

Charity and Security Network (2019)

Designation Processes, Asset Freezes and Due Process Issues

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Two sources of terrorist designations

- ▶ Department of State, Foreign Terrorist Organizations
 - As of July 2019, 68 FTO's on the list (1997–2019), and another 13 delisted (1999–2017).
- ▶ Dept. of the Treasury, Office of Foreign Assets Control (OFAC), Specially Designated Global Terrorists (and similar programs)
 - As of July 2019, the SDN list is 1,313 pages.

Department of State, FTO

- ▶ To challenge a FTO designation on constitutional due process or First Amendment grounds, must have property or other physical presence in this country. *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *32 County Sovereignty Committee v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002).
- ▶ If due process not required, D.C. Circuit only looks to whether administrative record provides “substantial support” for the designation.

Department of State, FTO

- ▶ *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220 (D.C. Cir. 2010).
- ▶ Due process requires notice and an opportunity for a meaningful hearing.
- ▶ Due process violated, since State gave PMOI no opportunity to rebut the unclassified portion of the administrative record before the redesignation.
- ▶ Due process violated, since State did not explain which sources were credible and how these sources support the designation.

Department of State, FTO

- ▶ *In re People's Mojahedin Org. of Iran*, 680 F.3d 832 (D.C. Cir. 2012).
- ▶ PMOI sought a writ of mandamus, because Secretary of State had issued no decision in the 2 years since the D.C. Circuit's remand.
- ▶ D.C. Circuit ordered State to act on the petition within 4 months; otherwise, the petition for writ of mandamus setting aside the FTO designation would be granted.
- ▶ State delisted PMOI on Sept. 28, 2012.

Department of State, FTO

- ▶ Providing “material support or resources” to a FTO can lead to criminal prosecution, 18 U.S.C. § 2339B(a)(1).
- ▶ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (6–3 decision, in favor of gov’t)
- ▶ Plaintiffs challenged § 2339B’s prohibition on “training,” “expert advice or assistance,” “service,” and “personnel”
- ▶ Due process (void for vagueness); First Am. freedom of speech & freedom of association

Holder v. Humanitarian Law Project

- ▶ Supreme Court holds that § 2339B not void for vagueness (Fifth Amendment due process) because it has sufficiently specific terms that clearly apply to plaintiffs' proposed activities, and requires "knowledge" of the FTO's activities.
- ▶ Forbidden: to "train members ... on how to use humanitarian and international law to peacefully resolve disputes" and to "teach members on how to petition various representative bodies such as the United Nations for relief."

Holder v. Humanitarian Law Project

- ▶ No First Amendment violation, since § 2339B “reaches only material support coordinated with or under the direction of a designated foreign terrorist organization.”
- ▶ “Independent advocacy that might be viewed as promoting the group’s legitimacy is not covered.”

Office of Foreign Assets Control (OFAC)

- ▶ Executive Order 13,224 (Sept. 23, 2001). Authorized Treasury to designate individuals or entities who assisted, sponsored, supported, or otherwise associated with terrorists, and to block their assets.
- ▶ OFAC designated hundreds of individuals and entities from 2001 through 2019, and has blocked their U.S.-based assets.
- ▶ Parallel United Nations and European Union designations

Office of Foreign Assets Control (OFAC)

- ▶ What to do when an organization or person is designated and its assets are blocked?
- ▶ Need to get a license to represent them and to be paid, either from blocked funds, or from unblocked overseas funds, or from a legal defense fund approved by the gov't.
- ▶ Need to challenge seizure of assets (money and documents/objects).
- ▶ Need to challenge designation.
- ▶ Parallel criminal / grand jury investigation?

Office of Foreign Assets Control (OFAC)

- ▶ *In re Search of KindHearts*, 594 F. Supp. 2d 855 (N.D. Ohio 2009).
- ▶ Judge Carr allowed attorneys and officers of KindHearts to have access to the seized documents and information.
- ▶ Government's proposed protective order violated due process and Sixth Amendment right to counsel.

KindHearts v. Geithner, 647 F. Supp. 2d 857 (N.D. Ohio 2009).

- ▶ Key decision on designation challenge and Fourth Amendment seizure issues.
- ▶ OFAC's blocking without giving entity a chance to respond is a Fourth Amend. seizure
- ▶ OFAC must provide organization with constitutionally adequate notice prior to blocking assets during its investigation.
- ▶ OFAC's attorney's fees policy was applied arbitrarily and capriciously.

KindHearts v. Geithner, 676 F. Supp. 2d 649 (N.D. Ohio 2009).

- ▶ Judge Carr issued temporary restraining order (TRO) enjoining the designation as a SDGT.
- ▶ Likelihood of success on the merits, since court already found a constitutional violation in the blocking.
- ▶ Irreparable harm (reputational) if designation allowed to go forward.

KindHearts v. Geithner, 710 F. Supp. 2d 637 (N.D. Ohio 2010).

- ▶ Decision on remedies – required OFAC to provide KindHearts with notice of the basis for its “blocked pending investigation” status, usually done by providing unclassified summary of classified record.
- ▶ OFAC has to reconsider attorneys’ fee petitions.
- ▶ OFAC agreed to unblock KindHearts’ assets and allow distribution of its assets to other charities.

Office of Foreign Assets Control (OFAC)

- ▶ *Al Haramain Islamic Foundation, Inc. v. U.S. Dep't of the Treasury*, 585 F. Supp. 2d 1233 (D. Or. 2008), *rev'd in part*, 686 F.3d 965 (9th Cir. 2012).
- ▶ Oregon charity, assets blocked and property seized (Feb. 2004).
- ▶ AHIF's attorneys provided information to OFAC, and requested OFAC provide it with all documents supporting the blocking and proposed designation.
- ▶ OFAC designated AHIF (Sept. 2004).

Al Haramain Islamic Foundation, Inc.

- ▶ After designation, AHIF submitted additional documents, requested administrative reconsideration, and sought an explanation for the designation.
- ▶ After receiving no response from OFAC, AHIF filed a federal lawsuit, alleging:
 - Due process violation through use of classified evidence and refusal to provide reasons for investigation and designation.
 - Fourth Amendment violation – no search warrant before seizing its assets.

Al Haramain Islamic Foundation, Inc.

- ▶ Another plaintiff, Multicultural Association of Southern Oregon (MCASO), joined the lawsuit with a First and Fifth Amendment claim that its continued work with AHIF was prohibited by the designation.
- ▶ District Court denied preliminary injunction against monitoring attorney communications with clients, and then granted summary judgment to defendants.
- ▶ Ninth Circuit reversed in key parts.

Al Haramain, 686 F.3d 965 (9th Cir. 2012)

- ▶ While OFAC can rely upon classified evidence in designating an organization, it violated AHIF's Fifth Amendment due process rights by not giving it adequate notice and opportunity to respond, e.g., providing unclassified summary.
- ▶ OFAC violated the Fourth Amendment by freezing and seizing assets without a warrant.
- ▶ MCASO has a First Amendment right to engage in coordinated advocacy, e.g., a joint press conference; its First Amendment rights were violated.

Al Haramain, 686 F.3d 965 (9th Cir. 2012)

- ▶ After the Ninth Circuit's decision, AHIF sought reconsideration of OFAC's redesignation of the organization.
- ▶ AHIF demanded access to the unclassified record, and either a security clearance to access the classified record or an unclassified summary of the classified record.
- ▶ OFAC instead agreed to delist AHIF and to distribute its assets.

U.S. v. Sedaghaty, 728 F.3d 885 (9th Cir. 2013)

- ▶ Parallel criminal prosecution of AHIF and two directors for alleged tax fraud. Trial against one director, Pete Seda (Perouz Sedaghaty).
- ▶ Jury verdict for government set aside by Ninth Circuit: (1) *Brady* violations; (2) failure to provide adequate summary of classified information; and (3) overbroad search.
- ▶ Government dismissed prosecution and settled both the criminal case and the OFAC designation case in 2014.