Freezing Assets in the War on Terror: OFAC and the Fourth Amendment

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In the days following the attacks of September 11, 2001, President Bush issued Executive Order 13224. The order declared a state of national emergency and triggered an array of emergency powers. Chief among these powers was the International Emergency Economic Powers Act ("IEEPA"),\(^1\) which permits the Treasury Department’s Office of Foreign Asset Control ("OFAC") to freeze the assets and accounts of suspected terrorists and their affiliates. The goal is to “choke” asset flows and “starve” terrorism projects by cutting off access to funding. Since 2001, OFAC has utilized its Terrorism Sanction authority extensively, expanding its asset blocks from the initial list of 27 Specially Designated Global Terrorists (“SDGT”) to over 539.\(^2\) The current list of SDGTs is over 17 pages long with roughly 95 pages of additional details, pseudonyms and related entities for each name.\(^3\) Included on this list are the names Holy Land Foundation for Relief and Development ("Holy Land"), Al Haramain Islamic Foundation ("Al Haramain"), and Kindhearts for Charitable Humanitarian Development ("Kindhearts").

Each of these organizations was notified its assets were being frozen by OFAC.\(^4\) Each organization is a registered U.S. charitable corporation. Each organization subsequently challenged the freezing of assets as a violation of their Fourth Amendment rights. And each organization received a different judicial determination on the Fourth Amendment question. The Kindhearts court found OFAC’s actions to constitute a seizure subject to Fourth Amendment requirements, the Al-Haramain court also found OFAC’s actions triggered the Fourth

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Amendment but were covered by the “Special Needs” exception, and the Holy Land court found that OFAC’s actions were neither a seizure nor takings under the Fourth and Fifth Amendments, respectively.\(^5\)

Whether these blocking actions constitute a “seizure” for the purposes of the Fourth Amendment is not settled.\(^6\) As with other assertions of Executive power under Congressional statutes, the AUMF for example, the courts have not come to a clear understanding of how far national security powers authorized by Congress can stretch.\(^7\) With a heightened national emphasis on national security and Executive deference, the courts are now put to decide issues with ramifications for the larger national security apparatus.\(^8\)

OFAC’s Terrorism Sanctions program is an essential part of the U.S. national security anti-terrorism activities.\(^9\) In its most recent report to Congress, OFAC reported blocking $19 million in terrorist group assets—$11 million of which is linked to Al Qaida- and many millions more linked to State sponsors of terrorism.\(^10\) As the program continues to enforced against

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\(^6\) The Government has argued or conceded that the issue of the Fourth Amendment and IEEPA has never come before the Supreme Court. See Al Haramain, 2009 WL 3756363, at *10.

\(^7\) See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that the government can hold individuals as “enemy combatants” but that U.S. citizens held have a right to habeas petitions); Boumediene v. Bush, 553 U.S. 723 (2008) (extending Constitutional protections to Guantanamo and holding the Military Commissions Act to be in violation of the Constitution).

\(^8\) See generally, Robert M. Chesney, National Security Fact Deference, 95 VA. L. REV. 1361 (2009). In addition to violations of statutory and substantive constitutional rights, all three plaintiffs also alleged a violation of their due process rights. Those claims will be overlooked for the purposes of this paper. All three courts agreed due process was served in some capacity and that where it was not, it did not constitute a “structural error” or the error was “harmless.” Where there was a violation, it could be remedies post facto. See Kindhearts for Charitable Humanitarian Dev., Inc., v. Geithner, 710 F.Supp.2d 637 (N.D. Ohio 2009) [hereinafter Kindhearts II]; Al Haramain, 2009 WL 3756363, at *1. Moreover even if there was a finding that due process had been violated, the issue of a Fourth Amendment violation would still be left unresolved. For a full discussion of due process concerns surrounded OFAC designations and processes, see Danielle Stampley, Blocking Access to Assets: Compromising Civil Rights to Protect National Security or Unconstitutional Infringement on Due Process and the Right to Hire and Attorney?, 57 AM. U.L. REV. 683 (2008).


parties domestically and abroad, the question of rights will continually reemerge when enforced against U.S. Citizens. The three cases to be discussed demonstrate no consensus on the Fourth Amendment issue. There is currently no clear way to conceptualize OFAC’s blocking actions. Fourth Amendment challenges are a recent development with no real precedent. Though both are covered by the Fourth Amendment, pure seizures, absent searches, are a fairly unique circumstance. More traditional approaches to this issue have included a search component. How OFAC’s actions are characterized has broad ramifications for the program, and others like it, going forward. Given the import, size, and scope of the Terrorism Sanctions program, the law should be settled as to how to characterize OFAC’s freezing actions.

Part I of this paper will look at the current legal context under which the current Fourth Amendment challenges to OFAC actions have been brought. Part II will review the Holy Land, Kindhearts, and Al Haramain cases. Within these discussions will be a look at the evolution of Fourth Amendment law surrounding asset freezes dating back to World War I, and the dearth of related case law. Part III looks at the Government’s arguments against classifying OFAC’s actions as Fourth Amendment seizures. Part IV will consider what remedies, if any, must flow from OFAC’s conduct, and whether traditional remedies for Fourth Amendment violations fit well in the arena of national security. It will conclude by finding that OFAC’s freezes of assets are Fourth Amendment seizures when carried out against U.S. Citizens and entities. All available exceptions to the warrant requirement are generally inapt, though may apply in specialized factual circumstances. In order to protect Constitutional rights some form of a warrant or interposition of the judiciary is necessary. At a minimum, something akin to a Foreign Intelligence Surveillance Act (“FISA”) warrant or review is required.
Part I: IEEPA and Executive Order 13224

OFAC’s Terrorism Sanctions program is operating under a multi-faceted legal framework encompassing statutes, regulations, and several Executive Orders.11 The central governing statute is IEEPA. IEEPA may be invoked upon a declaration of a national emergency that presents an “unusual and extraordinary threat” to the United States or its interests with its source “in whole or substantial part outside the United States.”12 The statute permits the President or a

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11 For the purposes of this paper, orders for country-specific sanctions will not be discussed. Though they are at times groups with the larger Terrorism Sanctions, they are independent sanctions programs.

12 International Emergency Powers Act, § 1701 (“may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat”). The law is one of a variety of powers available to the President under a declared national emergency. See U.S. Congress, Senate Special Committee on the Termination of the National Emergency, Emergency Powers Statutes, 93rd Cong., 1st sess., S.Rept. 93-549 (Washington: GPO, 1973), accessed at http://www.ncrepublic.org/images/lib/SenateReport93_549.pdf. Prior to 1972 many national emergencies were left ongoing for years after the emergency circumstances had ended. See Id. (noting the ongoing emergencies declared by President Roosevelt in 1933 in response to the Great Depression, by President Truman during the Korean conflict- though stable for 20 years as of the report, and in Indochina). Starting in the 1970’s Congress began to look at the issue of national emergencies and the delegated powers they triggered. A Special Committee was convened to look at the variety of powers bestowed on the president in emergency conditions, noted “[t]hese [470] statutes delegate to the President extraordinary powers, ordinarily exercised by the Congress, which affect the lives of American citizens in a host of all-encompassing manners. This vast range of powers, taken together, confer enough authority to rule the country without reference to normal Constitutional processes.” Id. at Forward.

The Committee sought to regulate the power to declare a national emergency, limiting a President’s ability to retain emergency powers in perpetuity. See Id. (specifically defining their task as “to examine the consequences of terminating the declared states of national emergency that now prevail; to recommend what steps the Congress should take to ensure that the termination can be accomplished without adverse effect upon the necessary tasks of governing; and, also, to recommend ways in which the United States can meet future emergency situations with speed and effectiveness but without relinquishment of congressional oversight and control.”). The Committee stated, “a legislative formula needs to be devised which will provide a regular and consistent procedure by which any emergency provisions are called into force. It will also be necessary to establish a means by which Congress can exercise effective oversight over such actions as are taken pursuant to a state of national emergency as well as providing a regular and consistent procedure for the termination of such grants of authority.” Id. at 14.

The outgrowth of these hearings and deliberations was the National Emergencies Act, 50 U.S.C. §§1601-1651 (2011) (“NEA”), wherein, “[w]ith respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency.” Pub.L. 94-412, 90 Stat. 1255, 1257 (1976). The NEA imposes formal rules for declaring, reporting, and terminating a national emergency, and gives Congress a right of review with the option to terminate the emergency. 50 U.S.C. §§ 1601, et seq. It delimits the duration of emergency powers, something previously not codified. Id. at §1621. The implications of this is that Presidents are able to invoke specific “national emergency” powers under the law that are allowed to continue for many years so long as the emergency is continued by the President and Congress is notified. See, Id. at 1621; see also Exec. Order No. E.O. 13357, 69 FR 56665 (2004) (revoking Exec. Order No. 12543, ending an eighteen year national emergency with Libya); Exec. Order No. 13224,
party acting with a delegation of Presidential authority to “investigate, block during pendency of investigation, [or] regulate” the property or interests in property “that are in the United States or . . . come within the United States, or . . . come within the possession or control of United States persons.”

While this generally relates to foreign assets, IEEPA also includes an additional clause at §§ 1702(a)(1)(A) & (B) which permits the President to “investigate, block during pendency of investigation, [or] regulate” property in which foreigners have an interest “or with respect to any property, subject to the jurisdiction of the United States.”

IEEPA has been frequently invoked since its passage to handle a variety of national security concerns. A landmark emergency declaration, indicating the breadth of power of said declaration, was President Clinton’s “middle east peace process emergency” in 1995. To protect the nascent peace process the Order prohibited transactions with Hamas or others who would disrupt the process under IEEPA. Within the Order Hamas was identified as a “terrorist” group and was given a new designation as a “Specially Designated Nationals” (“SDN”). The Order set the groundwork for designating parties in broad categories as opposed to solely by

75 FR 57159 (2010) (continuing the nine-year national emergency declared following September 11, 2001). The law was not invoked until 1979 by President Carter, and was used in a fairly limited capacity until the mid-1980s. See Exec. Order No. 12170, 44 FR 65729 (1979) (declaring a national emergency with Iran).


17 See 31 C.F.R. § 595.311; Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001). Though the Executive Order mentioned the term “terrorism” and included a list of individuals or groups, it was the Treasury that developed the name SDT and promulgated rules in accordance.
name or nationality as was done in the past. Rather than rely on nationality, designations, such as SDN or “Specially Designated Terrorists” (“SDT”) or Foreign Terrorist Organizations (“FTO”), are based on actions or affiliation with groups or causes.

In late 2001 President Bush issued Executive Order 13224 that similarly included a list of “global terrorists” and invoked IEEPA. As with the Clinton order, a new class of parties covered by the order was created, “Specially Designated Global Terrorists” (“SDGT”). This new label was intended to capture the U.S.’s enemies in the “Global War on Terror.” SDGTs are not defined by any nationality, geographic region, or political belief; they are defined solely by actions or potential actions constituting “terror.” Under the Order, the Treasury is authorized to block “all property or and interests in property of [SDGTs] that are in the United States or . . . come within the United States, or . . . come within the possession or control of United States persons.” The Order also provides for “guilt by association” permitting actions against parties who assist or associate with targeted parties. The goal of disrupting terrorist activities by limiting access to funds was laid out in the Presidential release entitled, “National

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18 See, e.g., Exec. Order No. 8389, 5 FR 1400 (April 10, 1940) (protecting the funds of Norway and Denmark via freezes and blocks).
19 See, e.g., 31 C.F.R. § 594.310; Laura K. Donahue, Anti-Terrorist Finance in the United Kingdom and United States, 27 MICH. J. INT'L L. 303, 431 (2006) (“The United States’ failure to substantiate such claims, the introduction of measures that allowed for freezing assets on the basis of mere association, and the state’s disproportionate focus on Muslim charities created an environment hostile to legitimate Islamic businesses and charities.”).
21 31 C.F.R. § 594.310.
Strategy for Combating Terrorism,” and was reiterated again in the final 9/11 Commission Report.\textsuperscript{26}

In accordance with Order 13224, OFAC issued a series of rules and regulations governing their freezing and blocking actions.\textsuperscript{27} Section 594.201 institutes and initial block on all parties named in Executive Order 13224 and all determined by the President or Treasury to fall within the SDGT criteria of the Order.\textsuperscript{28} The note to this section states that the USA PATRIOT Act “authorize[d] explicitly the blocking of property and interests in property of a person or entity during the pendency of an investigation.”\textsuperscript{29} In effect, this permits a blocking of assets without a determination that a party is a threat to U.S. interests or a SDGT. The government need only have an interest in investigating a party in order to freeze their assets, they need not have confirmed that the party is a danger.

The SDGT determination process is not well documented. According to affidavits by Treasury officials, the investigative and designation process is “comprehensive.”\textsuperscript{30} OFAC officials, in consultation with other agencies like the State Department, initially determine whether or not to block an entity or person’s assets while investigating them.\textsuperscript{31} Should they decide to block, the party is notified that its assets are formally “blocked pending investigation,”

\textsuperscript{26} See Office of the Press Secretary, President Bush Releases National Strategy for Combating Terrorism, (Washington, DC: February 14, 2003); The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon the United States, at 382 (2004) (“Vigorous efforts to track terrorist financing must remain front and center in U.S. counterterrorism efforts. The government has recognized that information about terrorist money helps us to understand their networks, search them out, and disrupt their operations. Intelligence and law enforcement have targeted the relatively small number of financial facilitators—individuals al Qaeda relied on for their ability to raise and deliver money—at the core of al Qaeda’s revenue stream. These efforts have worked.”); see also Raphael Perl, Anti-Terror Strategy, the 9/11 Commission Report & Terrorism Financing: Implications for U.S. Policymakers, STRATEGIC INSIGHTS, Vol. IV, Iss. 1 (January 2005).

\textsuperscript{27} See 31 C.F.R. § 594.201.

\textsuperscript{28} See 31 C.F.R. § 594.201(a).

\textsuperscript{29} See 31 C.F.R. § 594.201(b), n. 1.


and that they are now included on SDGT lists as “BPI.” A party may eventually have its status cleared and or be formally designated an SDGT. During the time a party is fully designated or BPI, financial institutions and other related parties are prohibited from transacting the blocked-party’s property. All persons, banks, brokerages, businesses, etc. have an affirmative duty to report any holdings or attempted transactions. Violations of the blocking notice by the blocked-party or others obligated to block assets are subject severe penalties, though not criminal charges.

There is an “appeals” process available to parties designated a SDGT though it is limited at best. A designated party may, “submit arguments or evidence that the person believes establishes that insufficient basis exists for the designation. The blocked person also may propose remedial steps on the person's part, such as corporate reorganization, resignation of persons from positions in a blocked entity, or similar steps, which the person believes would negate the basis for designation.”

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32 See 31 C.F.R. Chapt. V.
36 See 31 C.F.R. § 594.201(b) n. 1. Though criminal charges are not brought against breaching parties, if the breach is adjudged to be willful and an attempt to aid the terrorists or an “enemy” charges can be brought under 18 U.S.C. § 2339B and the TWEA. In 2010 Barclay’s PLC settled with the OFAC for $298 million. The year before, Lloyds TSB Bank settled with OFAC for $217 million. Both were “Deferred Prosecution Agreements” for violations of US sanctions programs against Cuba, Sudan, Iran, and many others. See Brent Kendall & Michael Rothfeld, Green Light on Barclays Pact, The Wall St. J., Aug. 19, 2010; Settlement Agreement: Lloyds TSB Bank, MUL-4745344, U.S. Dep’t of Treas. (Dec. 22, 2009), available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/lloyds_agreement.pdf.
37 See 31 C.F.R. § 501.807.
38 Id.
A meeting with OFAC officials may also be requested, though OFAC is not required to meet with a requesting party.39

**Part II: Case Profiles: OFAC and Fourth Amendment Challenges**

**Holy Land Foundation for Relief and Development v. Ashcroft**

Holy Land Foundation (“HLF”) is a registered 501(c)(3) non-profit U.S. corporation. Its stated mission was to provide humanitarian aid throughout the globe.40 The majority of its efforts were focused on providing aid to Palestinians in Gaza and the West Bank.41 Following an investigation by OFAC, it was determined that HLF was acting for or on behalf of Hamas, and was subsequently designated a SDGT on December 4, 2001. HLF challenged the determination, alleging violations of its Fourth and Fifth Amendment rights.42

OFAC argued, and the District Court agreed, that HLF was linked to Hamas if Hamas could have a direct or indirect interest in HLF funds.43 The District Court specifically held that, based on the text of IEEPA and an earlier ruling in *Regan v. Wald*, Hamas need not have a legally enforceable interest in HLF assets, only “any interest.”44 Based on evidence of a documented relationship between HLF and Hamas leaders, it was concluded that Hamas had an interest in HLF assets.45 The District Court held that OFAC’s seizure did not violate HLF’s Fifth Amendment rights because title in HLF’s assets had not shifted to the government nor had the

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39 *Id.*
40 *Holy Land*, 219 F.Supp.2d at 64.
41 *Id.*
42 *Id.*
43 *Id.* at 67-68.
44 *Id.* at 67; *see International Emergency Economic Powers Act*, §§ 1701 et seq.; *see also C.F.R. § 500.311-.312*. The court cites *Regan v. Wald*, 486 U.S. 222, 224 (1984) to assert that “any interest” should be construed broadly. I did not find the case to support this broadly stated proposition.
45 Ties between HLF and Hamas were documented as were linked in that HLF provided support for widows and orphans of Hamas “martyrs.” *See Holy Land*, 219 F.Supp.2d at 69-73.
seizure been characterized as anything but “temporary.” Since HLF still held title, it was reasoned, OFAC could not have taken the property.

The District Court’s most curious ruling was its determination that OFAC’s freeze of assets was not a seizure and therefore no Fourth Amendment violation occurred. Rather than go through a Fourth Amendment seizure analysis looking at seizure case law, the District Court simply states that the freeze is not a seizure, “[t]he Government plainly had the authority to issue the blocking order pursuant to the IEEPA and the Executive Orders and the Court has determined that its actions were not arbitrary and capricious. . . . Accordingly, the freezing of HLF’s accounts is not a seizure entitled to Fourth Amendment protection.”

The District Court cites cases relating to the Trading With the Enemy Act of 1917 (“TWEA”) for authority, despite the fact that TWEA cases are all Fifth Amendment cases and the Fourth Amendment challenge is grounded in IEEPA, not the TWEA.

The DC Circuit affirmed the District Court’s holdings. Later cases like Islamic Am. Relief Agency v. Unidentified FBI Agents utilize the HLF District Court’s thin opinion to find no Fourth Amendment claim or violations as well.

**Kindhearts for Charitable Humanitarian Dev. v. Geithner**

The *Kindhearts* case stands in direct opposition to *Holy Land*. Kindhearts was a registered 501(c)(3) non-profit U.S. corporation. Its mission was to provide humanitarian aid “without regard for religious or political affiliation.” Kindhearts' assets were frozen pending

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46 See Id. at 78.
50 Kindhearts, 647 F.Supp.2d at 864.
investigation on February 19, 2006. Roughly a year later it was provisionally designated an SDGT. The District Court held that OFAC’s actions were a Fourth Amendment seizure and that Kindhearts’ Constitutional rights had been violated. They found all warrant exceptions inapplicable.

The District Court applied the Soldal standard to find that OFAC’s freezing was a Fourth Amendment seizure. In Soldal, the Supreme Court defined Fourth Amendment seizure of property as “some meaningful interference with an individual’s possessory interest in that property.” The Kindhearts court reasoned that OFAC’s blocks, by definition, were meant to interfere with possessory interests. The District Court also drew a distinction from Holy Land noting that those courts applied a Fifth Amendment-takings analysis and used takings case law to find there was no Fourth Amendment seizure. The District Court noted that no plaintiffs have ever asserted Fourth Amendment claims in response to the TWEA or IEEPA, and therefore the Supreme Court has never had occasion to consider it. They reasoned that though the Supreme Court has never considered it, it did not mean there was not a valid claim asserted by Kindhearts or that OFAC’s actions were outside the scope of the Amendment. Looking to both Youngstown and inherent national security powers, the District Court agreed with the Government that the President had the authority to block assets pending investigation, but refused to defer solely to Executive interpretation, noting that “the executive’s domestic actions-

51 Id.
52 Id.
53 Id.
54 Id.
56 Kindhearts, 647 F.Supp.2d at 881
57 Id. at 874.
58 Id.
even when taken in the name of national security- must comport with the Fourth Amendment."  

Finally, the District Court considered the exceptions to the warrant and probable cause requirements, noting that reasonableness is required. Generally warrantless seizures are *per se* unreasonable unless the seizure falls into a recognized exception. The District Court stated that only the Special Needs and Exigent Circumstances exceptions likely apply.  

The Special Needs exception is generally used in non-criminal searches and seizures. Supreme Court jurisprudence on “special needs” indicates that it has upheld the exception where “the “special need” that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State’s general interest in law enforcement.”

The District Court articulated a three-factor test for the Special Needs exception: 1. The program must serve a non-law enforcement purpose; 2. A warrant and probable cause must be impracticable; and 3. The “method of search or seizure must have built-in limits” on programmatic reach and government-official discretion. If these factors were met, the seizure could be deemed “reasonable” absent probable cause and a warrant. The District Court first

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61 There is a presumption of a warrant requirement subject only to a recognized exception. See *Johnson v. United States*, 33 U.S. 10 (1948). All of the exceptions to the warrant requirement- emergency/exigent circumstances, consent of the person to have their person or effects searched, automobiles for which it is untimely and unreasonable to get a warrant, objects in plain view or touch in an area searched pursuant to a valid search warrant, and Special Needs which is a non-law enforcement type search, require reasonableness if not probable cause. See *Brigham City v. Stuart*, 547 U.S. 398 (2006) (exigent or emergency circumstances); *Schneckloth v. Bustamante*, 412 U.S. 218 (1973) (consent to search); *Carroll v. U.S.*, 267 U.S. 132 (1925) (automobile exception if probable cause); *Horton v. California*, 496 U.S. 128 (1990) (plain view doctrine); *New York v. Burger*, 482 U.S. 691 (1987) (Special Needs exception for search pursuant to regulatory scheme).


65 *Kindhearts I* citing *Ferguson*, 532 U.S. at 81-86.


noted that all parties are not blocked by OFAC, only those suspected of terrorism activities, making the activities more like law enforcement. Second, that there was no evidence a warrant was impracticable in light of the initial investigations and decisions to block.\textsuperscript{69} And third, that though OFAC’s administrative scheme might be reasonable, it had no limitations on discretion (time, place, or scope) such that it would provide adequate notice to parties of potential searches and seizures. Because of this timing issue, the District Court also determined that, at least in Kindhearts’ case, no exigent circumstances existed such that a warrant was impracticable.\textsuperscript{70} Since neither the Special Needs nor exigent circumstances exception was applicable, the District Court ruled that OFAC’s blocking violated Kindhearts’ Fourth Amendment rights. The judge deferred ruling on a remedy for a later date.\textsuperscript{71}

These holdings were reiterated in a second opinion several months later.\textsuperscript{72} Despite its earlier concerns, the District Court held that OFAC’s seizure program is civil in nature. Therefore OFAC had to show it had “probable cause- that is, reasonable ground,” rather than meet the higher criminal evidentiary standard- probable cause.\textsuperscript{73} Upon a valid showing, the Fourth Amendment violation would be remedied. The District Court acknowledged the special national security context and concerns, and limited its role to protecting the Constitutional right. The District Court ordered a \textit{post hoc in camera} judicial review of OFAC’s evidence, akin to what a warrant issuing judge would conduct, to determine probable cause to freeze Kindhearts’ assets.\textsuperscript{74} No classified information needed to be shared with the plaintiff. They noted that

\textsuperscript{69} \textit{Id.} at 880-81.
\textsuperscript{70} \textit{Id.} at 882-883.
\textsuperscript{71} \textit{Id.} at 887.
\textsuperscript{72} \textit{Kindhearts,} 710 F.Supp.2d 637.
\textsuperscript{73} “Probable cause” was defined by one court as “‘less than evidence which would justify conviction’ and ‘more than bare suspicion’.” \textit{See U.S. v. Prandy-Binett,} 995 F.2d 1069 (D.C. Cir. 1993). \textit{See also Kindhearts,} 710 F.Supp.2d at 650-52.
\textsuperscript{74} \textit{Id.} at 646-53.
though sensitive intelligence was at issue, the government and Courts have found a way to make the situation work for decades.\textsuperscript{75}

\textit{Al Haramain Islamic Found., Inc. v. U.S. Dept. of Treasury}

Al Haramain Islamic Foundation (“AHIF”) is a registered 501(c)(3) non-profit U.S. corporation. Like HLF, AHIF was engaged in charitable activities and claimed distributing Islamic literature as their primary activity.\textsuperscript{76} In 2004 its assets were blocked pending investigation by OFAC. AHIF retained BPI status until February 6, 2008 when it was formally designated an SDGT. OFAC concluded that AHIF was affiliated with AHIF of Saudi Arabia which had ties with Al Qaida.\textsuperscript{77} The District Court of Oregon held that OFAC’s actions were valid, that its seizure of AHIF’s assets was not arbitrary and capricious, and that the seizure was covered by the Fourth Amendment “Special Needs” doctrine.\textsuperscript{78}

Unlike the District Court in \textit{Holy Land}, the Oregon District Court went through an extensive analysis of AHIF’s Fourth Amendment claim. At the start, the District Court held that OFAC’s blocking of assets constituted a Fourth Amendment seizure under \textit{Soldal}.\textsuperscript{79} They then looked to the history of the Fourth Amendment dating back to the founding for guidance in classifying OFAC’s blocks. The District Court noted that the history was “not revealing” and that attempts to use forfeiture as a basis for comparison were inappropriate. The District Court

\textsuperscript{75} Id. The court also mentioned FISA courts as a paradigm of a vital national security program that relies on expediency, and still abides by the warrant requirement.


\textsuperscript{77} \textit{Al Haramain}, 2009 WL 3756363, at *3.

\textsuperscript{78} Id. at *14-15 & *18.

\textsuperscript{79} Id. at *9; \textit{Soldal v. Cook County}, 506 U.S. 56, 61 (1992).
did state that the historical treatment of seizures under TWEA and IEEPA might be a useful basis for judging the reasonableness of OFAC’s conduct.\textsuperscript{80}

Once determining that the actions could be reasonable if they fell into a warrant exception, the District Court evaluated the government’s contention that if the block was a seizure, which they argued it was not, it was covered by the Special Needs exception.\textsuperscript{81}

The District Court agreed that OFAC’s actions fell under the Special Needs exception.\textsuperscript{82} The District Court articulated a two-part test for the Special Needs exception: 1. “The primary purpose of the seizure must be beyond criminal law enforcement” and 2. “A warrant and probable cause must be impracticable.”\textsuperscript{83} They found that OFAC’s purposes were not to capture terrorists or derive information leading to arrests, but to “ensure future terrorist acts are not committed.”\textsuperscript{84} This preventative action is outside traditional law enforcement activities. Second, they held that OFAC needed to act quickly to ensure the program’s efficacy and it therefore met the second requirement.\textsuperscript{85} They agreed with the government’s claim that delineating all the assets to be blocked would be near impossible, and that this inability would preclude them from obtaining a valid warrant. An analogy was made to searches of parolees and the difficulties of obtaining a warrant.\textsuperscript{86}

The District Court then balanced the qualified- Special Needs seizure against the violation of Al Haramain’s individual rights. They found that the government interest in

\textsuperscript{80} Al Haramain, 2009 WL 3756363, at *10.
\textsuperscript{81} Id. at *11.
\textsuperscript{82} Id.
\textsuperscript{83} Id. The District Court acknowledged the use of a different test than the Kindhearts court. It felt that the third requirement of “limiting scope and discretion” was misguided and that “the focus of the inquiry is on the programmatic purpose of the activity, not the method by which the activity is carried out.” Id. at n. 8.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at *13.
\textsuperscript{86} Id. The analogy is inapt as parolees’ freedom is conditional and they have a lesser expectation of privacy. See U.S. v. Knights, 534 U.S. 112 (2001) (holding that release was conditional and therefore the parolee had a lesser expectation of privacy). The same is not true for parties like AHIF who are not under the supervision of a correctional system.
stopping the flow of assets to terrorist groups to be a compelling national interest that out-
weighed Al Haramain’s interests.\textsuperscript{87} Al Haramain’s claim ultimately failed.\textsuperscript{88}

**Part III: The Government’s Arguments**

In each of these cases the Government argued that the Fourth Amendment was not
implicated in OFACs actions, and, in the event it was, the actions were subject to a warrant
exception. The President holds a number of national security powers- from both the take care
clause and foreign affairs power- that have only expanded as they have been spread out across
military and civilian agencies.\textsuperscript{89} Accordingly, the government bases its arguments in the
preceding cases on Constitutional authority and the affiliated plenary powers, asserting that
judicial review or a warrant would “inject the judiciary into the middle of the exercise of the
executive’s most uniquely reserved powers -- conducting foreign affairs and protecting the
national security – and would substantially undermine the executive’s ability to quickly and
effectively respond to threats to the national security and foreign policy with economic
sanctions.”\textsuperscript{90}

Like the court in *Holy Land*, the government has utilized the history of TWEA freezes to
assert the Fourth Amendment does not apply. IEEPA was only enacted in the late 1970’s, the
TWEA’s history dates back to 1917.\textsuperscript{91} In the Government’s respondent’s brief in *Kindhearts* the

\textsuperscript{87} *Al Haramain*, 2009 WL 3756363, at *14.
\textsuperscript{88} The case has since gone up to the 9\textsuperscript{th} Circuit on appeal. At oral arguments Al Haramain did not challenge the
Special Needs determination. Instead it argued due process violations and a desire to present evidence in its
defense.
\textsuperscript{89} See, e.g., Exec Order No. 2729A (Oct. 12, 1917) (vesting authority in a variety of agencies to better manage
Executive affairs and the war effort).
\textsuperscript{90} Defendants’ Motion to Dismiss at 62 *Kindhearts v. Geithner*, 647 F.Supp.2d 857 (2009) (No. 3:08-cv-2400),
referencing *Regan v. Wald*, 468 U.S. 222 (1984); see also Erwin Chemerinsky, Constitutional Law: Principles and
\textsuperscript{91} Following initial use during World War I, the TWEA was the basis for Executive Orders 6102, 6260, 6560
wherein President Roosevelt declared an emergency and called in all gold and bullion held by persons in the United
TWEA’s history is offered as a synecdoche for IEEPA and all asset seizures. They assert that the history of a similar statute (TWEA), that has never been held to implicate the Fourth Amendment, should stand-in for another with limited history (IEEPA). For support they quote from Youngstown, “[c]onsiderable weight should be given to this “systematic, unbroken, executive practice, long pursued to the knowledge of the Congress [and the courts], and never before questioned, engaged by Presidents who have also sworn to uphold the Constitution.”

The comparison of the two is not wholly inappropriate, but there are critical differences between the two statutes, namely: IEEPA permits seizure/blocking, the TWEA permits full ‘takeings’ and conversion to the property of the United States.

Following both World Wars I and II the TWEA was the basis for a large volume of litigation over Fifth Amendment takings and conversion, though not the seizure, of property.96

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91 “In the nearly 100 years since TWEA was passed, no Court has held that the executive must obtain a warrant to conduct an economic blocking authorized by either TWEA or IEEPA. Indeed, the nature of the executive regulatory action of issuing economic sanctions and the broad effects counsel against improvident inclusion of the executive exercise of this statutory and constitutional authority under the Fourth Amendment.” Defendants’ Motion to Dismiss at 63 Kindhearts v. Geithner, 647 F.Supp.2d 857 (2009) (No. 3:08-cv-2400).

92 Id.; Youngstown, 343 U.S. 579, 610-11.


94 The government had the authority to, and did, conduct both blocks or seizures and conversion of property. In the periods after World War I and through World War II TWEA “freezes” or seizures were carried out by two main offices, the Office of the Alien Property Custodian (“APC”) (a modified version of a similar WWI office) and the Foreign Funds Control (“FFC”). The APC was in charge of receiving property of foreign aggressors and retaining property of foreign nationals who were victims of Axis Powers’ aggression. The FFC had a smaller role, regulating and/or blocking restricted currency and banking transactions. See “Holocaust-Era Assets: Department of Justice Records: Records of the Office of Alien Property (RG 131)” Finding aid at the National Archives, Washington D.C., http://www.archives.gov/research/holocaust/finding-aid/civilian/rv-131.html. Both offices went through several changes during the course of the war, and both were either shut down or transferred to the Treasury Department or Department of Justice following the war. The Treasury’s present-day OFAC unit grew out of the FFC. See U.S Dep’t of Treas.: Office of Foreign Asset Control, http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#11. Though the FFC was formally shut down, OFAC was vested with nearly identical powers and responsibilities. Id.

95 See, e.g., Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921). Post-World War II litigation focused on TWEA and earlier Executive Orders regarding gold hoarding and freezing foreign national assets- namely 6102,
In many instances plaintiffs were successful or settled with the U.S. Government many years later as the parties sorted out the degree of involvement in wartime activities or lack thereof.\(^97\)

The dearth of Fourth Amendment challenges to wartime seizure might be best understood in terms of the property at issue and the defined enemy during wartime: The assets of specified foreign nationals and nations- both allies and belligerents- were seized and converted and or liquidated by the Alien Property Custodian.\(^98\)

As noted earlier, the TWEA and orders referencing it only restrain transactions with and the property of foreign governments and nationals. A close

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6560, 8389, and 8785, which were amended and enforced by the President. See Exec. Order No. 6102 (Apr. 5, 1933); Exec. Order No.6560 (Jan. 15, 1934); Exec. Order No. 8389, 5 FR 1400 (Apr. 12, 1940); Exec. Order No. 8785, 6 FR 2897 (June 14, 1941). In these orders President Roosevelt sustained existing emergencies defined in the Executive Orders and announced new freezes with respect to the Axis powers and nearly all European nations. Id.\(^97\) See *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197 (1958) and related litigation. *Societe Internationale* or I.G. Farben, as the case is often called, is one of the most notable cases of the period. Litigation began in 1948 and the case was finally settled in 1964. The case was summarized by the Supreme Court as follows: “Acting under this section, the Alien Property Custodian, during World War II, assumed control of assets which were found by the Custodian to be "owned by or held for the benefit of" I.G. Farbenindustrie, a German firm and a then enemy national. These assets, valued at more than $100,000,000, consisted of cash in American banks and approximately 90% of the capital stock of General Aniline & Film Corporation, a Delaware corporation. In 1948, petitioner, a Swiss holding company also known as I. G. Chemie or Interhandel, brought suit under § 9(a) of the Trading with the Enemy Act [\(\text{\textit{TWEA}}\)] against the Attorney General, as successor to the Alien Property Custodian, and the Treasurer of the United States, to recover these assets. This section authorizes recovery of seized assets by "[a]ny person not an enemy or an ally of enemy" to the extent of such person's interest in the assets. Petitioner claimed that it had owned the General Aniline stock and cash at the time of vesting, and hence, as the national of a neutral power, was entitled under § 9(a) to recovery. The Government both challenged petitioner's claim of ownership and asserted that, in any event, petitioner was an "enemy" within the meaning of the Act, since it was intimately connected with I. G. Farben, and hence was affected with "enemy taint" despite its "neutral" incorporation” *Id.* at 198-99.

\(^98\) See Exec. Order No. 8785, 6 FR 2897 (June 14, 1941) (naming for seizure or ‘protection’ Norway, Denmark, the Netherlands, Belgium, Luxembourg, France (including Monaco), Latvia, Estonia, Lithuania, Rumania, Bulgaria, Hungary, Yugoslavia, Greece, Albania, Andorra, Austria, Czechoslovakia, Danzig, Finland, Germany, Italy, Liechtenstein, Poland, Portugal, San Marino, Spain, Sweden, Switzerland, and Union of Soviet Socialist Republics); see also *Kindhearts*, 647 F.Supp.2d at 873 (in referencing the dearth of Fourth Amendment cases relating to government asset seizures under IEEPA or the TWEA, “[f]ailure of plaintiffs in those cases probably did not arise from lawyerly oversight: the economic sanctions targeted foreign governments, and neither foreign government nor non-resident foreign nationals enjoy Fourth Amendment protection”). Unlike the Fifth and Fourteenth Amendments that reference “persons” or “all persons,” the Fourth Amendment references “the people.” See U.S. CONST. amends. IV, V, & XIV; see *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). This language has been interpreted in *Verdugo-Urquidez* to cover U.S. Citizens and resident aliens but not foreigners present in the U.S. or abroad. See *Verdugo-Urquidez*, 494 U.S. at 266 (“the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory”). The Supreme Court held that a non-citizen or non-resident individual, with no significant voluntary connections to the United States could not invoke Fourth Amendment protections against unwarranted search and seizure abroad. See *Id.* However the court has held unwarranted searches of U.S. citizens abroad by U.S. government actors to violate the Fourth Amendment. *Id.* at 273. The Court elaborated that mere presence in the United States is not enough to trigger the amendment’s protections. *Id.* The duration of time in, and relation to, the U.S. matters. *Id.*
reading of Executive Order 8785 indicates that though transactions with foreign nations were restricted, no domestic assets were held unless foreign nations or foreign nationals also held an interest in the property in question. Only when there was a joint title interest (U.S. citizen and foreign national) or a U.S. citizen was affiliated with a belligerent nation (for example, a Japanese U.S. citizens) was the property of U.S. citizens/entities seized and or converted.

It was after the war, in 1946- long after the seizure of property- that the TWEA was amended to permit claims for seized property,

“The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine-

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediate & prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner;”

Claims were limited: Non-belligerents or U.S. Citizens could file for a return of property after the war, whereas belligerents generally had to sue for conversion or a Fifth Amendment violation for property liquidated by the custodian under the TWEA and Executive Orders. In

99 See Exec. Order No. 8785, 6 FR 2897 (June 14, 1941) (prohibiting “such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect” with any U.S. bank or person).
100 60 Stat. 50, as amended, 50 U. S. C. App. § 32 (a) August 8, 1946
101 Trading with the enemy Act of 1917, § 32 (“(A) the Governments of Germany, Japan, Bulgaria, Hungary and Rumania; (B) corporations or associations organized under the laws of such nations; (C) persons voluntarily resident since Dec. 7, 1941, in any such nation, other than American citizens, certain diplomatic officers, or certain persecuted persons; (D) citizens of such nations, other than certain persecuted persons, who were present or engaged in business there between Dec. 7, 1941, and Mar. 8, 1946; and (E) certain foreign corporations or associations which, after Dec. 7, 1941, were controlled by persons falling within the above categories.”).
102 Trading with the enemy Act of 1917, § 12 (“[t]he alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act [], and, [], and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof”).
that context, a U.S. Citizen was best served by filing a claim rather than filing suit because at that stage a Fourth Amendment seizure violation has no remedy, but a Fifth Amendment claim does. Given this reality, it is clear that strict comparisons of IEEPA to the TWEA are inapt. The TWEA can provide a useful history as to how other seizure programs were handled in the past, but the fundamental differences between the two programs cannot be ignored.

Arguing in the alternative, the government asserts that the Fourth Amendment is not implicated because its freezes of assets are a “reasonable” exercise of Executive foreign affairs power and subject to the Special Needs exception. They assert no warrant is needed by laying out a three-part standard for a Special Needs seizure different from both Kindhearts and Al Haramain:

(1) there exists a substantial need to act quickly; (2) the agency action is intended to

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103 This begs the question: Why are there currently no Fifth Amendment claims? Holy Land did advance a takings claim in its case that was rejected by the District Court. *Holy Land*, 219 F.Supp.2d 57. The District Court stated that “[t]he case law is clear the blocking under Executive Orders are temporary deprivations that do no vest the assets in the Government. Therefore, blockings do not, as a matter of law, constitute takings within the meaning of the Fifth Amendment. Accordingly courts have consistently rejected these claims in the IEEPA and TWEA context.” *Id.* at 78. The key element in their argument and in the cases cited by the court is the question of time. The District Court acknowledged that Holy Land might have a valid claim, where the “long-term blocking order has ripened into a vesting of property in the United States.” *Id.*

104 Additionally the amended version of the TWEA provides for an administrative review of a claim. Trading with the enemy Act of 1917, § 9. IEEPA does not obligate such a review. International Emergency Economic Powers Act, §§ 1701 et seq.

secure the property and not to review it for investigative purposes; and (3) the action is executed in furtherance of the President’s foreign affairs powers."106 However, the basis of this standard was a decision superseded by the enactment of Foreign Intelligence Surveillance Act - a statute requiring a warrant for specific national security searches.107 If warrantless government searches violate the Fourth Amendment, even in the name of national security, it follows that warrantless seizures do so as well.108

The government also rightfully states that IEEPA does not require a warrant in advance of its blocks.109 They argue that because IEEPA is their basis of authority, they are not required to obtain a warrant.110 This is a hollow argument that situates Executive and Congressional authority outside the Constitution. IEEPA is a valid grant of powers but it can be unconstitutional as applied. The government is correct in asserting that activities have a basis in substantial part outside the U.S. The mere fact of this does not mean its conduct does not occur with in the U.S. or against U.S. citizens. This does not supersede the protections of the Constitution.111

Part IV: Options for the Courts

Holy Land, Kindhearts, and Al Haramain highlight a range of options for the Courts moving forward. Despite its affirmation by the D.C. Circuit Court, the holdings of Holy Land seem least defensible. The District and Circuit Courts’ failure to draw a distinction between the TWEA and IEEPA leads to two possible conclusions: First, that the Court is sticking to

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108 See U.S. v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (holding brief stops to be ok if supported by “specific articulable facts, together with rational inferences therefrom, reasonably warranting suspicion”); see also Florida v. Royer, 460 U.S. 491 (1983) (detention converted to arrest supported only by reasonable suspicion was invalid).
111 Id. at 66-67.
Executive interpretation deference in a complex area of national security. Rather than attempt to unwind the IEEPA program and open the door to challenges, the Court can abide by the government’s interpretation of its authority. This hypothesis is supported by the fact that the District Court does find Fourth Amendment violations where agents broke into HLF offices and seized materials without a warrant. Such a blatant violation cannot be as easily ignored as a more complex government asset freezing program.

Or second, that IEEPA was intended to be a non-wartime version of the TWEA. IEEPA was passed following the “national emergency” reforms of the 1970’s. It was also at this time that the TWEA, which had previously been applied in both wartime and national emergency periods was “reinterpreted” to apply only in the case of a declared war or “the existence of a state of war.” The TWEA was passed by Congress to aid President Wilson manage the national emergency of World War I. The law was enacted to restrict trade and commerce with enemy nations or residents and businesses thereof. Like IEEPA, it limited transactions in property in which a foreign nation held an interest, and allowed the President to grant licenses in exception of the law. But unlike IEEPA, it permits, during a time of war that,

“any property or interest of any foreign country or national thereof shall vest … as … directed by the President, in such agency or person as may be designated … by the

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112 Holy Land, 219 F.Supp.2d at 79.
113 See Jennifer K. Elsea & Richard F. Grimmett, Cong. Research Serv., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 27-28 (2011). Section 9 of the TWEA notes permissive taking and conversion of enemy property in “time of war or during any national emergency declared by the President.” Trading with the enemy Act of 1917, § 9. This language stands apart from the earlier statutory language that references “war” only. Id. at § 2. The definitions section defines “enemy” as “any nation with which the United States is at war”. Id. The statute was amended to apply only in wartimes or conditions leading to war. Elsea, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 27-28. This logically makes sense there can be no “enemy” unless there is a war under the statutes definitions. See Trading with the enemy Act of 1917, at § 2.
114 Trading with the enemy Act of 1917, 50 U.S.C. Appx §§ 1-44.
115 Id.
116 Id. at § 4.
President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States ...”117 (emphasis added)

Because the TWEA and Executive Orders118 promulgated under the law permitted complete takings and conversion of property, they were challenged as violations of the Fifth Amendment. In *Stoehr v. Wallace*, plaintiffs alleged they were a U.S. corporation who was denied due process and received no compensation in response to the government taking, conversion, and partial liquidation of their property.119 The Court denied relief citing, *Central Union Trust Co. v. Garvan*,120 and noting that the TWEA provided for a review and appeals process.121 In *Garvan* the Court held that “[t]here can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy, as it could provide for an attachment or distraint, if adequate provision is made for a return in case of mistake.”122 No citation or support is given for this assertion.

*Stoehr* and *Garvan* both grew out of wartime seizure and conversion of assets. IEEPA does not provide for the same conversion to U.S. possession, only “blocking.”123 Therefore, under the statute, Holy Land would have better luck with a Fourth Amendment challenge.

However, given the absence of germane Fourth Amendment case law124 and the closeness of

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117 Id. at § 5(b)(1)(B).
118 See Exec. Order No. 2729-A, (Oct. 12, 1917) (exercising powers under the TWEA to endow the War Trade Board and other agencies to administer trade and enemy property) & Exec. Order No. 2796 (Jan. 26, 1918) (promulgating additional rules related to the restriction on international trade).
120 *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921).
121 See *Stoehr*, 255 U.S. at 245 (“That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable.”) (referencing, *Garvan*, 254 U.S. at 566); Trading With the Enemy Act, 50 U.S.C. Appx §§ 19.
122 *Garvan*, 254 U.S. at 566.
124 *Supra*, Note 98.
IEEPA and the TWEA, it is not unreasonable that a court would look to TWEA jurisprudence for guidance.\footnote{Defendants’ Motion to Dismiss at 62-63 Kindhearts v. Geithner, 647 F.Supp.2d 857 (2009) (No. 3:08-cv-2400), (noting the dearth of case law related to specific government seizures like those under IEEPA).}

The \textit{Holy Land} case was one of the first of its kind, decided shortly after September 11, and affirmed shortly after the invasion of Iraq.\footnote{Holy Land, 219 F.Supp.2d 57 (decided August 2002); Holy Land, 333 F.3d 156 (decided June 2003); Anthony DePalma, \textit{Threats and Responses: An overview: March 19-20, 2003; Starting a War, Appealing for Surrender and Pulling Out the Networks}, \textsc{NY Times}, Mar. 20, 2003.} The fear of the initial 24 months following September 11 and the civil libertarian reaction to the Government’s response has tempered the courts somewhat.\footnote{See, \textit{e.g.}, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Boumediene \textit{v. Bush}, 553 U.S. 723 (2008).} Since the \textit{Holy Land} ruling other jurisdictions have ruled otherwise, though none by a Circuit court. However, collectively these cases build a body of case law that was absent at the time of \textit{Holy Land}.\footnote{The Fifth Amendment may yet have a home, as seizures persist such that they are tantamount to conversions. This possibility was considered in \textit{Holy Land}.} It is later cases like \textit{Kindhearts} and \textit{Al Haramain} that find the Fourth Amendment is at least implicated.\footnote{See Al Haramain, 2009 WL 3756363, at *1; Kindhearts, 647 F.Supp.2d 857.} Given this, it seems likely that the Fourth Amendment will remain an issue in OFAC freezing actions where U.S. individuals and corporations are involved.

OFAC’s blocks undeniably implicate the Fourth Amendment, whether under the \textit{Soldal} standard or \textit{Van Leeuwen}.\footnote{Soldal, 506 U.S. 56; \textit{United States v. Van Leeuwen}, 397 U.S. 249 (1970).} In \textit{Van Leeuwen} the Supreme Court upheld a detention of property for a “limited time” supported by reasonable suspicion.\footnote{\textit{Van Leeuwen}, 397 U.S. 249.} A detention or freeze beyond the limited period becomes an unreasonable seizure. The Supreme Court has rejected a specified time limit for detentions of persons or property.\footnote{\textit{See United States v. Sharpe}, 470 U.S. 675 (1985) (rejecting a “hard-and-fast” time limit on detentions and noting “indefiniteness” as a marker of a seizure).} Based on the standard articulated, it is
reasonable to conclude that OFAC’s open-ended block of assets, stretching for several years, is not a mere detention. 133

The resolutions proposed by Kindhearts and Al Haramain may establish a workable framework for asset seizure cases. The positions espoused by both cases each have merit. Both can be justified legally, though as applied, the Al Haramain Special Needs exception is less convincing. Under the Special Needs doctrine the government is permitted to conduct warrantless searches pursuant to an administrative program the serves a compelling government policy. In determining the reasonableness of the program and searches the court,

“balances the need for a particular search or seizure against the degree of invasion upon personal rights that the search or seizure entails. And if the probable cause standard and/or the warrant requirement takes insufficient account of the state interest in light of the degree of intrusion, the court finds it reasonable to dispense with such requirements in favor of lesser standards such as reasonable suspicion . . .” 134

The government has an undeniable interest in national security, a need that can outweigh personal rights in certain contexts like airports. The civil nature of OFAC’s seizures falls within the definition of an important administrative program whose interests should be balanced against individual rights. Although, whether the probable cause standard or warrant requirement take “insufficient account” of national security concerns is disputable.

Setting aside the question of whether preventive action is a traditional law enforcement function, the holdings that probable cause and a warrant are impracticable are troubling. In Kindhearts and Al Haramain the government pleaded the difficulty of obtaining a warrant for

133 Id.
134 STEPHEN SALTZBURG & DANIEL CAPRA, AMERICAN CRIMINAL PROCEDURE INVESTIGATIVE: CASES AND COMMENTARY 381 (9th ed. 2010).
both temporal and logistical reasons.\textsuperscript{135} The timing argument, as Judge Carr in \textit{Kindhearts} wrote, does not stand up given the level of investigation required to designate and entity SDGT or BPI.\textsuperscript{136} (There are certainly exceptions to this, which could be covered by the emergency exception on a case by case basis.)\textsuperscript{137} As for the logistical concerns, the government stated in its \textit{Kindhearts} brief:

\begin{quote}
\textquote{a [warrant] requirement would inject the judiciary into the middle of the exercise of the executive’s most uniquely reserved powers – conducting foreign affairs and protecting the national security – and would substantially undermine the executive’s ability to quickly and effectively respond to threats to the national security and foreign policy with economic sanctions.}^\textsuperscript{138}
\end{quote}

This statement presumes an overly strong evidentiary threshold. Moreover it ignores the exigency exception available when truly quick action in needed and workable models like those under FISA. Further, it is belied by an accompanying affidavit by the head of OFAC, Adam Szubin,

\begin{quote}
“OFAC’s process of designating individual or entities appropriate for sanctions begins with an extensive investigation. Such investigations draw on a broad range of information both publicly available and non-publicly available information (such as privileged or classified information) . . . Once the evidence is collected, Treasury staff draft an evidentiary memorandum summarizing the information acquired through their investigation. . . . \textit{it is then reviewed for legal sufficiency by Treasury’s attorneys}. Based on that review, the analyst of investigator may engage in further investigation and revise
\end{quote}

\textsuperscript{135} \textit{Al Haramain}, 2009 WL 3756363, at *13; \textit{Kindhearts}, 647 F.Supp.2d at 882-84.
\textsuperscript{136} See, infra, n.138.
\textsuperscript{137} \textit{Kindhearts}, 647 F.Supp.2d at 883.
the package to address any legal concerns. *The Department of Justice also provides legal review of the evidentiary packages under E.O. 13224.*”139 (emphasis added)

The designation and blocking process is not immediate. How retrieving a warrant is impracticable after investigation and multiple levels of review defies logic- the evidence is already gathered, prepared, and drafted. Mr. Szubin and OFAC have cited a lack of knowledge of specific banks or locations of assets as a reason a warrant requirement would hamper or cripple the blocking program.140 The Supreme Court has held that a warrant be reasonably specific as to the persons, places, and objects to seized, but it has not required a detailed itemization.141 Therefore a warrant application freezing “bank accounts of AHIF” versus “Bank of American bank accounts of AHIF,” supported with reasonable suspicion or probable cause would be sufficient for a warrant.

While OFAC’s seizures trigger the Fourth Amendment it is a civil and non-law enforcement program because the seizures in and of themselves are intended to prevent access, not inculpate. Even if the searches and seizures eventually have criminal repercussions, the Supreme Court has upheld them as civil.142 Presumably OFAC has a modicum of individualized suspicion as they engage in an investigative process to determine which accounts to freeze. The required probable cause showing is less than that for a criminal warrant.143 The Supreme Court has commented in regard to the warrant requirement that “entries upon property for civil purposes, where the occupant was suspected of no criminal conduct whatsoever, involved a more

141 See *Andersen v. Maryland*, 427 U.S. 463 (1976) (upholding a seizure of items not specifically listed in a warrant that related to the alleged crime that was the basis for the warrant, and rejecting seizure of items related to unalleged crimes as the warrant was too vague).
143 *Kindhearts*, 710 F.Supp.2d at 652 (“reasonable ground”).
peripheral concern and the less intense “right to be secure from intrusion into personal privacy.”

Further, the probable cause requirement can also be met given OFAC’s stated procedures. OFAC makes determinations and designations pursuant to a Constitutional Executive grant of authority. Once clearing the extensive procedures described in the affidavit, the Government can state that it has probable cause the party is affiliated with terrorism. OFAC would have probable cause that people or organizations would utilize banking or monetary systems, and would have probable cause to seize assets contained therein. Based on this probable cause, the government can petition to seize/block/freeze assets in accordance a Constitutional civil program to fight terror.

Given the time, investigation, and lower probable cause, the claim that a warrant is impracticable is unpersuasive. Without meeting this second prong, the Special Needs exception cannot apply. Requiring a warrant when the assets at issue belong to a U.S. person or entity is the most prudent way to manage the competing national security and individual liberty concerns. A warrant best protects both parties and further protects the government in the likely event of litigation. Despite the protest on the part of the Government the law supports a less onerous standard for procuring such a warrant. While a warrant does provide an additional step, it does not appear that the seizures before the courts thus far would have been hampered by acquiring warrants. In cases requiring expediency, the government is still supported by the exigency exception to the warrant requirement.

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144 Id.
147 See Zucher v. Stanford Daily, 436 U.S. 547, 556 (1978) (holding that a search warrant is valid if there is “reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought”).
The Government would argue that even this lower threshold is problematic, reaching the bounds of judicial competency and entering the realm of Article II national security powers.\footnote{U.S. CONST. art. II; National Security Fact Deference, 95 VA. L. REV. 1361, 1407-11 (2009).} The President does hold the authority to act in the name of national security, but as the courts have reiterated, not at the expense of the Constitution.\footnote{See U.S. v. U.S. Dist. Court, 407 U.S. 297, 320 (1972).} Judges handle a plethora of issues relating to national security concerns and are able to rule on the Constitutionality of elements without problem.\footnote{See, e.g., Al-Aulaqi v. Obama, 727 F.Supp.2d 1 (2010) (ruling on Constitutional issues while addressing State Secrets concerns).} Additionally, OFAC evidentiary packets are sent to the Department of Justice for review of the legality.\footnote{See Affidavit of Adam Szubin at 9-11, Defendants’ Memorandum in Opposition Kindhearts v. Geithner, 647 F.Supp.2d 857 (2009) (No. 3:08-cv-2400).} If these attorneys are competent to review and preliminarily determine the evidence comports with the law, why should a Federal judge not be able to make the same reasoned determination? National security concerns are real but need to be balanced against the rights of U.S. individuals and entities. Interposing a neutral arbiter will ensure a minimum threshold of reasonable suspicion or probable cause exists to conduct a civil seizure.

A warrant would not require disclosure of classified information. Despite their disagreements, all three cases discussed rejected mandatory disclosure of classified information for pre-seizure determination or upon appeal.\footnote{The Al Haramain appeal addressed this issue with its due process concerns stating that it was designated without knowing the charges against it. The Treasury department did declassify some information but refused to further discuss what the information meant. At issue was not the declassification, but the allegations against the group.} National security concerns can be allayed by continuing to restrict access to classified information. An OFAC warrant could be issued under seal and subject only to \textit{in camera} judicial review. A FISA-type court system could also be utilized.\footnote{“FISA” is the common abbreviation for the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511 (1978) (codified at 50 U.S.C. §§ 1801-1829 (1994)).} Congress could establish a separate judicial body to issue OFAC warrants and or
permit OFAC to utilize the FISA courts (FISCs). Under FISA the Government is the only party before FISC and the judges, because of their appointment to FISC, have expertise in the national security issues before them. Under this model, OFAC’s actions would no longer be unchecked assertions of Executive power.

Where OFAC has already made a designation, like the cases of Holy Land, Al Haramain, and Kindhearts, a post-hoc in camera review should be required. The review, as espoused in Kindhearts, permits the government to demonstrate it had reasonable grounds to seize assets. Presumably the government should have no difficulty in demonstrating this. It also provides a Constitutional remedy to a Fourth Amendment violation. The Government is then put in a legally superior position.

**Conclusion**

National security often requires swift and covert actions by the government. It is when such actions are taken against U.S. citizens the Constitution is most readily implicated. OFAC’s Terrorism Sanctions program is a valid exercise of Executive power, so long as it operates within the bounds of the Bill of Rights.

OFAC’s blocks are Fourth Amendment seizures within all standards set forth by the Supreme Court. The rights of U.S. citizens and entities are implicated by OFAC seizures and such actions should comport with established law governing Fourth Amendment seizures. The exceptions to warrants are compelling one considering the increasingly sophisticated threats the

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155 The Department of Justice has stated, “[t]he government presents applications for a court order authorizing electronic surveillance or a physical search to the judges in in camera, ex parte proceedings. FISA also created the Foreign Intelligence Surveillance Court of Review, which has jurisdiction to review the denial of FISA applications by the FISA Court.” A Review of the FBI's Handling of Intelligence Information Prior to the September 11 Attacks, Special Report November 2004 (Released Publicly June 2005) Office of the Inspector General.

156 Kindhearts, 710 F.Supp.2d at 651-52.

U.S. and world faces. But such exceptions must be applied to real facts and circumstances according to legal standards. OFAC does not, as a general matter, meet any exception. How the appellate level courts will treat this argument is unclear. The competing tensions of national security and individual rights will continue to shift as world events change.

Legislative enactments like IEEPA must be balanced against the constitution. Though the warrant requirement FISA-type or otherwise, might cause OFAC to incur some burden, it should not vanish in the name of national security. The most prudent course for the Courts is to continue to carve out a space for themselves in difficult issues of national security. Removing the courts permits increased opportunities for rights violations. By establishing a place for themselves the court can protect both government interests and the rights of individuals. Utilizing the courts for warrants keeps a check on Executive power in national security affairs, not to stymie, but ensure it comports with the Constitution.