



NOTE

Caught in the Crosshairs: Developing a Fourth Amendment Framework for Financial Warfare

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Abstract. What do Russia's incursion into Ukraine, the hacking of Sony, and democratic instability in Venezuela have in common? The U.S. response to each has been economic sanctions. In the twenty-first century, economic sanctions are perhaps the most frequently used tool in the U.S. foreign policy toolbox because they can inflict pain without having to resort to the use of kinetic force.

But this increasing reliance on sanctions has created a new legal problem. Does freezing assets without a warrant—which sounds a lot like “seizure”—violate the Fourth Amendment? Historically, this issue was not a problem because economic sanctions were targeted entirely against foreign countries—entities that do not enjoy Fourth Amendment protection. In today's complex financial landscape, however, the issue is not so simple. Many financial transactions subject to U.S. sanctions involve parties protected, or at least arguably protected, by the Fourth Amendment.

To date, courts have reached a number of different conclusions about whether the Treasury Department should be required to obtain a warrant when it freezes assets. Some courts have held that the Fourth Amendment simply does not apply, or that it applies but a special needs exception precludes a warrant. Other courts have held that a warrant is generally required or that, based on the facts of the case, a warrant is required in that instance. This Note proposes a new fact-specific “reasonableness” test to evaluate whether the Treasury Department should be required to get a warrant before freezing assets.

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Introduction

The key officials shuffle into the conference room at “the Annex,” compensating for lack of sleep with caffeine. The meeting has only one item on the agenda: how to respond to the Russian incursion into Ukraine.¹ The briefing slides for the meeting, however, are not what one would expect, such as intelligence on “little green men” (i.e. Russian soldiers in unmarked military uniforms),² possible military targets, or options for covert action. Instead, the “guerrillas in grey suits”³ debate a different set of questions: What sectors of the Russian economy are most vulnerable? Which oligarchs are closest to Putin? How much do we know about the Russian banking industry? This is not a meeting of the National Security Council, the Joint Chiefs of Staff, or the State Department. Instead, it is a meeting of the Office of Foreign Assets Control (OFAC)—“one of the government’s most powerful yet least understood offices.”⁴

In the twenty-first century, economic sanctions are “fast becoming the policy tool of choice for the United States.”⁵ For a wide range of foreign policy challenges—terrorism; nuclear proliferation; issues in countries including Iran, Iraq, Libya, Syria, and Ukraine; and even persons undermining democratic institutions in Zimbabwe⁶—the United States relies heavily on sanctions to advance its foreign policy goals. In 2014, the Obama administration “confronted a long list of security challenges,” and it “responded to each with the same tool: financial sanctions.”⁷ Indeed, there are currently twenty-nine separate sanctions programs in place.⁸

The reach of these programs is staggering. OFAC—the small office located within the Treasury Department responsible for implementing these sanctions—issues sanctions that apply to U.S. citizens located anywhere in the

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1. See generally Anna Yukhananov & Warren Strobel, *After Success on Iran, U.S. Treasury’s Sanctions Team Faces New Challenges*, REUTERS (Apr. 14, 2014, 11:11 PM EDT), <http://reut.rs/1kTVJLF> (providing an overview of the Office of Foreign Assets Control (OFAC) through the lens of recent meetings about Ukraine).
 2. Vitaly Shevchenko, “Little Green Men” or “Russian Invaders?”, BBC (Mar. 11, 2014), <http://www.bbc.com/news/world-europe-26532154>.
 3. JUAN C. ZARATE, *TREASURY’S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE*, at xi (2013).
 4. ZARATE, *supra* note 3, at 23.
 5. Richard N. Haass, *Introduction to ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY* 1, 1 (Richard N. Haass ed., 1998).
 6. *Sanctions Programs and Country Information*, U.S. DEP’T TREASURY, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (last visited Mar. 3, 2016).
 7. Paul Richter, *U.S. Use of Sanctions Is Riling Some Beyond the Target Countries*, L.A. TIMES (Jan. 12, 2015, 3:00 AM), <http://fw.to/uPMk6IV>.
 8. See *Sanctions Programs and Country Information*, *supra* note 6.

world and all persons and entities within the United States.⁹ It also asserts jurisdiction over any money that enters the U.S. financial system—a significant amount of global commerce given that “all financial roads lead to New York.”¹⁰

Practically, the burden falls on the private sector, namely banks, to enforce sanctions. When OFAC determines that a person (natural or corporate) is subject to sanctions, financial institutions are then responsible for freezing any assets currently held by this person and prohibiting any future transfers to these people.¹¹ The penalties for failing to comply are enormous. Since 2008, OFAC has announced at least 156 civil penalties for sanctions violations totaling \$4.1 billion in penalties.¹² In Summer 2014, BNP Paribas made headlines with an \$8.9 billion dollar settlement with various U.S. entities, including a \$963 million settlement with OFAC, for a host of sanctions violations.¹³ Given these penalties (and the need to access U.S. markets), ignoring OFAC is simply “not an option for most banks or businesses.”¹⁴

The financial stakes of U.S. sanctions programs are enormous. Although the information available publicly is limited, a few examples highlight the scope of how much money OFAC directly disrupts. In 2004, an official testified that OFAC interdicted “at least \$1 million and sometimes as much as \$35 million” every week.¹⁵ A 2007 OFAC report, meanwhile, announced it had disrupted more than \$1 billion worth of assets of narcotraffickers and their networks.¹⁶ OFAC has also used sanctions to target gangs and organized crime,

9. *OFAC FAQs: General Questions*, U.S. DEP'T TREASURY, http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic (last updated May 11, 2015, 3:26 PM) [hereinafter *OFAC FAQ*].

10. *Examining Treasury's Role in Combating Terrorist Financing Five Years After 9/11: Hearings Before the S. Comm. on Banking, Hous. & Urban Affairs*, 109th Cong. 38 (2006) (statement of Adam J. Szubin, Director, Office of Foreign Assets Control, U.S. Department of the Treasury).

11. See *infra* Part I.C.

12. See *Civil Penalties and Enforcement Information*, U.S. DEP'T TREASURY, <http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx> (last updated Feb. 2, 2016, 10:46 AM) (providing annual totals of number of settlements and dollar amounts).

13. See *Treasury Reaches Largest Ever Sanctions-Related Settlement with BNP Paribas SA for \$963 Million*, U.S. DEP'T TREASURY (June 30, 2014), <http://www.treasury.gov/press-center/press-releases/Pages/jl2447.aspx>; see also *2014 Enforcement Information*, U.S. DEP'T TREASURY, <http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/2014.aspx> (last updated Mar. 12, 2015, 11:33 AM).

14. ZARATE, *supra* note 3, at 26.

15. *Counterterror Initiatives in the Terror Finance Program: Hearings Before the S. Comm. on Banking, Hous. & Urban Affairs*, 108th Cong. 189 (2004) (statement of R. Richard Newcomb, Director, Office of Foreign Assets Control, U.S. Department of the Treasury).

16. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, *IMPACT REPORT: ECONOMIC SANCTIONS AGAINST COLOMBIAN DRUG CARTELS*, at iii-iv (2007).

including the El Salvadoran gang MS-13.¹⁷ In 2011, OFAC froze \$37 billion of Libyan government assets in one fell swoop as the civil war during the Arab Spring was unfolding.¹⁸ The indirect impact of sanctions is also massive. Sanctions, as intended, have had a large impact on targeted countries. A senior U.S. official testified in 2014 that Iran's economy is twenty-five percent smaller than it would have been without U.S. sanctions.¹⁹ Similarly, although there are many factors that have contributed to the recent economic downturn in Russia, sanctions have played a role.²⁰

Caught in the crosshairs of this financial warfare is a significantly underappreciated legal issue: Do economic sanctions, which arguably "seize" property without a warrant, violate the Fourth Amendment? Historically, this issue was not a problem because economic sanctions were targeted entirely against foreign countries—entities that do not enjoy Fourth Amendment protection.

In today's complex financial landscape, however, the issue is not so simple. Many financial transactions involve a party protected, or at least arguably protected, by the Fourth Amendment. In the wake of anti-terrorism-financing measures taken after 9/11, a number of people challenged the Treasury Department's authority to freeze assets without a warrant. Courts have come to four very different answers. Some courts have held that the Fourth Amendment simply does not apply, or that it applies, but a special needs exception precludes a warrant. Other courts have held that a warrant is generally required or that, based on the facts of the case, a warrant is required in that instance.

This Note conducts the first comprehensive analysis of these cases in order to develop a new Fourth Amendment jurisprudential framework. Currently, there is very little legal literature discussing OFAC. There are a few pieces, for example, criticizing various aspects of the due process afforded in an OFAC "blocking" action—an announcement that entities holding assets subject to sanctions must freeze them.²¹ To the extent that some commentators flagged

17. See, e.g., Samuel Rubinfeld, *U.S. Treasury Hits MS-13 Members with Sanctions*, WALL ST. J.: RISK & COMPLIANCE J. (Apr. 16, 2015, 10:52 AM ET), <http://blogs.wsj.com/riskandcompliance/2015/04/16/u-s-treasury-hits-ms-13-members-with-sanctions>.

18. ZARATE, *supra* note 3, at 347. Other examples of specific post-9/11 assets seizures include \$1.1 million from the Al Barakaat network, *id.* at 38-39, and \$2 billion of Iranian assets held by Clearstream, *id.* at 311.

19. *Iran: Status of the P5+1 Negotiations with Iran: Hearing Before the S. Comm. on Foreign Relations*, 113th Cong. 9 (2014) (statement of David S. Cohen, Under Secretary for Terrorism and Financial Intelligence, U.S. Department of the Treasury).

20. Lidia Kelly, *Update 2—Russian Economy Stagnates as Capital Flight Hits \$75 Billion*, REUTERS (July 9, 2014, 2:24 PM EDT), <http://reut.rs/1sxcHPP>.

21. See, e.g., Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 414-17 (2006); Robert E. O'Leary, *Improving the Terrorist Finance Sanctions Process*, 42 N.Y.U. J. INT'L L. & POL. 549, 577-79 (2010) (advocating for a "National Security Sanctions Court" to review OFAC designations according to a three-

footnote continued on next page

the Fourth Amendment issue many years ago, their analysis of the initial cases on the subject adopted an all-or-nothing view. A note²² and an unpublished paper²³ staked out one end of the spectrum: OFAC actions clearly violate the Fourth Amendment. Another note came to the exact opposite conclusion, incorrectly predicting that the first court decision to hold that OFAC blocking orders violated the Fourth Amendment was “likely an anomaly.”²⁴ These all-or-nothing views—OFAC actions clearly violate or do not violate the Fourth Amendment—do not account for the myriad factual situations that arise. While courts have started to recognize these complexities, there has been no effort to develop a comprehensive framework to analyze the Fourth Amendment constitutionality of OFAC actions.

This Note aims to achieve that goal. Part I explains in detail how the OFAC sanctions process works. This institutional account is crucial to a new framework for analyzing the Fourth Amendment constitutionality of OFAC actions. Part II outlines current Fourth Amendment doctrine. In particular, Part II discusses the “special needs” exception, which features prominently in cases about OFAC blocking orders. Part III analyzes the cases that have challenged OFAC blocking orders. Four major viewpoints have emerged about the constitutionality of OFAC blocking orders: (1) they do not present a cognizable Fourth Amendment claim; (2) they are subject to the Fourth Amendment “special needs” exception; (3) they violate the Fourth Amendment;

tiered designation process); J. David Pollock, *Administrative Justice: Using Agency Declaratory Orders in the Fight to Staunch the Financing of Terrorism*, 33 CARDOZO L. REV. 2171, 2196-98 (2012) (proposing that OFAC switch to Administrative Procedure Act declaratory orders); David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1394-1409 (2007) (criticizing post-9/11 OFAC sanctions enforcement as “inexpert,” “unchannelled,” and “incongruous”); Nicole Nice-Petersen, Note, *Justice for the “Designated”: The Process that Is Due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L.J. 1387, 1388 (2005) (criticizing lack of OFAC due process); 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, 720 (2008) (“OFAC’s current regulations do not adequately protect an organization’s right to hire an attorney . . .”).

22. David Klass, Note, *Asset Freezing of Islamic Charities Under the International Economic Emergency Powers Act: A Fourth Amendment Analysis*, 14 WASH. & LEE J. C.R. & SOC. JUST. 155, 196 (2007) (arguing that “OFAC has failed to meet the requirements of the Fourth Amendment in its blocking actions” because “[p]robable cause must . . . be surmounted”).
23. Rebecca Kagan Sternhell, *Freezing Assets in the War on Terror: OFAC and the Fourth Amendment* 30 (Sept. 25, 2011) (unpublished manuscript), http://works.bepress.com/rebecca_kagansternhell/1 (“OFAC’s blocks are Fourth Amendment seizures within all standards set forth by the Supreme Court.”).
24. Jeffrey N. Davenport, Note, *Freezing Terrorist Finance in Its Tracks: The Fourth Amendment, Due Process, and the Office of Foreign Assets Control After KindHearts v. Geithner*, 61 SYRACUSE L. REV. 173, 192, 200 (2010) (finding district court determination that OFAC blocking orders violate the Fourth Amendment “seems to stretch the bounds of both logic and precedent”).

and (4) they may violate the Fourth Amendment, depending on the facts. Lastly, Part IV proposes a new jurisprudential framework for evaluating the Fourth Amendment constitutionality of OFAC blocking orders. To resolve the fractured status quo, I propose a multifactor reasonableness test with specific criteria to provide clear guidance to courts and the executive branch.

I. “Guerrillas in Gray Suits”: The Treasury Department’s Army

A. The Rise of OFAC

Economic warfare is nothing new in international relations.²⁵ In the United States, presidential authority to use economic sanctions against foreign countries was first officially codified in 1917 by the Trading with the Enemy Act (TWEA).²⁶ A few decades later, the United States officially established the Office of Foreign Assets Control to target Chinese assets during the Korean War.²⁷

The legal authorities for the vast majority of today’s sanctions programs were created in the late 1970s. Under the TWEA, there was no procedure in place to terminate a national emergency declared by the President. In the 1970s, Congress created the Special Committee on National Emergencies and Delegated Emergency Powers to address the fact that “emergency laws and procedures in the United States ha[d] been neglected for too long,” and the committee recommended passing the National Emergencies Act.²⁸ Ultimately, Congress decided to “delineate the Executive Branch’s exercise of emergency economic powers in response to wartime and peacetime crises.”²⁹ It passed two pieces of legislation that underpin nearly all of the sanctions programs today: the National Emergencies Act (NEA)³⁰ and the International Emergency Economic Powers Act (IEEPA).³¹ Broadly speaking, the NEA established the framework for the declaration and termination of national emergencies. For example, Title III requires that the President “specif[y] the provisions of law

25. Tor Egil Førland, *The History of Economic Warfare: International Law, Effectiveness, Strategies*, 30 J. PEACE RES. 151, 156-60 (1993) (surveying history of economic warfare).

26. Pub. L. No. 65-91, § 5(b), 40 Stat. 411, 415 (1917) (codified as amended at 50 U.S.C. app. § 5(b)(1) (2014)); see also JIMMY GURULÉ, UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM 196 (2008) (describing enactment of TWEA).

27. ZARATE, *supra* note 3, at 24.

28. S. REP. NO. 94-922, at 19 (1976).

29. GURULÉ, *supra* note 26, at 196.

30. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-51); see also HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-505 GOV. NATIONAL EMERGENCY POWERS 12 (2007).

31. Pub. L. No. 95-223, tit. II, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701-06).

under which he proposes that he . . . will act,”³² and Title IV creates accountability and reporting requirements.³³ Once a national emergency is properly declared, IEEPA permits the President to block (synonymous with freeze) “any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.”³⁴

By the late 1970s, OFAC’s star started to shine. During the Iran Hostage Crisis, OFAC blocked \$12 billion of Iranian assets, establishing that OFAC “needed to become more than just a licensing office” for the United States.³⁵ By 1986, OFAC released its first public Specially Designated Nationals (SDN) list—a comprehensive record of individuals and companies subject to sanctions.³⁶ That year, OFAC had only ten employees.³⁷ Throughout the 1990s, sanctions programs targeted a familiar cast of characters: Burma,³⁸ Cuba,³⁹ Iran,⁴⁰ Iraq,⁴¹ North Korea,⁴² narcotraffickers,⁴³ terrorists who threatened peace in the Middle East,⁴⁴ and would-be proliferators of weapons of mass destruction.⁴⁵

32. 50 U.S.C. § 1631.

33. *Id.* § 1641.

34. *Id.* § 1702(a)(1)(B).

35. ZARATE, *supra* note 3, at 24.

36. *Id.* at 25; *see also* Office of Foreign Assets Control, U.S. Dep’t of the Treasury, Specially Designated Nationals and Blocked Persons List (Mar. 3, 2016), <https://www.treasury.gov/ofac/downloads/sdnlist.pdf> [hereinafter SDN List]. This list is updated every day and therefore reflects the last date it was visited prior to publication.

37. Zaring & Baylis, *supra* note 21, at 1400.

38. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, BURMA SANCTIONS PROGRAMS 3 (2015), <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/burma.pdf>.

39. *Cuba Sanctions*, U.S. DEP’T TREASURY, <http://www.treasury.gov/resource-center/sanctions/Programs/pages/cuba.aspx> (last visited Mar. 3, 2016) (indicating Cuban sanctions program began with Executive Order 12,854 in 1993).

40. *Iran Sanctions*, U.S. DEP’T TREASURY, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx> (last visited Mar. 3, 2016) (listing three executive orders imposing sanctions during the 1990s).

41. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, IRAQ: AN OVERVIEW OF THE IRAQ STABILIZATION AND INSURGENCY SANCTIONS REGULATIONS 2 (2010), <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iraq.pdf>.

42. Selig S. Harrison, *Time to Leave Korea?*, FOREIGN AFF., Mar.-Apr. 2001, at 62, 63.

43. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, NARCOTICS SANCTIONS PROGRAM 3 (2014), <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/drugs.pdf>.

44. *Counter Terrorism Sanctions*, U.S. DEP’T TREASURY, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/terror.aspx> (last visited Mar. 3, 2016) (identifying two executive orders implementing sanctions during the 1990s).

45. Office of Foreign Assets Control, U.S. Dep’t of the Treasury, What You Need to Know About Treasury Restrictions 2 (2012), <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/wmd.pdf>.

In the wake of September 11th, the world changed. According to the 9/11 Commission, that change occurred “nowhere more than in the area of countering terrorist financing.”⁴⁶ As a high-level U.S. official observed, money is an “essential ingredient” in terrorist operations—“every bit as important as fighters, weaponry and extremist ideology.”⁴⁷ Less than two weeks after 9/11, President George W. Bush announced Executive Order 13,224,⁴⁸ created to “starve the terrorists of funding.”⁴⁹ With the legal authorities in place, the U.S. government quickly initiated a number of “aggressive and high-profile” anti-terrorism-financing actions.⁵⁰ By the end of 2001, only four months after the 9/11 attacks, the Treasury Department had designated 164 individuals, and the United States and international community had frozen \$60 million in terrorist-related assets.⁵¹

However, the rise of sanctions after September 11th was not limited to anti-terrorism-financing. As a former NSC official observed, “let’s go sanction somebody” is often the default in the “classic situation where the toolkit is limited.”⁵² Since 2004, OFAC has created sixteen new sanctions programs, including programs addressing the Central African Republic, South Sudan, Venezuela, and Russia’s provocations in Ukraine in 2014.⁵³ The United States even used sanctions in response to North Korea’s alleged involvement in the Sony hacking.⁵⁴

46. JOHN ROTH ET AL., NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION 41 (2004).

47. David S. Cohen, Assistant Sec’y for Terrorist Fin., U.S. Treasury Dep’t, Remarks at the Council on Foreign Relations (Jan. 28, 2010), <http://www.cfr.org/terrorist-financing/tackling-terrorist-financing/p34696>.

48. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

49. President George W. Bush, Remarks on United States Financial Sanctions Against Foreign Terrorists and Their Supporters and an Exchange with Reporters, in 37 WEEKLY COMP. PRES. DOC. 1364, 1364 (Sept. 24, 2001).

50. ROTH ET AL., *supra* note 46, at 47.

51. GURULÉ, *supra* note 26, at 7.

52. Rosie Gray & John Stanton, *Sanctions Push to Punish Russia over Ukraine Gains Steam*, BUZZFEED (Mar. 1, 2014, 2:02 PM), <http://www.buzzfeed.com/rosiegray/sanctions-push-to-punish-russia-over-ukraine-gains-steam#a7twztd> (quoting an expert on Russia and Ukraine from the Clinton Administration).

53. *Sanctions Programs and Country Information*, *supra* note 6. The new sanctions programs created since 2005 relate to Belarus (2006), the Central African Republic (2014), Cote d’Ivoire (2006), the Democratic Republic of Congo (2006), Lebanon (2007), the former Liberian regime of Charles Taylor (2004), Libya (2011), Sergei Magnitsky (2012), malicious cyber-enabled activities (2015), Somalia (2010), South Sudan (2014), Syria (2004), Ukraine (2014), Venezuela (2015), and Yemen (2012). *Id.*

54. Sangwon Yoon, *U.S. to Expand Sanctions on N. Korea Finances, Officials Say*, BLOOMBERG BUS. (Jan. 13, 2015, 3:07 PM PST), <http://bloom.bg/1j8UadW>.

All in all, OFAC currently enforces twenty-nine separate sanctions programs, many involving multiple rounds of sanctions.⁵⁵ The SDN list—identifying entities or individuals subject to U.S. sanctions—has more than 6000 entries.⁵⁶ But only about 175 people,⁵⁷ who operate on a budget of approximately \$30 million, do all of this work.⁵⁸ For a point of comparison, the U.S. Army Band has more than 5000 members and costs \$195 million a year.⁵⁹

But how, exactly, do these sanctions get implemented? The U.S. government cannot simply flip a switch and suddenly a country wakes up to crippling economic sanctions. The next Subpart answers that question by using the recent crisis in Ukraine to demonstrate how the U.S. government creates, and then enforces, a sanctions program.

B. Preparing for Battle: OFAC's Designation Process

In March 2014, Russian troops entered the region of Crimea in eastern Ukraine in response to calls for assistance from pro-Russian authorities in the area.⁶⁰ The United States responded by announcing multiple types of Ukraine-related sanctions. First, the United States issued sanctions against individual bad actors—the traditional way it designs a sanctions program.⁶¹ To do this, the President issued an executive order that both declared a national emergency—a legal prerequisite to active executive powers under IEEPA⁶²—and blocked certain types of property. Executive Order 13,660—issued on March 6, 2014—declared a national emergency to deal with the threat from the “actions and policies” of persons who, among other things, “undermine democratic processes and institutions in Ukraine; threaten its peace, security, stability,

55. *Sanctions Programs and Country Information*, *supra* note 6.

56. *OFAC FAQ*, *supra* note 9. For the full list of designated entities, see SDN List, *supra* note 36.

57. Samuel Rubinfeld, *OFAC Rises as Sanctions Become a Major Policy Tool*, WALL ST. J.: RISK & COMPLIANCE J. (Feb. 5, 2014, 10:56 AM ET), <http://blogs.wsj.com/riskandcompliance/2014/02/05/ofac-rises-as-sanctions-become-a-major-policy-tool>.

58. Yukhananov & Strobel, *supra* note 1. Not surprisingly, “[o]utside lawyers complain [the budget] is stretched thin.” *Id.*

59. Walter Pincus, *Defense Department Spends \$500 Million to Strike Up the Bands*, WASH. POST (Sept. 6, 2010, 10:39 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/06/AR2010090603018.html?sid=ST2010090603042>.

60. Robert McMahan, *Ukraine in Crisis*, COUNCIL ON FOREIGN REL. (Aug. 25, 2014), <http://www.cfr.org/ukraine/ukraine-crisis/p32540>.

61. *Id.*

62. 50 U.S.C. § 1701(a) (2014) (“Any authority granted to the President by section 1702 of this title may be exercised . . . if the President declares a national emergency with respect to such threat.”).

sovereignty, and territorial integrity; and contribute to the misappropriation of its assets.”⁶³

Executive Order 13,660 now applies to “[a]ll property and interests in property” within U.S. jurisdiction of those “responsible for or complicit in, or [who] have engaged in” actions or policies that “undermine democratic processes or institutions in Ukraine” and “threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine.”⁶⁴ It also applies to persons providing material support for the proscribed activities and being owned or controlled by a person whose property and interests are blocked by the order.⁶⁵ In addition to Executive Order 13,660, the President also issued Executive Order 13,661 on March 16.⁶⁶ This executive order expanded the scope of the national emergency declared in Executive Order 13,660 by providing the authority to block the property of Russian officials, those operating in the Russian arms sector, entities owned or controlled by Russian officials, and those providing material support to Russian officials.⁶⁷

In order to give teeth to these authorities, OFAC then identified the persons (natural or nonnatural) subject to the executive order by issuing “designations”—a formal finding by the government that a person meets the criteria listed in the relevant executive order and is, therefore, subject to sanctions.⁶⁸ In the context of the Ukraine-related sanctions, OFAC ultimately designated approximately 117 persons—43 entities and 74 individuals—under Executive Orders 13,660 and 13,661 in 2014.⁶⁹

These designations are one of the most controversial parts of OFAC’s work.⁷⁰ In practice, however, this narrative ignores the significant amount of process that goes into a designation. When OFAC considers designating a

63. Exec. Order No. 13,660, 31 C.F.R. § 589 app. A (2015).

64. *Id.* § 1(a)(i).

65. *Id.* § 1(a)(iv)-(a)(v).

66. Exec. Order No. 13,661, 31 C.F.R. § 589 app. B.

67. *See, e.g.*, U.S. Dep’t of the Treasury, Protecting Charitable Giving: Frequently Asked Questions 3-4 (2010), <https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/Treasury%20Charity%20FAQs%206-4-2010%20FINAL.pdf> [hereinafter Protecting Charitable Giving].

68. Exec. Order No. 13,661, § 1(a).

69. *SDN by Programs*, U.S. DEP’T TREASURY, <http://www.treasury.gov/ofac/downloads/prgrmlst.txt> (last visited Mar. 3, 2016).

70. *See, e.g.*, LAWYERS’ COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA, THE OFAC LIST: DUE PROCESS CHALLENGES IN DESIGNATION AND DELISTING 3 (2014), <http://www.lccr.com/wp-content/uploads/The-OFAC-List-2014-FINAL.pdf> (“The wide discretion accorded to OFAC to designate entities as terrorists, combined with the lack of transparency in the process, has given rise to abuse and discriminatory enforcement of the law.”).

party, it begins by conducting an investigation using a broad range of sources.⁷¹ The investigation, considering a wide range of inculpatory and exculpatory information, must determine that there is a “reasonable basis” for civil designation.⁷² Once the investigation is complete, the Treasury Department drafts an evidentiary memorandum that is subject to internal legal review by attorneys from OFAC, the Department of the Treasury, and the Department of Justice.⁷³ For example, in 2006, the Treasury Department pushed to designate “terrorist ideologues”—notably Mohammed Moumou and Mullah Krekar—for providing material support to Al Qaeda.⁷⁴ In the interagency process, however, “Justice [Department] lawyers were worried that [they] were overstepping the First Amendment, while State and Treasury [Department] lawyers were concerned that [they] were expanding the use of targeted sanctions beyond what was intended or wise.”⁷⁵ These “independent players inside the executive branch . . . shape and constrain presidential action through investigation and legal interpretation.”⁷⁶

In addition to internal legal review, an OFAC designation may also be halted for policy reasons. Formally, the executive order establishing a national emergency will usually require the Secretary of the Treasury to consult with the Secretary of State before designating an individual.⁷⁷ Informally, the “growing complexity of US counterterrorism efforts” led to an interagency group wherein the CIA, FBI, White House, and departments of State, Defense, and Treasury could debate “the wisdom of public designations.”⁷⁸ Other agencies may want to avoid moving forward with a designation that the Treasury Department supports. In early 2002, for instance, the Treasury Department scrapped a number of planned Al Taqwa network designations because the CIA was concerned designations would reveal intelligence sources and operations.⁷⁹ Designations also might be scrapped, or put on hold, because they would unduly harm a relationship with a country at a critical time. Is it wise, for instance, to move forward with additional designations of Iranian entities in the midst of nuclear negotiations? Some would say such designations

71. Protecting Charitable Giving, *supra* note 67, at 3.

72. *Id.* Criminal actions can also be brought by the Justice Department.

73. *Id.*; see also ZARATE, *supra* note 3, at 28 (“Whole tribes of lawyers from the Treasury, State, and Justice departments would review any designation proposal . . .”).

74. ZARATE, *supra* note 3, at 111-12.

75. *Id.* at 113.

76. JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 229 (2012).

77. See, e.g., Exec. Order No. 13,660, § 1(a), 31 C.F.R. § 589 app. A (2015).

78. ZARATE, *supra* note 3, at 41.

79. *Id.* at 40-41. For a description of the Al Taqwa network, see Mark Hosenball, *Attacking the Money Machine*, NEWSWEEK (Nov. 6, 2001, 7:00 PM), <http://www.newsweek.com/attacking-money-machine-149693>.

could create another unnecessary thorn in the relationship between the United States and Iran.

In addition to designating persons responsible for contributing to the conflict in Ukraine, the United States also introduced a pair of novel sanctions. In Executive Order 13,662, the United States announced sectoral sanctions for the first time.⁸⁰ Instead of designating specific persons deemed responsible for fomenting instability in Ukraine, Executive Order 13,662 created the legal authority for sanctions against those who operate in “such sectors” of the Russian economy as “financial services, energy, metals and mining, engineering, and defense”—and those who materially assist or are owned or controlled by them—irrespective of the relationship (or lack thereof) between persons in these sectors and instability in Ukraine.⁸¹ OFAC implemented these sanctions via four directives, each of which outlines the prohibitions applicable to a specific sector.⁸² The defense sector directive, for instance, prohibits “all transactions in, provision of financing for, and other dealings in new debt of longer than 30 days maturity of persons determined to be subject to this Directive, their property, or their interests in property” by a U.S. person⁸³ or person within the United States.⁸⁴ As of July 2015, fourteen entities—including big names such as Gazprom and Bank of Moscow—were subject to sectoral sanctions under one or more directives.⁸⁵

Additionally, the United States also departed from its list-based sanctions—identifying individuals or companies subject to sanctions—in a December 2014 executive order. In addition to blocking the property of persons operating in Crimea, Executive Order 13,685 prohibits “new investment in the Crimea

80. Exec. Order No. 13,662, § 1(a), 31 C.F.R. § 589 app. C.

81. *Id.*

82. Office of Foreign Assets Control, U.S. Dep’t of the Treasury, Directive 1 (as Amended) Under Executive Order 13662 (2014), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662_directive1.pdf; Office of Foreign Assets Control, U.S. Dep’t of the Treasury, Directive 2 (as Amended) Under Executive Order 13662 (2014), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662_directive2.pdf; Office of Foreign Assets Control, U.S. Dep’t of the Treasury, Directive 3 (as Amended) Under Executive Order 13662 (2014), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662_directive3.pdf [hereinafter Directive 3]; Office of Foreign Assets Control, U.S. Dep’t of the Treasury, Directive 4 (as Amended) Under Executive Order 13662 (2014), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662_directive4.pdf.

83. The Ukraine sanctions, for instance, define a U.S. person as “any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.” 31 C.F.R. § 589.312.

84. Directive 3, *supra* note 82.

85. *See generally* Office of Foreign Assets Control, U.S. Dep’t of the Treasury, Sectoral Sanctions Identification List (2015), <http://www.treasury.gov/ofac/downloads/ssi/ssi.pdf>.

region of Ukraine by a United States person” and importation or exportation of goods, services, and technology from Crimea.⁸⁶ This broad-based ban on investment in Crimea applies to anyone (subject to U.S. jurisdiction) investing in the region, not just those deemed to be creating instability.

C. Leveraging the Private Sector

An OFAC designation is merely a finding by the government that an individual or entity is subject to U.S. sanctions. But what happens next? One of the most critical evolutions in sanctions policy over the past couple of decades is that the U.S. government has shifted much of the burden of enforcing sanctions to the private sector, namely financial institutions.

Even as late as the 1990s, the United States relied on broad sanctions—“updat[ing] the idea of blockades and trade-route disruption for a modern age”—as the “predominant” sanctions tool.⁸⁷ Sanctions were a tool used by one state directly against the economy of another state. In response to the 9/11 attacks, however, the United States developed a more nuanced approach to sanctions. Through innovative legal authority in the PATRIOT Act⁸⁸ and executive actions,⁸⁹ the United States shifted much of the burden for enforcing sanctions to the private sector.

The “strategic revelation” of post-9/11 financial warfare is the “revolutionary” idea that banks are the “prime movers” in the twenty-first-century financial and commercial environment.⁹⁰ Therefore, instead of trying to enforce economic sanctions through tools such as embargoes, which can be notoriously difficult to enforce, the government instead “relie[s] more and more on the ability of financial institutions to act as protective gatekeepers to the financial system by identifying, reporting, and preventing” impermissible use of the financial system.⁹¹

86. Exec. Order No. 13,685, §§ 1-2, 79 Fed. Reg. 77,357, 77,357 (Dec. 19, 2014).

87. ZARATE, *supra* note 3, at 6-7.

88. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of the U.S. Code). One of the most innovative tools is section 311, which allows the Secretary of the Treasury to designate foreign jurisdictions, institutions, types of accounts, or classes of transactions as “primary money laundering concern[s].” 31 U.S.C. § 5318A(b)(1)(A) (2014). Section 311—which allows the United States to declare a financial institution as a “financial pariah” in a “single stroke”—has been particularly successful, as evidenced by the 2005 Banco Delta Asia case. See ZARATE, *supra* note 3, at 240-41.

89. See, e.g., Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

90. ZARATE, *supra* note 3, at 151.

91. Juan C. Zarate, *Harnessing the Financial Furies: Smart Financial Power and National Security*, WASH. Q., Oct. 2009, at 43, 49.

When OFAC announces designations (or prohibits certain types of transactions), U.S. financial institutions are legally required to comply.⁹² Practically, that means that if OFAC designates a Russian official, any U.S. financial institution holding that person's assets is required to freeze them (and also to prohibit any additional transfers to these accounts).⁹³ Companies often use complicated compliance software to ensure they do not run afoul of OFAC requirements.⁹⁴ If there is a match between an OFAC designation and an account the institution holds, the institution is required to freeze the account. Unsurprisingly, many large financial institutions have also hired away former Treasury employees to help them navigate this complicated regulatory terrain.⁹⁵

Failure to comply with these requirements "could bring high regulatory and reputational costs if uncovered."⁹⁶ Statutorily, IEEPA authorizes civil penalties of the greater of \$250,000 or twice the amount of the transaction *per* violation and criminal penalties up to \$1,000,000 and/or twenty years of imprisonment.⁹⁷ Because these punishments are per violation, penalties add up very quickly—producing some very large settlements. In 2014 alone, OFAC reached twenty-three settlements totaling \$1.2 billion, including a \$963 million settlement with BNP Paribas (out of a total \$8.9 billion settlement) for a host of sanctions violations.⁹⁸ These actions have made clear to "bankers and passive investors in terror who may have played the game of willful blindness" that "straddling the fence . . . [is] no longer acceptable."⁹⁹

92. *See, e.g.*, 31 C.F.R. § 595.203 (2015); *see also* OFAC FAQ, *supra* note 9.

93. OFAC also generally requires compliance by foreign branches of U.S. entities and, in some cases, foreign subsidiaries. *See* OFAC FAQ, *supra* note 9.

The SDN list will also include nicknames and alternative names for designated individuals and entities. *See, e.g.*, SDN List, *supra* note 36, at 741 (listing one designated person as "SLUTSKIY, Leonid (a.k.a. SLUTSKY, Leonid; a.k.a. SLUTSKY, Leonid E.; a.k.a. SLUTSKY, Leonid Eduardovich)").

94. *See, e.g.*, *Our Products*, OFAC ANALYZER, <http://www.ofacalyzer.com> (last visited Mar. 3, 2016) (advertising software to ensure OFAC compliance).

95. Kasia Klimasinska et al., *Banks Woo Treasury Sanctions Pros to Navigate Complex U.S. Rules*, BLOOMBERG BUS. (Aug. 12, 2014, 9:00 PM PDT), <http://bloom.bg/1MmrN2H>.

96. Zarate, *supra* note 91, at 44.

97. 50 U.S.C. § 1705 (2014). IEEPA was amended in 2007 to raise the maximum penalty to \$250,000. International Emergency Economic Powers Enhancement Act, Pub. L. No. 119-96, sec. 2(a), § 206(b), 121 Stat. 1011, 1011 (2007) (codified as amended at 50 U.S.C. § 1705 note). Previously, the maximum was \$50,000. Combating Terrorism Financing Act of 2005, Pub. L. No. 109-177, tit. IV, sec. 402, § 206, 120 Stat. 243, 243 (codified as amended at 50 U.S.C. § 1705).

98. *See supra* note 13 and accompanying text.

99. *See* ZARATE, *supra* note 3, at 27.

II. The Fourth Amendment and Twenty-First-Century National Security

OFAC actions involve a number of complexities that do not easily map onto existing Fourth Amendment jurisprudence. U.S. sanctions target individuals around the world who further a policy that the executive branch has determined poses a “national emergency” to the United States. Because sanctions freeze assets, any target would likely move its money quickly outside of U.S. jurisdiction if provided any notice. Against this backdrop, what role, if any, does the Fourth Amendment play in constraining the Treasury Department’s actions? This Part traces the development of Fourth Amendment doctrine over the past few decades, particularly the rise of the “special needs” exception that is central to evaluating the Fourth Amendment constitutionality of OFAC blocking orders.

Akhil Amar has observed that the “Fourth Amendment today is an embarrassment. . . . Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays.”¹⁰⁰ In the twenty-first century, the interaction between technology and national security has not made the task any easier.¹⁰¹ OFAC blocking orders have an interesting relationship to the Fourth Amendment.¹⁰² Fourth Amendment jurisprudence generally focuses on defining what constitutes a “search,” but OFAC blocking orders are a possible “seizure” not incident to a search. Additionally, OFAC blocking orders occur without a warrant, so the only question is whether the blocking orders escape Fourth Amendment scrutiny or are subject to an exception—not whether probable cause existed or a warrant was properly executed. To determine whether OFAC blocking orders violate the Fourth Amendment, there are three important inquiries: (1) whether the aggrieved party enjoys Fourth Amendment protection, (2) whether the government action is a “seizure,” and (3) if so, whether it is an “unreasonable” seizure (which involves determining whether the Fourth Amendment “special needs” exception applies).

100. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994); see also Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 505 (2007) (observing that the Fourth Amendment “state of affairs is widely considered an embarrassment”).

101. See generally STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 144-69 (2012) (describing pressures of post-9/11 world on Fourth Amendment protections).

102. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

First, the Fourth Amendment is viewed in rather territorial terms.¹⁰³ In *United States v. Verdugo-Urquidez*, the Supreme Court held that the Fourth Amendment did not apply to the search and seizure of property owned by a nonresident alien in a foreign country, but the opinion did not foreclose the possibility of a claim by someone who had a “significant voluntary connection” with the United States.¹⁰⁴

The answer to the next question is fairly straightforward. The Supreme Court held in *Soldal v. Cook County* that the standard for a “seizure” of property under the Fourth Amendment is “some meaningful interference with an individual’s possessory interests in that property.”¹⁰⁵ OFAC blocking orders clearly meet this standard. An OFAC blocking order indefinitely freezes all of the assets subject to U.S. jurisdiction—certainly a “meaningful interference.” For instance, some of the sanctions relief contemplated by the 2015 Iran nuclear deal involves Iranian assets that have been frozen in the United States for quite some time.¹⁰⁶

The question whether a seizure is “unreasonable” is more complicated. One of the most fundamental debates about the Fourth Amendment is the relationship between the Reasonableness Clause and the Warrant Clause. Historically, the Supreme Court embraced the view that warrants were generally required when the government performed a search or seizure.¹⁰⁷ The *Katz* Court, for instance, famously stated that “searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”¹⁰⁸ The Supreme Court has also held that warrantless seizures of property are generally *per se* unreasonable.¹⁰⁹ Over the past couple of decades, however, the Court appears to be moving away from a “warrant preference” view and towards a “reasonableness” view of

103. See, e.g., Orin S. Kerr, *The Fourth Amendment and the Global Internet*, 67 STAN. L. REV. 285, 287 (2015) (“So far, almost all of the cases and scholarship applying the Fourth Amendment to the Internet have assumed domestic territoriality.”).

104. 494 U.S. 259, 261, 271 (1990).

105. 506 U.S. 56, 61 (1992) (quoting *United States v. Jacobson*, 466 U.S. 109, 113 (1984)). This property-based view of the Fourth Amendment can also be seen in recent Supreme Court decisions. See *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (“[P]roperty rights ‘are not the sole measure of Fourth Amendment violations,’ . . . but though *Katz* may add to the baseline, it does not subtract anything . . .” (quoting *Soldal*, 506 U.S. at 64)).

106. Patrick Clawson, *Iran’s ‘Frozen’ Assets: Exaggeration on Both Sides of the Debate*, WASH. INST. (Sept. 1, 2015), <http://www.washingtoninstitute.org/policy-analysis/view/irans-frozen-assets-exaggeration-on-both-sides-of-the-debate>. For a comprehensive look at U.S. sanctions against Iran, see generally KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS (2015).

107. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 559 (1999).

108. *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted).

109. *United States v. Place*, 462 U.S. 696, 701 (1983).

the Fourth Amendment.¹¹⁰ Reasonableness balances the degree to which a search or seizure intrudes upon an individual's privacy against the degree to which it is needed for the promotion of legitimate governmental interests.¹¹¹ Commentators disagree about which view is historically accurate.¹¹² Where a court falls on this spectrum is often crucial to its evaluation of the constitutionality of OFAC blocking orders.

Part of this reasonableness inquiry involves determining whether OFAC blocking orders are subject to one of the well-delineated exceptions the *Katz* Court referenced. The primary exception litigated in OFAC blocking cases is the special needs exception.¹¹³ It originally developed out of judicial acceptance of "administrative searches" that allow for certain inspections without standard warrants. In *Camara v. Municipal Court*, for instance, the Court upheld periodic building inspections without a standard warrant because "the public interest demands such a rule."¹¹⁴ In *Griffin v. Wisconsin*, the Court officially established the special needs exception.¹¹⁵ There, the Court held that Wisconsin parole officers could search the home of a parolee without a warrant because "[a] State's operation of a probation system, like its operation of a school . . . presents 'special needs' beyond normal law enforcement that may justify

110. See, e.g., *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) ("As the text indicates and we have repeatedly affirmed, 'the ultimate touchstone of the Fourth Amendment is reasonableness.'" (quoting *Riley v. California*, 134 S. Ct. 2473, 2482 (2014))); Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 *Miss. L.J.* 1133, 1143 (2012).

111. *Virginia v. Moore*, 553 U.S. 164, 171 (2008).

112. Compare *Amar*, *supra* note 100, at 762 (rejecting the argument that the relationship between the "two discreet commands" of the Fourth Amendment—searches and seizures must be reasonable and warrants authorizing various searches and seizures must be limited (by probable cause, particular description, and so on)—"are yoked by an implicit third that no searches and seizures may take place except pursuant to a warrant"), with Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 *S. CAL. L. REV.* 1, 20-21 (1994) ("[T]he Warrant Clause defines and interprets the Reasonableness Clause.").

113. Commentators have generally been critical of the special needs exception. See, e.g., Jennifer Y. Buffaloe, Note, "Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 *HARV. C.R.-C.L. L. REV.* 529, 530-31 (1997) ("This exception is so broad and far-reaching that it is poised to turn the warrant preference rule on its head."). But see William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 *STAN. L. REV.* 553, 555 (1992) (arguing criticism of special needs cases is misplaced because if searching is forbidden, the government has other options it can exercise that might make innocent search targets worse off).

114. 387 U.S. 523, 533 (1967).

115. 483 U.S. 868, 873 (1987). While *Griffin* officially recognized the special needs exception, the term was first used in a Justice Blackmun concurrence. See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

departures from the usual warrant and probable-cause requirements.”¹¹⁶ Doctrinally, the special needs test has two parts: it evaluates (1) whether the government action is “beyond the normal need for law enforcement,” and (2) whether acquiring a warrant is impracticable.¹¹⁷ Courts will often then conduct a balancing test that “weigh[s] the intrusion on the individual’s interest in privacy against the ‘special needs’ that supported the program.”¹¹⁸

As one commentator has described, special needs cases fall into two buckets: dragnet policies and reduced individual suspicion policies.¹¹⁹ A dragnet policy is “one in which the government searches or seizes every person, place, or thing in a specific location or involved in a specific activity based only on a showing of a generalized government interest.”¹²⁰ The Court has upheld dragnet policies involving health and safety inspections,¹²¹ searches of closely regulated businesses,¹²² checkpoints,¹²³ and drug testing programs that apply to an entire class of people.¹²⁴ The second category of special needs cases involves “groups of individuals with reduced expectations of privacy.”¹²⁵ In this category, the Court has permitted warrantless searches of parolees,¹²⁶ students,¹²⁷ and government employees.¹²⁸

Dragnet searches and reduced individual suspicion cases are permitted for different reasons. Dragnet policies, despite involving no individualized suspicion, are justified because they address important public policy concerns (such as drunk driving, terrorism prevention, and health and safety standards) by conducting a search in a particular area. Part of the reason a warrant is

116. *Griffin*, 483 U.S. at 873-74.

117. *Id.* at 873 (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment)).

118. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001).

119. Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 259 (2011).

120. *Id.* at 263.

121. *Camara v. Mun. Court*, 387 U.S. 523, 533 (1967).

122. *See, e.g.*, *New York v. Burger*, 482 U.S. 691, 693, 702 (1987) (allowing warrantless searches of junkyard businesses); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978) (allowing warrantless searches of liquor and firearms dealers).

123. *See, e.g.*, *Illinois v. Lidster*, 540 U.S. 419, 421-22 (2004) (upholding checkpoint stop of all cars a week after fatal accident in same location); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (upholding sobriety checkpoint). *But see* *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) (prohibiting checkpoint to interdict unlawful drugs).

124. *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002) (upholding drug tests for all students who compete in competitive extracurricular activities); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 664 (1989) (upholding drug tests for all customs employees directly involved in drug interdiction).

125. Primus, *supra* note 119, at 270-71.

126. *Samson v. California*, 547 U.S. 843, 857 (2006).

127. *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985).

128. *O’Connor v. Ortega*, 480 U.S. 709, 725 (1987) (plurality opinion).

excused is that these dragnets possess “some form of preclearance from another branch of government—such as an area warrant or a statutory or regulatory regime—that . . . set[s] the terms of the search in a way that cabin[s] executive discretion.”¹²⁹ “Special subpopulation” searches or seizures, however, are justified because there is still some degree of individual suspicion.¹³⁰ While a principal or a prison guard may not have suspicion that rises to the level of probable cause, they are nonetheless permitted to conduct a warrantless search because students and parolees do not enjoy the same expectation of privacy as a standard person.

There are national security issues that fall into each bucket. In the national security context, courts have upheld warrantless dragnet searches on public ferries¹³¹ and subways.¹³² Commentators disagree about whether these warrantless searches should be considered a special need.¹³³ The process of the Foreign Intelligence Surveillance Court, by contrast, is more akin to a reduced individual suspicion policy.¹³⁴

OFAC blocking orders are interesting because they share characteristics with both dragnet and reduced individual suspicion cases. Blocking orders are issued using a “reasonable basis” standard, suggesting a reduced individual suspicion lens.¹³⁵ Unlike other reduced individual suspicion categories, however, there is nothing inherent about those subject to sanctions (e.g., age, conviction, employer) that automatically justifies a reduced standard of individual suspicion. The argument for a reduced individual suspicion lens—i.e., that sanctions advance important policy goals—is an argument typically deployed in dragnet cases.¹³⁶

129. Primus, *supra* note 119, at 278.

130. *Id.*

131. *Cassidy v. Chertoff*, 471 F.3d 67, 87 (2d Cir. 2006) (holding special needs exception justifies warrantless trunk searches on public ferries to prevent terrorist acts).

132. *MacWade v. Kelly*, 460 F.3d 260, 263 (2d Cir. 2006) (holding special needs exception authorizes warrantless bag searches on subway for antiterrorism purposes).

133. Compare Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843 (2010) (arguing that suspicionless antiterrorism searches should not be subject to the special needs exception), with Russell D. Covey, *Pervasive Surveillance and the Future of the Fourth Amendment*, 80 MISS. L.J. 1289, 1307 (2011) (“Antiterrorism searches fit well within the parameters of the special needs doctrine . . .”), and Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777, 778 (2004) (arguing for expanded version of special needs exception to allow warrantless searches to prevent national security threats).

134. See, e.g., *In re Sealed Case*, 310 F.3d 717, 738 (FISA Ct. Rev. 2002) (“Congress clearly intended a lesser showing of probable cause for these activities than that applicable to ordinary criminal cases.”).

135. Protecting Charitable Giving, *supra* note 67, at 3.

136. See, e.g., *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (upholding checkpoint because, *inter alia*, “[t]he relevant public concern was grave”).

But dragnet cases are also an imperfect fit. Sanctions often apply to a wider range of people than existing dragnet cases, which are confined to a certain type of person (e.g., student athletes), entity (e.g., closely regulated businesses), or location (e.g., checkpoints) subject to scrutiny for a particular public policy reason. Sanctions, however, can apply to any person who invests in certain sectors like the Russian economy or Crimea, for instance. It could apply to literally anyone subject to U.S. jurisdiction, which OFAC reads broadly.

Moreover, sanctions also implicate the rights of third parties that cannot conduct business with sanctioned persons. OFAC asserts jurisdiction over any U.S. person anywhere in the world and any money that enters the U.S. financial system,¹³⁷ and so any third party attempting to send money to a designated entity will have its assets frozen. This is a significantly larger dragnet than existing special needs cases. Nonetheless, OFAC blocking orders, similar to dragnet policies, rely on institutional checks (in combination with a reduced suspicion standard) to help cabin executive discretion.¹³⁸ An analysis of the OFAC Fourth Amendment cases demonstrates that whether courts view OFAC blocking orders more like reduced suspicion cases or dragnet cases plays an important role in the outcome.¹³⁹

Ultimately, this Note advocates a fact-specific “reasonableness” view to evaluate the Fourth Amendment constitutionality of OFAC blocking orders.¹⁴⁰ While the Supreme Court has repeatedly noted that Fourth Amendment jurisprudence should provide bright-line rules to give clear guidance to law enforcement,¹⁴¹ a reasonableness test is preferable in the OFAC context for two reasons. First, OFAC’s work involves so many complexities for Fourth Amendment purposes (including territoriality, national security, and exigency) that it is not possible to fashion a bright-line rule that accounts for the myriad factual permutations that can exist. Second, the proposed reasonableness test is based on a number of specific factual questions, which ameliorates concerns that it will simply be another “mushy balancing test.”¹⁴²

137. See *supra* notes 9-10 and accompanying text.

138. See *supra* text accompanying notes 72-79.

139. See *infra* Part III.

140. See *infra* Part IV.B.

141. See, e.g., *Riley v. California*, 134 S. Ct. 2473, 2491 (2014) (“[O]ur general preference [is] to provide clear guidance to law enforcement through categorical rules.”).

142. Adam Klein, *Justice Scalia’s Legacy*, LAWFARE (Feb. 16, 2016, 5:41 PM), <https://www.lawfareblog.com/justice-scalias-legacy> (discussing Justice Scalia’s criticism of the plurality opinion in *Hamdi* for using a “mushy balancing test”).

III. Fourth Amendment Challenges to OFAC Blocking Orders

There is little historical evidence of Fourth Amendment challenges to U.S. sanctions programs.¹⁴³ Since September 11th, however, there have been at least seven merits decisions on Fourth Amendment challenges to OFAC blocking orders.¹⁴⁴ Although the basic facts of all of these cases are similar—OFAC designates an entity and blocks its assets without a warrant—courts have come to four very different answers. This Part explores those answers.

A. The Deference View: Sanctions Are Not a Seizure

The District Court for the District of Columbia (DDC) has heard the most Fourth Amendment challenges to OFAC blocking orders, and it has consistently held that OFAC blocking orders do not violate the Fourth Amendment. As the case law has developed, however, the DDC has relied on two very different reasons for rejecting Fourth Amendment claims. One set of cases, explored in this Subpart, argues that OFAC blocking orders are simply not a seizure. (The second set of cases, explored in Subpart D.2 below, relies on a factual analysis to determine whether a warrant is required in that instance.)

The first Fourth Amendment challenge to an OFAC blocking order was *Holy Land Foundation for Relief & Development v. Ashcroft*.¹⁴⁵ In December 2001, the Treasury Department designated the Holy Land Foundation (HLF)—the largest Muslim charitable foundation in the United States—as a Specially Designated Terrorist and a Specially Designated Global Terrorist for conducting “acts for or on behalf of” Hamas.¹⁴⁶ As a result, OFAC issued a “Blocking Notice,” requiring financial institutions to freeze “all of HLF’s funds, accounts and real property.”¹⁴⁷

The DDC held in a brief memorandum opinion that OFAC’s freezing of accounts was “not a seizure entitled to Fourth Amendment protection.”¹⁴⁸ The court reasoned that the government “plainly had the authority to issue the blocking order,” and that the blocking order was not arbitrary and

143. See *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury (Al Haramain II)*, No. 07-1155-KI, 2009 WL 3756363, at *10 (D. Or. Nov. 5, 2009), *aff’d in part, rev’d in part*, 686 F.3d 965 (9th Cir. 2011).

144. *Al Haramain*, 686 F.3d 965; *Kadi v. Geithner*, 42 F. Supp. 3d 1 (D.D.C. 2012); *Al Haramain II*, 2009 WL 3756363; *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner (KindHearts I)*, 647 F. Supp. 2d 857 (N.D. Ohio 2009); *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008); *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34 (D.D.C. 2005), *aff’d in part sub nom. Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff’d*, 333 F.3d 156 (D.C. Cir. 2003).

145. 219 F. Supp. 2d 57.

146. *Id.* at 62-64.

147. *Id.* at 64.

148. *Id.* at 79.

capricious.¹⁴⁹ Interestingly, the court also stated that “the case law is clear that a blocking of this nature does not constitute a seizure,” citing a number of takings law cases for the proposition that blocking property does not vest title with the government.¹⁵⁰ The Fourth Amendment issue was not discussed on appeal.¹⁵¹

The DDC relied heavily on *Holy Land* in two subsequent cases. In *Islamic American Relief Agency v. Unidentified FBI Agents*, the court held that a blocking order does not present a cognizable Fourth Amendment claim, citing *Holy Land* for the proposition that “the case law is clear that a blocking of this nature does not constitute a seizure.”¹⁵² This conclusion is drawn from citations to the same string of takings law cases cited in *Holy Land*.¹⁵³ As in *Holy Land*, the court draws upon cases analyzing the Fifth Amendment takings standard to evaluate a Fourth Amendment claim, even though these inquiries are distinct. The Fourth Amendment issue was not discussed on appeal.¹⁵⁴ Similarly, in *Zarmach Oil Services, Inc. v. U.S. Department of the Treasury*, the DDC cited the same sentence from *Holy Land* that draws upon a number of takings law cases.¹⁵⁵ The opinion also noted that “courts owe a substantial measure of ‘deference to the political branches in matters of foreign policy,’ including cases involving blocking orders.”¹⁵⁶

B. The Special Needs View: A Warrant Requirement Is Not Practical

In 2009, the District Court for the District of Oregon took a different approach in *Al Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury (Al Haramain II)*.¹⁵⁷ In February 2004, OFAC froze the assets of Al Haramain-Oregon—a branch of the Saudi Arabia-based Al Haramain Islamic Foundation that had been involved in terrorist attacks against the United

149. *Id.* at 78.

150. *Id.* at 78-79 (citing *Tran Qui Than v. Regan*, 658 F.2d 1296, 1301 (9th Cir. 1981); *D.C. Precision Inc. v. United States*, 73 F. Supp. 2d 338, 343 n.1 (S.D.N.Y. 1999); *IPT Co. v. Dep’t of Treasury*, No. 92 Civ. 5542 (JFK), 1994 WL 613371, at *5-6 (S.D.N.Y. Nov. 4, 1994); and *Can v. United States*, 820 F. Supp. 106, 109 (S.D.N.Y. 1993)). These cases stand for the proposition that a government blocking of property does not vest title with the government, which is true, but does not answer whether freezing assets (without vesting) constitutes a “seizure.”

151. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003).

152. 394 F. Supp. 2d 34, 48 (D.D.C. 2005), *aff’d in part sub nom. Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007).

153. *Id.*

154. *See Islamic Am. Relief Agency*, 477 F.3d 728.

155. 750 F. Supp. 2d 150, 160 (D.D.C. 2010).

156. *Id.* at 155 (quoting *Regan v. Wald*, 468 U.S. 222, 242 (1984)).

157. No. 07-1155-KI, 2009 WL 3756363, at *14-15 (D. Or. Nov. 5, 2009), *aff’d in part, rev’d in part*, 686 F.3d 965 (9th Cir. 2011).

States—pending investigation into whether the Oregon branch should be designated under antiterrorism executive orders.¹⁵⁸ After exchanging some information with Al Haramain Islamic Foundation-Oregon, OFAC designated the entity a Specially Designated Global Terrorist on September 9, 2004.¹⁵⁹

Unlike the DDC cases adopting the deference view, the court used the special needs exception to conclude that OFAC did not violate the Fourth Amendment.¹⁶⁰ The opinion analyzed (1) whether the blocking order was a seizure, and (2) whether that seizure was unreasonable or fell into the special needs exception.¹⁶¹

Unlike *Holy Land* and *Unidentified FBI Agents*, the court in *Al Haramain I* concluded that an OFAC blocking order is a seizure for purposes of the Fourth Amendment because, under *Soldal*, it is a “meaningful interference with an individual’s . . . property.”¹⁶² The court persuasively reasoned that *Holy Land* was incorrect “to equate a seizure with the transfer of property to the government” because the Fourth Amendment “imposes a lower threshold” than the Fifth Amendment.¹⁶³ As the court explained, “a blocking order would constitute a violation of the Fifth Amendment only if it resulted in an appropriation of property for the government’s use or, if it could be deemed a ‘regulatory’ taking, eliminated ‘all economically valuable use’ of the property.”¹⁶⁴

After determining that OFAC blocking orders are seizures, the court turned to the reasonableness of such seizures. To evaluate reasonableness, the court used the two-step framework established in *Virginia v. Moore*: first, look to the statutes and common law of the Founding era to determine the norms that the Fourth Amendment was meant to preserve; and second, if history is inconclusive, balance the intrusion upon an individual’s privacy with “the degree to which it is needed for the promotion of legitimate governmental interests.”¹⁶⁵ At step one, the court concluded that there was too “little legal guidance about seizures of property at the time of the Framers” to determine whether the seizure was unreasonable.¹⁶⁶ The court was not persuaded that

158. *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury (Al Haramain I)*, 585 F. Supp. 2d 1233, 1241, 1245 (D. Or. 2008). *Al Haramain I* deferred a decision on the Fourth Amendment issue pending additional briefing. *Id.* at 1264.

159. *Id.* at 1245-46.

160. *Al Haramain II*, 2009 WL 3756363, at *11-15.

161. *Id.* at *9.

162. *Al Haramain I*, 585 F. Supp. 2d at 1262 (quoting *Soldal v. Cook Cty.*, 506 U.S. 56, 61 (1992)).

163. *Id.* at 1262-63.

164. *Id.* at 1262 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 323 (2002)).

165. 553 U.S. 164, 168-71 (2008) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

166. *Al Haramain II*, 2009 WL 3756363, at *9.

OFAC blocking orders were analogous to forfeitures because the purpose of such orders is “not as much punishment as it is prevention.”¹⁶⁷ The court also determined that the fact that no Fourth Amendment challenges had been raised in almost 100 years of blocking actions “informs the reasonableness” of the government’s actions.¹⁶⁸ Nonetheless, the court was unwilling to find that OFAC blocking orders escape Fourth Amendment scrutiny entirely.

Instead, the court held that while the Fourth Amendment does apply to OFAC actions, they fall within the special needs exception.¹⁶⁹ Under *Griffin*, the special needs exception applies if (1) the government action is “beyond the normal need for law enforcement,” and (2) acquiring a warrant is impracticable.¹⁷⁰ Here, the court concluded that freezing assets is beyond normal law enforcement because the “purpose of the asset seizure scheme is not to obtain information about whether the asset owner has committed an act of terrorism, but rather is to withhold assets to ensure future terrorist acts are not committed.”¹⁷¹ Additionally, the court found that requiring a warrant was impracticable for three reasons: (1) “the government must act quickly to prevent asset flight,” (2) it would be “impossible” to meet warrant specificity requirements, and (3) it would be difficult “to track down assets . . . and apply for a warrant in each jurisdiction in which the asset is located.”¹⁷²

Lastly, the court concluded that the government’s interest in stopping terrorism outweighed the entity’s privacy interests under the special needs balancing test.¹⁷³ In response to the plaintiff’s argument that there must be safeguards that substitute for a warrant, the court—viewing blocking orders through a reduced suspicion lens—found OFAC’s “reasonable suspicion” standard a sufficient safeguard.¹⁷⁴

C. The Expansive Warrant View: OFAC Actions Are Not a Special Need

Around the same time as the *Al Haramain II* district court decision, a federal district court in Ohio came to a very different conclusion. In *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, a federal district court held for the first time that an OFAC blocking order violated the Fourth

167. *Id.* at *10.

168. *Id.* at *10-11.

169. *Id.* at *15.

170. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

171. *Al Haramain II*, 2009 WL 3756363, at *12.

172. *Id.* at *13.

173. *Id.* at *14.

174. *Id.*

Amendment.¹⁷⁵ A judge who previously sat on the Foreign Intelligence Surveillance Court for six years wrote the opinion.¹⁷⁶

KindHearts was a Toledo-based nonprofit corporation with a “stated goal . . . to provide humanitarian aid.”¹⁷⁷ In February 2006, OFAC froze all of KindHearts’ assets—about \$1 million—pending investigation into whether it violated antiterrorism executive orders.¹⁷⁸ OFAC provisionally determined to designate KindHearts in May 2007, but the court enjoined the actual designation pending the outcome of the litigation.¹⁷⁹

In its Fourth Amendment analysis, the court first determined that the Fourth Amendment applied to OFAC blocking orders. It agreed with *Al Haramain II* that a blocking order constitutes meaningful interference with an individual’s property under *Soldal*.¹⁸⁰ It was not persuaded, however, that the historical lack of Fourth Amendment challenges should matter, given that past cases dealt with economic blocking against foreign governments and persons, who are not subject to Fourth Amendment protections.¹⁸¹ The court was also unwilling to conclude that deference to the executive in foreign affairs precludes blocking orders from Fourth Amendment scrutiny.¹⁸²

The court also reached the same conclusion as the *Al Haramain II* district court: that a “reasonableness” interpretation of the Fourth Amendment could not shield OFAC blocking orders from scrutiny altogether.¹⁸³ The court eschewed an “open-ended balancing of interests” for the view that “searches and seizures are usually ‘reasonable’ only when conducted with a judicial warrant supported by probable cause” because “the Fourth Amendment ‘derives content and meaning through reference to the warrant clause.’”¹⁸⁴

The *KindHearts I* court sharply diverged with the *Al Haramain II* court, however, by finding that the special needs exception does not apply to OFAC blocking orders. In addition to the *Griffin* prongs of “beyond normal criminal law enforcement” and warrant impracticability, the court added that the seizure “must have built-in limits, such as a confined geographic scope or regular, suspicionless application”—quintessential dragnet limitations—“that

175. *KindHearts I*, 647 F. Supp. 2d 857, 919 (N.D. Ohio 2009).

176. *Judge James G. Carr*, U.S. DISTRICT CT. FOR N. DISTRICT OHIO, <http://www.ohnd.uscourts.gov/home/judges/judge-james-g-carr> (last visited Mar. 3, 2016).

177. *KindHearts I*, 647 F. Supp. 2d at 864.

178. *Id.* at 865, 867.

179. *Id.* at 867, 870 n.6.

180. *Id.* at 871-72.

181. *Id.* at 873.

182. *Id.* at 876-78.

183. *Id.* at 878-79; see also *Al Haramain II*, No. 07-1155-KI, 2009 WL 3756363, at *11 (D. Or. Nov. 5, 2009), *aff'd in part, rev'd in part*, 686 F.3d 965 (9th Cir. 2011).

184. *KindHearts I*, 647 F. Supp. 2d at 879 (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 309-10 (1972)).

restrict executive discretion and ensure that all citizens know the circumstances under which they are subject to a special needs search or seizure.”¹⁸⁵

The court determined that blocking orders fail all three parts of this special needs test. OFAC’s blocking power, the court concluded, has “more in common with ordinary law enforcement” than with special needs activities because “it only blocks those it suspects have violated the law,” as opposed to open-ended border searches or checkpoints.¹⁸⁶ Second, OFAC “provide[d] no explanation as to why the probable cause warrant requirements were impracticable in this case.”¹⁸⁷ The opinion noted that Congress could create a flexible warrant procedure.¹⁸⁸ Lastly, but “[m]ost importantly,” the court found that “OFAC’s blocking power entails no built-in limitations curtailing executive discretion and putting individuals on notice that they are subject to blocking.”¹⁸⁹ The court’s analysis thus suggests that a special needs exception must fall within the dragnet category by treating any individualized suspicion short of probable cause as evidence of normal law enforcement operations, as opposed to an alternative for probable cause.

D. The Maybe View: OFAC Actions Can Require a Warrant

With *KindHearts I* and *Al Haramain II* squarely at odds, *Al Haramain II* went up on appeal to the Ninth Circuit. The Ninth Circuit’s *Al Haramain* decision was the first to answer “maybe” to the question whether OFAC blocking orders require a warrant. Prior to this “maybe” view, courts had relied on legal arguments to make a categorical determination about whether the Fourth Amendment applied to OFAC actions. In contrast, these “maybe” decisions can be viewed as a factual spectrum. *Al Haramain*, as decided by the Ninth Circuit, is a case in which the arguments for Fourth Amendment protection are stronger, whereas a pair of DDC cases help stake out the other end of the spectrum—cases in which the arguments for Fourth Amendment protections are very weak.

1. *Al Haramain* on appeal

The Ninth Circuit reversed the lower court’s *Al Haramain II* decision, holding that the specific OFAC blocking order violated the Fourth

185. *Id.*

186. *Id.* at 881.

187. *Id.*

188. *See id.* at 884. Congress has not done so.

189. *Id.* at 881.

Amendment.¹⁹⁰ The scope of the holding, however, was substantially narrower than the *KindHearts I* opinion.

On appeal, the government made two primary Fourth Amendment arguments. First, it argued that OFAC actions fall within the special needs exception.¹⁹¹ Second, it argued that blocking orders are not susceptible to Fourth Amendment challenges because they are per se reasonable under the “general reasonableness” test.¹⁹²

The “dispositive” question for the Ninth Circuit was whether acquiring a warrant was impracticable.¹⁹³ Unlike previous cases, the plaintiff conceded that OFAC blocking orders—aimed at preventing the funding of terrorist organizations—were beyond normal law enforcement,¹⁹⁴ so the Court did not have to analyze the first prong of the special needs exception. The Court also concluded that the general reasonableness argument—weighing the nature and extent of the privacy interest at hand against the nature and immediacy of the government’s concerns and the efficacy of the procedures employed in meeting those concerns—provided little help in this context because a “blocking order effectively shuts down the private entity,” whereas the “government’s interest in preventing terrorism and the funding of terrorism is extremely high.”¹⁹⁵

Contrary to the *Al Haramain II* district court, the Ninth Circuit concluded that acquiring a warrant was not impracticable in this case.¹⁹⁶ The government argued a warrant was impracticable for three reasons: (1) OFAC is often unable to determine the location of the assets it seeks to block, (2) it would be very difficult to update warrants when additional assets are discovered, and (3) the timing of blocking orders is coordinated with other governments.¹⁹⁷ The Ninth Circuit was “not persuaded” because, on the facts of the case, none of these arguments appeared to pose an insurmountable obstacle.¹⁹⁸ In a footnote inserted after the decision to deny rehearing en banc, the court emphasized the narrowness of the holding: “We address only the facts of this case: OFAC’s seizure of assets as a result of its designation order of a United States entity located within the United States.”¹⁹⁹ The court included a number of caveats throughout its opinion to clarify the scope of the holding. Because the

190. *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 995 (9th Cir. 2011).

191. *Id.* at 990.

192. *Id.* at 993.

193. *Id.* at 993.

194. *Id.* at 991.

195. *Id.* at 992-94.

196. *Id.* at 993.

197. *Id.*

198. *Id.*

199. *Id.* at 995 n.18.

government faces a number of logistical challenges before blocking, such as asset flight and intra- and intergovernmental coordination, the court stated that “OFAC can . . . seiz[e] the assets *initially* pursuant to an emergency exception to the warrant requirement” and then obtain a warrant after it has blocked the assets.²⁰⁰ The court also explicitly stated that its holding did not address whether a warrant is required for designation of foreign entities, designations by executive order (as opposed to administrative announcement), or designations when subsequent additional assets are discovered.²⁰¹

2. *Kadi*

Following the Ninth Circuit’s decision in *Al Haramain*, the DDC denied a Fourth Amendment claim in *Kadi v. Geithner*.²⁰² OFAC designated Kadi, a citizen and permanent resident of Saudi Arabia, a Specially Designated Global Terrorist in October 2001.²⁰³ In response to Kadi’s claim that this designation violated the Fourth Amendment, the government argued that the Fourth Amendment did not apply, and that even if it did, blocking actions are per se reasonable and fall within the special needs exception.²⁰⁴

The *Kadi* court viewed the issues similarly to the Ninth Circuit but drew the opposite conclusion based on the facts. Despite the DDC cases adopting the “deference viewpoint” that sanctions are not a seizure,²⁰⁵ the *Kadi* court, like the Ninth Circuit, “expressed some reluctance to find that, categorically, blocking orders could *never* be ‘seizures’ under the Fourth Amendment.”²⁰⁶ Instead, the court made five arguments why, in that specific case, requiring a warrant would not make sense. First, the court—observing that “the Supreme Court has repeatedly instructed that the ultimate touchstone of the Fourth Amendment remains reasonableness”—was “highly skeptical” that Kadi could even assert a Fourth Amendment claim because he had “not argued persuasively that he ha[d] sufficient connections to raise such a claim.”²⁰⁷ Second, the court found that OFAC’s internal designation process could satisfy

200. *Id.* at 993.

201. *Id.* at 995 n.18. It also declined to address the degree of specificity required in the warrant. *Id.*

202. 42 F. Supp. 3d 1, 38 (D.D.C. 2012).

203. *Id.* at 6.

204. Memorandum in Support of Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment at 41-48, *Kadi*, 42 F. Supp. 3d 1 (No. 09-0108), 2009 WL 2249130.

205. *See supra* Part III.A.

206. *Kadi*, 42 F. Supp. 3d at 37; *see also* *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 70 (D.D.C. 2008) (rejecting Fourth Amendment challenge to an OFAC blocking order from a Saudi Arabian citizen because the Fourth Amendment “does not ‘restrain the actions of the Federal Government against aliens outside of the United States territory’” (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990))).

207. *Kadi*, 42 F. Supp. 3d at 37 n.21.

the requirements of the Fourth Amendment: because “OFAC’s decision to maintain the SDGT designation of Kadi was supported by substantial evidence, it follows that the blocking order was not issued unreasonably or without probable cause.”²⁰⁸ Third, the court agreed with the government that “the safeguard of a warrant would only minimally advance Fourth Amendment interests” because “it is not even clear that requiring a warrant in this case would even have much effect, given that Kadi is a Saudi Arabian citizen with substantial assets overseas.”²⁰⁹ Fourth, the court found that the importance of stopping terrorism cut against the protection provided by the Fourth Amendment.²¹⁰ Fifth, the court was substantially more sympathetic to the government’s claims about warrant impracticability than the Ninth Circuit. It decided that the government’s concerns about the practicability of obtaining warrants—OFAC cannot determine the location of assets, updating warrants as additional assets were uncovered would be difficult, and blocking orders often require coordination with other governments—were “well-founded,” explaining why it was “reluctant” to apply the Ninth Circuit’s *Al Haramain* decision to the present situation.²¹¹

IV. Developing a Fourth Amendment Framework for Financial Warfare

Overall, the current jurisprudence is a mess. Some courts say that the Fourth Amendment does not apply, some courts say that it does but that the special needs exception precludes a warrant requirement, some courts say that you always need a warrant, and some courts say that you might need a warrant, but it is not clear when. To solve this highly fractured status quo, this Note introduces two basic recommendations. First, courts should reject categorical determinations that the Fourth Amendment clearly does, or does not, apply to OFAC blocking actions. These black-and-white answers do not adequately account for the myriad factual possibilities that can arise in OFAC actions.

Second, courts should adopt a Fourth Amendment “reasonableness” test to evaluate the constitutionality of OFAC blocking actions. While the “maybe”

208. *Id.* at 37; *see* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261, 271 (1990) (denying Fourth Amendment protection to a person “who has had no previously significant voluntary connection with the United States”).

209. *Kadi*, 42 F. Supp. 3d at 37 n.21 (quoting *United States v. Jacobsen*, 466 U.S. 109, 125 (1984)).

210. *See id.* (holding lack of a warrant justified in part on “the substantial government interest in combatting terrorism”); *see also id.* at 38 n.22 (agreeing that the scope of the Fourth Amendment is “more limited in the context of foreign relations and national security than in typical criminal investigations and administrative actions” (quoting *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 647 (N.D. Ohio 2010))).

211. *Id.* at 38.

view espoused in the Ninth Circuit’s *Al Haramain* decision and the DDC’s *Kadi* decision is a step in the right direction, both courts emphasized the narrowness of their holdings and left many questions unanswered.²¹² A comprehensive “reasonableness” test provides the flexibility necessary to evaluate the factual permutations that exist.

A. Reject Categorical Determinations

Categorical determinations about the applicability of the Fourth Amendment to OFAC actions are responsible for a large part of the existing judicial morass. Courts directly disagree on fundamental questions such as whether the Fourth Amendment even applies to OFAC actions and whether the special needs exception categorically excuses OFAC. This Subpart will show that each of the categorical views—deference, special needs, and expanded warrant—is incomplete. Each ignores important counterarguments and factual circumstances where requiring a warrant may or may not make sense.

1. OFAC blocking actions are not entirely beyond the scope of the Fourth Amendment

The deference view—OFAC actions are entirely outside the scope of the Fourth Amendment—is incorrect for several reasons. As a threshold matter, OFAC blocking orders constitute a seizure for the purposes of the Fourth Amendment. Although *Holy Land*’s observation that freezing assets does not vest title with the government is accurate—a blocking of property only results in it being placed in an account that cannot be accessed without OFAC permission—it does not answer the question whether the assets are “seized” for purposes of the Fourth Amendment. Courts addressing OFAC blocking orders since *Holy Land* and *Unidentified FBI Agents* have properly found that the *Soldal* meaningful-interference-with-property standard is the correct test to determine whether an action is a seizure under the Fourth Amendment.²¹³ A blocking order, which indefinitely freezes all of the assets of an entity, almost certainly meets this standard. OFAC permission is required to make any disbursements from the account, including even paying attorneys’ fees to

212. See *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 995 n.18 (9th Cir. 2012) (“We address only the facts of this case: OFAC’s seizure of assets as a result of its designation order of a United States entity located within the United States. We do not address the requirements under the Fourth Amendment for other situations . . .”); *Kadi*, 42 F. Supp. 3d at 37 (concluding that the court “need not resolve” whether blockings did not constitute seizures, “nor need it decide as a general matter whether blocking orders categorically fall within one of the enumerated exceptions to the Fourth Amendment warrant requirement”).

213. *Soldal v. Cook Cty.*, 506 U.S. 56, 61 (1992); see, e.g., *supra* notes 163, 181 and accompanying text.

challenge the blocking.²¹⁴ Later courts were correct to criticize the DDC for applying the standard for a government taking under the Fifth Amendment, which is a higher bar than that properly used to determine an unreasonable seizure.

Although OFAC blocking actions involve core executive foreign affairs powers, that fact alone is insufficient to bypass the Fourth Amendment entirely. In other situations involving national security concerns and the Fourth Amendment, such as airport screenings or subway searches, the privacy interest involved is relatively minimal compared to the government interest at hand.²¹⁵ In OFAC cases, however, both parties have considerable interests at stake: preventing financing of problems determined to be national emergencies versus having personal property frozen indefinitely. The application of the traditional Fourth Amendment balancing test—the degree to which a seizure intrudes upon an individual’s privacy versus the degree to which it is needed for the promotion of legitimate governmental interests—does not provide a clear answer. Not surprisingly, courts disagree on how to balance civil liberties and counterterrorism in this context.²¹⁶ Moreover, the standard deference courts give to the executive branch in matters of foreign affairs should be somewhat more limited when the assets frozen are owned by a U.S. citizen or located in the United States.²¹⁷

The other categorical view that OFAC actions do not require a warrant—the special needs view—also relies on assumptions that do not always hold true. The *Al Haramain II* district court made three arguments to justify applying the special needs exception: the government needs to act quickly to prevent asset

214. See Office of Foreign Assets Control, U.S. Dept. of Treasury, Guidance on the Release of Limited Amounts of Blocked Funds for Payment of Legal Fees and Costs Incurred in Challenging the Blocking of U.S. Persons in Administrative or Civil Proceedings 1-3 (2010), https://www.treasury.gov/resource-center/sanctions/Documents/legal_fee_guide.pdf.

215. See, e.g., *Cassidy v. Chertoff*, 471 F.3d 67, 79 (2d Cir. 2006) (holding that searches of baggage were “by any measure, minimally intrusive”).

216. Compare *Al Haramain II*, No. 07-1155-KI, 2009 WL 3756363, at *14 (D. Or. Nov. 5, 2009) (“[T]he government’s interest in seizing the assets of organizations with links to international terrorist organizations are [sic] substantial [T]he government’s interest in stopping the financing of terrorism outweighs [plaintiff’s] privacy interests.”), *aff’d in part, rev’d in part*, 686 F.3d 965 (9th Cir. 2011), with *Al Haramain*, 686 F.3d at 993 (“[T]he sensitive subject matter is no excuse for the dispensing altogether with domestic persons’ constitutional rights.”). One commentator has argued that “terrorism is the ultimate governmental interest, and as long as a balancing test is the only safeguard standing between Americans and the erosion of civil liberties, it is likely that Americans will lose.” Anthony C. Coveny, *When the Immovable Object Meets the Unstoppable Force: Search and Seizure in the Age of Terrorism*, 31 AM. J. TRIAL ADVOC. 329, 386 (2007).

217. See, e.g., *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 320 (1972) (“[T]he President’s domestic security role . . . must be exercised in a manner compatible with the Fourth Amendment.”).

flight, it is difficult to meet the particularity requirement, and it would be difficult to track down assets and apply for warrants in each jurisdiction.²¹⁸ While these arguments have merit, they are insufficient to justify categorical application of the special needs exception. The Ninth Circuit directly answered the first argument by suggesting that OFAC can “seiz[e] the assets *initially* pursuant to an emergency exception to the warrant requirement” and then obtain a warrant after it has blocked the assets.²¹⁹

The warrant particularity argument also may not be an insurmountable obstacle. In some cases, such as “roving wiretaps,”²²⁰ courts have been willing to accept a reduced particularity standard,²²¹ provided that OFAC can provide enough information about the designee and the information that it may have about assets in the United States. Lastly, while it is often difficult for OFAC to determine the location of assets that it blocks,²²² it is not the case that OFAC never knows the location of assets it is blocking. For example, when the U.S. government was considering freezing Libyan assets in 2011, OFAC specialists “had been in conversations with bank officials . . . and their lawyers” to get an estimate of how many Libyan assets were subject to U.S. jurisdiction.²²³ If there was enough time between these conversations and OFAC’s designations, it may have been practicable for OFAC to get a warrant in that case.

2. OFAC actions should not be subject to a warrant requirement

While blocking orders should receive Fourth Amendment scrutiny, the government should not be required to obtain a warrant in all or even most situations. Indeed, the situations where OFAC does not need a warrant vastly outnumber the circumstances where it might because nearly all designated individuals have few, if any, connections to the United States. Therefore, the expanded warrant view—that OFAC blocking actions are subject to the Fourth Amendment because the special needs exception does not apply—is even more problematic than the deference view and the special needs view. The *KindHearts I* opinion adopting this view has three major flaws. First, its

218. See *supra* text accompanying note 172.

219. *Al Haramain*, 686 F.3d at 993.

220. See 18 U.S.C. § 2518(11) (2014) (providing that requirements “relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply” if certain circumstances are met).

221. See, e.g., *United States v. Petti*, 973 F.2d 1441, 1444 (9th Cir. 1992) (noting that a roving wiretap “may comply with the particularity requirement even though it does not specify the physical location of the place to be surveilled”). The particularity requirement refers to the Fourth Amendment’s command that a warrant shall not issue unless it “particularly” describes the place to be searched or person or things to be seized. U.S. CONST. amend. IV.

222. See *supra* note 211.

223. ZARATE, *supra* note 3, at 345.

argument that OFAC actions are not beyond normal law enforcement—the first requirement for a special need—is not persuasive.

The court argued that OFAC’s blocking power “focuses on single entities, and does so on the basis of some suspicion,” which “more closely resembles the *modus vivendi* and *modus operandi* of traditional law enforcement investigative activity.”²²⁴ The *Al Haramain II* decision, however, rightly pointed out that there is a crucial distinction between the method and the “programmatic purpose” of the activity.²²⁵ The purpose of OFAC blocking actions is to prevent the financing of future acts of terrorism (or other national emergencies) as opposed to seeking evidence of guilt for past crimes. Additionally, OFAC enforcement actions are usually civil, not criminal. Not surprisingly, courts have generally been sympathetic to the argument that preventing terrorism is an activity beyond normal law enforcement.²²⁶ The *Al Haramain* appellants’ concession that blocking orders are beyond normal law enforcement, despite *KindHearts I* concluding the opposite on similar facts, is telling. While OFAC blocking orders are likely “beyond normal law enforcement,” the more difficult question remains the second prong of the special needs test: whether getting a warrant is impracticable.

On this issue, the *KindHearts I* court found that “for the special needs exception to apply, both the probable cause and warrant requirements must *categorically* be impracticable in light of the government’s purpose.”²²⁷ This functionally created a warrant requirement because it is difficult to prove that it is categorically impracticable for OFAC to get a warrant. While there may often be difficulties that make getting a warrant impracticable, there are other times, such as the Libya example above, where getting a warrant might be practicable.

A warrant requirement for OFAC actions is legally unnecessary and unwise as a policy matter. Legally, some argue that the Fourth Amendment requires *ex ante* review by a neutral and detached decisionmaker.²²⁸ But a number of preeminent scholars have concluded, as a historical matter, that precisely the opposite is true.²²⁹ Furthermore, the Supreme Court’s Fourth

224. *KindHearts I*, 647 F. Supp. 2d 857, 881 (N.D. Ohio 2009).

225. *Al Haramain II*, No. 07-1155-KI, 2009 WL 3756363, at *12 n.8 (D. Or. Nov. 5, 2009), *aff’d in part, rev’d in part*, 686 F.3d 965 (9th Cir. 2011).

226. See, e.g., *Cassidy v. Chertoff*, 471 F.3d 67, 82 (2d Cir. 2006); *MacWade v. Kelly*, 460 F.3d 260, 271 (2d Cir. 2006).

227. *KindHearts I*, 647 F. Supp. 2d at 881 (emphasis added).

228. See, e.g., Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 822 & nn.16-17 (1994) (cataloguing sources arguing that the Fourth Amendment creates a warrant presumption).

229. See TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 41 (1969) (“[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants.”); Amar, *supra* note 100, at 762 (arguing that never requiring a warrant “squares more snugly with the Amendment’s specific words, harmonizes
footnote continued on next page”)

Amendment jurisprudence contains a number of exceptions that, at least implicitly, suggest that there are many situations where a warrant or ex ante review is not required. In the OFAC context, the Ninth Circuit understandably concluded in *Al Haramain* that OFAC is not required to have a warrant when it initially seizes assets because of concerns about asset flight. Instead, it concluded that OFAC can “seiz[e] the assets *initially* pursuant to an emergency exception to the warrant requirement, or pursuant to a carefully circumscribed warrant” and then obtain a warrant after it has blocked the assets.²³⁰ Functionally, this is no different than ex post review: a court will evaluate whether OFAC had, at the time of asset freeze, sufficient evidence to justify the seizure.

As a policy matter, always requiring OFAC to obtain a warrant prior to seizing assets would be quite burdensome and provide few benefits. OFAC’s surprisingly small staff handles a very large portfolio of sanctions programs. Adding a warrant requirement to OFAC’s existing workload “would serve only to divert valuable agency resources”²³¹ from working on pressing national security matters. Getting a warrant for a national security issue is often an involved process. In a standard law enforcement setting, like a DUI stop, the Supreme Court has recognized that technology provides ways to quickly get a warrant.²³² But there is a difference between getting a warrant to take a blood sample—where the facts suggesting a suspect may be intoxicated are relatively straightforward—and the determination, for instance, of whether a Muslim charity finances terrorism or educational projects. The FISA court may provide a useful example of the resources involved in acquiring warrants for national security actions. Although a high percentage of FISA warrant applications is approved, there is significant back and forth between the staff and the Justice Department before a warrant is actually approved.²³³ In OFAC’s case, some might argue that the number of warrants OFAC would need to get is relatively small because very few designated entities are entitled to Fourth

better with its historic context, and makes considerably more common sense”). *But see* Maclin, *supra* note 112, at 20-21.

230. *Al Haramain*, 686 F.3d at 993 (citation omitted).

231. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 666 (1989) (finding that “even if Customs Service employees are more likely to be familiar with the procedures required to obtain a warrant,” requiring a warrant diverts resources “from the [agency’s] primary mission”). This could also be true of Treasury officials.

232. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1562 (2013) (“Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing.”).

233. Letter from Reggie B. Walton, Presiding Judge, U.S. Foreign Intelligence Surveillance Court, to Patrick J. Leahy, Chair, Senate Comm. on the Judiciary 1-3 (July 29, 2013), <http://www.leahy.senate.gov/imo/media/doc/Honorable%20Patrick%20Leahy.pdf>.

Amendment protection. While partially true, a warrant requirement provides OFAC with little guidance in the common instance where a person has some connections to the United States and might enjoy Fourth Amendment protection.²³⁴ Requiring OFAC to get a warrant in every case where a person might have a colorable claim to Fourth Amendment protection would impose a large burden on this small staff.

That is not to say that an underresourced government department justifies flouting the Fourth Amendment. After all, every government agency, both federal and local, can argue, rightly or wrongly, that it is stretched thin. But in this unique factual circumstance, requiring a warrant would provide little benefit. OFAC has designated more than 6000 people, and only 8 Fourth Amendment challenges have been raised in federal court (and of those 8, all but 2 were rejected).²³⁵ The vast majority of people designated live abroad, have little connection to the United States, and are believed by the U.S. government to participate in activity that constitutes a national emergency to the United States. Therefore, it is very unlikely that many of them will show up in federal court to challenge their designation. It does not make sense to require OFAC to get a warrant in every instance where a person could enjoy Fourth Amendment protection when very few of them would actually seek to try to enforce those rights. Substantively, a warrant requirement also does not add as much benefit as it does in other contexts. The warrant application will likely come after the assets have been seized (pursuant to the exigency exception), so there is no benefit of *ex ante* review. While having the review of a neutral decisionmaker can be important, the difference in OFAC actions lies between requiring a judge to bless every OFAC seizure with an *ex post* warrant or having a judge evaluate Fourth Amendment challenges brought by a plaintiff. Moreover, OFAC often will not know what assets a designated entity possesses. A court should not deny a warrant application just because the government cannot name every account a designated entity has at a financial institution. That would impose a very difficult standard for the government to meet in a vital national security arena. But that means the particularity requirement of the Fourth Amendment does very little, if any, work in this context. Requiring OFAC to get a warrant authorizing seizure of all property that third-party institutions can identify does not add a great deal of protection.

Lastly, the *KindHearts I* court's conclusion that the "[m]ost important[]" finding is that "OFAC's blocking power entails no built-in limitations curtailing executive discretion and putting individuals on notice that they are subject to blocking,"²³⁶ ignores important factual and legal counterarguments.

234. See *infra* notes 251-52 and accompanying text.

235. See *supra* Part III.

236. *KindHearts I*, 647 F. Supp. 2d 857, 881 (N.D. Ohio 2009).

Factually, this conclusion overlooks many of the checks on the designation process that exist within the executive branch. As explained earlier, designations are subject to a legal review by both the Treasury and Justice Departments, and also a policy debate from the relevant government stakeholders to determine if and when to sanction various entities.²³⁷ Legally, the conclusion that a special needs seizure “must have built-in limits, such as a confined geographic scope or regular, suspicionless application” is an incomplete reading of the doctrine.²³⁸ As outlined in Part II above, there are two types of special needs cases: dragnet cases and special subpopulation cases. The court references only dragnet limitations, ignoring the category of cases where a standard of individualized suspicion less than probable cause is justified by the factual circumstances. OFAC actions represent a hybrid between the dragnet and special subpopulation categories; they use a combination of executive limitations and some degree of individual suspicion (“reasonable basis”) to justify the lack of a warrant.

B. Adopt a Reasonableness Test to Evaluate OFAC Blocking Actions

Categorical determinations about the applicability of the Fourth Amendment to OFAC actions are inadequate. The existing balancing tests—whether done at the “general reasonableness” stage or within an analysis of the special needs exception—are also insufficient because both essentially weigh the private actor’s interest against the government’s interest. In the OFAC context, the interests of both entities are so great—not having all of your assets frozen versus preventing the financing of terrorism—that the test does not lend itself to detailed analysis. Instead, a court often states either that national security is paramount²³⁹ or that national security powers are not a blank check for the government.²⁴⁰

Instead, courts should adopt an OFAC-specific reasonableness test to evaluate the Fourth Amendment constitutionality of OFAC actions.²⁴¹ This

237. *See supra* Part I.B. The executive branch could change these internal policies, but these changes could be subject to a judicial challenge. Courts have consistently relied on the fact that sufficient evidence existed for designations to uphold challenges under the Administrative Procedure Act and the Fifth Amendment.

238. *KindHearts I*, 647 F. Supp. 2d at 879.

239. *See, e.g.*, *Kadi v. Geithner*, 42 F. Supp. 3d 1, 10 (D.D.C. 2012).

240. *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of the Treasury*, 686 F.3d 965, 993 (9th Cir. 2011) (“[T]he sensitive subject matter is no excuse for the dispensing altogether with domestic persons’ constitutional rights.”).

241. Some have argued that a sanctions court, similar to the FISA court, should be created. *See, e.g.*, O’Leary, *supra* note 21, at 574-80. This Note takes no position on such an idea, although some of the justifications for the FISA court—such as having judges close to Washington quickly available to approve warrants—are less critical when lawsuits are brought *after* assets have been frozen because there is no reason that the case needs to be heard instantly.

fact-specific test can provide courts with the flexibility to deal with the array of factual situations that arise in OFAC actions.²⁴² OFAC blocking actions should be analyzed with a two-part test. First, OFAC blocking orders should receive a rebuttable presumption of reasonableness. Second, courts should analyze a number of factual questions to determine if the seizure in question is unreasonable.

Under this new reasonableness test, OFAC blocking orders should begin with a presumption of reasonableness. To be clear, this would not be a constitutional presumption of reasonableness, but merely a thumb on the scale analogous to that used in other areas of the law.²⁴³ As outlined above in Part I, there is a significant (and underappreciated) amount of process involved in OFAC designations.²⁴⁴ This process—assuming it is effective—helps establish the Fourth Amendment reasonableness of OFAC actions because it ensures that there are built-in executive limitations and a degree of individualized suspicion, even if “reasonable basis” is less than probable cause. To the extent the process is not effective, the proposed reasonableness test incorporates judicial review of the sufficiency of the process. Additionally, OFAC actions should also begin with a presumption of reasonability, as the mission of OFAC is incredibly important. Executive IEEPA authorities are activated only once the President declares a national emergency with respect to a major foreign policy threat facing the United States. While the importance of the activity should not provide an absolute shield for OFAC actions, the *KindHearts II* and *Kadi* courts were nonetheless in agreement that “the scope of the Fourth Amendment [is] ‘more limited in the context of foreign relations and national security than in typical criminal investigations and administrative actions.’”²⁴⁵

Against this presumption of reasonability, courts should conduct a fact-specific inquiry to determine when a seizure is unreasonable. Currently, briefs and judicial decisions in OFAC cases too frequently view Fourth Amendment “reasonableness” in black-and-white terms: the President’s foreign affairs powers should make warrantless seizures per se reasonable,²⁴⁶ or warrantless

242. Congress could, of course, pass legislation defining requirements that must be met before the Treasury Department can seize assets, as they have done in areas such as Title III wiretaps. See 18 U.S.C. §§ 2510-22 (2014).

243. See, e.g., *United States v. R. Enters.*, 498 U.S. 292, 301 (1991) (“[A] grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance.”).

244. See *supra* Part I.B.

245. *Kadi*, 42 F. Supp. 3d at 38 n.22 (quoting *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner (KindHearts II)*, 710 F. Supp. 2d 637, 647 (N.D. Ohio 2010)).

246. See, e.g., Redacted Unclassified Brief for Appellees at 53-55, *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965 (9th Cir. 2012) (No. 10-35032), 2010 WL 6039475.

government actions are typically *per se* unreasonable.²⁴⁷ Instead, Fourth Amendment reasonableness should be viewed along a spectrum. For the purposes of the Fourth Amendment, OFAC designations should be presumed reasonable, but courts should evaluate five factors to determine whether the presumption was rebutted. And courts should adopt a two-prong remedy in the event of a Fourth Amendment violation, awarding attorneys fees to victorious plaintiffs and addressing the status of any remaining frozen assets.

1. The factors

When a challenge is brought, the court should consider the following factors. These factors should be evaluated holistically, and all of the factors do not need to favor one side. The first three factors are particularly important.

a. The person's known jurisdictional proximity to the United States

One of the most important factual questions when evaluating whether OFAC actions violate the Fourth Amendment is the jurisdictional proximity of the entity to the United States. In *United States v. Verdugo-Urquidez*, the Court held that the Fourth Amendment did not apply to the search and seizure of property owned by a nonresident alien in a foreign country.²⁴⁸ The opinion did not foreclose the possibility, however, of a claim by someone who had a "significant voluntary connection" with the United States.²⁴⁹ A significant number of OFAC actions, like *Kadi*, will target entities located outside the United States who have very few, if any, connections with the United States. The Ninth Circuit's decision in *Al Haramain*, however, illustrates the other end of the spectrum: a designation "of a United States entity located within the United States."²⁵⁰

In practice, there are a number of factual situations in between these two cases. For example, a number of individuals and entities on the Specially Designated Nationals list have some ties to the United States—such as a Social Security number²⁵¹ or dual citizenship²⁵²—but reside elsewhere. The

247. *E.g., KindHearts I*, 647 F. Supp. 2d 857, 879 (N.D. Ohio 2009) ("Under most circumstances searches and seizures conducted without a warrant are '*per se* unreasonable under the Fourth Amendment—subject only to a few specifically and well-delineated exceptions.'" (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))).

248. 494 U.S. 259, 271 (1990).

249. *Id.*

250. *Al Haramain*, 686 F.3d at 995 n.18.

251. *See, e.g., SDN List, supra* note 36, at 2370 ("ABDALLAH, Ramadan . . . Damascus, Syria; DOB 01 Jan 1958; POB Gaza City, Gaza Strip; Passport 265 216 (Egypt); SSN 589-17-6824 (United States) . . .").

252. *See, e.g., id.* at 2008 ("CAZARES GASTELLUM, Victor Emilio . . . Mexico; nationality Mexico; citizen Mexico; alt. citizen United States . . .").

extraterritorial application of the Fourth Amendment raises another issue. Courts generally view the Fourth Amendment in territorial terms,²⁵³ which maps onto OFAC's work poorly. OFAC requires compliance from "U.S. persons," which it defines as "including all U.S. citizens and permanent resident aliens regardless of where they are located, . . . all U.S. incorporated entities and their foreign branches," and "[i]n the cases of certain programs, foreign subsidiaries owned or controlled by U.S. companies."²⁵⁴ But in OFAC cases, there may be a disconnect between the location of the target and the location of the seizure. If, for instance, OFAC designates a U.S. citizen living in Afghanistan, the person's assets might be subject to U.S. jurisdiction because the assets were (i) located in a bank account in New York, (ii) located in an account of the foreign branch of a U.S. bank, (iii) located in an account of the subsidiary controlled by a U.S. company, or (iv) located in an account with a foreign bank that clears dollar transactions through a bank in the United States. It is unclear how much, if at all, these distinctions implicate the territorial scope of the Fourth Amendment. In *Verdugo-Urquidez*, the opinion of the Court noted that a warrant from a magistrate in this country "would be a dead letter outside the United States."²⁵⁵ The Second Circuit relied heavily on this logic in *In re Terrorist Bombings of U.S. Embassies in East Africa*, holding that searches of U.S. citizens outside the United States need only satisfy the Fourth Amendment's requirement of reasonableness because seven of the Justices in *Verdugo-Urquidez* did not think U.S. courts were empowered to issue warrants for foreign searches.²⁵⁶ If a foreign bank that is owned or controlled by a U.S. bank freezes assets pursuant to an OFAC designation, does *Verdugo-Urquidez* mean that a warrant is not required? The answer is not clear, but the case illustrates the relevance of territorial considerations in OFAC's work.

To conduct this jurisdictional inquiry, courts should evaluate the information that OFAC had available about the person and their assets at the time of the designation or blocking. The stronger the evidence that the person or their assets are located in the United States, the stronger the claim that

253. See, e.g., Kerr, *supra* note 103, at 291 ("[E]xisting law . . . consistently reflects . . . a 'territorial' conception of the Fourth Amendment.").

254. OFAC FAQ, *supra* note 9. The Iran sanctions, for example, define "United States person" as "any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States." 31 C.F.R. § 560.314 (2015) (italics omitted).

255. 494 U.S. 259, 274 (1990); see also *id.* at 278 (Kennedy, J., concurring) (noting that "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials" all militate against extraterritorial application of the Fourth Amendment).

256. 552 F.3d 157, 167-69 (2d Cir. 2008); see also *United States v. Stokes*, 726 F.3d 880, 893 (7th Cir. 2013).

OFAC should get a warrant. This information would presumably exist, or could be included, in the designation package.²⁵⁷

b. The legal sufficiency of the designation package

Lawsuits challenging OFAC actions often involve challenges—usually under the Administrative Procedure Act (APA) and the Fifth Amendment—to the substantive designation of the entity. The analysis of evidence supporting the substantive designation of an entity should also be a factor in determining the Fourth Amendment reasonableness of OFAC actions. In the cases to date that have found that OFAC violated the Fourth Amendment, the evidence upholding the substantive designation of the entity was permitted to cure any Fourth Amendment defect.²⁵⁸ The *Kadi* court moved this analysis even earlier, finding that because OFAC had substantial evidence for the designation, “it follows that the blocking order was not issued unreasonably or without probable cause.”²⁵⁹ It is more efficient to evaluate the quality of the evidence supporting a designation as part of a comprehensive reasonableness test than to bifurcate the analysis about whether OFAC violated the Fourth Amendment and then, on remand, have a separate determination of whether the quality of the designation evidence cures any Fourth Amendment violation. Although this analysis will overlap with the APA and Fifth Amendment, it should still be included as a factor in a Fourth Amendment reasonableness test as the Fourth Amendment could provide a stronger right and/or remedy in some cases.²⁶⁰

c. Warrant practicability

In the OFAC cases to date, the second prong of the special needs exception—whether getting a warrant is practicable—is often debated at the theoretical level. There are many factual circumstances in which it would be very difficult for OFAC to get a warrant. For example, OFAC has argued it would be impracticable to get a warrant for designations that involve substantial cooperation between the United States and another government

257. One could argue that that the Treasury Department will simply exclude locational information from a designation package to avoid getting a warrant. This is unlikely, however, because information about a person’s location would also probably be needed to provide “substantial evidence” that the designation itself was justified.

258. See *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury (Al Haramain III)*, No. 3:07-CV-01155-KI, 2012 WL 6203136, at *6 (D. Or. Dec. 12, 2012); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner (KindHearts II)*, 710 F. Supp. 2d 637, 653 (N.D. Ohio 2010).

259. *Kadi v. Geithner*, 42 F. Supp. 3d 1, 37 (D.D.C. 2012).

260. See *Amar*, *supra* note 100, at 805 (arguing for using other parts of the Constitution to “furnish benchmarks against which to measure reasonableness and components of reasonableness itself”).

(e.g., the United States and Saudi Arabia).²⁶¹ Instead of using these examples to justify categorical application or denial of Fourth Amendment protection, courts should evaluate whether, in the case at hand, it was practicable to get a warrant.²⁶² In some cases, such as an investigation over many years about whether an entity should be designated, it would not be very difficult to get a warrant. In other instances, the speed and complexity of OFAC's work may make getting a warrant impracticable.

d. Designations “pending investigation”

IEEPA permits the Treasury Department to freeze assets “pending investigation” into whether there is sufficient evidence to designate the entity. Indeed, this procedure was used in both *Al Haramain II* and *KindHearts I*, the two cases to find a Fourth Amendment violation.²⁶³ The *KindHearts I* court was particularly frustrated because the investigation lasted years—leaving the person without access to its assets despite no finding that it violated U.S. sanctions.²⁶⁴ A designation merely “pending investigation” may increase the risk of erroneous deprivation because there has not been a formal finding that the entity has violated sanctions—the government is only investigating. Therefore, it should increase the chance that a Fourth Amendment seizure would be unreasonable. Additionally, if a pending investigation will take a significant amount of time—which can often be the case due to the volume of documents involved and OFAC's workload—it should not be especially difficult to secure a warrant during the course of said lengthy investigation.

e. The authorizer for the blocking

The Director of OFAC, the Secretary of the Treasury, or the President typically authorizes OFAC blocking orders. In *Al Haramain*, the Ninth Circuit held that OFAC's seizure of assets without a warrant violates the Fourth Amendment, but the court declined to address designations by executive order

261. Redacted Unclassified Brief for Appellees, *supra* note 246, at 58 (“[T]he timing of designation decisions is often based on foreign policy and national security considerations.”).

262. For example, the United States and Saudi Arabia had high-level meetings to discuss whether to designate the Al Haramain Foundation, the global branch of Al Haramain-Oregon, and decided to jointly designate the entity. *ZARATE*, *supra* note 3, at 73-75.

263. *Al Haramain II*, No. 07-1155-KI, 2009 WL 3756363, at *2 (D. Or. Nov. 5, 2009), *aff'd in part, rev'd in part*, 686 F.3d 965 (9th Cir. 2011); *KindHearts I*, 647 F. Supp. 2d 857, 865 (N.D. Ohio 2009).

264. 647 F. Supp. 2d at 870 (“Since February 19, 2006, when OFAC first notified KindHearts of the block pending investigation, OFAC has not designated KindHearts For almost three years OFAC has blocked KindHearts' property and property interests and criminalized all transactions with it. OFAC has effectively shut KindHearts down.”).

(and therefore signed by the President).²⁶⁵ The court did not expand on that statement (located in a footnote), but might have worried that requiring the President himself to acquire a warrant before designating entities comes too close to infringing on the President's extraordinary national security power.²⁶⁶ There may also be a concern that exercising delegated national security powers—from the President to the Secretary of the Treasury to the Director of OFAC—reduces the democratic accountability of the action, thereby heightening judicial concern. Therefore, the person signing a designation should be one factor relevant to the reasonableness of the seizure. The importance of high-level executive clearance is seen in other Fourth Amendment contexts, such as “roving wiretap” applications, which must be approved by a very senior Justice Department official.²⁶⁷

2. The remedy

In the only two cases to date where courts found a Fourth Amendment violation, that violation was deemed harmless error on remand because there was sufficient evidence to support a designation.²⁶⁸ In the event that a court determines that OFAC violated the Fourth Amendment, a plaintiff should have two remedies available. First, a prevailing plaintiff should be entitled to attorneys' fees, even if the fees exceed the damages sought. This remedy provides important incentives to both sides. It incentivizes plaintiffs (and their attorneys) to bring cases that may not have a high chance of success while placing a modicum of additional pressure (without overdetering agency conduct) on the government to avoid being on the losing side of these lawsuits. There is already some informal precedent for this action. In the *KindHearts* case,²⁶⁹ the settlement agreement between the plaintiffs and the government (after a number of rulings against the government) included payment of \$330,000 in attorneys' fees.²⁷⁰ Second, the court should evaluate, based on the circumstances of the case, what to do with the frozen assets. If, for instance, there remains substantial evidence to support a designation, the funds should

265. *Al Haramain*, 686 F.3d at 995 n.18.

266. *See, e.g., Regan v. Wald*, 468 U.S. 222, 242 (1984).

267. 18 U.S.C. § 2518(11)(a)(i), (b)(i) (2014).

268. *Al Haramain III*, No. 3:07-CV-01155-KI, 2012 WL 6203136, at *6 (D. Or. Dec. 12, 2012); *KindHearts II*, 710 F. Supp. 2d 637, 653 (N.D. Ohio 2010).

269. *See supra* Part III.C.

270. Settlement Agreement [Between KindHearts for Charitable Humanitarian Development, Inc. and Timothy F. Geithner] (Nov. 29, 2011), http://www.aclu.org/files/assets/kindhearts_v_geithner_settlement.pdf; *see also* Order, *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, No. 3:08cv2400 (N.D. Ohio July 17, 2014) (acknowledging settlement and instructing parties to file a dismissal entry or joint status report by July 2012).

likely remain frozen. If the designation is not legally justifiable, then the funds should be released.

3. The application

Logistically, courts will have to conduct this reasonableness test only when a plaintiff brings a Fourth Amendment challenge against OFAC actions. If the past is a useful indicator, few investigations need occur; only eight claims have been filed since 2001. Although litigation takes longer than a warrant application, this is not a particularly great concern. The person's assets remain frozen during the pendency of the litigation, so there is not a risk to U.S. foreign policy goals. Also, the litigation would likely be led by the Federal Programs Branch at the Justice Department, as opposed to Treasury attorneys, so there is significantly less risk that this approach encroaches on existing Treasury Department demands.²⁷¹

Ultimately, the proposed reasonableness test has three advantages over the status quo. First, it provides a nuanced way to address the national security versus civil liberties balance. Sanctions, which indefinitely freeze a person's assets, are a qualitatively different infringement on an individual's rights than something like an airport screening or a subway search. They play a vital role in U.S. foreign policy precisely because they can be so potent. Currently, courts abstractly weigh national security versus civil liberties—whether as an executive power argument, a Fourth Amendment *per se* reasonableness argument, or as part of the special needs exception analysis—and frequently arrive at completely opposite conclusions. By contrast, the reasonableness test actually calibrates that balance. Warrants will be needed very infrequently, but the executive does not automatically get a free pass. Second, the reasonableness test creates clarity for both OFAC and those subject to OFAC actions. Currently, it is difficult for either side to ascertain whether a warrant is required and, if so, under what circumstances (or in what jurisdictions). The reasonableness test provides the road map to challenge an OFAC action, but does not require OFAC to expend the significant resources to get a warrant before every action. Third, the reasonableness test creates flexibility for the courts to deal with the myriad factual situations that arise in OFAC cases. While some may argue that a case-by-case reasonableness test creates another mushy balancing test,²⁷² evaluating the Fourth Amendment constitutionality of OFAC actions cannot easily be solved by a categorical pronouncement.²⁷³ A

271. See *Federal Programs Branch*, U.S. DEP'T JUST., <https://www.justice.gov/civil/federal-programs-branch> (last updated Oct. 20, 2014) ("Federal Programs Branch attorneys litigate on behalf of approximately 100 federal agencies . . .").

272. See *supra* note 142.

273. See *supra* Part IV.A.i.

fact-specific reasonableness test is better suited to provide a flexible way to analyze these complex cases.

Conclusion

Sanctions play an instrumental role in U.S. foreign policy. As recently as September 2015, major articles discussed how sanctions should look after the Iran deal, whether the United States would ease sanctions on Russia in exchange for an agreement over Ukraine, and whether the United States should use its new cybersecurity sanctions on China in advance of President Xi Jinping's visit.²⁷⁴ The current jurisprudence about when, if ever, OFAC should be required to get a warrant when implementing these sanctions is unpredictable. The Fourth Amendment may not apply at all, it may apply but fall within an exception, or it may apply in limited factual circumstances. To resolve this mess, courts should instead adopt a "reasonableness" test to analyze Fourth Amendment challenges on a case-by-case basis. The view should begin with a presumption that OFAC blocking orders are reasonable—given the underappreciated process that exists in an area subject to significant executive deference—and use a number of fact-specific inquiries to determine when a seizure is constitutionally unreasonable. This specific multifactor balancing can provide a clear, predictable framework to government officials.

²⁷⁴ E.g., Ellen Nakashima, *U.S. Won't Impose Sanctions on Chinese Companies Before Xi Visit*, WASH. POST (Sept. 14, 2015), <http://wpo.st/k1XG1>.