows for an even broader justification of the "national interests of the United States." In section 5 of this Executive Order, the President grants the Treasury Secretary the ability to take action beyond "blocking assets" provided that the Secretary has consulted with the Secretary of State and the Attorney General, and such actions are "consistent with the national interests of the United States." Exec. Order No. 13,224, 66 Fed. Reg. 49,081 (Sept. 25, 2001).

objectives in mind, President George W. Bush and his predecessors have authorized OFAC to administer the following sanctions programs involving: Burma (Myanmar),[21] Cuba,[22] Iran,[23] Iraq,[24] Libya,[25] Liberia,[26] North Korea,[27] Sierra Leone,[28] Sudan,[29] Taliban (Afghanistan),[30] Yugoslavia (FRY S & M),[31] Yugoslavia (FRY-Kosovo),[32] and Yugoslavia (FRY—Milosevic).[33]

While the recent OFAC promulgations against those "specially designated terrorists" do not implicate a specific foreign sovereignty, the United States has identified nonsovereign organizations in the past that pose threats to the national interests of the United States.[34] Those programs against nonsovereign organizations that do not concern terrorist activity include the Balkans,[35] "National Union for the Total Independence of Angola" (UNITA),[36] those engaged in transactions of highly enriched uranium originating from the Russian Federation's nuclear weapon stockpile,[37] and those entities or individuals engaged in

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21. *See* Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 22, 1997). Upon finding that the government of Burma has "committed large-scale repression of the democratic opposition in Burma," President Clinton ordered the prohibition of any new investment in Burma. *Id.*

22. *See* Exec. Order No. 12,854, 58 Fed. Reg. 36,587 (July 7, 1993) (Implementation of the Cuban Democracy Act).

23. *See* Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (Aug. 21, 1997). As the official OFAC website indicates, since 1979, approximately seventeen Executive Orders have been filed concerning threats to the national interest by the state of Iran. OFAC website, *available at* http://www.ustreas.gov/offices/enforcement/ofac/legal/iran.html. Most of the orders were generated by the U.S.-Iranian hostage crisis. *Id.* The Clinton Administration issued the most recent order "prohibiting certain transactions with respect to Iran." *See* Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (Aug. 21, 1997).

24. *See* Exec. Order No. 12,817, 57 Fed. Reg. 48,433 (Oct. 23, 1992) (concerning the transfer of certain Iraqi government assets held by domestic banks); Exec. Order No. 12,724, 55 Fed. Reg. 33,089 (Aug. 13, 1990) (blocking Iraqi government property and prohibiting transactions with Iraq); Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (Aug. 3, 1990).

25. Exec. Order No. 12,801, 57 Fed. Reg. 14,319 (Apr. 17, 1992); Exec. Order No. 12,544, 51 Fed. Reg. 1235 (Jan. 10, 1986); *See* Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 9, 1986).

26. *See* Exec. Order No. 13,213, 66 Fed. Reg. 28,829 (May 24, 2001).

27. *See* 31 C.F.R. § 500.328 (2001).

28. *See* Exec. Order No. 13,213, 66 Fed. Reg. 28,829 (May 24, 2001).

29. *See* Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (Nov. 5, 1997).

30. *See* Exec. Order No. 13,268, 67 Fed. Reg. 44,751 (July 3, 2002).

31. *See* Exec. Order No. 12,934, 59 Fed. Reg. 54,119 (Oct. 25, 1994).

32. *See* Exec. Order No. 13,088, 63 Fed. Reg. 32,109 (June 12, 1998).

33. *See* Exec. Order No. 13,192, 66 Fed. Reg. 7379 (Jan. 23, 2001).

34. *See* Fitzgerald, *supra* note 13, at 107-08.

35. *See* Exec. Order No. 13,219, 67 Fed. Reg. 34,777 (June 26, 2001) (blocking property of those who threaten the international stabilization efforts in the Western Balkans).

36. *See* Exec. Order No. 13,069, 62 Fed. Reg. 65,989 (Dec. 16, 1997); Exec. Order No. 12,865, 63 Fed. Reg. 51,005 (Sept. 29, 1993).

37. *See* Exec. Order No. 13,094, 66 Fed. Reg. 40,803 (July 30, 1998).

narcotics trafficking.[38] The vast range of these programs administered by OFAC combined with the changing foreign policy initiatives of successive presidential administrations have drawn criticism.[39]

On the other hand, trade embargoes provide much needed leverage, and since frozen assets are equally important bargaining chips for curbing actions of targeted nations and individuals, such proscriptions by OFAC are by no means absolute.[40] As foreign policy objectives are achieved to the administration's satisfaction, seized assets could theoretically "thaw out," thereby allowing access to previously blocked asset-holders.[41] In addition, OFAC permits certain economic activity between U.S. "persons" and targeted nations or entities by means of a licensing procedure.[42] Still further, depending on the nature of the activity, some transactions may fall within those categories expressly exempted by OFAC.[43]

The freezing of assets should not be considered an exclusive punitive measure.[44] A recent example of "protective freezing" is illustrated by the events that precipitated the 1990-1991 Persian Gulf War, i.e., Iraq's early efforts to occupy Kuwait.[45] In an attempt to protect Kuwaiti assets, the U.S. government immediately froze those assets within U.S. jurisdiction, effectively protecting those assets until the resolution of that conflict.[46]

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38. *See* Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 24, 1995).

39. The OFAC programs can change significantly in nature over only a year's time. *See* Anne Q. Connaughton, *Exporting to Special Destinations or Entities: Terrorist-Supporting and Embargoed Countries, Sanctioned Countries or Entities*, *in* COPING WITH U.S. EXPORT CONTROLS 1999, at 369, 373-80 (PLI Comm. Law & Practice Course, Handbook Series No. A-798, 1999). Some suggest the expanding and contracting of these programs' targets amounts to basic political blacklisting. *See* Newcomb, *supra* note 12, at 121.

40. Newcomb, *supra* note 12, at 120.

41. *See* Neil E. McDonell, *Thaw Is Possible for Frozen Iraqi Assets*, NAT'L L.J., July 27, 1992, at 25; Neil E. McDonell, *Efforts to Unfreeze Iraqi Funds Continue*, NAT'L L.J., Mar. 15, 1993, at 21 [hereinafter McDonell, *Efforts to Unfreeze Iraqi Funds Continue*].

42. 31 C.F.R. § 501.801 (2001).

43. Exempted categories are as follows:

> (1) information and informational materials; (2) personal communications; (3) travel; (4) journalistic activity; (5) humanitarian donations; (6) personal transfer of funds to "non-blocked" individuals, in which such transactions would in no manner benefit "blocked/targeted" individuals.

Newcomb, *supra* note 12, at 133-34.

44. *Id.* at 127-28.

45. *Id.*

46. *Id.*

B. The Statutory Authority for OFAC

1. Section 5(b) of the Trading With the Enemy Act (TWEA)[47]

Economic sanctions have always played a vital role in shaping U.S. foreign policy, even in its crudest and earliest form of colonial boycotts.[48] Yet the statutory basis for the use of economic sanctions to shape U.S. foreign policy originates with the enactment of the TWEA "six months after the United States entered into World War I."[49] Therefore, the intention of Congress in enacting the TWEA was to deter the nationals of a state from dealing commercially with declared enemies of the United States.[50] While the intention of Congress was primarily to confer this power to the Executive during wartime alone, this limitation did not last for very long.[51] By relying on the Act to order the "banking holiday" in the 1930s, President Roosevelt would be the first among several other administrations to broaden the interpretation of the TWEA.[52] Congress quickly amended the TWEA to provide the textual basis for this peacetime action by inserting language allowing the President to take economic action when a national emergency exists.[53]

2. The International Economic Emergency Powers Act (IEEPA)[54]

Enactment of the IEEPA in 1977 signaled a possible retreat from the broad grant of power delegated to the Executive through an amendment to the TWEA to include a national emergency provision.[55] Congress would have the IEEPA govern the use of economic sanctions by the Executive during the peacetime periods, and then only with its prior approval would sanctions go forward.[56] The TWEA would remain for wartime uses only. Any sanctions in effect prior to the IEEPA were to be grandfathered in.[57] But despite the congressional attempt to place a

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47. *See* 50 U.S.C. app. § 5(b)(1) (1990).
48. Stanley J. Marcuss, *Grist for the Litigation Mill in U.S. Economic Sanctions Programs*, 30 LAW & POL'Y INT'L BUS. 501, 501-02 (1999).
49. *Id.* at 501.
50. *See* Michael P. Malloy, *Economic Sanctions and Retention of Counsel*, 9 ADMIN. L.J. AM. U. 515, 518-19 (1995).
51. *Id.* at 518.
52. *Id.*
53. *Id.* at 518-19.
54. *See* 50 U.S.C. §§ 1701-1706 (1994).
55. *Id.*
56. *Id.*
57. *Id.*

check on presidential power to enact sanctions during peacetime, the "controlling devices" were short-lived.[58]

C. Judicial Review of OFAC and Executive Authorized Sanctions

1. The Supreme Court Recognizes the Preference of the Executive Branch in Determining Foreign Policy

In two key rulings during the 1980s, *Dames & Moore v. Regan* and *Regan v. Wald*, the United States Supreme Court directly addressed the question of whether the Executive had such broad, discretionary authority to act under the IEEPA and the TWEA.[59] In *Dames & Moore*, the petitioner alleged that the President lacked any authority to transfer funds to Iran under the Algiers Accords.[60] At the outset of *Dames & Moore*, the Court reaffirmed what it considered to be the prevailing policy behind both Acts.[61] The Court noted that the President relied on the option of freezing assets, because it served as a "bargaining chip" when dealing with typically "hostile foreign countries."[62] Equally important, the Court expressly noted that the power of the Executive to enter into claims agreements over foreign assets stems essentially from Congress' reluctance to set any limit on such power.[63] While the Court acknowledged that the intention of the IEEPA was to limit the power of the President during peacetime, it nevertheless concluded that the final enactment of the IEEPA did not result in any significant change in the power of the Executive to control these foreign assets.[64] Specifically, the Court referred to Congress being reticent to take any actions as the history of "congressional acquiescence in this area."[65]

In *Regan v. Wald*, the Supreme Court was again asked to review the legitimacy of the Executive Order for sanctions against Cuba.[66] In *Wald*, the Court upheld the sanctions, explaining that they were properly

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58. *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1264-65 nn.35-40 (1988) (discussing the effect of the Supreme Court's ruling invalidating the use of legislative vetoes in INS v. Chadha as well as the Court's upholding of grandfathered sanctions against Cuba recognized by the IEEPA).

59. Dames & Moore v. Regan, 453 U.S. 654, 660 (1981); Regan v. Wald, 468 U.S. 222, 232 (1984).

60. 453 U.S. at 660-64.

61. *Id.* at 673.

62. *Id.*

63. *Id.* at 681-83.

64. *Id.* at 672-73.

65. *Id.* at 682-83.

66. *See* Regan v. Wald, 468 U.S. 222, 224 (1984).

grandfathered into the IEEPA from the TWEA period.[67] Commentators have pointed out that the cumulative effect of these two opinions, along with the removal of the legislative veto in *INS v. Chadha*, is to bestow a tremendous discretionary power on the President.[68] The Executive need only identify "a national emergency" before ordering sanctions or requesting OFAC to promulgate regulations regarding foreign assets.[69]

2. Review of OFAC Regulations in the Lower Courts

Despite the academic criticism of OFAC regulations and procedure,[70] many lower courts follow the deferential approach to OFAC demonstrated by the Supreme Court in *Dames & Moore* and *Regan v. Wald*.[71] At the outset of most of these cases, courts begin by determining the appropriate standard of review. Since the alleged injury supposedly results from an executive agency's action, the standard of review is provided by the Administrative Procedure Act.[72] Therefore, challenged conduct by OFAC is reviewed under the standard that it should be accorded deference as long as it serves some rational purpose and is "not arbitrary and capricious."[73]

OFAC's licensing procedure, the process by which it permits specific transactions that would ordinarily be barred by OFAC regulations on a case-by-case basis, has prompted a sizeable amount of litigation in the lower courts. The majority of these courts have exhibited consistent deference to OFAC, ultimately declining to assess any licensing decision of OFAC, in the absence of some egregious behavior of the agency.

For example, in *Havana Club Holding, S.A. v. Galleon S.A.*, the defendant alleged that the plaintiff had misled OFAC when applying for a license to conduct business with Cuban nationals.[74] In response to the defendant's claim, the district court declined to review OFAC's decision to grant the plaintiff a license and noted: "[c]onsidering that OFAC's actions as an Executive Branch agency rest upon sensitive foreign policy

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67. *Id.* at 232-40.
68. *See* Koh, *supra* note 58, at 1264-65.
69. *Id.*
70. *See* Marcuss, *supra* note 48, at 504-05; Fitzgerald, *supra* note 13, at 110-11.
71. *See* Koh, *supra* note 58, at 1265.
72. *See* Sage Realty Corp. v. United States Treasury Dep't, No. 99 CIV. 3718(RJW), 2000 WL 272192, at *3 (S.D.N.Y. Mar. 10, 2000) (citing 5 U.S.C. § 706 (2)(A)).
73. *Id.*
74. *See* Havana Club Holding, S.A. v. Galleon, S.A., 961 F. Supp. 498, 500 (S.D.N.Y 1997).

concerns, the courts should not lightly take on the role of second-guessing its determinations."[75]

A panel of the United States Court of Appeals for the Fifth Circuit in *Milena Ship Management Co. v. Newcomb* also accorded great significance to the role of foreign policy in reviewing the seizure of a vessel in which the targeted Federal Republic of Yugoslavia arguably retained an interest.[76] The panel, in affirming the lower court's grant of summary judgment, extended wide latitude to OFAC's determination that the Federal Republic of Yugoslavia had "social capital" interest in the Maltese flag vessel.[77] The panel also was in agreement with the lower court that OFAC bore no obligation to provide a custodial agent for the vessel during the seizure period, despite the fact that the TWEA had originally provided that OFAC did have such an obligation.[78]

The grant of such deference to OFAC regulations and licensing procedure has also been extended, without great opposition, to such areas as the attorney-client relationship and First Amendment law. At first, OFAC received a harsh rebuke from the majority of a United States Court of Appeals for the D.C. Circuit panel, when it argued that the Agency's regulations could conceivably preclude the defendant from retaining his or her choice of counsel.[79] Nevertheless, this did not prevent OFAC from successfully defending its "fresh funds" rule. Under this rule, when an offshore company seeks to contest the blocking of its assets by OFAC, such plaintiffs "are consistently required to pay attorneys' fees with fresh funds" and not use the blocked funds as a source of these payments.[80]

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75. *Id.* at 504.

76. *See* Milena Ship Mgmt. Co. v. Newcomb, 995 F.2d 620, 625 (5th Cir. 1993).

77. *Id.* at 624-25. The panel explained that although these were Maltese flag vessels, the determinative factor was whether the Federal Republic of Yugoslavia had any interest in the corporation that owned the vessels. The panel was persuaded by the argument that should this corporation go private (i.e., sell shares of stock), the proceeds would go to at least one governmentally controlled fund. *Id.*

78. *Id.* at 625. The Fifth Circuit contended that although the TWEA provides for the custodial requirement for seized assets, the silence of the IEEPA on this issue is no indication that Congress intended to permit such a provision to carry over to the latter Act. *Id.* The reasoning of the panel is somewhat dubious as the Supreme Court has noted the Executive Branch has been granted rather liberal interpretations of TWEA and IEEPA provisions.

79. *See* Am. Airways Charters, Inc. v. Regan, 746 F.2d 865 (D.C. Cir. 1984). *But see* Looper v. Morgan, No. H-92-0294, 1995 U.S. Dist. LEXIS 10241 (S.D. Tex. June 23, 1995). One of the few critical opinions of OFAC, the district court ruled that OFAC officials could not defeat the attorney-client privilege and review papers of an attorney returning to the United States whose clients were suspected of doing business on behalf of the sanctioned Libyan government. *Id.*

80. Beobanka d.d. Belgrade v. United States, Nos. 95 CIV. 5138(HB), 95 CIV. 5771(HB), 1997 WL 23182, at *2 (S.D.N.Y. Jan. 22, 1997) (finding the fresh funds rule not to be arbitrary and capricious).

Similarly, OFAC had little difficulty defending its decision to prevent the ABC television network from broadcasting the Pan-American Games taking place in Cuba.[81] Whatever First Amendment rights ABC may have had to cover the sporting event, it was not enough in the court's opinion to trump OFAC's regulation barring transfer of funds to the Cuban government.[82] The court found that this specific provision of ABC's exclusive agreement to broadcast the sporting event precluded coverage.[83] Nor was the court persuaded that the event would fall under the exemption promulgated by OFAC that permits transactions defined as news coverage to go forward unchallenged.[84]

The clear continuity in the above decisions and the rare occasion in which a court dissents, illustrates that OFAC enjoys even more deference than its other administrative counterparts. Noting that foreign policy objectives and national security interests play a predominant role in the promulgation of OFAC regulations, judges are reluctant to review OFAC's actions in even the slightest manner.[85] Courts recognize that this "foreign affairs function" releases OFAC from the obligation that other administrative agencies have to follow.[86] Most notable is the absence of any notice-and-comment procedure for OFAC.[87] Typically such a period is required of agencies by the Administrative Procedure Act prior to promulgating a new administrative rule.[88] For some, this lack of notice raises serious due process issues, particularly when OFAC is freezing assets of specially designated nationals (SDNs) and targeted individuals and entities.[89]

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81. *See* Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007 (S.D.N.Y. 1990).

82. *Id.* at 1012-13.

83. *Id.* at 1013.

84. *Id.* at 1014.

85. Paradissiotis v. Rubin, 171 F.3d 983, 988-89 (5th Cir. 1999); Havana Club Holding, S.A. v. Galleon S.A., 961 F. Supp. 498, 505 (S.D.N.Y. 1997).

86. Bergerco Canada v. United States Treasury Dep't, 129 F.3d 189, 191 n.1 (D.C. Cir. 1997) (citing 5 U.S.C. § 553(a)(1)).

87. *See id.*; *see also* Int'l Bhd. of Teamsters v. Pena, 17 F.3d 1478, 1486 (D.C. Cir. 1994).

88. *See* 5 U.S.C. § 553 (2000).

89. For questions as to whether this amounts to violations of due process, see Fitzgerald, *supra* note 13, at 137-38. However, the Bush Administration, quite aware of this criticism, justifies the absence of notice in section 10 of Executive Order No. 13,224 as such:

> [B]ecause of the ability to transfer funds or assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to this order.

Exec. Order No. 13,244, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

D. OFAC'S Current Promulgations Targeting Terrorists and Their Sponsors

Despite the recent criticism directed towards the Clinton Administration's inability to prevent the terrorist attacks of 9/11,[90] the approach of OFAC under the current Bush Administration is nearly indistinguishable from that of the prior administration. Both administrations initially required OFAC to administer specific asset freezes by way of Executive Orders. Such specific sanctions were then supplemented with broad-based legislative acts.

In 1995, President Clinton signed Executive Order 12,947, which specially designated twelve terrorist organizations as targeted entities due to their goal of disrupting the Middle East Peace process.[91] The order prohibited U.S. citizens from providing any goods or services to such designated entities.[92] Supplementing the Executive Order was the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), signed by Clinton nearly a year and a half later.[93] The AEDPA provided that the Secretary of State would coordinate with the Secretary of Treasury to designate other terrorist organizations.[94] With prior approval of Congress, the AEDPA further permitted the Treasury Department to freeze all assets in which such designated organizations would have an interest, as well as prohibit any assistance to such organizations from U.S. persons.[95] In 1998, President Clinton amended the 1995 Executive Order to include Usama Bin Ladin, the Al-Qaeda organization, and two other individuals.[96] The following year, the Clinton Administration, upon a finding that the Taliban government provided safe haven to Usama bin Laden and the Al-Qaeda organization, authorized OFAC to block property and transactions with the Taliban.[97]

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90. John F. Harris, *Conservatives Sound Refrain: It's Clinton's Fault*, WASH. POST, Oct. 7, 2001, at A15.

91. *See* Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 25, 1995) (prohibiting transactions with terrorists who threaten to disrupt the middle east peace process). The Executive Order identifies the following twelve groups: Abu Nidal Organization (ANO), Democratic Front for the Liberation of Palestine (DFLP), Hizballah, Islamic Gama' at (IG), Islamic Resistance Movement (HAMAS), Jihad, Kach, Kahane Chai, Palestinian Islamic Jihad-Shiqaqi faction (PIJ), Palestine Liberation Front-Abu Abbas faction (PLF-Abu Abbas), Popular Front for the Liberation of Palestine (PFLP), Popular Front for the Liberation of Palestine-General Command (PFLP–GC). *Id.* at 5081.

92. *Id.* at 5079-81.

93. *See* 8 U.S.C. § 1189 (2000).

94. *Id.*; *see* 18 U.S.C. § 2332d (2000).

95. 8 U.S.C. § 1189 (a)(2)(C); 18 U.S.C. §§ 1189 (a)(2)(B), 2332d.

96. Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (Aug. 25, 1998).

97. Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (July 7, 1999).

In similar fashion, the Bush Administration initially designated the targeted terrorist groups and supplemented this order with general sanctions legislation as well. President Bush's Executive Order 13,224 designated twelve individuals, fifteen organizations, including three charities and one business entity, as specially designated global terrorist groups.[98] Accordingly, any assets in which these groups had an interest were seized and transactions with these terrorists would be barred by the order. Nearly a month later, President Bush signed the U.S.A. Patriot Act.[99] While the U.S.A. Patriot Act focuses on a wide range of initiatives for the prosecution of the United States' war on terror, the Act also underscores the ability of OFAC to confiscate assets under the guidance of the current administration.[100]

If the months following 9/11 serve as any guidance, then it is highly likely that the focus of economic sanctions under the Bush Administration will change somewhat in approach from its predecessors.[101] Previous administrations placed an emphasis on monitoring officially funded state-terrorism.[102] But the acts of the current administration suggest a shift towards looking primarily for terrorist organizations and secondarily establishing punitive measures for states that fund or harbor them, in what some are now beginning to call the "Bush Doctrine."[103]

Understandably, in the aftermath of the largest terrorist attack on American soil, the Bush Administration's response is to take an aggressive, expansive view of which foreign individuals and entities may be considered terrorists. To illustrate this point, the Clinton Administration issued only two Executive Orders naming or identifying approximately sixteen individuals or organizations engaged in terrorist activity, each order fitting on a single page.[104] Contrast this with the

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98. Mintz & Hilzenrath, *supra* note 9, at A8.

99. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A. Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

100. A. Jeff Ifrah, *Casting a Wide Net; The Patriot Act Will Ensnare a lot of Law-Abiding Corporations*, LEGAL TIMES, Nov. 19, 2001, at 30.

101. *See* Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (Aug. 25, 1998). As Executive Order No. 13,099 indicates, even though U.S. officials were aware of the Al-Qaeda organization, rather than target the organization itself, those officials preferred to levy sanctions against the Taliban government. *Id.*

102. *Id.*

103. *See* Peter D. Trooboff, *Antiterrorism Measures*, NAT'L L.J., Dec. 17, 2001, at A19 (noting the emergence of the "so-called Bush Doctrine—nations that harbor terrorists will be treated as terrorists").

104. *See* Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (Aug. 25, 1998); Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 25, 1995).

effort by the current Bush Administration whose lists of designated terrorists have been promulgated seven times since the 9/11 attacks, approximating a total of nearly 150 individuals and entities.[105] Without question, such a dramatic increase in the special designations prosecuted under OFAC will lead to challenges in the lower courts.

E. Special Designated Nationals (SDN) and Terrorists (SDT) Lists

Individuals or entities may be placed on a "special designated list" either through Executive Order and then promulgation by OFAC through the Federal Register or by designation of the State Department via recent provisions of the AEDPA.[106] The formation of these lists has drawn criticism in the past from some areas as improper and unconstitutional blacklisting.[107] In particular, since OFAC does not follow certain notice-and-comment requirements, some contend that its abrupt and sudden seizure of assets in the United States amounts to unconstitutional taking.[108] Nevertheless, as discussed below, lower courts generally support the government's use of these special designations on the basic premise that the Executive Branch is due strict deference for decisions made to further foreign policy objectives.

1. Challenging the OFAC Special Designation

In *Paradissiotis v. Rubin*, the appellant Paradissiotis, a citizen of Cyprus, asserted OFAC's promulgation placing him on a specially designated national list was not only erroneous, but that it amounted to an unconstitutional bill of attainder.[109] Because of this designation, the appellant was precluded from transferring stock he held in several of the companies for which he worked.[110] The court noted OFAC's finding that

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

106. With regard to classifying entities or individuals as "terrorist," a subtle difference should be noted in the difference in terminology between OFAC and the State Department. OFAC classifies through "special designation" (SDN/SDT), while the State Department uses the term foreign terrorist organizations (FTO). *See* Revisions to the Export Administration Regulations; Exports and Reexports to Specially Designated Terrorists and Foreign Terrorist Organizations, 64 Fed. Reg. 1120, 1121 (Jan. 8, 1999). The former involves prohibition on only financial activity, while the latter includes a much broader concept of terrorist supported activity ranging from financial to active involvement. Also of importance is that designation under the latter category incorporates some sense of notice (section 1189(a)(2) of AEDPA) as well as review by Congress (section 1189(a)(2)(B)(ii) of AEDPA), while designation by OFAC does not (section 10 of Exec. Order No. 13,224, 66 Fed. Reg. 49,081 (Sept. 25, 2001)).

107. *See* Fitzgerald, *supra* note 13, at 137-38.

108. *Id.*

109. 171 F.3d 983, 986-88 (5th Cir. 1999).

110. *Id.* at 986.

appellant also held several executive positions in these same companies in which he held stock.[111] These companies were determined by OFAC to be subsidiaries of companies directly held by the government of Libya.[112] In order to punish the Libyan government for its support for international terrorism, and under the authority of the IEEPA, President Reagan ordered OFAC to freeze all assets of those acting directly or indirectly on behalf of the Libyan government.[113] The court acknowledged that OFAC's actions were to receive a higher deference than the *Chevron* standard, and affirmed the lower court's ruling that the regulation could not be found to be applied in any inconsistent manner.[114] Proceeding to the question of whether the special designation list amounts to an unlawful bill of attainder, the court noted at the outset, that the appellant's right to allege a constitutional injury was somewhat tenuous, as he was a nonresidential foreign national.[115] Even if the appellant's foreign status was not at issue, the court was persuaded by the Tenth Circuit's reasoning that a bill of attainder is only applicable to legislative acts and not regulatory actions of administrative agencies.[116]

Challenging OFAC appears at times an insurmountable obstacle and the special designation seems to be fatal, although rare exceptions exist where the Agency has retracted its classification. To date, the most notable exception involves Salah Idris, the owner of the El-Shifa Pharmaceuticals plant in Sudan.[117] His plant was bombed as part of the missile strike ordered by the Clinton Administration in retaliation for the embassy bombings in Kenya and Tanzania.[118] Shortly after the U.S. missile struck, OFAC requested that the "Bank of America freeze his accounts in the United Kingdom, 'pending investigation' as to whether he should be a specially designated national."[119] Nearly a year later, prompted by Idris' lawsuit against the Department of Treasury, OFAC ordered his assets unfrozen.[120] It is now widely suggested that Salah

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111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 987.
115. *Id.* at 988.
116. *Id.* at 988-89. The court went even further to assert, without really providing any reasoning, that even should the bill of attainder be applicable in the administrative context, being placed on a list of specially designated nationals whose assets are frozen does not amount to the punitive measure prohibited by bill of attainder. *Id.*
117. *See* Otis Bilodeau, *When Bombs Miss the Mark*, LEGAL TIMES, Nov. 26, 2001, at 1; *see* Fitzgerald, *supra* note 13, at 134-35.
118. *See* Bilodeau, *supra* note 117, at 1.
119. Fitzgerald, *supra* note 13, at 134-35.
120. *See id.*

Idris' plant did not manufacture chemical weapons as originally suspected by the U.S. government.[121] Seeking compensation for the damage to the plant as well as a retraction by the U.S. government of any ties to terrorists, Idris has filed two concurrent claims against the United States pending in United States Court of Federal Claims and the United States District Court in the District of Columbia.[122]

2. Challenging the Special Designated Terrorist Under the Anti Terrorism and Effective Death Act (AEDPA)

Arguably, there are more challenges to special designated terrorist classification under the AEDPA than the SDN classification of OFAC. This could be explained by several reasons. As indicated above, OFAC enjoys relatively little oversight and may not be worth challenging from a plaintiff's perspective. On the other hand, charges may be more common under the AEDPA as it provides for more serious penalties than the basic forfeiture that OFAC could order.[123]

In *Humanitarian Law Project v. Reno*, the appellants argued that the AEDPA's special designated terrorist classification was unconstitutionally vague and the criminalization of any material support for such organizations infringed on the appellants' First Amendment rights.[124] The appellants were challenging the designation of the Kurdistan Workers' Party (KWP) and the Liberation Tigers of Tamil Eelam (LTTE).[125] Appellants maintained on appeal to the United States Court of Appeals for the Ninth Circuit that their donations to these organizations were political contributions that the court should view as strictly constitutionally protected speech.[126]

The Ninth Circuit noted that in reviewing this provision of the AEDPA, it was required to apply the widest latitude in allowing the government to regulate in this area.[127] Because "the regulation involves

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121. *See* Bilodeau, *supra* note 117, at 9. Bilodeau points out that "[r]eports in the *New York Times*, *The Wall Street Journal*, *The Washington Post*, and *The New Yorker* [have all] discredited the claim that the [El-Shifa] plant was involved in chemical weapons." *Id.*

122. Both claims hinge on two central issues: (1) whether a court can review the foreign military action ordered by the Executive and (2) whether a nonresidential alien can then adequately allege a takings violation. *See id.*

123. *See* 18 U.S.C. § 2332d (2001); *see also* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1132 (9th Cir. 2000), *cert. denied*, 532 U.S. 934 (2001) (noting that AEDPA § 303(a) has extensive penalties for any material support for terrorist activity with fines and imprisonment up to ten years).

124. *See Humanitarian Law Project*, 205 F.3d at 1133.

125. *Id.*

126. *Id.* at 1134.

127. *Id.* at 1136.

the conduct of foreign affairs, we owe the executive branch even more latitude than in the domestic context."[128] On this premise, the Ninth Circuit affirmed the district court order finding that the provisions were not unconstitutionally vague and that the State Department is authorized to designate organizations as terrorist organizations.[129] The court also held that the donations appellants intended to provide could be lawfully prohibited by the AEDPA, as there exists no absolute First Amendment right to political advocacy directed towards another foreign government.[130]

The year prior to the Ninth Circuit panel's opinion in *Humanitarian Law Project v. Reno*, several organizations such as the Mojahedin and the LTTE challenged the State Department's classification of them as terrorist organizations in *People's Mojahedin Organization of Iran v. United States Department of State*.[131] Appellants asserted they were entitled to more notice than simply being listed as a terrorist organization by the State Department in the Federal Register.[132] The appellants also took issue with the adequacy of the findings on which the Secretary of State based her decision.[133] The D.C. Circuit panel held that it could only review a limited amount of information due to the national security interests of the U.S. government in protecting intelligence sources.[134] Despite the limited findings available to the court,[135] the circuit panel was still persuaded that the State Department correctly determined the status of the appellants on those findings.[136] The panel further held that appellants' claims amounted to asking that court to recognize a foreign sovereign, essentially a strictly political function outside the judicial branch's reach.[137]

The panel also made clear that the appellants were not entitled to any more notice than what they had already received by way of the Federal Register.[138] The panel distinguished the appellants from *Joint*

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128. *Id.* at 1137.
129. *Id.*
130. *See id.* at 1130, 1134 n.1.
131. 182 F.3d 17, 18-19 (D.C. Cir. 1999).
132. *Id.* at 22.
133. *Id.* at 24.
134. *Id.* at 23-24.
135. *Id.* at 23. According to the panel, "[b]ecause nothing in the [AEDPA] restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities, the 'administrative record' [upon which the designation is based] may consist of little else." *Id.* at 19.
136. *Id.* at 24.
137. *Id.*
138. *Id.* at 21.

Anti-Fascist Refugee Committee v. McGrath, where the United States Supreme Court found that similarly situated individuals, having been placed on a communist list, were deprived of Fifth Amendment due process rights.[139] The panel made the key distinction that "[the appellants] have no presence in the United States. Their status as foreign is uncontested."[140] Citing the majority opinion in *United States v. Verdugo-Urquidez*, the panel concluded, "[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."[141] However, the D.C. Circuit panel expressly declined to examine whether its ruling was applicable to "those in the United States" who were donors or members of organizations designated by the State Department.[142] Two years later in *National Council of Resistance of Iran v. Department of State* (*NCRI*), the D.C. Circuit addressed this question.[143]

In *NCRI*, the D.C. Circuit ultimately remanded the "designation decision" back to the State Department in order for the NCRI to be given full due process rights before it received a designation of terrorist organization by the State Department.[144] Mindful that it could only review portions of the record not related to U.S. security interests, the D.C. Circuit deemed the State Department to have violated the due process rights of the NCRI.[145] Yet the key difference between NCRI and People's Mojahedin is that the former group actually had an office in Washington, D.C., as well as financial accounts in the United States.[146] The D.C. Circuit believed that this presence in the United States was substantial enough to extend due process rights to the NCRI.[147]

NCRI proves to be one of the very few exceptions to the general policy of expansive deference to the Executive Branch by U.S. courts. The Treasury Department's OFAC has been criticized as highly disorganized and inconsistent in applying its promulgations, licensing,

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139. *Id.* at 22 (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951)).
140. *Id.*
141. *Id.*
142. *Id.* at 22 n.6.
143. 251 F.3d 192, 200-07 (D.C. Cir. 2001).
144. *Id.* at 209.
145. The test employed by the State Department is as follows: if (1) the entity is a foreign terrorist organization; (2) engaging in terrorist activities; and (3) threatens the national security of the United States. *See id.* at 199-200 (citing *People's Mojahedin*, 182 F.3d at 19 (construing 8 U.S.C. § 1189)). See 8 U.S.C. § 1182(a)(3)(B)(iii) (2000) for what constitutes "terrorist activity" under the AEDPA. See 8 U.S.C. § 1189(c)(2) for what constitutes a threat to national security.
146. *NCRI*, 251 F.3d at 200-01.
147. *Id.* at 201-02.

and special designations.[148] Most courts appear reluctant to provide any encompassing review of OFAC, again on the rationale that the State Department, guided by the presidential administration, is the proper authority to guide foreign policy. This lack of oversight complicates matters. While it is argued that the Executive Branch should dictate foreign policy, this contention loses some ground when U.S. citizens can point to some sustainable injury at the hands of a designated targeted nation or terrorist group. Such injuries were once deemed insufficient to grant subject-matter jurisdiction in U.S. courts. This is no longer the case. Recent changes by Congress to the traditional notions of a foreign sovereign's immunity, as well as provisions in the recently enacted AEDPA, indicate an abrupt turn from the longstanding congressional acquiescence in this area. The tension between the rights of a U.S. citizen to bring suit against a state that sponsors terrorism and the foreign policy objectives of the Executive Branch are unavoidable.

III. *THE OTHER ECONOMIC WAR AGAINST TERRORISM*: PRIVATE LAWSUITS AGAINST FOREIGN SOVEREIGNS AND FOREIGN ENTITIES IN THE UNITED STATES COURT SYSTEM

The U.S. government is not alone in tracking the massive financial network that has supported terrorist attacks on U.S. citizens abroad. The families of the victims of specific terrorist acts have repeatedly attempted to collect damages from foreign states, as well as purported business and charitable organizations, that have contributed to such terrorist activity. But those attempts to collect have been in vain because of the basic principle of sovereign immunity barring suits against a defendant foreign government. It would have taken several key pieces of legislation in the mid-1990s to allow for these families to successfully maintain a suit against a defendant foreign government. Yet in an ironic twist, when it came time to collect against them, these defendants would enjoy the company of none other than the United States Justice Department.[149] As Part II explains more fully, the aggressive approach of OFAC reaches beyond merely seizing assets, but also regularly intervenes in private actions against foreign state sponsors of terrorism. While Congress may have acquiesced to the Executive Branch in permitting the collection of foreign assets by OFAC, lawmakers have proven to be increasingly skeptical of such a rationale when it is used to bar the distribution these

148. *See* Marcuss, *supra* note 48, at 525-27.

149. Robert Schmidt, *U.S. Man Suing Iran Finds State Dept. His Foe; Bid to Collect Assets Collides with Foreign Policy Concerns*, LEGAL TIMES, Aug. 10, 1998, at 1, 6.

funds to the U.S. victims of terrorist attacks. As Part II discusses, it would take nearly a decade for the victims of certain state-sponsored terrorist acts to win the right to sue *and collect*.[150] The recent victims of privately funded terrorist acts should not be forced through a similar ordeal for the sake of flawed U.S. policy.

A. Prior Obstacles to Bringing Suit: OFAC and the Foreign Sovereign Immunities Act (FSIA)

OFAC's consistent reliance on the overriding interest of U.S. foreign policy is not limited to just judicial review of agency promulgations. In fact, it is not uncommon for OFAC to intervene when it anticipates that the potential damages award will come from frozen assets. Intervening in these suits, OFAC has argued, not surprisingly, that the potential award of damages from any of these frozen accounts inevitably undercuts the diplomatic leverage of the Executive Branch in the foreign policy arena. Until very recently, the dispensing of frozen assets to pay damages was not a major concern for OFAC. For some time, a U.S. citizen generally was barred from bringing suit against a foreign state, regardless of the nature of the intended lawsuit and alleged injury.[151] But in 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA), thereby opening the door—albeit slightly—for suits to be maintained against foreign states and those acting as agents on its behalf.[152] The 1976 FSIA delineated specific exceptions to the prior rule of immunity. For example, the FSIA provided that a court could find subject-matter jurisdiction over a foreign sovereign, or agent thereof, if: (1) the defendant state had consented; (2) the suit involves a matter of commerce or contract; (3) noncommercial torts committed by officials or agents of a state acting within their official duties; or (4) cases involving arbitrated settlements.[153]

Despite the express intention of Congress to remove the executive and foreign policy considerations from a very narrow area of litigation,[154] the Treasury Department's OFAC still persisted in intervening in lawsuits filed by U.S. banks and corporations.[155] A more notable example of the persistence of OFAC occurred after the conclusion of the Persian Gulf

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150. Jim Oliphant, *The Ragged Road to Revenge*, LEGAL TIMES, May 7, 2001, at 1, 16.

151. Richard T. Micco, *Putting the Terrorist-Sponsoring State in the Dock: Recent Changes in the Foreign Sovereign Immunities Act and the Individual's Recourse Against Foreign Power*, 14 TEMP. INT'L & COMP. L.J. 109, 110 (1999).

152. *Id.* at 125.

153. *Id.* at 126-28.

154. *See id.* at 124-25 n.131.

155. McDonnel, *Efforts to Unfreeze Iraqi Funds Continue*, *supra* note 41, at 23.

War. OFAC argued that a number of U.S. creditors should be denied their claims on frozen Iraqi assets because of the much needed bargaining value those assets provide for the administration.[156] With OFAC hindering commercial actions against frozen funds—a clearly legitimate action under the 1976 FSIA—it is easy to envision the extraordinary opposition that OFAC would mount to an action based on terrorist-type activity because of its obvious political overtones. Unlike the area of general economic sanctions, where each administration has more or less enjoyed Congress' tacit approval, Congress would not prove so silent when it came to private lawsuits. Within the last decade, a number of legislative reforms have been enacted in order to allow a cause of action against state and private entities that sponsor terrorism.

B. The 1991 Anti-Terrorism Act (ATA) and the Recent FSIA Amendments

The 1991 Anti-Terrorism Act was enacted to provide some recourse for U.S. citizens who have incurred injuries as a result of the activities of foreign terrorist organizations.[157] It simplifies service of process issues as well as jurisdiction over such foreign entities.[158] However, the Act is not applicable to defendants who are foreign states.[159] Nor does the Act allow for suits to be instituted on attacks that are considered acts of war.[160] The obvious effect of the Act is to supplement the exceptions in the FSIA, yet at the same time not expose the United States to any liabilities abroad, with the general prohibition on acts of war.[161]

In 1996, Congress amended the FSIA by enacting the AEDPA, allowing for the Flatow Amendment.[162] The amendment confers jurisdiction to the federal courts over claims by U.S. citizens alleging injury at the hands of state-sponsored terrorism.[163] The plaintiff is

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156. *See id.* What fueled these creditors' anger even more was the fact that OFAC was selectively distributing a portion of the frozen funds to American banks, but not other U.S. creditors. *Id.*

157. Richard K. Milin, *Suing Terrorists and Their Private and State Supporters*, N.Y. L.J., Oct. 29, 2001, LEXIS, Nexis Library, New York Law Journal File.

158. *Id.* (citing 18 U.S.C. §§ 2333-2334, 2336 (2000)).

159. *Id.*

160. *Id.*

161. *Id.*

162. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 25-26 (D.D.C. 1988). The Flatow Amendment was named after Alisa Flatow, an American killed in Israel by a Palestinian suicide bombing conducted by the Iranian funded terrorist organization, Hizballah. *See* 28 U.S.C. § 1605 (2000) (allowing for punitive damages against a foreign state sponsor of terrorism).

163. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1996).

required to provide notice to the foreign government, in an effort to arbitrate some type of settlement between the parties.[164] Not surprisingly though, the Executive Branch still plays a decisive role in determining which suits can be maintained against which foreign states. More specifically, the 1996 amendment to the FSIA requires the defendant state to have already been identified as a state-sponsor of terrorism by the U.S. State Department.[165]

While Congress enacted the amendments to the FSIA so that plaintiffs may at last find some redress for the loss they have suffered, it nevertheless presents plaintiffs with the quintessential "catch-22." That is to say, if the defendant is identified by the State Department as "a state sponsor" of terrorism, this typically means that there is already substantial evidence of illicit activity. At the same time, if the defendant's actions warrant them being placed on the list by the State Department, then there is a good chance that the defendants' assets in the United States have already been frozen by way of Executive Order. Nevertheless, despite this predictable conflict between the U.S. government and its citizens, three major suits were filed after the enactment of the AEDPA.

C. Suing State-Sponsors of Terrorism

In 1994, plaintiffs Joseph Cicippio and David Jacobson attempted to sue Iran for their abduction and torture in Lebanon by terrorists funded and directed by Iran.[166] Since this was prior to the FSIA-Flatow Amendment, the plaintiffs argued, albeit futilely, that subject-matter jurisdiction was proper since it fell under both of the FSIA exceptions for noncommercial torts or commercial activity.[167] Three years later, the plaintiffs brought suit again under the new FSIA exception provided by the FSIA-Flatow Amendment.[168] They needed only to meet the requisite evidentiary burden, as the Iranian government declined to make an appearance.[169] The total award was just over seventy million dollars.[170]

As indicated, the *Cicippio* judgment was possible precisely because of the Flatow Amendment. The Flatow family themselves brought a successful suit under the AEDPA against Iran, in *Flatow v. Islamic*

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164. *Id.*
165. *See* 28 U.S.C. § 1605(a)(7)(A).
166. *See* Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 165 (D.C. Cir. 1994).
167. *Id.*
168. *See* Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 67 (D.D.C. 1998).
169. *Id.*
170. *Id.*

Republic of Iran.[171] The court awarded the Flatow family $247 million in damages for the loss of their daughter directly resulting from an Iran funded Hizballah terrorist attack.[172] Also in 1998, another large award was ordered under the recently amended AEDPA in *Alejandre v. Republic of Cuba*.[173] In *Alejandre*, the court ordered $187 million for the loss of family members killed by the Cuban Air Force.[174]

In all these cases, the awards were blocked by a Clinton Administration Executive Order that asserted the damage awards should not be paid from frozen assets out of national security interests.[175] In response, Congress balked and ordered specific relief for the plaintiffs by inserting a provision regarding payment of these judgments during the passage of the Victims of Trafficking and Violence Protection Act.[176] This essentially amounted to an ephemeral political compromise,[177] since the provision allowed redress for only a specific group of claimants,[178] who in turn relinquished their rights to any other pending claims.[179] The additional consequence is that the law is returned to its pre-1998 state and thereby repealed the Flatow Amendment.[180] Thus, the current version of the FSIA does nothing to ameliorate an inevitable conflict between the interests of the Executive and those of U.S. citizens who look to the assets in the United States as a reliable means to secure compensation.

Since the most recent amendment to the FSIA, an increasing number of cases have been successfully litigated against the Islamic Republic of Iran in the past two years in the United States District Courts

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171. 999 F. Supp. 1 (D.D.C. 1998).

172. *See* Pamela S. Falk, *Show Them the Money*, LEGAL TIMES, Oct. 1, 2001, at 52.

173. 996 F. Supp. 1239 (S.D. Fla. 1997).

174. *Id.* at 1253-54.

175. *See* Presidential Determination, No. 99-1, 63 Fed. Reg. 59,201 (Nov. 2, 1998) (stating that to release assets would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions). For a good summary of the Flatow family's tortuous journey in attempting to effect judgment against the Republic of Iran, *but written prior to the enactment of Victims of Trafficking and Violence Prevention Act*, see S. Jason Balesta, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1291-99 (2000).

176. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000).

177. Sean Vitrano, *Hell-Bent on Awarding Recovery to Terrorism Victims: The Evolution and Application of the Antiterrorism Amendments to the Foreign Sovereign Immunities Act*, 19 DICK J. INT'L L. 213, 239-240 (2000).

178. *See id.* (citing Victims of Trafficking and Violence Protection Act of 2000 § 2002(a)).

179. *Id.*

180. *See* Weinstein v. Islamic Republic of Iran, 184 F. Supp. 2d 13, 24 n.1 (D.D.C. 2002) (citing Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 113 n.17 (D.D.C. 2000)). Both opinions reminding litigants that Pub. L. No. 106-386, § 2002(f)(2), repealed 28 U.S.C. § 1606 permitting punitive damages for actions under § 1605(a)(7) and § 1610(f). *Id.*

of the District of Columbia. The identity of these plaintiffs ranges widely: parents of Jewish-American college students,[181] retired U.S. Marine Corps personnel,[182] college professors,[183] Iranian political dissidents,[184] and a member of the clergy.[185] Each district court opinion is a testament to the clear and organized effort of the Iranian government to fund terrorist activity through its own secret service agency, MOIS, or through other externalities such as HAMAS and Hizballah. In fact, the over-familiarity with Iran's support of terrorism has made most judges comfortable to acknowledge it with a mere footnote.

But all of this makes the most recent case in the District of Columbia's District Court's docket all the more notable. Once again in *Roeder v. Islamic Republic of Iran*,[186] currently before United States District Judge Emmet G. Sullivan, the current administration has intervened on the side of the Islamic Republic of Iran.[187] This administration differs from its predecessors' general appeal to a foreign policy privilege with its reliance on the Algiers Accords, claiming that the United States is bound by its obligations in the Algiers Accords to keep any reachable assets in the U.S. jurisdiction frozen.[188] But as the plaintiffs have astutely pointed out, Congress has responded again, ordering specific relief for these plaintiffs in a defense appropriations bill passed December 20, 2001.[189]

D. Suing Private-Sponsors of Terrorism

While Congress enacted the initial version of the ATA a little over a decade ago, plaintiffs have only asserted a cause of action based on the ATA in two separate instances within the past year.[190] These ongoing actions rest on the broadest interpretation of the ATA thus far. In both instances, the plaintiffs seek damages for the defendants' knowing

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181. *See* Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1, 4 (D.D.C. 2000); *Weinstein*, 184 F. Supp. 2d at 17.

182. *See* Wagner v. Islamic Republic of Iran, 172 F. Supp. 2d 128, 130 (D.D.C. 2001).

183. *See* Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27, 30 (D.D.C. 2001).

184. *See* Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 100 (D.D.C. 2000).

185. *See* Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27, 29 (D.D.C. 2001).

186. Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140 (D.D.C. 2002).

187. Plaintiffs seek damages as a result of the 1979 Tehran hostage crisis. *See* Marcia Coyle, *Hostages of the Law: Ex-Iran Captives' Obstacle to Award for Damages Is the U.S. Government*, NAT'L L.J., Feb. 18, 2002, at A10 (citing Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140 (D.D.C. 2002)).

188. *See* Neely Tucker, *In Lawsuit Against Iran, Former Hostages Fight U.S.*, WASH. POST, Dec. 13, 2001, at A1, A29; Neely Tucker, *Hostages' Suit Against Iran Gets a Boost*, WASH. POST, Jan. 15, 2002, at B2.

189. *See* Coyle, *supra* note 187, at A1.

190. *See* Milin, *supra* note 157.

provision of material support to terrorist organizations. In *Boim v. Quranic Literacy Institute*, the plaintiffs allege that the defendant organization, acting under the guise of a tax-exempt religious charity, devised a highly organized fundraising scheme for the Palestinian terrorist group, HAMAS.[191] The district court declined to grant a motion to dismiss by defendants who argued that the allegations could only be maintained under the ATA if the defendants were actively involved in the specific terrorist act.[192] Currently before the United States Court of Appeals for the Seventh Circuit, *Boim* could prove to be a watershed case in this area. It is one of the first cases to seek damages from a foreign entity based in the United States for injuries incurred abroad on the theory that knowledge alone may be a basis for liability. Like *Boim*, plaintiffs in *Estates of Ungar* ex rel. *Strachman v. Palestinian Authority* appeal to the ATA, although the defendants are not physically located in the United States.[193] In *Estates of Ungar*, the district court dismissed the claims against the individual defendants, but held that the entities themselves (HAMAS and the Palestinian Authority) had sufficient minimum contacts to warrant jurisdiction over them.[194]

The success of both of these cases and the plaintiffs' ability to effect judgment will prove highly instructive to the increasing number of U.S. citizens who have lost loved ones in the onslaught of terrorist attacks committed against the state of Israel since 1993.[195] The Bush Administration has already provided some legal foundation for assigning liability by ordering OFAC to freeze assets of several defendants in these two lawsuits.[196] However, it remains to be seen whether OFAC, under this administration, will yet again attempt to preclude the plaintiffs from receiving any damage awards.

It also seems that the stage has been set for the battle between the Executive Branch and the estates of those lost in the 9/11 attacks. Specifically, Congress inserted the term "domestic terrorism" as a basis for these suits.[197] While different compensation funds have been

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191. 127 F. Supp. 2d 1002, 1003 (N.D. Ill. 2001).

192. *Id.* at 1014.

193. *See* Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 153 F. Supp. 2d 76, 82 (D.R.I. 2001).

194. *Id.* at 91.

195. From 1993 to February 2002, through the collaborative efforts of the HAMAS, Hizballah, Al-Aqsa-Martyrs Brigade, and Yasser Arafat's Fatah organizations, twenty-five Americans have been killed and sixty-six reported wounded while in Israel. *See Terror Victims Association, Terror Attacks in Israel 2001*, *available at* http://www.terrorvictims.com/attacks2000.htm.

196. *See supra* notes 1-5 and accompanying text.

197. *See* Pamela S. Falk, *Families of Missing Have Three Options*, NAT'L L.J., Nov. 27, 2001, at 5, 9.

proposed, including immediate tax relief for the victims' families, the U.S.A. Patriot Act does not address that, should the families choose to sue the terrorists, they will have to await a determination to liquidate the assets.[198] Early indications from the Bush Administration foreshadow that such an administrative move would be highly unlikely.[199] Currently, the author notes only one bill currently pending whereby the administration would be authorized to liquidate assets frozen under the first Executive Order following the 9/11 attacks.[200] With the frozen assets of just the Taliban regime reaching $300 million, there will undoubtedly be serious debate on this issue to follow.[201]

IV. CONCLUSION

It is by no accident that this Comment ends where it began, namely, with the Executive Orders promulgated in the wake of the 9/11 terrorist attacks. There are two dimensions to the current economic war on terrorism. One originates from Pennsylvania Avenue and the other is found in the federal courtrooms not all that far away. These two dimensions illustrate truly asymmetric policy in the U.S. economic war on terrorism. For while the administration has mounted an aggressive campaign to *starve the terrorists of their funding*, the inevitable progression of such a policy will be to *starve the victims of terrorism of their due compensation*.

Perhaps previous administrations have been successful upon relying on the general rationale that it is the Executive Branch that should dictate the foreign policy interests of the United States. Yet as this Comment suggests, congressional acquiescence in this area is clearly waning. Since the mid-1990s, with recent amendments to the FSIA, Congress has made it abundantly clear that it will no longer tolerate subordinating victims' interests to the foreign policy whims of the Executive Branch. The last decade reflects a more aggressive stance by Congress to make sure these victims of terrorism are being compensated.

Further, it will become progressively more difficult to justify this asymmetric approach where the administration will freeze assets, but at

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198. *See id.* at 9.

199. *Id.* (citing Letter from Paul V. Kelly, Assistant Secretary for Legislative Affairs, U.S. Dept. of State, to Chris Cannon, Representative, U.S. Congress (Oct. 11, 2001)).

200. The Housing Finance Regulatory Improvement Act: Hearings on H.R. 3703 Before the Subcomm. on Capital Mkts., Sec. and Gov't Sponsored Enters. of the House Comm. on Banking and Fin. Servs., 106th Cong. (2000) (introduced by Rep. Peter Hoekstra) to authorize the President to distribute liquidated assets pursuant to Executive Order 13,224 and similar orders to the victims and surviving members of the terrorist attacks of 9/11.

201. *See* Falk, *supra* note 197, at 9.

the same time block them from being liquidated to victims for the following reasons: the argument as set forth by previous administrations, which asserts that frozen assets have a deterrent effect, is belied by the continual promotion of terrorism by such countries as the Islamic Republic of Iran; and with this in mind, it is equally implausible to believe that the theoretical return of frozen assets would have such a deterrent effect on the activities of organizations such as Al-Qaeda.

Matters may be complicated by what will undoubtedly be a foreseeable growth in litigation in two post-9/11 areas: suits challenging OFAC promulgations designating the plaintiff as a terrorist or supporter thereof and suits seeking compensation from terrorists and their supporters. In both of these contexts, courts will have to address what has been codified by the U.S.A. Patriot Act and is more commonly known as the Bush Doctrine. The Bush Doctrine supports one of the more expansive definitions of terrorism to date thus far, but sadly has yet to be accepted by a number of supposed U.S. allies in the Middle East.[202] It is this international cooperation, although currently lacking, which might provide the desired deterrent effect on terrorists. Perhaps when assets are frozen as part of a coordinated effort by not only the United States, but also other countries, particularly those in the Middle East, will the financial deterrent to terrorism be truly felt. Otherwise, in the absence of any international cooperation, the U.S. government's effects to freeze assets are in vain and needlessly deny those who have suffered from international terrorist attacks their due compensation.

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202. *See* Calvin Lynch, *Islamic Group Blocks Terror Treaty; Nations Demand U.N. Pact Exemption for Anti-Israeli Militants*, WASH. POST, Nov. 10, 2001, at A19.