



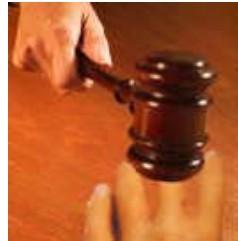
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Court Rules That OFAC Blocks Require Judicial Warrants

Posted by Clif Burns at 6:55 pm on September 27, 2011
Category: [OFAC](#)

Last Friday the U.S. Court of Appeals for the Ninth Circuit released its [opinion](#) in a case brought by the Al Haramain Islamic Foundation ("AHIF") in which AHIF challenged its designation as a terrorist-supporting organization by the Office of Foreign Assets Control ("OFAC"). Although the court found that there was sufficient evidence to support OFAC's designation of AHIF and its blocking of AHIF's assets, it found that OFAC's procedures were deficient and it remanded part of the case to the district court for further proceedings.



The first area in which the Ninth Circuit chided OFAC was in relation to OFAC's reliance on confidential information to designate AHIF as a specially designated global terrorist ("SDGT") under [Executive Order 13,224](#) without providing any information to AHIF concerning that confidential information. While the court held that the government's interest in national security and the prevention of terrorism did not require it to disclose the confidential information to AHIF or to not rely on undisclosed confidential information in making its determination, the court held that there were procedures short of those options that were mandated by the Due Process clause. Specifically, the Ninth Circuit noted that OFAC should provide, subject to exceptions for special cases, either an unclassified summary of the evidence or access to the evidence by an attorney with an appropriate security clearance.

The second area of criticism of OFAC by the court also related to the requirement of the Due Process clause and specifically to its requirement to provide to AHIF adequate notice of the basis for AHIF's designation as an SDGT. The court noted that OFAC never supplied a statement of reasons to AHIF but only provided it with several unclassified documents and a request the AHIF supply OFAC with a copy of the Koran. (I must admit that I am completely baffled by OFAC's Koran request. If, for some reason, OFAC needed to research Islamic principles a free copy of the Koran can easily be found for download at the Gutenberg Project in both a [translation by J.M Rodwell](#) and a [translation by George Sale](#).)

Even though the Ninth Circuit found that OFAC violated AHIF's Due Process rights, it declined to take further action on these violations on the basis that AHIF was not harmed by these violations. Basically, the court relied on the legal doctrine known as "guilty as hell." In effect, the court said that AHIF was so clearly a terrorist-supporting organization that it would have lost even if OFAC had supplied a statement of reasons for the designation as well as an unclassified summary of the confidential evidence or access to that evidence

by an attorney with a security clearance.

The third area in which the court took OFAC to task, and which resulted in the remand to the district court, was OFAC's violation of AHIF's Fourth Amendment rights by seizing AHIF's assets through the blocking process without a judicial warrant. The court did credit OFAC's concern with "asset flight" and permitted OFAC to initially seize assets without a warrant pursuant to the emergency exception to the Fourth Amendment. But that exception would still require a judicial warrant before the assets were permanently blocked.

This decision accords with a prior district court decision in the [KindHearts case](#). Other district court have ruled that blocking assets isn't a seizure because the government doesn't take possession of the blocked assets, a strained rationale at best. See *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 47-48 (D.D.C. 2005); *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57, 79 (D.D.C. 2002). Because the Ninth Circuit's rationale only applies to assets held by U.S. citizens, and because most blocked assets belong to foreign citizens, it is unlikely that this warrant requirement, even if followed by OFAC, would have a significant impact on OFAC's practices.

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2 Comments:



Clif — One of the most surprising elements of the 9th Circuit decision is the statement that having a single Specially Designated National on the board of directors of AHIF meant that AHIF was "controlled" by that SDN, justifying designation of AHIF on that ground alone. There is no discussion of the size of the board or why one member is deemed to control of the board and hence the entity. Let's hope this aspect of the decision doesn't become a "precedent" for future designations by OFAC. (Consider whether the presence of one U.S. person on the 20-person board of a wholly foreign entity would make it a "person subject to U.S. jurisdiction" for purposes of the Cuba sanctions, because the one person "controlled" the foreign entity.)

Comment by Ex-OFAC on [September 28th, 2011](#) @ 6:57 pm



I agree, and I was adding a post on this issue when your comment arrived. I think OFAC and the Ninth Circuit relied on more than just the fact that a director was an SDGT — including alleged links by AHIF to Chechnyan terrorism — but still the language used by the Court is troubling dicta.

Comment by [Clif Burns](#) on [September 28th, 2011](#) @ 8:53 pm

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