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## "If Property Rights Were Treated Like Human Rights, They Could Never Get away with This": Blacklisting and Due Process in U.S. Economic Sanctions Programs

Peter L. Fitzgerald

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# “If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This”: Blacklisting and Due Process in U.S. Economic Sanctions Programs

by  
PETER L. FITZGERALD\*

## Table of Contents

Introduction.....	74
I. Blacklists In U.S. Economic Sanctions.....	77
A. The Sanctions on The Former Yugoslavia.....	77
B. The Blacklist.....	83
C. Blacklisting in other U.S. Economic Sanctions Programs.....	88
(1) A Growing Number of Programs.....	90
(2) A Plethora of Blacklists.....	98
(3) A History of Administrative Problems.....	110
(a) Problems Detailing New Controls.....	111
(b) Problems Removing Outdated Controls.....	116
(c) Problems Managing the Blacklists.....	120

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II.	The Legal Morass.....	135
A.	Obstacles to Individual Challenges to OFAC Controls...	136
	(1) Practical Obstacles to Individual Challenges.....	136
	(2) Legal Obstacles to Individual Challenges.....	139
B.	Legislative Measures .....	160
	Recommendations and Conclusion .....	166

### Introduction

Spring is in the air in the rolling hills of Bucks County, Pennsylvania, as the cars pull into the parking lot of a suburban office park just a few miles from the Washington Crossing State Historic Site. Ten men, with the nondescript business suits, radios, and haircuts which make them easily identifiable as government agents, pale beside the bright rhododendron blooms lining the walkway as they parade to the door of the offices of a small importer/exporter of machine tools a little after lunch. The IPT Company, Inc., a New York corporation, had been in business for over twenty-five years when the U.S. Treasury Agents arrived without warning to close the business down. The thirteen employees at the Warminster office and warehouse were told to collect their personal belongings, as the premises were to be vacated immediately, the locks changed, and the business closed. One of the agents affixed a new sign to the door, which read:

U.S. Persons are prohibited from engaging in transactions with the entity occupying this space. All assets owned or controlled by it are blocked. . . . Criminal penalties for violation of this notice may include up to 10 years imprisonment, \$500,000 in corporate and \$250,000 in individual fines.<sup>1</sup>

Neither the company nor its employees or principals were accused of any wrongdoing. Rather, IPT was "blocked" by the Treasury Department's Office of Foreign Assets Controls (OFAC) because of U.S. foreign policy concerns regarding the identity of IPT's overseas stockholders. By virtue of its foreign ownership, this New York corporation had become caught up in one of the U.S. government's economic sanctions programs - in this case, the then newly-announced sanctions on the Federal Republic of Yugoslavia.<sup>2</sup> The notice served on IPT stated:

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1. Barbara Demick, *Bosnia Fallout Scars a Company in Bucks: Clinton's Anti-Yugoslav Sanctions Hit Home*, PHILADELPHIA INQUIRER, May 24 1993, at A1, available in 1993 WL, PHILINQ database.

2. See *id.*; see also *infra* notes 91, 120-129, 258-266 and accompanying text. More than 400 individuals, firms, and vessels have been blacklisted under the Yugoslav sanctions.

All entities located in or organized under the laws of the Federal Republic of Yugoslavia (Serbia and Montenegro), and any entities owned or controlled by the foregoing, are presumed to be controlled by the Government of the Federal Republic of Serbia. . . . For this reason the U.S. Department of Treasury considers IPT Company, Inc. to be an entity blocked by [the Executive Orders imposing economic sanctions on the Federal Republic of Yugoslavia]. U.S. Persons (including IPT employees) are, therefore, prohibited from engaging in transactions with IPT, unless licensed by the Office of Foreign Assets Control, and all assets within U.S. jurisdiction which are owned or controlled by IPT are required to be treated as blocked. You are hereby ordered to close the IPT premises immediately and to post the enclosed notice on the outside of the door. No property is to be removed without the express permission of the Office of Foreign Assets Control. All accounts of IPT and accounts in which IPT has an interest in the United States or in foreign branches of U.S. banks are blocked.<sup>3</sup>

Thus, IPT was effectively considered to be a Yugoslavian agent by the Treasury Department's Office of Foreign Assets Controls (OFAC), and dealings with this U.S. machine tool exporter became subject to the same prohibitions and regulations applied to dealing with Slobodan Milosovic or his Government.<sup>4</sup> Why? Because the

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3. IPT Co. v. United States Dep't of Treas., No. 92 Civ. 5542 (JFK), 1992 U.S. Dist. LEXIS 12796, at \*1-\*2 (S.D.N.Y. Aug. 24, 1992).

The text truncates the events which led to the closing of IPT. The economic sanctions imposed following the breakup of Yugoslavia were actually implemented in several steps. The notice quoted above was served on IPT in July of 1992 as a result of the initial announcement of sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro). See Exec. Order No. 12,808, 57 Fed. Reg. 23,299 (1992); Exec. Order No. 12,810, 57 Fed. Reg. 24,347 (1992). Following the initial shutdown of the company, OFAC issued licenses which permitted IPT to resume operating as long as they did not do business with the affected areas of Yugoslavia. IPT complied with OFAC's conditions. However, these licenses were revoked in 1993 when the initial sanctions were tightened as the situation in the former Yugoslavia continued to deteriorate. The unannounced revocation of the licenses and shutdown of the Warminster IPT offices described in the text accompanying note 1, *supra*, occurred in 1993 following the issuance of Executive Order 12,846. See Exec. Order No. 12,846, 58 Fed. Reg. 25,771 (1993); IPT Co. v. United States Dep't of Treas., No. 92 Civ. 5542 (JFK), 1993 U.S. Dist. LEXIS 6304, at \*2-\*3 (S.D.N.Y. May 13, 1993); No. 92 Civ. 5542 (JFK), 1992 U.S. Dist. LEXIS 18388, at \*1-\*2 (S.D.N.Y. Dec. 3, 1992). The sanctions were then further tightened in 1994. See Exec. Order No. 12,934, 59 Fed. Reg. 54,117 (1994).

The sanctions and blocking measures directed at Serbia and Montenegro were prospectively lifted in January of 1996 as a result of the Dayton Peace Accords, see 61 Fed. Reg. 1,284 (1996); 31 C.F.R. § 585.525 (1999), but were not similarly lifted for the Serbian controlled areas of Bosnia until the following May. See 61 Fed. Reg. 24,697 (1996); 31 C.F.R. § 585.527 (1999). Sanctions were then reimposed on the Federal Republic of Yugoslavia in June of 1998 as a result of Serbian actions in Kosovo. See 63 Fed. Reg. 54,575 (1998).

4. The Federal Republic of Yugoslavia Sanctions Regulations (FRYSR) impose a

shares of this New York corporation were owned by two commercial companies established in the Federal Republic of Yugoslavia.<sup>5</sup>

As a consequence, IPT's name was added to one of OFAC's "blacklists" and no person<sup>6</sup> or company subject to U.S. jurisdiction could engage in any sort of transaction with IPT, without

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variety of restrictions on dealing with the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). See 31 C.F.R. § 585.201 (1999). The Government of the Federal Republic of Yugoslavia is defined in the regulations to include:

- (a) The state and Government of the FRY (S&M). . . including their respective agencies or instrumentalities. . . ;
- (b) *Any entity owned or controlled by the foregoing.* For purposes of the prohibitions of this part, all *entities located in or organized under the laws* of any jurisdiction within the FRY (S&M) are presumed to be controlled by the Government of the FRY (S&M) unless proven otherwise;
- (c) Any person. . . acting or purporting to act, directly or indirectly, on behalf of any of the foregoing; and
- (d) *Any person or organization determined* by the Director of the Office of Foreign Assets Control *to be included within this section, or owned or controlled by such a person or organization.*

31 C.F.R. § 585.311 (1999) (emphasis added).

5. The two Serbian companies that owned IPT were Invest-Import, an importer and exporter of industrial products, and LZTK (Livnica Zeljeza I Tempera-Kikinda), a tool and grinding machine manufacturer. The U.S. government successfully asserted that Invest-Import and LZTK must be presumed to be controlled by the government of the Federal Republic of Yugoslavia because of their being located in Serbia. IPT had argued that its shareholders were not government instrumentalities, but rather "Workers' Organizations" - companies owned by the workers - considered to be "socially owned" by the government only because privatization was not yet complete at the time Yugoslavia broke apart. See *IPT Co. v. United States Dep't of Treas.*, 1992 U.S. Dist. LEXIS 18388, at \*3 n. 1. See also *Milena Ship Management Co., Ltd. v. Newcomb*, 995 F.2d 620, 623-24 (5th Cir. 1993) (discussing "Social Capital" in Yugoslavian law); 804 F. Supp 859, 863 (E.D. La. 1992); and 804 F. Supp 846, 853-54 (E.D. La. 1992). In response to IPT's arguments, when the sanctions relating to Kosovo were reimposed in 1998, new language was included in the Executive Order specifically including "socially owned entities . . . located in the Federal Republic of Yugoslavia (Serbia and Montenegro)" within the definition of the "Government" targeted by the controls. Exec. Order No. 13,088 § 5(e), 63 Fed. Reg. 32,109, 32,110 (1998). Additionally, a new, broadened, definition was also included in the Kosovo Sanctions Regulations (KSR) which reads:

The term *Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)* means the Government of the FRY (S&M), its agencies, instrumentalities, and controlled entities, including all financial institutions and state-owned and socially-owned entities organized or located in the FRY (S&M) as of June 9, 1998, any successors to such entities, and their respective subsidiaries and branches, wherever located, and any persons acting or purporting to act for or on behalf of any of the foregoing.

31 C.F.R. § 586.306 (1999). Compare this new provision with the more convoluted language of the FRYSR. See *id.* § 585.311, *supra* note 4.

6. These prohibitions also extended to IPT's employees. The President of IPT, Melita Jaric, was prevented from seeing the company's mail, and was even unable to access company records in order to obtain the telephone numbers of IPT's customers. See *supra* note 3 and accompanying text.

authorization from the U.S. government.<sup>7</sup> After twenty five years of operations as a U.S. company, producing annual revenues of up to \$50 million dollars,<sup>8</sup> IPT was out of business.<sup>9</sup> “We didn’t expect that something like this could happen in a country with such strong democratic inclinations,” said Melita Jaric, the Croatian-born President of IPT, “[i]t is one of the worst horrors imaginable to any business person. If property rights were treated like human rights, they could never get away with this.”<sup>10</sup>

## I. Blacklists In U.S. Economic Sanctions

### A. The Sanctions on The Former Yugoslavia

IPT’s difficulties with the Yugoslav sanctions provide a good example of how the “blacklisting” of specific individuals and companies is used as an important adjunct to the various U.S. economic sanctions or embargo programs.<sup>11</sup>

When the former Socialist Federal Republic of Yugoslavia<sup>12</sup> established by Marshall Tito broke apart into six republics in the early 1990’s,<sup>13</sup> the governments of Serbia<sup>14</sup> and Montenegro<sup>15</sup> declared themselves to be the Federal Republic of Yugoslavia (FRY).<sup>16</sup> The FRY became subject to both a U.S.<sup>17</sup> and a U.N.<sup>18</sup>

7. See 31 C.F.R. §§ 585.201-218, 586.201-206 (1999). See also *infra* notes 17-21 and accompanying text (detailing how the U.S. sanctions were phased in between 1992 and 1994, and then reimposed in 1998).

8. See DEMICK, *supra* note 1.

9. As the court noted during one of IPT’s legal challenges to this process, “[b]eing closed down is the ultimate harm that a business can suffer.” IPT Co. v. United States Dep’t of Treas., 1993 U.S. Dist. LEXIS 6304, at \*4 (S.D.N.Y. May 13, 1993).

10. See DEMICK, *supra* note 1.

11. See *infra* notes 62-103 and accompanying text, for an overview of the U.S. Government’s economic sanctions programs.

12. See 31 C.F.R. § 585.312 (1999) (defining “Government of the Socialist Federal Republic of Yugoslavia” as it is used in this section).

13. After the collapse of communism, the six republics which comprised the former Yugoslavia (Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia) split apart in a bloody civil war. See generally *HISTORY OF YUGOSLAVIA 1948-1998* JANE’S SENTINEL, (1999) available at <http://www.janes.com/defence/features/kosovo/history.html>.

14. See 31 C.F.R. §§ 585.311, 586.308 (1999).

15. See *id.* §§ 585.311, 586.307.

16. See *id.* §§ 585.313, 586.304.

17. The initial U.S. sanctions were imposed on May 30, 1992. See Exec. Order No. 12,808, 57 Fed. Reg. 23,299 (1992).

18. The initial U.N. sanctions were imposed, simultaneously with the U.S. sanctions, on May 30, 1992, with U.N. Security Council Resolution Number 757. S.C. Res. 757, U.N. SCOR, 47th Sess., 3082d mtg. at 4-9, U.N. Doc. S/RES/757 (1992). Over time, and as the situation in Yugoslavia continued to worsen, the U.N. called for further sanctions through

economic embargo<sup>19</sup> as a result of its attempts to seize territory and conduct "ethnic cleansing" in the Republics of Croatia and Bosnia-Herzegovina, and similar efforts more recently aimed at suppressing ethnic Albanians within the Serbian province of Kosovo.<sup>20</sup>

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1994. See S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg. at 9-6, U.N. Doc. S/RES/787 (1992); S.C. Res. 820, U.N. SCOR, 48th Sess. 3200th mtg. at 10-30, U.N. Doc. S/RES/820 (1993); S.C. Res. 942, U.N. SCOR, 49th Sess., 3428th mtg. at 7-22, S/RES/942 (1994). With the signing of the Dayton Peace Accords, the U.N. economic sanctions were suspended and its arms embargo phased out over a period of months. See S.C. Res. 1022, U.N. SCOR, 50th Sess., 3595th mtg. at 1-7, U.N. Doc. S/RES/1022 (1995). However, when fighting broke out in the Serbian province of Kosovo, the U.N. called for a renewed arms embargo with Security Council Resolution Number 1160. S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg. at 8-9, U.N. Doc. S/RES/1160 (1998). This was further augmented by a call for U.N. members to prohibit fundraising in their territories from being used to undermine the arms embargo. See S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg. at 11, U.N. Doc. S/RES/1199 (1998).

19. The initial sanctions ordered U.S. citizens, residents, or companies (including their overseas branches) to "block" all property belonging to the FRY government, or in which the FRY government had "any interest." See Exec. Order No. 12,808 §§ 1-2, 57 Fed. Reg. 23,299 (1992). This was quickly expanded with Executive Order 12,810 on June 5, 1992 to reflect U.N. Security Council Resolution No. 757 by adding an import/export ban, travel restrictions, restrictions on sporting/cultural/scientific exchanges and, significantly, a prohibition on any financial dealings with "commercial entities" located in the FRY. See Exec. Order No. 12,810, 57 Fed. Reg. 24, 347 (1992). These measures were still further tightened (particularly with regard to trans-shipments through Yugoslavia or dealings with Yugoslav-controlled vessels) to align the U.S. sanctions with the additional measures being called for in U.N. Security Council Resolution 787. See Exec. Order No. 12,831, 58 Fed. Reg. 5,253 (1993). As the situation deteriorated over the next several months, the U.N. continued to tighten the embargo. See S.C. Res. 820, *supra* note 18; S.C. Res. 942, *supra* note 18. Accordingly, President Clinton issued Executive Orders 12,846 and 12,934 on April 25, 1993, and October 25, 1994, respectively. Executive Order 12,846 built upon steps taken under the earlier Orders by specifically extending the blocking measures to commercial entities based in the FRY or controlled by the FRY. See Exec. Order No. 12,846, 58 Fed. Reg. 25,771 (1993). Executive Order 12,934 extended the sanctions to include the Bosnian Serbs and entities based in the portion of Bosnia-Herzegovina which they controlled. See Exec. Order No. 12,934, 59 Fed. Reg. 54, 117 (1994).

Following the conclusion of the Dayton Peace Accords, the U.S. blocking measures directed at the FRY itself (*i.e.* Serbia and Montenegro) were prospectively lifted in January 1996. See 31 C.F.R. § 585.525 (1999). The measures directed at the Serb-controlled portions of Bosnia-Herzegovina were similarly lifted in May 1996, when the Serb forces were withdrawn. See 31 C.F.R. § 585.527 (1999). FRY property which had been frozen under the terms of the sanctions prior to December 27, 1995, however, remained blocked, see 31 C.F.R. § 585.525(a) (1999), as did Bosnian Serb property blocked prior to May 10, 1996, see 31 C.F.R. § 585.527(a) (1999). New sanctions, however, were imposed as a result of FRY actions with regard to the province of Kosovo. See *infra* notes 20-36 and accompanying text.

20. With the issuance of Executive Order 13,121 on June 9, 1998, property and assets of the governments of the FRY, Serbia, and Montenegro were again blocked, as are any new investments, although purely domestic transactions within the FRY by U.S. citizens, residents, or companies remain permissible along with barter transactions. See Exec. Order No. 13,088, 63 Fed. Reg. 32,109 (1998); Exec. Order No. 13,121, 64 Fed. Reg. 24,021

Under the auspices of the U.S. Treasury Department's Office of Foreign Assets Controls (OFAC), a wide range of sanctions were imposed.<sup>21</sup> Imports from<sup>22</sup> or exports to<sup>23</sup> the FRY were prohibited, absent Government approval, as were any dealings with regard to property originating in or trans-shipped through the FRY.<sup>24</sup> Services relating to sea or air transportation to the FRY were also restricted.<sup>25</sup>

It is the "blocking" measures, however, which were the most significant and far reaching of the various sanctions which were imposed. The U.S. Government "froze" or "blocked"<sup>26</sup> all property

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(1999). The Kosovo Sanctions Regulations (KSR), implement these new sanctions. *See* 31 C.F.R. § 586 *et seq.* (1999). Interestingly, as section 7 of Executive Order 13,088 directed the Treasury Department to give "special consideration" to Montenegro in implementing the new sanctions, *see* 63 Fed. Reg. 32,109, 32,110 (1998), OFAC issued a General License on June 18, 1998, which excluded the government of Montenegro and entities located within Montenegro from the scope of the new sanctions. Although not published in the Federal Register at the time of its release, this General License is now reflected in the Kosovo Sanctions Regulations. *See* 31 C.F.R. § 586.516 (1999).

The KSR, while a separate sanctions program, nevertheless overlaps with the original Yugoslav Sanctions Regulations, 31 C.F.R. § 585 *et seq.* (1999), in that they are both targeted at the FRY. With the reimposition of sanctions under the KSR, parties who were "blacklisted" under the earlier sanctions are again blacklisted under these regulations. That is, the blacklisted parties lose the benefit of the prospective lifting of sanctions embodied in 31 C.F.R. §§ 585.525 and 585.527 of the older Yugoslav Sanctions Regulations. *See* notes following the Regulations at 31 C.F.R. §§ 586.306 and 586.308 (1999). As the U.N. measures with regard to the renewed fighting in Kosovo simply call for an arms embargo and a cease-fire, *see supra* note 18, the reimposition of the broader FRY blocking measures means that the U.S. sanctions are arguably more onerous than those called for by the U.N.

21. Although phased in over time with a series of different Executive Orders, *see supra* notes 3 and 19, the sanctions eventually were embodied in the awkwardly captioned "Federal Republic of Yugoslavia (Serbia and Montenegro) and Bosnian Serb-Controlled Areas of the Republic of Bosnia and Herzegovina Sanctions Regulations," more commonly known as the Federal Republic of Yugoslav Sanctions Regulations (FRYSR), 31 C.F.R. § 585 *et seq.* (1999), and the more recent Kosovo Sanctions Regulations (KSR), *id.* § 586 *et seq.* Interestingly, OFAC administered the Yugoslav sanctions program for eight months without any regulations at all: from May 30, 1992, when Executive Order 12808 was signed, until March 10, 1993, when the FRYSR were first published. 58 Fed. Reg. 13,199 (1993).

22. *See* 31 C.F.R. §§ 585.204, 586.201 (1999).

23. *See* 31 C.F.R. §§ 585.205, 586.201 (1999).

24. *See* 31 C.F.R. §§ 585.206, 586.201 (1999).

25. This would cover, for example, ground, port, refueling, bunkering, clearance or freight forwarding services, ticketing or insuring of ships or aircraft destined for or stopping in the FRY, or which are owned or controlled by the FRY. *See* 31 C.F.R. § 585.207 (1999). Overflying the U.S. was also prohibited, if the route included a stop in the FRY, *see* 31 C.F.R. § 585.208 (1999), and vessels registered in the U.S., or owned or controlled by U.S. parties, were prohibited from entering FRY waters or ports, *see* 31 C.F.R. § 585.217 (1999).

26. The act of "blocking," or another similar and frequently used term, "freezing," of the property of a sanctions target is not actually described or defined in the regulations,



and "interests in property" of the Government of the FRY (Serbia and Montenegro) whether in the United States, or within the possession or control of any U.S. residents, citizens, or firms outside of the United States.<sup>27</sup> This was accomplished through a broadly-worded prohibition on virtually any transfer, payment, withdrawal, or "other dealing" in such property without U.S. Government approval.<sup>28</sup> Similar blocking measures were aimed at the property or "interests in property" of "commercial, industrial, or public . . .

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despite the common use of such terms by both practitioners in the area and by OFAC itself. The FRYSR do contain, however, a definition of a "blocked account" or of "blocked property." See 31 C.F.R. § 585.302 (1999). The KSR follow a similar structure. See *id.* § 586.301 (1999). See also *infra* notes 106, 138-49 and accompanying text.

27. Only "U.S. persons" are obligated to comply with the terms of the U.S. sanctions on dealings with the FRY. See 31 C.F.R. §§ 585.201, 586.201 (1999). This includes foreign branches of U.S. juridical entities, but not foreign-incorporated subsidiaries.

Thus, FRYSR and KSR are examples of sanctions programs which the U.S. Government established with "limited" extraterritorial application to U.S.-affiliated parties abroad. This approach reflects the fact that other nations would be taking similar steps in their own laws in compliance with the U.N. call for a multilateral embargo of the FRY. At other times, U.S. economic sanctions programs have been given greater extraterritorial application, particularly when the U.S. is acting "unilaterally" and it is not expected that other nations will impose similar restrictions. The terms of the U.S. embargo of Cuba, for example, apply more broadly to "all persons subject to U.S. jurisdiction" and therefore obligate foreign juridical persons which are owned or controlled by U.S. residents, citizens, or firms to comply with the U.S. embargo. See 31 C.F.R. § 515.329(d) (1999). Imposing legal obligations on foreign juridical entities in this manner is generally opposed by the international community as an unreasonable assertion of jurisdiction under international law and an infringement of other nations' sovereignty. See, e.g., Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT'L L. 1, 36-41 (1998).

28. The FRYSR reads:

Except as authorized by regulations, orders, directives, rulings, instructions, licenses, or otherwise, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract or any license or permit . . . no property or interest in property of the Government of the FRY (S&M), or that is held in the name of the Federal Republic of Yugoslavia or the former Government of the Socialist Federal Republic of Yugoslavia, that is in the United States, that hereafter comes within the possession or control of U.S. persons, including their overseas branches, may be transferred, paid, exported, withdrawn, or otherwise dealt in.

31 C.F.R. § 585.201(a) (1999).

The analogous provision in the KSR is similarly worded:

Except as authorized by regulations, orders, directives, rulings, instructions, licenses, or otherwise, no property or interests in property of the Governments of the FRY (S&M), the Republic of Serbia, and the Republic of Montenegro that are in the United States, . . . or that are or hereafter come within the possession or control of U.S. persons, including their overseas branches, may be transferred, paid, exported, withdrawn, or otherwise dealt in.

*Id.* § 586.201(a) (1999).

undertakings or entities organized or located” in the FRY.<sup>29</sup> The Bosnian Serb military and paramilitary forces were also covered, along with the portions of the territory of Bosnia-Herzegovina which were under their control, and the various entities located within that territory.<sup>30</sup> Any transfers or dealings contrary to these provisions are rendered null and void.<sup>31</sup>

29. The FRYSR reads:

Except as otherwise authorized, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted . . . no property or interest in property of any commercial, industrial, or public utility undertakings or entities organized or located in the Federal Republic of Yugoslavia (Serbia and Montenegro) including, without limitation, the property and all interests in property of entities (wherever organized or located) owned or controlled by such undertakings or entities, that are in the United States, that hereafter come within . . . the possession or control of United States persons, including their overseas branches, may be transferred, paid, exported, withdrawn, or otherwise dealt in.

31 C.F.R. §585.201(b) (1999).

The KSR reach the same result by defining the term “government” to include any entities located within that government’s particular jurisdiction:

The term Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) means the Government of the FRY (S&M), its agencies, instrumentalities, and controlled entities, including all financial institutions and state-owned or socially-owned entities organized or located in the FRY (S&M) . . . any successors to such entities, and their respective subsidiaries and branches, wherever located, and any persons acting or purporting to act for or on behalf of any of the foregoing.

*Id.* § 586.306 (1999).

Virtually the same language is found in the KSR provisions defining the “Government of the Republic of Serbia,” *see id.* § 586.308 (1999), and the “Government of the Republic of Montenegro,” *see id.* § 586.307.

30. The FRYSR reads:

Except as otherwise authorized, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted . . . no property or interest in property of the following persons that is in the United States, or that is or hereafter comes within the possession or control of United States persons, including their overseas branches, may be transferred, paid, exported, withdrawn, or otherwise dealt in:

(1) The Bosnian Serb military and paramilitary forces and the authorities in those areas of the Republic of Bosnia and Herzegovina under the control of those forces;

(2) Any entity, including any commercial, industrial, or public utility undertaking, organized or located in those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces . . . .

*Id.* § 585.201(c).

The sanctions on the Bosnian Serbs have not been reinstated under the KSR, although property which was blocked prior to the withdrawal of the Serb forces from Bosnia in May of 1996 remains frozen. *See id.* § 585.527.

31. *See id.* §§ 585.202, 586.202 .

These three categories—the governments of the FRY (Serbia and Montenegro), the Bosnian Serb forces, and the various entities within their respective territories—taken together constituted the primary “targets” of the U.S. and U.N. sanctions on the former Yugoslavia. However, in an effort to make the sanctions more effective, and more inclined to induce a change in behavior on the part of the various targets of the embargo, other provisions were included to reduce the possibility that the adverse effects of the sanctions might be avoided. For example, performing any contractual obligations outside of the FRY related to the support of projects *within* the FRY was also prohibited.<sup>32</sup> Moreover, the prohibitions on direct dealings with the FRY included dealings with the sanctioned targets conducted *outside* of Serbia or Montenegro.<sup>33</sup> Even more significantly, however, the controls also specifically included “without limitation, the property and all interests in property of entities (wherever organized or located) owned or controlled” by those within the FRY.<sup>34</sup> It is this provision of the Yugoslav sanctions which ensnared IPT. Additionally, anyone could be brought within the ambit of the controls, whether or not owned or controlled by one of the sanctions targets, if they were “acting for or on behalf of” a sanctioned party or entity.<sup>35</sup> Finally, any transaction which had the “purpose or effect” of evading or avoiding the controls was also

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32. *See id.* §§ 585.209, 586.201, 586.407. The KSR also prohibit new investments in Serbia. *See id.* § 586.204.

33. The FRYSR reads:

The prohibitions contained in §§ 585.201 and 585.206 apply to transactions by U.S. persons in locations outside the United States with respect to property in which the U.S. person knows or has reason to know that a person whose property or interests in property are blocked pursuant to § 585.201 has or has had an interest since the effective date specified in § 585.301, or that such property is held in the name of a person whose property or interests in property are blocked pursuant to § 585.201.

*Id.* § 585.408(a). *See also id.* § 585.201(c)(4).

The KSR provision is analogous. *See id.* § 586.407.

34. *Id.* § 585.201(b) (1999) (emphasis added). A similar provision extended the reach of the prohibitions on dealing with entities located in the Serb-controlled areas of Bosnia-Herzegovina. *See id.* § 585.201(c)(3) (1999). *See also* the analogous KSR provisions, *id.* §§ 586.201, 586.407(c)(2) (1999).

35. *See id.* §§ 585.201(c)(4), 586.306-308. Interestingly this “agency” provision, as included in the current FRYSR appears to only apply to the sanctions directed at the Bosnian Serbs and not the sanctions directed at the FRY, because it only internally references § 585.201(c) and there are no parallel paragraphs for § 585.201(a) or § 585.210(b). Such a reading would not comport with the wording of the underlying Executive Orders, nor with OFAC practice, however. *See, e.g.*, Exec. Order 12,808, at § 4(b), (c), 57 Fed.Reg. 23,299 (1992); Exec. Order No. 12,810 at § 5(c), 57 Fed. Reg. 24,347 (1992); General Notice No. 1, 57 Fed. Reg. 32,051 (1992).

prohibited.<sup>36</sup>

## B. The Blacklist

In order to further bolster these regulations on any dealings with the FRY, the U.S. Government also established a list of those who are "deemed" to be acting for, or on behalf of, the FRY. This builds upon the prohibition against dealings with those "known or believed to be" acting as agents of a sanctioned target in third countries, as well as the similar prohibition against dealings with sanctioned parties which might be operating outside of their home territory. By affirmatively declaring that specific individuals and companies are to be considered as agents, or deemed to be treated as nationals of a sanctions target, the blacklisted parties become subject to the same restrictions which apply to direct dealings with the target of the controls.<sup>37</sup> In this way OFAC expands its reach to ostensibly neutral "fronts" or "cloak" organizations employed by a particular sanctions target destination, such as the Federal Republic of Yugoslavia. In blacklisting these parties in third countries, the U.S. Government effectively brings *indirect* dealings through intermediaries within the scope of its ban on *direct* dealings with the embargoed target itself.<sup>38</sup>

The parties named in OFAC's blacklist might be foreign, third-country subsidiaries of firms or entities based in the sanctioned target; entities which are simply subject to the "control" of the sanctioned target; or actually entirely devoid of any ties of ownership or control whatsoever to the sanctioned target. In each case, by including a party on its blacklist, the U.S. Government will have declared that they are irrebuttably presumed to be acting "for, or on behalf of," the sanctioned target.<sup>39</sup> In essence, OFAC expands upon the traditional concepts of nationality under international law to create a new category of "specially designated nationals" for its blacklists.<sup>40</sup> As a

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36. See 31 C.F.R. §§ 585.214, 586.205 (1999).

37. See *id.* §§ 585.201(c)(4), 585.408, (FRYSR); 586.306-308, 586.407(a), (KSR) (1999).

38. In doing so, the U.S. Government is adopting a technique which is perhaps more familiar as part of the blacklisting mechanism employed in the Arab League's boycott of firms which do business with Israel. While the ability of two nations to employ trade embargoes or "primary boycotts" in their direct dealing between themselves is recognized under international law, the blacklisting of third parties for their connection or dealings with one of the disputants (a "secondary boycott") is increasingly suspect under emerging standards of international law, and is specifically condemned, at least in the Arab/Israeli context, by the U.S. antiboycott laws. See Export Administration Act Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977); 50 U.S.C. app. § 2407 (1994); Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 1061-64, 1066-67, 90 Stat. 1649-50, 1654 (1976); Fitzgerald, *supra* note 27, at 49-60, 87-96.

39. See, e.g., notes following 31 C.F.R. § 585.201(c)(4) (FRYSR); 63 Fed. Reg. 54,575, 54,579 (1998) (to be codified at 31 C.F.R. § 586.306-308) (KSR).

40. See *infra* notes 104-196 and accompanying text; see also MICHAEL P. MALLOY,

consequence, just as the sanctions would apply to either a natural or juridical “national” of a sanctioned destination wherever they might be found, the same sanctions apply to those parties who become blacklisted as “specially designated nationals.”

Accordingly, with the addition of IPT’s name to the blacklist<sup>41</sup> of “Blocked” or “Specially Designated Nationals” (SDNs)<sup>42</sup> of the FRY, any dealings with IPT are deemed to be the same as dealings with the government of the FRY,<sup>43</sup> even though IPT is established as

ECONOMIC SANCTIONS AND U.S. TRADE 329-39 (1990) (discussing the specialized treatment of “nationals” under the OFAC regulations).

41. See 31 C.F.R. ch. V, apps. A (Alphabetical Listing), B (Vessels) (1999).

42. The specific terminology associated with the OFAC blacklist (e.g., “blocked,” “controlled,” “governmental,” or “specially designated” entities) varies among the different OFAC sanctions programs, and sometimes even among various documents related to a single sanctions program. For example, when initially released, the blacklist associated with the FRYSR was styled as a list of “Controlled Yugoslav Entities,” but the same document was also sub-captioned as a list of “Blocked Yugoslav Entities Currently Identified.” See General Notice No. 1, 57 Fed. Reg. 32,051, 32,052 (1992). This same blacklist was then restyled as a list of “Blocked Persons and Specially Designated Nationals” when it was updated to include “Bosnian Serb Civilian and Military Authorities.” See Notice of Blocking, 60 Fed. Reg. 19,448 (1995). There is little or no real practical difference attributed to the various terms used. The variation in terminology is largely due to historical reasons, and to the fact that each new sanctions program was traditionally crafted as a stand-alone set of regulations without reference to other, similar programs. See *infra* notes 104-199 and accompanying text.

In contrast with the terminology, however, the operation of the list is consistent across all programs which utilize the blacklisting tool, in that blacklisting under whatever designation is used defines the listed parties as being part of a particular sanctions target. In 1996, OFAC began publishing a consolidated master blacklist, see 56 Fed. Reg. 44,459 (1996), which now appears as a series of appendices to 31 C.F.R. Chapter V (1999), with the cumbersome title of “. . . Listing of Blocked Persons, Specially Designated Nationals, Specially Designated Terrorists, Foreign Terrorist Organizations, and Specially Designated Narcotics Traffickers and Blocked Vessels.” The short reference most commonly used by practitioners referring to this blacklist, and which will be used in this article, is the “Specially Designated Nationals” or “SDN” list.

43. The FRYSR defines the term “Government of the Federal Republic of Yugoslavia (Serbia & Montenegro)” to include:

Any person or organization determined by the Director of the Office of Foreign Assets Control to be included within this section, or owned or controlled by such a person or organization.

NOTE TO §585.311: Please refer to the appendices at the end of this chapter for listings of persons designated pursuant to this part. . .

31 C.F.R. § 585.311(d) (1999)

The KSR defines the term “Government of the Federal Republic of Yugoslavia (Serbia & Montenegro)” to mean:

The term Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) means the government of the FRY (S&M), its agencies, instrumentalities, and controlled entities, including all financial institutions and state-owned and socially-owned entities organized or located in the FRY (S&M) as of June 9, 1998, any successors to such entities, and their respective

a U.S. corporation and operating in the United States. This makes even domestic dealings with IPT within the U.S. subject to the same prohibitions applicable to any direct transaction with the FRY.<sup>44</sup> All those who are obligated to follow U.S. law, therefore, are subject to the sanctions regulations' broad controls over virtually any dealings with IPT, absent U.S. Government approval in the form of either a regulatory authorization for the specific type of transaction involved or an actual license issued by OFAC.<sup>45</sup>

Additionally, blacklisting means that *all* dealings with the designated party are deemed to involve the sanctioned destination, whether or not the blacklisted party is actually acting as an "agent" of the sanctioned target for a particular transaction.<sup>46</sup> Thus, IPT's long established business operations in the United States may not directly benefit the FRY in any manner, but are nonetheless subject to the same controls as direct dealings with Slobodan Milosovic or his government. While the blacklisting may be justified as an attempt to stop foreign agents acting for a sanctioned destination, the mechanism is nevertheless effectively one based upon a special designation of "nationality." As such, for a blacklisted party such as IPT to attempt to show that no actual agency relationship exists is unavailing.<sup>47</sup> The distinction between actually acting as an agent for

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subsidiaries and branches, wherever located, and any persons acting or purporting to act for or on behalf of any of the foregoing.

NOTE TO §586.306: Please refer to the appendices at the end of this chapter for listings of persons determined to fall within this definition who have been designated pursuant to this part . . .

*Id.* § 586.306.

The KSR also introduces a new definition of the "Government of Serbia" which is virtually identical in wording to this provision, and which includes the same reference to parties falling within the definition by virtue of their "designation" in the SDN list. *See id.* § 586.308.

44. *See id.* §§ 585.201, 586.201.

45. *See id.*

46. *See Paradissiotis v. Rubin*, 171 F.3d 983, 987 (5th Cir. 1999). Additionally, parties that are neither FRY nationals or entities, nor "deemed" to be such by virtue of an OFAC "designation," can nevertheless still be brought within the terms of the embargo under ordinary agency principles. However, any activities of these parties, who are not actually blacklisted, which are outside the scope of their agency would not be subject to the regulatory control. *See* 31 C.F.R. § 585.311(c) (1999) (bringing any person who is reasonably believed to have acted directly or indirectly for the Government of the FRY within the regulations ambit, but only "to the extent" of their representation or agency). The KSR accomplishes the same result in its definitions of the "Government of the FRY (S&M)," "Government of the Republic of Montenegro," and the "Government of the Republic of Serbia," but *omits* the language found in the FRYSR which limits the controls to the "extent" of the agency or representation. *See id.* 31 C.F.R. §§ 586.306-308.

47. *See, e.g., Paradissiotis*, 171 F.3d at 987; *Milena Ship Management Co. v. Newcomb*, 804 F. Supp 846 (E.D. La. 1992), *aff'd* 995 F.2d 620 (5th Cir. 1993), *cert. denied* 510 U.S. 1071 (1994).

the Federal Republic of Yugoslavia, or acting in some other capacity, may well affect whether it is possible to obtain the U.S. government's approval or authorization to proceed with a particular transaction, but it does not affect the requirement to *seek* that approval.<sup>48</sup> Once a party is blacklisted (*i.e.* designated as an SDN) the regulatory prohibitions are triggered by their *status*, and not by the application of agency principles to the tasks the party may be performing for itself or others at any given time.

Treating individuals and entities outside of an embargoed destination, who nevertheless act on its behalf, the same as the target itself simply reflects the U.S. Government's desire to make it more difficult for those it targets with its sanctions to avoid the effect of the controls.<sup>49</sup> Thus, one of the principal purposes for the blacklist is to extend the reach of the U.S. controls. By affirmatively naming these individuals and firms in its blacklists, the Government attempts to influence the behavior of third parties beyond the reach of U.S. jurisdiction by compelling those parties the Government can reach to refrain from further dealings with the named parties.<sup>50</sup> Often the third party behavior which the U.S. Government seeks to influence is entirely permissible, and sometimes even actively encouraged, in the territory in which the actions actually occur.<sup>51</sup> Thus, the OFAC blacklists are not used to punish those who in some way violated U.S. laws or regulations, but rather they are aimed simply at promoting a

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48. *See id.* Authorization to proceed is typically obtained by requesting a specific "license" from OFAC for an otherwise embargoed transaction. *See* 31 C.F.R. § 501.801(b) (1999). However, the FRYSR and KSR also contain broader "general licenses" which authorize certain categories of transactions without the need for issuing individual approvals, although there may still be record keeping or reporting requirements associated with the use of one of these "general licenses." *See id.* §§ 501.801(a), 585.501-528, 586.501-516. Additionally, OFAC may issue notices or provide individual interpretative guidance concerning the applicability of the regulations which may indicate that the transaction is entirely outside the scope of the embargo program particularly when dealing with third party transactions outside of the embargoed destination itself.

49. OFAC's SDN lists have also sometimes been used to identify specific parties *within* an embargoed target destination. For example, there are currently more than four hundred "SDNs" of the FRY listed with addresses within the territory of the FRY (Serbia & Montenegro) itself. *See* 31 C.F.R. ch. V, app. A (1999).

However, this practice is criticized as being largely redundant with the broader geographic embargo, *i.e.*, there is no need to specifically list the names of parties in country X if *all* dealings with country X or its nationals or juridical entities are controlled. Alternatively, however, listing SDNs with addresses within the target country *may* be useful if the economic sanctions impose less than a complete embargo, as is the case with OFAC's Narcotics Trafficking Regulations. *See id.* § 536. *See also infra* notes 96-100 and accompanying text.

50. Thereby making the blacklisted parties the target of a "secondary boycott." *See generally* Fitzgerald, *supra* note 27.

51. *See id.* at 70-87.

more complete and effective embargo of the sanctioned target destination.<sup>52</sup> This distinguishes the OFAC blacklists from other major trade control blacklists, such as the Commerce Department's Denied Parties List<sup>53</sup> or the State Department's Debarred List,<sup>54</sup> which tend to focus more on those who have violated the respective agencies' trade controls.<sup>55</sup>

Given the purpose and the historical context in which many of the U.S. economic sanctions polices were formulated, this approach makes sense. Most embargoes, including the Yugoslav sanctions programs, are intended to economically isolate their target as completely as possible. The use of a blacklist to cut off dealings with "corporate cloaks" is a direct outgrowth of the U.S. experience in World War II, when President Roosevelt attempted to limit dealings with front organizations for the Axis powers by issuing the "Proclaimed List of Certain Blocked Nationals" in 1940.<sup>56</sup> The President declared that, "any person *so long as his name appears in such list shall be treated for all purposes* under Executive Order 8389 [the directive freezing enemy assets] *as though he were a national of Germany or Italy.*"<sup>57</sup> The Treasury Department later elaborated

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52. The use of this type of blacklisting to extend the reach of U.S. controls is being imported into the other agencies' "trade control" regimes. It can be seen in the State Department's announcement that various foreign parties are "weapons proliferators," triggering certain restrictions on exporting specified items or technology to "known" proliferators. *See* Fitzgerald, *supra* note 27, at 28-35. It can also be seen in the "Entities List" which the Commerce Department created in 1997 which similarly triggers certain "knowledge" based controls under the Export Administration Regulations. *See* 15 C.F.R. § 744 Supp. No. 4 (1999). *See also infra* note 192.

53. *See* 15 C.F.R. § 764 Supp. No. 2 (1999). The principal use of this list is to identify those parties who have lost their "export privileges" for some failure to comply with the Export Administration Regulations. *See id.*

54. The State Department's debarment authority is set forth in 22 C.F.R. § 127.7 (1999).

55. *See* Fitzgerald, *supra* note 27, at 28-35. Parties that are either in the U.S. or otherwise amenable to U.S. jurisdiction are already obligated to follow the U.S. controls and may be punished for their failure to do so. Adding their names to one of the OFAC blacklists would not further the reach of the list, nor enhance OFAC's enforcement authority. That is not to say that parties in the U.S. never appear in an SDN list, apart from those times when new sanctions programs are established. U.S.-based parties can be named to the list, as a prelude or adjunct to imposing penalties for violating the controls. This may be particularly likely if the U.S. entity to be added to the list is controlled by the embargoed target country, and becomes a means to close down that particular business or freeze any assets associated with that company or individual as part of the embargo program.

56. *See*, MARTIN DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II, Chs. X, XI (1943), as supplemented by MARTIN DOMKE, CONTROL OF ALIEN PROPERTY, 105-113 (1947); Exec. Order No. 8785 § 5E, 6 Fed. Reg. 2897, 2898, (1941).

57. Proclamation No. 2497, 6 Fed. Reg. 3555 (1941). The President's Proclamation continued to state that,



upon this expansive notion of nationality stating that, "it was recognized from the inception of the [WWII-era] freezing program that a control which could reach only those who were actually citizens of the Axis countries or of other countries under their domination would be ineffective, and, indeed, naive in the light of Axis practices."<sup>58</sup> The Proclaimed List of Blocked Nationals was designed, "so that anyone entangled in the web of Nazi influence could be subjected to the control."<sup>59</sup> Thus, it is important to recall that the these Treasury Department blacklists were, from their inception, considered not so much tools of trade policy, but rather instruments of economic warfare. This perspective carries over into current practice, as the present Director of OFAC has stated that, "[t]his is the other front . . . . [My staff members are] an elite category of highly trained professional men and women devoted to waging economic warfare."<sup>60</sup>

### C. Blacklisting in other U.S. Economic Sanctions Programs<sup>61</sup>

Economic sanctions increasingly became the Government's policy tool of first resort in dealing with a variety of diplomatic and foreign policy issues as the second half of the century progressed.<sup>62</sup> As the unusual position of overwhelming dominance the United States held in world affairs immediately after World War II abated, the

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[a]ll the terms and provisions of Executive Order 8389. . . shall be applicable to any person so long as his name appears in such list, and to any such property in which any such person has or has had an interest, to the same extent that such terms and provisions are applicable to nationals of Germany or Italy and to property in which nationals of Germany or Italy have or have had an interest.

*Id.*

58. U.S. TREASURY DEP'T, ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT 32-33 (1942), cited in Carl F. Goodman, "United States Government Foreign Property Controls," 52 GEO. L.J. 767, 782 (1964).

59. See *id.*

60. See Keith Kendrick, *In Economic Battle, Soldiers Fight on Carpet*, WASHINGTON POST, September 19, 1990, at A21. This history also explains why OFAC often contends that it is not a "trade control" agency like the Commerce Department's Bureau of Export Administration or the State Department's Office of Defense Trade Controls. However, from the perspective of businesses and others who must create procedures to comply with all of the various Government requirements, the OFAC programs are very much like the controls imposed by BXA and DTC.

61. See generally Fitzgerald, *supra* note 27, at 14-35.

62. Additionally, it should also be noted that U.S. economic sanctions and trade control programs are typically created to address particular economic, political, and diplomatic objectives, rather than as part of a concerted overall trade policy. In fact many of these measures have come to serve domestic political requirements as much as, if not more than, any foreign policy objective. See MALLOY, *supra* note 40, at 19-31.

Government sought alternately to lead, and then coerce, other nations into following its policies with a wide range of economic sanctions and trade control programs.<sup>63</sup> Sometimes these programs were created as part of a multilateral effort, often they were not.<sup>64</sup> Moreover, unlike similar measures taken in earlier times as a prelude or adjunct to hostilities, economic sanctions became ends in themselves, used to demonstrate that the Government was "taking action" to achieve diverse policy objectives<sup>65</sup> ranging from combating communism,<sup>66</sup> fighting the international drug trade<sup>67</sup> or terrorism,<sup>68</sup> to protecting democracy and human rights,<sup>69</sup> and limiting the spread of weapons of mass destruction,<sup>70</sup> for example. It is estimated that in the 1990s alone the United States resorted to some form of economic sanctions more than seventy times, affecting forty-two percent of the world's population.<sup>71</sup>

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63. Compare, for example, the U.S. approach to the Cuban embargo with the multilateral actions taken with regard to Iraq or the former Yugoslavia. *See infra* notes 88, 91 and accompanying text.

64. Multilateral sanctions include those targeted at the former Yugoslavia, Iraq, South Africa and to a lesser extent those aimed at Iran and Libya. *See infra* notes 82-84, 86, 88, 91 and accompanying text. Unilateral sanctions include the Cuban embargo and the sanctions which were aimed at Vietnam, Cambodia, Nicaragua, and Panama. *See infra* notes 77-79, 85, 87 and accompanying text.

65. Historically,

[m]ost of these episodes (the imposition of economic sanctions) foreshadowed, or accompanied, warfare. Only after World War I was extensive attention given to the notion that economic sanctions might substitute for armed hostilities as a stand alone policy. Even through World War II, the objectives sought with the use of sanctions retained a distinctively martial flavor . . . . In the period following World War II, other foreign policy motives became increasingly common . . . .

GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 5 (2d. ed. 1990) [hereinafter "SANCTIONS RECONSIDERED"].

66. For example, the Chinese, Cuban, or North Korean sanctions. *See infra* notes 74-76.

67. For example, the Narcotics Trafficking Sanctions Regulations program. *See infra* note 96.

68. For example, the Terrorism Sanctions Regulations, Terrorism List Governments Sanctions Regulations, and Foreign Terrorist Organizations Sanctions Regulations programs. *See infra* notes 97-99.

69. For example, the South African or Burmese sanctions. *See infra* note 83-84, 93.

70. For example, the Weapons of Mass Destruction Trade Control Regulations. *See infra* note 100.

71. These 70 different uses of economic sanctions have been connected with a variety of policy objectives and programs, including anti-narcotics (8), anti-terrorism (14), environmental protection (3), human rights/democratization (22), nuclear non-proliferation (9), political stability (8), and worker rights or the use of prison labor (6). They also involved 61 separate laws, targeting 35 different countries. *See NATIONAL ASSOCIATION OF MANUFACTURERS, A CATALOG OF NEW U.S. UNILATERAL ECONOMIC SANCTIONS FOR FOREIGN POLICY PURPOSES, 1993-1996* 1-2 (1997). *See also*

No other country on Earth opts for sanctions as often as America. Pick any hot spot on the globe, and U.S. sanctions . . . which can vary from a minor cutback in U.S. aid to a crippling embargo on all trade . . . are almost certainly in place. . . . The allure of sanctions is easy to understand: They offer a way of doing something, short of using military force, about troublesome issues from human rights abuses in Burma to drift-net fishing on the high seas. . . . Whether they work or not, sanctions are good politics.<sup>72</sup>

(1) *A Growing Number of Programs*

Since the end of the Second World War, the U.S. has imposed economic sanctions under the authority of the Trading With the Enemy Act (TWEA)<sup>73</sup> targeted at China (1950-1971),<sup>74</sup> North Korea (1950-present),<sup>75</sup> Cuba (1963-present),<sup>76</sup> North (1964-1994)<sup>77</sup> and

E. Iritani, *U.S. Learns How to Anger Friends While Failing to Influence Enemies; Trade: Global Economy Cuts Effectiveness of Unilateral Sanctions. American Businesses Complain of Lost Opportunities*, L.A. TIMES, March 24, 1997, at A6.

72. Thomas Omestad, *Addicted to Sanctions*, U.S. NEWS & WORLD REPORT, June 15, 1998, at 30, available in 1998 WL ALLNEWS database.

73. 50 U.S.C. app. § 1 (1994).

74. The China sanctions actually began with the Commerce Department tightening of the controls on exports of goods and technology with military significance as a result of the success of Communist forces within China. This escalated into a full embargo in 1950 with China's support of the North Korean invasion of South Korea. The sanctions were administered by the Treasury Department, and "blocked" or froze virtually all types of financial transactions and other dealings in a manner similar to the subsequent Cuban controls. See 15 Fed. Reg. 9,040 (1950). The embargo was effectively lifted in 1971 in connection with President Nixon's visit to China, although residual controls remained in place until outstanding claims were settled in 1980. See 36 Fed. Reg. 8,584, 11,441, (1971); 45 Fed. Reg. 7,224, (1980). See generally GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: SUPPLEMENTAL CASE HISTORIES*, 100-109 (2d. ed. 1990) [hereinafter "SANCTIONS SUPPLEMENT"].

75. See *id.*, 31 C.F.R. § 500 *et seq.* (1999). See generally SANCTIONS SUPPLEMENT, *supra* note 74, at 110-14. On September 17, 1999, the President announced that the sanctions on North Korea would be loosened in the near future. See OFFICE OF FOREIGN ASSETS CONTROLS, *What's New, Appendix A*, (visited September 20, 1999) <<http://www.ustras.gov/ofac/t11edit.txt>> (copy on file with *Hastings Law Journal*).

76. A variety of controls were applied to Cuba beginning in 1960 as a result of the nationalization and expropriation of various properties. Initially, these took the form of restrictions on various exports to, and imports from, Cuba. The full embargo was imposed following the Cuban missile crisis. See 28 Fed. Reg. 6,974 (1963). See generally SANCTIONS SUPPLEMENT, *supra* note 74, at 194-204.

77. As was the case with the Chinese sanctions, the larger embargo of North Vietnam was preceded by a tightening of the product oriented export controls as early as 1954. The embargo itself was imposed ten years later, see 29 Fed. Reg. 6,025, (1964), prospectively

South Vietnam (1975-1994),<sup>78</sup> and Cambodia (1975-1992).<sup>79</sup> More recently the International Emergency Economic Powers Act (IEEPA)<sup>80</sup> provided the primary legislative basis<sup>81</sup> for economic sanctions directed against Iran (1979-present),<sup>82</sup> South Africa (1985-

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lifted in 1994, *see* 59 Fed. Reg. 5,696 (1994), and completely removed upon settlement of outstanding claims the following year, *see* 60 Fed. Reg. 12,885 (1995). *See generally* SANCTIONS SUPPLEMENT, *supra* note 74, at 133-41.

78. *See supra* note 77. The embargo of North Vietnam was extended to the entire country with the fall of South Vietnam. *See* 40 Fed. Reg. 19,202 (1975).

79. The embargo of Cambodia, or Kampuchea, was established with the rise of the National United Front under Prince Sihanouk and the Communist Khmer Rouge. *See* 40 Fed. Reg. 17,262 (1975). It was prospectively lifted in 1992, *see* 57 Fed. Reg. 1,872 (1992), and completely removed in 1994, *see* 59 Fed. Reg. 60,558 (1994). *See generally* SANCTIONS SUPPLEMENT, *supra* note 74, at 412-16.

80. *See* 50 U.S.C. § 1701 (1994).

81. Other statutes have also supported the imposition of economic sanctions. For example, the United Nations Participation Act of 1945, 22 U.S.C. § 287(c) (1945), mandates the imposition of sanctions in accordance with decisions of the Security Council under Article 41 of the UN Charter. This was used to impose financial and trade restrictions on Rhodesia when Ian Smith's white-minority government unilaterally declared its independence from the United Kingdom in 1965 thereby thwarting steps towards self-determination in Southern Rhodesia. *See* 22 U.S.C. § 287(c) (1945). Then U.N. Security Council Res. No. 232 of December 16, 1966 called for mandatory sanctions after a series of lesser steps failed, S.C. Res. 232, U.N. SCOR, 21st Sess., 1340th mtg. at 7, U.N. Doc. S/RES/232 (1966), and then sanctions were still further tightened two years later. *See* S.C. Res. 253, U.N. SCOR, 23d Sess., 1428th mtg. at 5, U.N. Doc. S/RES/253 (1968). The U.S. complied imposing sanctions. *See* Exec. Order No. 11,322, 32 Fed. Reg. 119 (1966); Exec. Order No. 11,419, 33 Fed. Reg. 10,837, (1968). *But see* H.R. Rep. No. 95-59, 3-4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 18, 19-20, which questioned the effect of the Rhodesian sanctions in light of the "Byrd Amendment" to the Strategic and Critical Materials Stock Piling Act of 1939, 50 U.S.C. 98, which authorized the import of Rhodesian chrome from 1971-1977. The Rhodesian sanctions, *see* 31 C.F.R. § 530 *et seq.* (1972), were prospectively lifted upon the accession of majority rule and the creation of Zimbabwe in 1979, *see* Exec. Order No. 12,183, 44 Fed. Reg. 74,787 (1979), and entirely removed in 1992, *see* 57 Fed. Reg. 1,386 (1992). *See generally* SANCTIONS SUPPLEMENT, *supra* note 74, at 285-93.

Since the time of the Rhodesian sanctions, the more common practice has been to predicate the imposition of sanctions on multiple pieces of legislation. For example, both IEEPA and the UN Participation Act were used for the programs aimed at Iraq and Kuwait, *see infra* notes 88-89; Haiti, *see infra* note 90; the former Yugoslavia, *see infra* note 91; and Angola, *see infra* note 92. IEEPA and the International Security Development and Cooperation Act of 1985, 22 U.S.C. § 2349aa-9, together support the sanctions on Libya, *see infra* note 86, and the second round of sanctions aimed at Iran, *see infra* note 82; and the Comprehensive Anti-Apartheid Act of 1986 bolstered the IEEPA based sanctions on South Africa, *see infra* note 83.

The sanctions programs targeted at the Terrorism List Governments, *see infra* note 83, and Foreign Terrorist Organizations, *see infra* note 99, are predicated solely upon the Antiterrorism and Effective Death Penalty Act of 1996, rather than jointly with IEEPA. The only IEEPA based terrorist sanctions are those aimed at organizations threatening the Middle East peace process. *See infra* note 97.

82. Following the seizure of the U.S. Embassy in Tehran, President Carter first

1991)<sup>83</sup> and Namibia (1985-1990),<sup>84</sup> Nicaragua (1985-1990),<sup>85</sup> Libya

imposed a ban on importing any Iranian oil, Pres. Proclamation No. 4,702, 44 Fed. Reg. 65,581 (1979), and then tightened immigration and visa requirements for Iranian nationals, 44 Fed. Reg. 65,727 (1979). The next day the President used his authority under IEEPA to "block" all assets of the Iranian Government or its controlled instrumentalities which came within U.S. jurisdiction. See Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979). The Iranian Assets Control Regulations (IACR) followed immediately. See 44 Fed. Reg. 65,956 (1979); 31 C.F.R. § 535 *et seq.* (1999). It is interesting to note that "blocking" assets with financial sanctions is a term of art referring to the ultimate effect of a broad prohibition, *see, e.g.*, 31 C.F.R. § 535.201 (1999), on all financial dealings or transfers affecting an embargoed target. The term is not defined in the Iranian regulations themselves, although there are references to "blocked," "blocking," *see, e.g., id.* § 535.217, and "unblocking" accounts or persons, *see, e.g., id.* §§ 535.414, 535.508, 535.566, 535.802. These limited blocking measures were then expanded to include a broader trade embargo as the hostage crisis continued. See Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980); Exec. Order No. 12,211, 45 Fed. Reg. 26,685, (1980). Agreement was ultimately reached on the release of the hostages, and the return of the blocked assets with a complex arbitral process administered by a bilateral Claims Tribunal at the Hague, and most of the IACR controls were prospectively lifted in 1981. See Exec. Order No. 12,283, 46 Fed. Reg. 7,927 (1981); 31 C.F.R. § 535.579 (1999). These Executive Orders and the IACR represented the first use of IEEPA, as opposed to the TWEA, to support economic sanctions. See generally SANCTIONS RECONSIDERED, *supra* note 65 at 153-62.

Iran is also subject to further sanctions under the Iranian Transaction Regulations, (ITR), 31 C.F.R. pt. 560 (1999), which now have greater impact than the IACR. The ITR were initially implemented under the authority of the International Security and Development Cooperation Act of 1985, 22 U.S.C. § 2349aa-9, as a result of Iran's designation as a country supporting state sponsored terrorism. See Exec. Order No. 12,613, 52 Fed. Reg. 41,940 (1987). The ITR augmented a number of product oriented export restrictions imposed under the Export Administration Act, 50 U.S.C. app. § 2405(m), with a series of import restrictions on Iranian origin goods or services. See 31 C.F.R. § 560.201 (1999). The ITR were bolstered, and their legislative basis expanded to include IEEPA, in 1995 when the President banned contracts for the development of Iranian petroleum resources, as well as "blocking" new investments, exports, reexports, financing, or brokering transactions for the benefit of the Government of Iran or its controlled instrumentalities with a series of Orders. See Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (1995); Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995); 60 Fed. Reg. 47,061, 47,063 (1995). The amended ITR also included a broadly worded prohibition on those subject to the regulations taking any acts to evade or avoid their application. See 31 C.F.R. § 560.203 (1999). Additional restrictions on investing more than \$40 million in the development of Iranian petroleum resources in any 12 month period were imposed with the Iran and Libya Sanctions Act of 1996. Pub. L. 104-172, 110 Stat. 541 (1996) (codified at 50 U.S.C. § 1701, note).

83. See Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985). The South African Transaction Regulations (SATR), 50 Fed. Reg. 41,682 (1985) were imposed in an effort to head off more sweeping sanctions then being proposed by Congress. The SATR, 31 C.F.R. § 545 *et seq.* (1986) as initially promulgated were largely patterned after United Nations Security Council Resolution No. 569 of 1985. S.C. Res. 569, U.N. SCOR, 40th Sess., 2602d mtg., U.N. Doc. S/RES/569 (1985). Resolution No. 569 was then the latest in a series of U.N. resolutions condemning the apartheid practices in South Africa which extended back to 1962. It called for a broad economic embargo on transactions with the South African Government, after years of more limited measures. The U.S. had followed these earlier U.N. measures by initially imposing limited product oriented trade

restrictions on exports of arms and related equipment, *see* 15 C.F.R. § 385.4 (1964), and later on all exports, to the South African military and police. *See* 43 Fed. Reg. 7,311 (1978). The IEEPA based sanctions issued in 1985, *see* 50 Fed. Reg. 46,726 (1985), expanded the product oriented trade controls to ban most computer exports to the apartheid enforcing agencies, as well as most exports of nuclear goods and technology, severely limited the ability of U.S. financial institutions to extend credit to the South African Government, and prohibited the importation of South African arms, military vehicles, or Krugerrands. The 1985 controls were substantially modified and broadened the following year, in accordance with the Congressionally mandated program of sanctions found in the Comprehensive Anti-Apartheid Act (CAAA) of 1986. Pub. L. No. 99-440, 10 Stat. 1086 (1986). *See also* Exec. Order No. 12,571, 51 Fed. Reg. 39,505 (1986); 51 Fed. Reg. 41,906 (1986); 51 Fed. Reg. 46,853 (1986).

However, even the post-CAAA sanctions fell short of the sweeping prohibitions found in the TWEA based programs under the FACR and CACR, focusing more on various specific types of prohibited transactions rather than imposing a blanket prohibition on all dealings with South Africa or South African nationals. *See generally*, SANCTIONS RECONSIDERED, *supra* note 65 at 221-48. They did include a variety of limitations on new investment and loans, and wider bans on imports or exports directly or indirectly involving the Government of South Africa, apartheid enforcing agencies, or government controlled or subsidized entities known as "South African Parastatal Organizations." *See id.*; 31 C.F.R. §§ 545.208, 545.315 (1987). Additionally, unlike the earlier sanctions programs where the blacklists were maintained by the Treasury, the publication of the names of the blacklisted Parastatal Organizations was a responsibility of the Secretary of State. *See* Department of State Public Notice No. 983, 51 Fed. Reg. 41,912 (1986) *revised by* Department of State Public Notice No. 1007, 52 Fed. Reg. 9,982 (1987). Similarly, the Commerce Department blacklisted a number of "South African Entities Enforcing Apartheid" as an adjunct to its product oriented trade and export controls. *See* 52 Fed. Reg. 27,798 (1987). This reflects the complex delegations of authority to the Treasury, Commerce, and State Departments which were required to carry out the policy towards South Africa mandated by the CAAA and Executive Orders.

The SATR were prospectively lifted in 1991, 56 Fed. Reg. 32,056 (1991), although products subject to the U.N. arms embargo and certain U.S. unilateral controls on dealings with the military and police remained controlled until the U.N. lifted its arms embargo three years later, *see* S.C. Res. 919, U.N. SCOR, 49th Sess., 3379th mtg. at 69, U.N. Doc. S/RES/919 (1994); 59 Fed. Reg. 30,684 (1994), and the last remaining restrictions, affecting dealings in gold coins, were removed in 1995, *see* 60 Fed. Reg. 33,725 (1995).

84. Namibia, as part of South Africa, was initially caught in the sanctions which were aimed at dealings with the Government of South Africa. It was removed from the scope of the SATR in March of 1990 following Namibian independence. *See* 55 Fed. Reg. 10,618 (1990).

85. *See* Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985). The Nicaraguan Transaction Control Regulations (NTCR), *see* 50 Fed. Reg. 19,890 (1985) and 31 C.F.R. § 540 *et seq.* (1986), were imposed as part of the Reagan Administration's opposition to the Sandinista Government of President Daniel Ortega. They were lifted prospectively following the election of the Chamorro Government in 1990, *see* 55 Fed. Reg. 28,613 (1990), and removed entirely in 1995, *see* 60 Fed. Reg. 33,725 (1995). *See generally* SANCTIONS RECONSIDERED, *supra* note 65 at 175-91.

Unlike the FACR or CACR, however, the NTCR were largely trade (import/export) restrictions which lacked the broad general prohibitions of the other programs. They incidentally used a specific prohibition which affected direct dealings with Nicaraguan registered vessels and aircraft, but unlike some of the other programs (*see, e.g., infra* note 88 (ISR), 91 (FRYSR)) the NTCR did not specifically employ a blacklist for those vessels

(1986-present),<sup>86</sup> Panama (1988-1990),<sup>87</sup> Iraq (1990-present),<sup>88</sup> Kuwait

and aircraft. See 31 C.F.R. §§ 540.206-207 (1985). *But see id.* § 540.208 (1985) (broadly prohibiting engagement in "related transactions" which might result in violations of the NTCR). Thus the NTCR were more directed at embargoing direct transactions between the U.S. and Nicaragua with less control over off-shore or indirect dealings than was the case with many other OFAC sanctions programs

86. As is often the case, the economic sanctions imposed on Libya were preceded by a tightening of the product-oriented export controls dating back to 1978 when military sales were suspended because of Libyan support for international terrorism. These trade sanctions were expanded to a wider range of goods as tensions escalated through the early 1980s, and particularly focused on goods and technology used in the petroleum industry. See, e.g., 47 Fed. Reg. 11,247, 11,249 (1982); 49 Fed. Reg. 10,247, 10,248 (1984); 50 Fed. Reg. 3704, 3743 (1985). After a series of terrorist incidents involving Libya which cumulated in the Palestinian attack at the Rome airport in December of 1985, for which Abu Nidal claimed a "considerable amount of financing and assistance" from Momar Gadhafi, President Reagan invoked IEEPA to impose a broad trade and financial embargo of Libya. See, SANCTIONS RECONSIDERED, *supra* note 65, at 140-152. Additional authority for the President's actions was predicated upon the International Security and Development Cooperation Act of 1985, 22 U.S.C. §§ 2349aa-8, 2349aa-9 (1994), which would be used the following year to support the ITR, *see supra* note 82, as well as the Federal Aviation Act, 49 U.S.C. § 1514 (1994).

Two Executive Orders were issued in quick succession on January 7th and 8th, 1986, Exec. Order No. 12,543, 51 Fed. Reg. 875 (1986) and Exec. Order No. 12,544, 51 Fed. Reg. 1235 (1986), which provided the basis for the Libyan Sanctions Regulations, 31 C.F.R. § 550 *et seq.* (1999). The LSR froze or "blocked" all manner of property interests of the Government of Libya and its controlled entities which came within the possession or control of "U.S. Persons," in addition to restricting imports and exports. See *id.* § 550.200. In this regard the LSR are more similar to the TWEA based sanction programs than is the case with the NTCR, *see supra* note 85, or even the SATR, *see supra* note 83. The LSR was also the first IEEPA based sanctions program to include a regulatory definition of a "blocked account" or "blocked property" as "any account or property in which the Government of Libya has an interest, with respect to which payments, transfers or withdrawals or other dealings may not be made or effected except pursuant to an authorization or license," thereby highlighting the importance of being within or without the definition of "Government of Libya." See 31 C.F.R. § 550.316 (1999). Additional restrictions on investing more than \$40 million in the development of Libyan petroleum resources in any 12 month period were imposed with the Iran and Libya Sanctions Act of 1996. See Pub. L. 104-72, 110 Stat. 541 (1996) (codified at 50 U.S.C. § 1701, note).

87. See Exec. Order No. 12,635, 53 Fed. Reg. 12,134 (1988). The Panamanian Transaction Regulations were imposed as part of the Reagan Administration's efforts to isolate and undermine the regime headed by General Manuel Noriega because of involvement with drug trafficking. See 53 Fed. Reg. 20,566 (1988) and 31 C.F.R. § 565 *et seq.* (1988). The PTR were lifted prospectively in 1990 following the U.S. incursion which removed General Noriega from power, 55 Fed. Reg. 3,560 (1990), and removed entirely in 1995, 60 Fed. Reg. 33,725 (1995). See generally SANCTIONS RECONSIDERED, *supra* note 65, at 249-67.

88. As a result of Iraq's invasion of Kuwait on August 2, 1990, President Bush issued two Executive Orders, one restricting imports and exports to Iraq and "blocking" Iraqi Government property, Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (1990), and another "blocking" Kuwaiti Government property as a protective measure to limit looting by Iraq, Exec. Order 12,723, 55 Fed. Reg. 31,805 (1990). The United Nations immediately condemned the Iraqi invasion, *see* S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg. at 19,

(1990-1991),<sup>89</sup> Haiti (1991-1994),<sup>90</sup> the former Yugoslavia (1992-1996, 1998-present),<sup>91</sup> Angola (1993-present),<sup>92</sup> Burma (1997-present),<sup>93</sup>

U.N. Doc. S/RES/660 (1990), and called for mandatory embargo of Iraq by all member nations, *see* S.C. Res. 661, U.N. SCOR, 45th Sess. 2932d mtg. at 19-20, U.N. Doc. S/RES/661 (1990). This was supported by a naval blockade, *see* S.C. Res. 665, U.N. SCOR 45th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990), and restrictions of food and humanitarian shipments, S.C. Res. 666, U.N. SCOR, 45th Sess., 2939th mtg. at 21-22. U.N. Doc. S/RES/666 (1990), and an air embargo, *see* S.C. Res. 667, U.N. SCOR, 45th Sess., 2940th mtg. at 23-24. U.N. Doc. S/RES/667 (1990), as a prelude to the Gulf War. Although the initial U.S. and U.N. embargoes were quite similar, the U.S. sanctions were brought completely into line with the U.N. actions by Executive Order Number 12,724 with regard to Iraq, *see* Exec. Order No. 12,724 55, Fed. Reg. 33,089 (1990), and Number 12,725 with regard to Kuwait, *see* Exec. Order No. 12,725, 55 Fed. Reg. 33,091 (1990), thereby grounding the controls both in IEEPA and the U.N. Participation Act, 22 U.S.C. 287c.

The Iraqi Sanctions Regulations, 56 Fed. Reg. 2112 (1991); 31 C.F.R. § 575 *et seq.* (1999), and the separate but related Kuwaiti Assets Control Regulations, 55 Fed. Reg. 49,856 (1990); 31 C.F.R. § 570 *et seq.* (1991), utilize the full range of sanctions tools available to the Government in a manner not seen since the TWEA-based FACR and CACR. They employ a combination of financial sanctions (asset blocking), trade sanctions (export/import controls), travel restrictions, and contract restrictions, together with a broad prohibition on those subject to the regulations taking steps to evade or avoid the prohibitions. *See*, MICHAEL P. MALLOY, *supra* note 40 at § 9A.2.1 (Supp. 1996). Following the liberation of Kuwait, the KACR were prospectively lifted in 1991, 56 Fed. Reg. 12,450 (1991), and entirely removed in 1995, 60 Fed. Reg. 33,725 (1995). The ISR remain in effect.

89. *See supra* note 88.

90. The Haitian sanctions are unique in that they were applied, removed, and then applied again during the course of the same crisis. The President invoked IEEPA to impose "blocking" sanctions against the Government of Haiti following the coup which ousted the then recently elected President Aristide. *See* Exec. Order No. 12,775, 56 Fed. Reg. 50,641 (1991). The blocking measures were expanded after the OAS condemned the coup in Resolution 2/91 of October 1, 1991. *See* Exec. Order No. 12,779, 56 Fed. Reg. 55,975 (1991). Together the two orders imposed a broad range of financial and trade sanctions on the *de facto* Haitian Government and its various instrumentalities, along with the now standard prohibition against "evasion" of the regulatory requirements. The OFAC Haitian Transaction Regulations, 31 C.F.R. § 580 *et seq.* (1993), which embodied the controls created by the Executive Orders, were issued in March of 1992. *See* 57 Fed. Reg. 10,820 (1992). Later in August of 1993, U.N. Security Council Res. 861 called for the suspension of some of the sanctions based upon the Governor's Island Agreement for the return of the elected President. *See* S.C. Res. 861, U.N. SCOR, 48th Sess., 3271st mtg. at 121, U.N. Doc. S/RES/861 (1993); 58 Fed. Reg. 46,540 (1993). However when the return did not occur as scheduled the U.N. called for the reimposition of the sanctions. *See* S.C. Res. 873, U.N. SCOR 49th Sess., 3291st mtg. at 125, U.N. Doc. S/RES/873 (1993); Exec. Order No. 12,853, 58 Fed. Reg. 35,843 (1993). Further measures were taken when the issue remained unresolved the following year. *See* S.C. Res. 917, U.N. SCOR 49th Sess., 3376th mtg. at 47, U.N. Doc. S/RES/917 (1994). When the democratically elected President Aristide returned to Haiti, the sanctions were first suspended, *see* Exec. Order No. 12,932, 59 Fed. Reg. 52,403 (1994); 59 Fed. Reg. 51,066 (1994), and then finally removed in June, 1995. *See* 60 Fed. Reg. 33,725 (1995).

91. Exec. Order No. 12,808, 57 Fed. Reg. 23,299 (1992), was issued following the breakup of Yugoslavia, blocking property of the governments of Serbia and Montenegro



Sudan (1997-present)<sup>94</sup> and Afghanistan (1999-present).<sup>95</sup> Additionally, five more programs were recently created which are not necessarily tied to any one specific country, imposing economic sanctions on narcotics traffickers (1995-present),<sup>96</sup> Middle Eastern

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(the "Federal Republic of Yugoslavia" or FRY) when their troops seized territory within Croatia and Bosnia-Herzegovina. Simultaneously, U.N. Security Council Res. No. 757 of May 30, 1992, called for a broad range of trade and financial sanctions to be directed at the FRY, resulting in the issuance of Executive Order Number 12,810, 57 Fed. Reg. 24,347 (1992), which imposed additional controls to limit trade, and Executive Order Number 12,831, 58 Fed. Reg. 5,253 (1993), which expanded the blocking measures to companies and FRY controlled entities, thereby bringing the U.S. sanctions in line with the U.N. measures. As the U.N. called for still further sanctions, S.C. Res. 820, U.N. SCOR, 48th Sess., 3200th mtg. at 7, U.N. Doc S/RES/820 (1993); S.C. Res. 942, U.N. SCOR, 49th Sess., 3428th mtg. at 30, U.N. Doc S/RES/942 (1994), to tighten the embargo as the situation in the former Yugoslavia deteriorated, the United States followed suit, adjusting its own sanctions to block trade and financial dealings with the Serbian controlled portions of Bosnia and Herzegovina. *See* Exec. Order No. 12,846, 58 Fed. Reg. 25,771 (1993); Exec. Order No. 12,934, 59 Fed. Reg. 54,117 (1994). The blocking measures directed at Serbia and Montenegro were prospectively lifted in January of 1996 as a result of the Dayton Peace Accords, *see* 61 Fed. Reg. 1282 (1996); 31 C.F.R. § 585.525 (1999), but were not similarly lifted for the Serbian controlled areas of Bosnia until May, *see* 61 Fed. Reg. 24,697 (1996); 31 C.F.R. § 585.527 (1999), when the Serb forces withdrew. Sanctions were then reimposed in 1998 because of Serbian actions in Kosovo. *See* S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg. at 8-9, U.N. Doc S/RES/1160 (1998); Exec. Order No. 13,088, 63 Fed. Reg. 32,109 (1998); 31 C.F.R. § 586 *et seq.* (1999). *See also supra* notes 12-20 and accompanying text.

92. Sanctions were initially imposed on dealings with UNITA (the National Union for the Total Independence of Angola), *see* Exec. Order No. 12,865, 58 Fed. Reg. 51,005 (1993), in accord with U.N. Security Council Resolution 864, S.C. Res. 864, U.N. SCOR 48th Sess., 3277th mtg. at 59, U.N. Doc. S/RES/864 (1993), and later expanded. *See* Exec. Order No. 13,069, 62 Fed. Reg. 65,989 (1997); Exec. Order No. 13,098, 63 Fed. Reg. 44,771 (1998). The UNITA (Angola) Sanctions Regulations essentially block assets of those affiliated with UNITA and impose an arms embargo and prohibit actions which facilitate the sale of arms or petroleum products to UNITA or Angola. *See* 58 Fed. Reg. 64,904 (1993). However, Executive Order 13098 required so many changes to the details of the regulations that the USAR were entirely reissued on August 12, 1999. *See* 64 Fed. Reg. 43,924 (1999); 31 C.F.R. § 590 *et seq.* (1999).

93. The Government of Burma, or Myanmar, was sanctioned in May of 1997 for its "large scale repression of the democratic opposition" by the imposition of a prohibition on any new investment in the country. *See* Exec. Order 13,047, 62 Fed. Reg. 28,301 (1997); 63 Fed. Reg. 27,846 (1998) and 31 C.F.R. § 537 (1999).

94. The Government of Sudan was sanctioned in November of 1997 for its support of terrorism, efforts to destabilize its neighbors, and for human rights violations within Sudan by the imposition of a variety of "blocking" measures. *See* Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (1997). The Sudanese Sanctions Regulations (SDR) are found at 31 C.F.R. § 538 *et seq.* (1999).

95. Sanctions were imposed on dealing with the Taliban in Afghanistan on July 6, 1999. *See* Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (1999). In addition to an asset freeze, these sanctions also impose a limited trade embargo affecting the areas of Afghanistan controlled by the Taliban. *See id.*

96. In October, 1995, sanctions were imposed that prohibit dealings with designated,

terrorists (1995-present),<sup>97</sup> governments which support terrorism (1996-present),<sup>98</sup> foreign terrorist organizations (1997-present),<sup>99</sup> and those engaged in the proliferation of weapons of mass destruction (1998-present).<sup>100</sup>

Apart from the various Asian sanctions, which were administered with a single common set of regulations,<sup>101</sup> entirely new and separate regulations were created for each of these various sanctions programs.<sup>102</sup> One common element, however, is that virtually all of them employ some sort of blacklist tool.<sup>103</sup>

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primarily Colombian, narco-traffickers, and which block their property. See Exec. Order 12,978, 60 Fed. Reg. 54,579 (1995). The IEEPA-based Narcotics Trafficking Sanctions Regulations (NTSR) were created in March, 1997. See 31 C.F.R. § 536 *et seq.* (1999). The recently signed Foreign Narcotics Kingpin Designation Act, Title VIII of Pub. L. No. 106-120, will presumably expand these sanctions beyond the Colombian drug cartels.

97. In January, 1995, sanctions were imposed which prohibit dealings with designated terrorists and terrorist organizations which are deemed to pose a threat to the Middle East peace process. See Exec. Order No. 12,947, 60 Fed. Reg. 5,079 (1995). The Terrorism Sanctions Regulations (TSR), 31 C.F.R. § 595 *et seq.* (1999), which are the only IEEPA based terrorist sanctions program, were created in February, 1996. See 61 Fed. Reg. 3,805 (1996). The sanctions programs targeted at the Terrorism List Governments, see *infra* note 98, and Foreign Terrorist Organizations, see *infra* note 99, are predicated upon the Antiterrorism and Effective Death Penalty Act of 1996, rather than IEEPA.

98. The Terrorism List Governments Sanctions Regulations (TLGSR), 31 C.F.R. § 596 *et seq.* (1999), and the Foreign Terrorist Organizations Sanctions Regulations (FTOSR), 31 C.F.R. § 597 *et seq.* (1999), are unusual among the recent sanctions programs in that they are not predicated upon IEEPA. The TLGSR were issued under the authority of section 321 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 302-303, 110 Stat. 1214, 1248-1253 (1998), and prohibit unlicensed financial dealings with any government designated by the Secretary of State as supporting terrorism pursuant to section 6(j) of the Export Administration Act, 50 U.S.C. app. § 2405. This currently affects dealings with Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. See 31 C.F.R. § 596.201 (1999). All, except Syria, are countries which are already affected by other OFAC sanctions programs.

99. The FTOSR, *id.* § 597 *et seq.*, like the TLGSR, *id.* § 596 *et seq.*, are not predicated upon IEEPA. The FTOSR were issued under the authority of §§ 302-303 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. at 1248-1252 (1996), and prohibit providing material support or resources to designated terrorist organizations and also require the blocking of the assets of such organizations.

100. Certain persons engaged in weapons proliferation are subject to an import ban. Initially established in 1998 by Exec. Order No. 13,094, 63 Fed. Reg. 40,803 (1998), the ban was implemented with the Weapons of Mass Destruction Trade Control Regulations (WMDTCR), 31 C.F.R. § 539 *et seq.* (1999).

101. The embargoes of China, Vietnam, and Cambodia were all administered by OFAC under the FACR, as is the current embargo of North Korea. See *supra* notes 74-79 and accompanying text.

102. See *supra* notes 82-100 and accompanying text.

103. Only the Burma program lacks a clear blacklist tool as part of its sanctions. See *supra* note 93.

There are three additional programs administered by OFAC which fall outside the usual model, the Transaction Control Regulations (TCR), 31 C.F.R. § 505 *et seq.* (1999),

(2) *A Plethora of Blacklists*

The terminology associated with each blacklist varies, as the Government slightly restructures the basic sanctions mechanisms each time it drafts a new program. A confusing array of different terms, such as “specially designated,”<sup>104</sup> “controlled,”<sup>105</sup> “blocked,”<sup>106</sup> or “governmental,”<sup>107</sup> persons or entities are employed in conjunction with the blacklists used for the various programs. The purpose of the blacklist within each program, however, remains unaltered—to extend the reach of the sanctions beyond just the geography associated with the target country to reach transactions involving specific individuals or organizations wherever they may be located.

The term “Specially Designated National” (SDN) - which harkens back to President Roosevelt’s “Proclaimed Nationals” List<sup>108</sup> - was used in the early regulations and blacklists associated with the Asian<sup>109</sup> and Cuban<sup>110</sup> sanctions. It gradually disappeared from the regulatory text used in the later programs. Interestingly, however, even though the SDN term was no longer being used in the sanctions regulations themselves by the 1990s, it was sufficiently well

the Foreign Funds Control Regulations (FFCR), 31 C.F.R. § 520 *et seq.* (1994), and the Soviet Gold Coin Regulations (SGCR), 31 C.F.R. § 555 *et seq.* (1994).

The TCR were established as a TWEA based program in 1953 to supplement the Commerce Department’s Cold War era trade controls, and prohibited U.S. persons from facilitating exports of strategic goods to the then-communist countries, via transactions outside of the U.S. The controls were lifted in 1995 for goods controlled for national security reasons under the Export Administration Act, *see* 60 Fed. Reg. 34,143, 34,144 (1995), but remain applicable to items controlled under the Arms Export Control Act of 1976, 22 U.S.C. 2778 (1994), or the Atomic Energy Act of 1954, 42 U.S.C. 2011-2297g-4 (1994).

The FFCR were established in 1966 when authority over the residual World War II era claims settlements to blocked assets involving Czechoslovakia, East Germany, Estonia, Hungary, Latvia and Lithuania were transferred from the Justice Department to OFAC. *See* 31 Fed. Reg. 7,333 (1966). With subsequent settlements and the independence of the Baltic states these controls lost virtually all practical effect by 1992. *See* 38 Fed. Reg. 7,984, 7,985 (1973); 47 Fed. Reg. 12,338, 12,339 (1982); 57 Fed. Reg. 44,682 (1992). They were entirely removed from the CFR in 1995. *See* 60 Fed. Reg. 33,725 (1995).

The SGCR were imposed as an adjunct to restrictions on importing South African gold Kruggerands mandated by the Comprehensive Anti-Apartheid Act in 1986. *See* 51 Fed. Reg. 41,916 (1986). The restrictions were prospectively lifted in 1992, *see* 57 Fed. Reg. 10,291 (1992), and the regulations removed in 1995. *See* 60 Fed. Reg. 33,725 (1995). *See also supra* note 83.

104. *See supra* notes 56-59 and accompanying text; *infra* notes 109-114 and accompanying text.

105. *See infra* notes 115-136 and accompanying text.

106. *See supra* note 82; *infra* notes 115-149 and accompanying text.

107. *See infra* notes 150-169 and accompanying text.

108. *See supra* notes 56-59 and accompanying text.

109. *See* 31 C.F.R. § 500.306 (1999).

110. *See id.* § 515.306.

recognized as a term of art to be included parenthetically in the captions of the separately published blacklists used with the Libyan<sup>111</sup> and Iraqi<sup>112</sup> embargo programs. The SDN term also reappeared in the caption to the comprehensive blacklist published in the Federal Register in 1994,<sup>113</sup> and in the master consolidated blacklist which is now found in the appendices to 31 C.F.R., Chapter V.<sup>114</sup> The “controlled” or “blocked” terms are loosely used, almost interchangeably, in a number of other OFAC programs to simultaneously identify the sanctioned parties and to explain the

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111. As the Libyan sanctions developed over time they used an SDN list to extend the reach of the controls. See 56 Fed. Reg. 37,156 (1991), which created a blacklist of SDN's of Libya at 31 C.F.R. § 550 app. B (1991), see also 56 Fed. Reg. 20,540 (1991), which created a blacklist of “Organizations Determined to be Within the Term “Government of Libya” at 31 C.F.R. § 550 app. A (1991). The LSR themselves neither mention the SDN mechanism nor define the term as was done in the FACR and CACR. The SDN terminology only appears in the notices publishing the Libyan blacklist or its updates, along with the explanation that “individuals determined to be ‘specially designated nationals’ . . . thus fall within the definition of ‘Government of Libya’ contained in section 550.304(a) of the Regulations, and are subject to all prohibitions applicable to other components of the Government of Libya.” 57 Fed. Reg. 29,424 (1992). The Libyan blacklists are now consolidated into the appendices to 31 C.F.R. Chapter V (1999).

112. OFAC blacklisted a number of individuals and entities by defining them to be part of the sanctioned Iraqi or Kuwaiti government targeted by these regulations. See 31 C.F.R. § 570.306(d) (1991) and Appendix A (listing of “Kuwaiti Governmental Entities”), and 56 Fed. Reg. 13,584 (1991), which created “Individuals and Organizations Determined to Be Specially Designated Nationals of the Government of Iraq” and “Merchant Vessels Registered, Owned, or Controlled by the Government of Iraq or by Persons Acting Directly or Indirectly on behalf of the Government of Iraq” in Appendices A and B of 31 C.F.R. § 575 (1991). See also *infra* notes 164-169 (discussing the related Kuwaiti blacklists). This is not dissimilar to what was done under the LSR, see *supra* notes 86, 111, *infra* notes 158-160 and accompanying text; and the PTR, see *supra* note 87; *infra* notes 161-163 and accompanying text; and arguably with the IACR/ITR, see *supra* note 82. Once again, as the focus of the regulations is on identifying which persons or organizations should be “blocked” as part of the respective target governments (see 31 C.F.R. § 575.306 (1998)), the SDN mechanism was neither explicitly used nor defined in the ISR. The SDN term nevertheless appeared in the caption of the blacklist itself and in the Federal Register notice describing the blacklist. The Iraqi blacklist now appears in the appendices to 31 C.F.R. Chapter V (1999).

113. List of Blocked Persons and *Specially Designated Nationals*, 59 Fed. Reg. 59,460 (1994) (emphasis added).

114. See 31 C.F.R. ch. V apps. A (Alphabetical Listing of Blocked Persons, *Specially Designated Nationals*, *Specially Designated Terrorists*, Foreign Terrorist Organizations, and *Specially Designated Narcotics Traffickers*); B (Alphabetical Listing By Location of Blocked Persons, *Specially Designated Nationals*, *Specially Designated Terrorists*, Foreign Terrorist Organizations, and *Specially Designated Narcotics Traffickers*); C (Alphabetical Listing of Vessels That Are The Property of Blocked Persons or *Specially Designated Nationals*) (1998) (emphasis added). These appendices were added to Chapter V of 31 C.F.R. on June 26, 1996. See 61 Fed. Reg. 32,936 (1996). The original version of Appendix B, however, was removed three years later, and Appendix C redesignated as the new Appendix B. See 64 Fed. Reg. 34,984 (1999); 31 C.F.R. ch. V apps. A, B (1999).

effect of the sanctions.<sup>115</sup> Blacklisting of “controlled”<sup>116</sup> entities is seen most clearly in the Yugoslav<sup>117</sup> and Iranian<sup>118</sup> sanctions programs, whereas “blocking” of blacklisted parties is seen in the Haitian sanctions.<sup>119</sup>

When the Yugoslav sanctions were initially imposed in mid-1992, OFAC published an extensive list of “Controlled Yugoslav Entities” in its General Notice No.1, rather than using the SDN term.<sup>120</sup> The release of this blacklist actually occurred eight months before the publication of the sanctions regulations themselves,<sup>121</sup> and was predicated upon OFAC’s implicit ability to determine whether a particular person or organization was within the scope of the “Government of the Federal Republic of Yugoslavia (Serbia & Montenegro)”<sup>122</sup> targeted by the President’s Executive Orders.<sup>123</sup> This “Notification of the Status of Controlled Yugoslav Entities” also highlights the almost interchangeable ability to refer to such parties as “blocked” persons or entities, in that the caption of the actual list provided in the Notice is, “Blocked Yugoslav Entities Currently

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115. In fact, under the TWEA based Asian and Cuban embargo programs, one “effect” of being blacklisted as an SDN was that all property and accounts in which the SDN had any interest was “blocked.” See 31 C.F.R. §§ 500.201, 500.205 (FACR); 515.201, 515.205 (CACR) (1999). This is clearly seen in the regulatory definition of “Blocked Account” in the FACR and CACR which states: “The term *blocked account* shall mean an account in which any designated national has an interest, with respect to which account payments, transfers or withdrawals or other dealings may not be made or effected except pursuant to an authorization or license authorizing such action.” *Id.* §§ 500.319 (FACR); 515.319 (CACR) (1999). Similar definitions are found in other sanctions programs, even those which do not specifically employ the term “specially designated” mechanism. See, e.g., *id.* §§ 536.301 (SSR); 550.316 (LSR); 575.301 (ISR); 585.302 (FRYSR); 586.301 (KSR) (1999).

116. The precise meaning of the term “controlled” is not provided in any of the sanctions regulations. A number of programs, however, give OFAC broad power to determine which parties “controlled” by the sanctions target may be brought within a particular program’s provisions. See, e.g., *id.* §§ 535.301(a)(2), (4) (IACR); 536.312(c) (NTSR); 538.305(b)-(c) (SSR); 550.304(b)-(c) (LSR); 560.303, 560.304(b)-(c) (ITR); 575.304(a), 575.306(b)-(c), 575.307(b)-(c) (ISR); 585.311(b)-(c) (FRYSR); 586.306-308 (KSR); and 590.307(b)-(c) (USAR) (1999).

117. See *infra* notes 120-129 and accompanying text.

118. See *infra* notes 130-137 and accompanying text.

119. See *infra* notes 138-149 and accompanying text.

120. Notification of Status of Controlled Yugoslav Entities, 57 Fed. Reg. 32,051 (1992).

121. General Notice No.1 was published on July 20, 1992. See 57 Fed. Reg. 32,051 (1992). The FRYSR were published on March 10, 1993. See 58 Fed. Reg. 13,199 (1993).

122. See e.g. *Milena Ship Management Co. v. Newcomb*, 804 F. Supp. 846 (E.D. La. 1992), *aff’d*, 995 F.2d 620 (5th Cir. 1993). See also *supra* note 116 discussing OFAC’s broad authority to define parties as being within the scope of a particular sanctions target, once regulations have been issued.

123. Exec. Order No. 12,808, 57 Fed. Reg. 23,299 (1992); Exec. Order No. 12,810, 57 Fed. Reg. 24,347 (1992).

Identified.”<sup>124</sup> The term “blocked” predominated the term “controlled” when the Yugoslav blacklist was subsequently republished in OFAC’s comprehensive “List of Blocked Persons and Specially Designated Nationals” in 1994,<sup>125</sup> and when the Yugoslav list was separately republished<sup>126</sup> in the “Notice of Blocking”<sup>127</sup> which added various “Bosnian Serb Civilian and Military Authorities” to the Yugoslav blacklist in 1995.<sup>128</sup> Additionally, beyond just addressing natural or juridical persons these lists also included a category for “blocked vessels”—ships that were determined to be the property of, or controlled by, blacklisted Yugoslav parties.<sup>129</sup>

At about the same time, OFAC released a list of eighty-four “Banks Controlled by the Government of Iran,”<sup>130</sup> under the Iranian sanctions.<sup>131</sup> Their precise status is somewhat confusing, however, especially for those banks with offices which are physically located outside of Iran. Despite the broad authority granted under the regulations to define parties as being “Iranian”<sup>132</sup> or part of the “Government of Iran,”<sup>133</sup> OFAC did not expressly do so in issuing this list, and these banks’ names do not appear in the consolidated blacklist found in the appendices to the current regulations.<sup>134</sup>

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124. See 57 Fed. Reg. 32,051 (1992).

125. See 59 Fed. Reg. 59,460 (1994).

126. The publication of the “comprehensive” List of Blocked Persons and Specially Designated Nationals in November, 1994, *see id.*, was only a convenience. OFAC did not establish a single consolidated blacklist in the regulations until it created the appendices to Chapter V of 31 C.F.R. in 1996. See 61 Fed. Reg. 32,936 (1996).

127. 60 Fed. Reg. 19,448 (1995).

128. The title given to the section of the 1995 list dealing with Yugoslav entities was “Blocked Persons and Specially Designated Nationals of the Federal Republic of Yugoslavia (Serbia and Montenegro).” *Id.* at 19,450.

129. See 59 Fed. Reg. 59,460, 59,461 (1994); 60 Fed. Reg. 19,448, 19,450 (1995). Vessels owned or controlled by sanctioned governments, SDNs, or blocked entities were also blacklisted under other sanctions programs, notably the Cuban and Iranian embargoes. However, the Yugoslav program was the first program to specifically provide for this particular type of blacklisting in its regulations. See 31 C.F.R. § 585.418 (1999).

130. See Annex to General License No. 3, 60 Fed. Reg. 40,881, 40,883 (1995). This list was released as part of a series of interim measures OFAC took to implement Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (1995), and Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995). These provisions are now embodied in 31 C.F.R. §§ 560.304, 560.320, and 560.517 (1999).

131. There are two different sets of regulations imposing sanctions on Iran, the IACR and the ITR. See *supra* note 82.

132. See 31 C.F.R. §§ 535.301 (IACR); 560.303 (ITR) (1999).

133. See *id.* § 560.304.

134. However, in April of 1999, four years after this list was initially released, the banks were added to the ITR themselves in a special appendix entitled “Financial Institutions Determined to be Owned or Controlled by the Government of Iran.” See 64 Fed. Reg. 20,168, 20,175 (1999), 31 C.F.R. § 560 app. A (1999); see also *infra* notes 311-317 and accompanying text (discussing the effect of this list under the Iranian sanctions).

Accordingly, while the banks are considered to be “controlled” by Iran,<sup>135</sup> they are not themselves “blocked.”<sup>136</sup> OFAC nevertheless asserts that many financial dealings with the named institutions are prohibited by the Iranian Transactions Regulations (ITR), absent its approval.<sup>137</sup>

The “blocking” of blacklisted parties is perhaps most clearly evident in the now-defunct Haitian sanctions.<sup>138</sup> A lengthy list of “Blocked Persons of the De Facto Regime in Haiti” was issued in July, 1993, as a special appendix to the Haitian Transactions Regulations.<sup>139</sup> The list consisted of two sections. The first section, entitled “Blocked Individuals of the De Facto Regime in Haiti,”<sup>140</sup> included the names of individuals who were serving in the Haitian government or senior Haitian military positions following the coup which deposed President Aristide. The second section, “Blocked Entities of the De Facto Regime in Haiti,” listed organizations located in Haiti.<sup>141</sup> The blacklisted individuals were briefly “unblocked” in accordance with U.N. Security Council Resolution No. 861,<sup>142</sup> which prospectively suspended certain sanctions when a settlement appeared possible later that year, but the organizational entities remained subject to blocking.<sup>143</sup> When the political settlement embodied in the Governors Island Agreement regarding the return of President Aristide collapsed, the sanctions were reimposed.<sup>144</sup> Accordingly, OFAC issued a “Notification of Blocked

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135. 31 C.F.R. § 560.313 (1999).

136. In fact the banks, despite being deemed “controlled” by Iran, are not subject to the prohibitions of the IACR, *id.* § 535.201, at all, but rather fall under the provisions of the ITR, which do not contain any “asset blocking” provisions. *See supra* note 82; *infra* note 137 and accompanying text.

137. *See* Office of Foreign Assets Control, U.S. Dep’t of Treas., *Iran: What You Need to Know About U.S. Economic Sanctions Against Iran* (visited July 27, 1999) <http://www.ustreas.gov/ofac/t11iran.pdf> (copy on file with *Hastings Law Journal*); *see also* 31 C.F.R. § 560.517 (1999).

138. The sanctions were imposed by an Executive Order issued in October, 1991, and the subsequent Haitian Transactions Regulations were removed in June, 1995. *See supra* note 90.

139. *See* 58 Fed. Reg. 40,043 (1993); 31 C.F.R. § 580 app. A (1994).

140. *Id.* at app. A § I.

141. *Id.* at app. A § II.

142. S.C. Res. 861, U.N. SCOR, 48th Sess., 3271st mtg., at 121, U.N. Doc. S/RES/861 (1993).

143. *See* 58 Fed. Reg. 46,540, 46,541 (1993) which removed the “Blocked Individual” listings from 31 C.F.R. § 580 app. A § I, but left the § II “Blocked Entities” listing intact, and simultaneously created a new regulatory provision, 31 C.F.R. § 580.518(c), which “unblocked” the property of those individuals who had been listed as “blocked.”

144. This was accomplished by simply revoking the regulatory provision easing the U.S. sanctions, 31 C.F.R. § 580.518, which had been published the previous month. *See* 58 Fed. Reg. 54,024 (1993).

Individuals of Haiti” blocking the property of 41 individuals in November, 1993,<sup>145</sup> and expanded the blacklist to name 564 individuals in a revised regulatory appendix in early 1994 as President Aristide’s return was further delayed.<sup>146</sup> The sanctions were lifted in December, 1994,<sup>147</sup> following President Aristide’s actual return to Haiti. The use of “blocking” terminology remains, however, common to several of OFAC’s current sanctions programs,<sup>148</sup> and is reflected in the caption of the consolidated master blacklist in the appendices to the regulations.<sup>149</sup>

In addition to these blacklists of “specially designated,” “controlled,” or “blocked” parties, OFAC blacklists various “governmental” persons or entities. Once again, the terminology is more a reflection of the circumstances surrounding the creation of a

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145. See General Notice No. 2: Notification of Blocked Individuals of Haiti, 58 Fed. Reg. 58,480 (1993). The 41 individuals listed included 16 names which had been removed from the 31 C.F.R. § 580 app. A, blacklist just two months before. Compare 58 Fed. Reg. 40,043, 40,045 (1993) with 58 Fed. Reg. 58,480, 58,481, (1993). Interestingly, the Notice provides no indication whatsoever that these individuals names would be included in the Haitian (Appendix A) blacklist found in the regulations. This is perhaps due to the fact that the § 1 “Blocked Individuals” portion of the Appendix A blacklist had been abolished by OFAC’s earlier actions, and the number of rapid changes occurring in the Haitian program had temporarily distracted OFAC from the need to consider reinstating that part of Appendix A. See also *infra* note 146.

146. See Blocked Individuals of Haiti, 59 Fed. Reg. 16,548 (1994), which reconstituted the § 1 “Blocked Individuals” portion of the 31 C.F.R. § 580, Appendix A, blacklist. However, unlike the earlier incarnation of the “Blocked Individuals” portion of Appendix A blacklist, the list was now comprised almost entirely of the names of members of the Haitian military.

147. See 59 Fed. Reg. 51,066 (1994). The removal of the Haitian sanctions actually began with a “suspension” of many of their provisions on October 6, 1994, in anticipation of President Aristide’s return. However, this did not include “unblocking” the property of blacklisted parties. See 59 Fed. Reg. 51,066 (1994). This action was followed by a belated and retroactive lifting of sanctions for transactions occurring after October 16, 1994 which was published on December 27, 1994. See 59 Fed. Reg. 66,476 (1994). The HTR were finally removed from the C.F.R. in 1995. See 60 Fed. Reg. 33,725 (1995).

148. See, e.g., 31 C.F.R. §§ 535.301(a)(2), (4) (IACR); 536.312(c) (NTSR); 538.305(b)-(c) (SSR); 550.304(b)-(c) (LSR); 560.303, 560.304(b)-(c) (ITR); 575.304(a), 575.306(b)-(c), 575.307(b)-(c) (ISR); 585.311(b)-(c) (FRYSR); 586.306-308 (KSR); and 590.307(b)-(c) (USAR) (1999).

149. See 31 C.F.R. ch. V apps. A (Alphabetical Listing of *Blocked Persons*, Specially Designated Nationals, Specially Designated Terrorists, Foreign Terrorist Organizations, and Specially Designated Narcotics Traffickers); B (Alphabetical Listing By Location of *Blocked Persons*, Specially Designated Nationals, Specially Designated Terrorists, Foreign Terrorist Organizations, and Specially Designated Narcotics Traffickers); and C (Alphabetical Listing of Vessels That Are The Property of *Blocked Persons* or Specially Designated Nationals) (1998) (emphasis added). These appendices were added to Chapter V of 31 C.F.R. on June 26, 1996. See 61 Fed. Reg. 32,936 (1996). Three years later the Appendix B geographical listing was removed, and Appendix C redesignated as the new Appendix B. See 64 Fed. Reg. 34, 984 (1999); 31 C.F.R. ch. V apps. A-B (1999).



particular sanctions program rather than an indication of a substantive difference in the nature or operation of the blacklist mechanism. Blacklisting, irrespective of the terminology associated with a particular designation, is simply the trigger for the controls embodied in a given sanctions program. In fact, the three previous examples, involving the Haitian, Iranian, and Yugoslav sanctions programs, also all serve to highlight the substantial overlap with the notion of blacklisting "governmental" entities. In each case, the blacklisted parties were deemed to be acting for, or on behalf of, the sanctioned target government.<sup>150</sup> Nevertheless, OFAC chose to specifically single out "governmental entities" for blacklisting in a number of other programs, including the South African,<sup>151</sup> Libyan,<sup>152</sup> Panamanian,<sup>153</sup> and Kuwaiti<sup>154</sup> sanctions.

Identifying blacklisted parties with a sanctioned government is clearly seen in the 1980's-era South African sanctions under the Comprehensive Anti-Apartheid Act,<sup>155</sup> where the State Department published an extensive list of "South African Parastatal Organizations,"<sup>156</sup> which triggered various restrictions under OFAC's South African Transaction Regulations (SATR).<sup>157</sup> It also appears in the IEEPA based sanctions programs as well.

Although the Libyan sanctions imposed in 1986 were the first IEEPA-based program to include a definition of "blocked" accounts or property,<sup>158</sup> they are also notable for employing a blacklist of "Organizations Determined to be Within the Definition of the Government of Libya," which was parenthetically captioned as a list of "Specially Designated Nationals of Libya."<sup>159</sup> In doing so, the

150. The notion that individual parties are being blacklisted because of their relationship to the target government is self evident in Yugoslav sanctions "List of Controlled Yugoslav Entities" (*see supra* notes 120-129 and accompanying text), the list of "Banks Controlled by the Government of Iran" (*see supra* notes 130-137 and accompanying text), and the list of "Blocked Persons of the Defacto Regime in Haiti" (*see supra* notes 138-139 and accompanying text).

151. *See infra* notes 155-157 and accompanying text.

152. *See infra* notes 158-160 and accompanying text.

153. *See infra* notes 161-163 and accompanying text.

154. *See infra* notes 164-169 and accompanying text.

155. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086.

156. *See* State Department Public Notice No. 983, 51 Fed. Reg. 41,912 (1986), *revised by* State Department Public Notice No. 1007, 52 Fed. Reg. 9,982 (1987).

157. *See* 31 C.F.R. §§ 545.208, 545.315 (1986). The South African sanctions were unusual in that the blacklist of Parastatal Organizations which triggered OFAC's controls was published by the State Department rather than by the Treasury Department itself. This also occurs in the TLGSR, *see supra* note 98, where the State Department's designation of a government as a state sponsor of terrorism which triggers the OFAC sanctions.

158. *See* 31 C.F.R. § 550.316 (1999). *See also supra* note 86.

159. *See* 56 Fed. Reg. 20,540 (1991) and 31 C.F.R. § 550 app. A (1991). *See also supra*

Libyan Sanctions Regulations (LSR) combined both the Specially Designated National mechanism of the TWEA-based Asian and Cuban embargoes with the flexible definition of “blocked” persons or organizations employed in the IEEPA-based Iranian sanctions.<sup>160</sup>

Under the Panamanian program, OFAC created two separate blacklists, one identifying the “Panamanian Governmental Entities” subject to sanctions,<sup>161</sup> and another listing “Persons and Organizations Acting on Behalf of the Noriega/Solis Regime.”<sup>162</sup> This was necessary because there were effectively two “governments” of Panama, the Noriega regime and the U.S.-recognized government in exile. The U.S. Government used both of these blacklists to refine the scope of the sanctions, specifying precisely who should be treated as part of the Noriega regime, in a manner similar to what was done with the Libyan program.<sup>163</sup>

OFAC similarly identified a number of individuals and organizations as “Kuwaiti Governmental Entities” during the Gulf War, in order to impose “protective” blocking measures to preserve Kuwaiti assets from diversion or confiscation by the invading Iraqi forces.<sup>164</sup> The entries on this Kuwaiti list were subdivided in order to provide greater precision in determining precisely what controls OFAC was imposing, and in a manner which neatly highlights the interrelationship of the various terms used in connection with OFAC’s blacklists. The various Kuwaiti Governmental Entities were categorized as either “Controlled/Blocked,”<sup>165</sup> “Controlled/Licensed

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note 112 and accompanying text discussing the relationship of the “governmental” blacklist to the SDN mechanism used in other sanctions programs. The blacklists established under the later Panamanian program actually predate this Libyan blacklist, which was not added to the LSR until 1991. *See infra* notes 161-163 and accompanying text. The Libyan SDN List is now incorporated into the consolidated master blacklist found in the appendices to 31 C.F.R. Chapter V (1999).

160. *Compare* 31 C.F.R. § 535.301 (IACR definition of “Iran” and “Iranian”) and § 560.304 (ITR definition of “Government of Iran”) with § 550.304 (LSR definition of “Government of Libya”) (1999). In a sense, the list of “Banks Controlled by the Government of Iran” is also similar to the Libyan list in that each blacklist tries to specifically reach a subset of a targeted sanctioned government. *See supra* notes 130, 136 and accompanying text; Annex to General License No. 3, 60 Fed. Reg. 40,881, 40,883 (1995).

161. *See* 53 Fed. Reg. 20,566 (1988); 31 C.F.R. § 565 app. A (1988).

162. *See* 54 Fed. Reg. 36,272 (1989); 31 C.F.R. § 565 app. B (1990).

163. *See supra* notes 158-160 and accompanying text. However in the case of the Panamanian program, virtually all of the parties listed were located within Panama itself. The PTR were removed entirely in 1995. *See* 60 Fed. Reg. 33,725 (1995).

164. *See* 55 Fed. Reg. 49,856 (1990); 31 C.F.R. § 570 app. A (1991).

165. This meant that:

[t]he entities listed as “Controlled/Blocked” have been determined to be controlled by the Government of Kuwait and/or the Government of Iraq and should be regarded as blocked entities. This means U.S. persons are prohibited

to Operate,”<sup>166</sup> or “Not Controlled/No Restrictions.”<sup>167</sup> The blocking effect of these designations was lifted in 1991, when Kuwait was liberated by the coalition forces,<sup>168</sup> and the Kuwaiti regulations were entirely removed in 1995.<sup>169</sup>

A similar level of precision is sometimes found in the sanctions regulations themselves, rather than in the associated blacklists. This can be seen in the Angolan sanctions program, which is specifically targeted at the União Nacional para a Independencia, or UNITA, and the territory it controls, rather than at the entire government or territory of Angola.<sup>170</sup> Moreover, even particular entities, such as the organization “Free Angola Information Services, Inc.” or the “Center for Democracy in Angola,” are specifically defined in the regulations as being part of the sanctions target.<sup>171</sup> The majority of the IEEPA-based sanctions programs created since the mid 1980’s have in fact defined various particular entities as part of the sanctioned

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from engaging in transactions with these entities and all assets under U.S. jurisdiction owned or controlled by those entities are blocked. U.S. persons are not prohibited, however, from paying funds owed to these entities into blocked accounts held in U.S. financial institutions.

55 Fed. Reg. 49,856, 49,868 (1990); 31 C.F.R. § 570 app. A (1991).

166. This meant that:

[t]he entities listed as “Controlled/Licensed to Operate” should also be regarded as controlled by the Government of Kuwait, but as licensed to operate. This means the Office of Foreign Assets Controls has determined that the entities are under the effective control of the recognized Government of Kuwait and U.S. persons are authorized to engage in transactions with them. These authorized transactions include entering into contracts, making and receiving payments, and conducting other commercial or financial transactions. If questions arise, U.S. persons should request from the entities concerned to see copies of the operating licenses.

55 Fed. Reg. 49,856, 49,868 (1990); 31 C.F.R. § 570 app. A (1991).

167. This meant that:

[t]he entities listed as “Not Controlled/No Restrictions” are not regarded by the Office of Foreign Assets Control as controlled by the Government of Kuwait. The names of these entities appear on the list solely for the purpose of clarification because requests regarding their status have been received. Some of the entities on this list may be subject to special Treasury Department licensing or reporting requirements.

55 Fed. Reg. 49,856, 49,868 (1990); 31 C.F.R. § 570 app. A (1991).

168. See 56 Fed. Reg. 12,450; 56 Fed. Reg. 26,034 (1991).

169. See 60 Fed. Reg. 33,725 (1995).

170. See *supra* note 92. The sanctions imposed on the Taliban in Afghanistan are similar in that they target a particular group within the larger territory of Afghanistan. As initially promulgated the sanctions only blacklisted one individual, Mohammed Omar (Amir al-Mumineen [Commander of the Faithful]), see Annex to Exec. Order No. 13,129, 64 Fed. Reg. 36,759, 36,761 (1999). However, as of this writing, no regulations have been issued to further elaborate upon the sanctions imposed under the Executive Order. See *supra* note 95.

171. See, e.g., 31 C.F.R. § 590.314(a)(3), (4) (1999).

government, typically including at least the local government's "central bank."<sup>172</sup>

The utility and flexibility demonstrated in these programs led the Government to push the blacklisting tool to its logical conclusion in recent years. In several of the newer programs, specific parties or organizations are blacklisted arguably without any direct connection to any particular state or geography whatsoever. In these programs, the blacklist is no longer employed as a secondary tool, capturing the activities of corporate cloaks or front organizations which might enable a targeted country to avoid the effects of the sanctions, but is instead employed as the primary tool for achieving the Government's objectives. Those objectives also shift: from achieving the traditional goal of isolating of the sanctioned territory as a prelude or alternative to war—as was the case with the World War II sanctions—to demonstrating political "leadership" or to claim the "moral high ground" for domestic or international political purposes, with much less concern for whether the sanctions will actually restrict the actions of their intended target. That is, blacklisting is now seen as politically useful in attempting to address some of the more intractable problems facing policy makers today, such as narco-trafficking, terrorism, and human rights violations. Interestingly, there is also a return to the use of the "specially designated" terminology in the blacklists associated with these newer sanctions programs.

These recent, less geographically-oriented sanctions began appearing in January, 1995, with President Clinton's announcement that twelve terrorist organizations would be subject to blocking,<sup>173</sup> and OFAC's simultaneous release of the "List of Specially Designated Terrorists Who Threaten to Disrupt the Middle East Peace Process."<sup>174</sup> This Specially Designated Terrorist (SDT) list elaborated upon the organizations named in the President's Executive Order by identifying twenty-six individuals and forty-five organizations believed to be conducting terrorist operations in nine Middle Eastern countries, Gaza and the West Bank,<sup>175</sup> and it has since been further expanded.<sup>176</sup>

Similarly, in October, 1995, the President announced a blocking

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172. *See, e.g., id.* §§ 538.305 (SSR); 550.304 (LSR); 575.306-.307 (ISR); 585.311 (FRYSR) (1999); and 31 C.F.R. § 570.306 (KACR) (1991).

173. *See* Exec. Order No. 12,947, 60 Fed. Reg. 5,079, 5,081 (1995).

174. 60 Fed. Reg. 5,084 (1995).

175. *See id.*

176. The Specially Designated Terrorist List (SDT) was separately updated twice prior to the creation of the Terrorist Sanctions Regulations (TSR), in February, 1996. *See* 60 Fed. Reg. 41,152 (1995); 60 Fed. Reg. 58, 435 (1995); 31 C.F.R. § 595 (1999); *see also supra* note 97. The current version of the SDT list is now incorporated in the consolidated master blacklist in the appendices to 31 C.F.R. Chapter V (1999).

program aimed at four significant international narcotics traffickers,<sup>177</sup> which was again accompanied by the simultaneous release of another new blacklist from OFAC, entitled the "List of Specially Designated Narcotics Traffickers" (SDNTs).<sup>178</sup> The four individuals named by the President, along with others designated by the Secretary of the Treasury as being significantly involved in drug trafficking activities, and the various entities which they own or control, comprise the list of SDNTs. Although there is no express geographic limitation on the application of the narcotics trafficking sanctions in either the Executive Order or the implementing regulations,<sup>179</sup> the several hundred parties now designated as SDNTs through the end of 1999 have all been based in, or affiliated with, Colombia.<sup>180</sup>

Two other programs, sanctioning Terrorism List Governments<sup>181</sup> and Foreign Terrorist Organizations,<sup>182</sup> grew out of passage of the Antiterrorism and Effective Death Penalty Act of 1996.<sup>183</sup> This Act authorizes OFAC to regulate dealings with governments designated as supporters of international terrorism pursuant to section 6(j) of the Export Administration Act,<sup>184</sup> or those foreign organizations designated under amendments to the Immigration and Naturalization Act<sup>185</sup> as involved in terrorism. In both programs, it is the Secretary of State, and not the Treasury, who makes the initial designation.<sup>186</sup> However, OFAC republishes the lists of such parties, and in the case of the sanctions on Foreign Terrorist Organizations (FTOs), is also empowered to expand upon the Secretary of State's designations by similarly declaring that those who are acting for, or on behalf of, such parties are themselves FTOs.<sup>187</sup>

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177. See *Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers*, Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (1995).

178. 60 Fed. Reg. 54,582 (1995).

179. The Narcotics Trafficking Sanctions Regulations (NTSR), were issued in March, 1997. See 62 Fed. Reg. 9,959 (1997); 31 C.F.R. § 596 *et seq.* (1999).

180. See Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (1995); 60 Fed. Reg. 54,582; 60 Fed. Reg. 61,288 (1995); 61 Fed. Reg. 9,523 (1996); and the appendices to 31 C.F.R. Chapter V (1999). The recently signed Foreign Narcotics Kingpin Designation Act, Title VIII of Pub. L. No. 106-120 (1999), will presumably expand these sanctions beyond the Colombian drug cartels.

181. The Terrorism List Governments Sanctions Regulations (TLGSR), were issued in August of 1996. See 61 Fed. Reg. 43,462 (1996); 31 C.F.R. § 596 *et seq.* (1999).

182. The Foreign Terrorist Organizations Sanctions Regulations (FTOSR) were issued in October of 1997. See 62 Fed. Reg. 52,493, 52,495 (1997); 31 C.F.R. § 597 *et seq.* (1999).

183. 18 U.S.C. § 2332(d) (1996).

184. See 50 U.S.C. app. § 2405 (1994).

185. See 8 U.S.C. § 1189 (1994).

186. See 31 C.F.R. §§ 596.310 (TLGSR), 597.309 (FTOSR) (1999).

187. See *id.* § 597.301 (FTOSR) (1999). OFAC publishes the list of Terrorism List Governments in the regulations at § 596.201; the list of Foreign Terrorist Organizations

The narcotics trafficking sanctions and each of the three terrorist programs attempt to block all the blacklisted parties' property within the reach of U.S. jurisdiction,<sup>188</sup> and broadly prohibit any attempts to engage in unlicensed dealings with the blacklisted parties or to evade or avoid the programs' restrictions.<sup>189</sup> Thus, while they may appear superficially different from traditional geographically based sanctions,<sup>190</sup> they employ the same asset "blocking" techniques associated with the classic economic embargoes aimed at isolating specific countries.<sup>191</sup> Nevertheless, these programs do represent a natural progression in the evolution of blacklisting as a tool of U.S. government policy in the later part of the 20<sup>th</sup> century.<sup>192</sup> Perhaps the

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appear in the consolidated master blacklist in the appendices to 31 C.F.R. Chapter V (1999).

188. *See id.* §§ 536.201 (NTSR); 595.201 (TSR); 596.201 (TLGSR); 597.201 (FTOSR) (1999).

189. *See id.* §§ 536.204 (NTSR); 595.205 (TSR) (1999).

190. The SDTs are truly international, involving groups and individuals from many countries around the world, although there is a rudimentary "geographic" element to the TSR in that the SDT designation is predicated upon a potential threat to the peace process in the Middle East. *See id.* § 595.311 (TSR) (1999). Even this element is absent, however, when dealing with FTOs. *See id.* §§ 597.301, 597.309 (FTOSR) (1999). The SDNTs are more localized, at least currently, in that they are all associated with the Cali drug cartel based in Colombia and to that degree the NTSR contain a rudimentary "geographic" element. *See id.* § 536.312 (1999). However, the NTSR can be expected to expand its sanctions beyond the Colombian drug cartels as a result of the recently signed Foreign Narcotics Drug Kingpin Act, Title VIII of Pub. L. No. 106-120 (1999).

191. One might query the practicality of blacklisting some of these persons or organizations, such as Abu Nidal or the Black September Organization who appear as SDTs or FTOs, as they presumably operate in secret or conceal their identities, at least when dealing with U.S. parties and financial institutions.

192. OFAC's experience with blacklisting and economic sanctions has also demonstrated the usefulness of the blacklisting tool to other parts of the Government, such as the Commerce and State Departments. Both agencies have long made use of blacklists of parties who violate their regulatory controls on exporting U.S. goods, services, or technology as an adjunct to their enforcement powers. In addition to the various civil and criminal penalties which may be imposed, the Commerce Department can "deny the export privileges" of those who have failed to comply with its Export Administration Regulations, *see* 15 C.F.R. § 764.3(a)(2) (1999), and the State Department can "debar" those who failed to comply with the International Traffic in Arms Regulations, *see* 22 C.F.R. § 127.7 (1999). However, both agencies began importing the OFAC approach of using blacklisting to expand the reach of the controls, rather than to punish, following President Bush's 1990 Enhanced Proliferation Control Initiative, Exec. Order No. 12,735, 55 Fed. Reg. 48,587 (1990). Accordingly, Commerce now maintains an "Entity List," 15 C.F.R. § 744, Supp. No. 4 (1999), which triggers additional regulatory controls because of the Government's concern that certain foreign parties, otherwise beyond the reach of U.S. jurisdiction, are engaged in the proliferation of weapons of mass destruction. Similarly, the State Department's Bureau of Political-Military Affairs periodically announces that particular parties are engaged in proliferation-related activities, thereby triggering controls in the Export Administration Regulations or International Traffic in Arms Regulations which are dependent upon the U.S. exporter's "knowledge" that an importer or customer

most natural and logical (but long resisted) step in this progression was also taken in 1996 when the proliferation of separate blacklists forced OFAC to create a consolidated master blacklist for virtually all its programs in the appendices to 31 C.F.R. Chapter V, naming all the various Blocked Persons, SDNs, SDTs, SDNTs, and FTOs in one place in the regulations.<sup>193</sup>

One of the newest sanctions programs, however, may undermine some of this progress. The Weapons of Mass-Destruction Trade Control Regulations<sup>194</sup> impose an import ban on transactions involving “designated foreign persons” identified as being engaged in weapons proliferation by the Department of State. As initially announced, OFAC followed the model of many of the sanctions programs from the early 1990s in placing this blacklist of “designated foreign persons” only in the WMDTCR regulations themselves,<sup>195</sup> and not in the consolidated master list contained in the Appendices to 31 C.F.R. Chapter V. This appears to represent a retreat even from the approach recently employed with the Foreign Terrorist Organizations blacklist, which also originates at the State Department, but nevertheless is republished in the consolidated master list in the Appendices at the end of the CFR.<sup>196</sup>

### (3) *A History of Administrative Problems*

The proliferation of sanctions programs over time, each with its own set of regulations and its own peculiar blacklist, makes it more difficult for OFAC to administer the controls in a smooth, consistent, and efficient manner. Additionally, unlike other agencies involved in international trade—such as the Commerce Department’s Bureau of Export Administration, or the State Department’s Defense Trade

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is involved in a potentially proscribed “end-use.” *See, e.g.*, 61 Fed. Reg. 29,784 (1996); 60 Fed. Reg. 13,201, 30,148 (1995); 59 Fed. Reg. 10,663, 44,222, 61,648, 65,837 (1994); 58 Fed. Reg. 45, 408 (1993). *See also* FITZGERALD, *supra* note 27, at 28-35.

193. *See* 61 Fed. Reg. 32,936 (1996). Previously, OFAC had published a “convenience” copy of a “comprehensive” version of the blacklist in the Federal Register in 1994, *see* 59 Fed. Reg. 59,460 (1994), but the master list did not become part of the regulations themselves until 1996. However, this consolidated master blacklist still *omits* the list of Banks Controlled by the Government of Iran. *See supra* notes 130-137, and accompanying text; *infra* notes 311-317 and accompanying text. Moreover, the Terrorist List Governments are found only in the TLGSR, *see supra* notes 181-187 and accompanying text, as are the Designated Foreign Persons blacklisted under the WMDTCR, *see infra* notes 194-196, 318 and accompanying text.

194. 31 C.F.R. § 539 (1999).

195. *See id.* § 539 app. I.

196. *See id.* ch. V apps. A-B. It should also be noted, however, that the Terrorist List Governments sanctioned under the TLGSR do not appear in the appendices to 31 C.F.R. Chapter V, but only in the actual regulations themselves. *See supra* notes 181-187, 193 and accompanying text.

Controls Agency—OFAC has been slow to develop a cooperative relationship with those who must comply with its regulations. While OFAC's singular focus on economic and financial sanctions has enabled it to avoid some of the problems the Commerce Department sometimes experiences as a result of its dual missions of both promoting and controlling trade,<sup>197</sup> it has also fostered a more adversarial relationship with the trading community. As OFAC has focused on each sanctions program individually, rather than as part of a comprehensive system of controls, it has tended to be insensitive to the needs of those who must integrate its diverse regulatory requirements into an overall business compliance process.

This insensitivity is an outgrowth of OFAC's historical mission, and its self-image as an organization engaged in "economic warfare" with particular enemies of the U.S. Government.<sup>198</sup> OFAC publicly states that its mandate is to advance U.S. foreign policy, and not to respond to the needs of industry. This, in turn, produced a degree of isolation which has only recently begun to break down.<sup>199</sup> Moreover, as a small office separate and apart from the main "trade control" operations at State and Commerce, it has also sometimes had difficulty keeping up with the increasing demands for new and different sanctions programs in the post Cold War era. The ultimate result is, in the jargon of the corporate world, that OFAC has traditionally not felt it necessary to be "customer" or "service" oriented in administering its programs. This can be seen in the manner in which OFAC issues and removes controls from its regulations, and in the way it has handled the blacklists associated with its various programs.

#### (a) Problems Detailing New Controls

OFAC can sometimes be quite slow in formulating the detailed regulations which implement the various Presidential Orders or Congressional legislation imposing sanctions. Although OFAC tends to use a common set of "tools" in many of its sanctions programs—consisting of financial sanctions (such as freezing or blocking assets or prohibiting new investments), trade sanctions (such as import and export prohibitions), travel restrictions to and from the target

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197. See, e.g., Bureau of Export Administration, U.S. Dep't of Commerce, *China's Demand for Commercial Technology Poses Dilemma for U.S. Companies: Commerce Report Finds*, (visited Jan. 28, 1999) <http://www.bxa.doc.gov/PRESS/99/PRCTech.html>.

198. See, e.g., Kendrick, *supra* note 60, at A21; Benjamin Weiser, *Sanctions Czar: Big Gun or Loose Cannon?*, WASHINGTON POST, Aug. 4, 1996, at H-1.

199. See *Shipping Medical Products to Cuba: OFAC Requirements Swamp the Raft*, EXPORT CONTROL NEWS, September 30, 1994, available in 1994 WL 2247159.



destination, and contract restrictions<sup>200</sup>—it persists in issuing stand-alone programs for each target rather working from a standardized set of regulations. If it were to establish a common set of regulations as a baseline from which the particular sanctions applicable to a given target could be selectively invoked, many interpretative problems introduced by slight variations in wording over time would be mitigated,<sup>201</sup> and the process of issuing regulations as new programs are created would be streamlined.<sup>202</sup>

Delays in issuing the detailed implementing regulations have been a significant problem with the OFAC sanctions programs for nearly a decade. For example, from the time of the Executive Order imposing the applicable sanctions there was:

—a four-month delay in issuing KACR under the Kuwaiti program,<sup>203</sup>

—a four-and-a-half-month delay in issuing ISR under the Iraqi program,<sup>204</sup>

—a six-month delay in issuing the HTR under the Haitian program,<sup>205</sup>

—a nine-month delay in issuing the FRYSR under the Yugoslav program,<sup>206</sup>

—a delay of more than two months in issuing the initial USAR under the Angolan program,<sup>207</sup>

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200. See R. Richard Newcomb, *Office of Foreign Assets Control: An Overview, September 30, 1998*, in PLI COPING WITH U.S. EXPORT CONTROLS 115, 125-26 (1998).

201. For example, as initially issued, the IACR contained basically the same blocking provisions used in earlier programs, but OFAC nonetheless interpreted them differently with regard to “transfers” of “property interests” involving the Iranian Government. See Michael P. Malloy, *The Iran Crisis: Law Under Pressure*, 15 WIS. INT’L. L.J., 15, 30-33 & n.92 (1984).

202. See MALLOY, *supra* note 40, at 681-682. OFAC made a limited move towards a single set of regulations when it consolidated licensing application, reporting, and records retention requirements into the Reporting and Procedures Regulations, which were created in 1997. See 62 Fed. Reg. 45,101 (1997); 31 C.F.R. § 501 *et seq.* (1999).

203. Executive Order Number 12,723 was issued on August 2, 1990, see 55 Fed. Reg. 31,805 (1990), and the regulations were published on November 30, 1990, see 55 Fed. Reg. 49,856 (1990).

204. Executive Order Number 12,722 was issued on August 2, 1990, see 55 Fed. Reg. 31,803 (1990), and the regulations were published on January 18, 1991, see 56 Fed. Reg. 2,112 (1991).

205. Executive Order Number 12,775 was issued on October 4, 1991, see 56 Fed. Reg. 50,641 (1991), and the regulations were published on March 31, 1992, see 57 Fed. Reg. 10,820 (1992).

206. Executive Order Number 12,808 was issued on May 30, 1992, see 57 Fed. Reg. 23,299 (1992), and the regulations were published on March 10, 1993, see 58 Fed. Reg. 13,199 (1993).

207. Executive Order Number 12,865 was issued on September 26, 1993, see 58 Fed. Reg. 51,005 (1993), and the regulations were published on December 10, 1993, see 58 Fed. Reg. 64,904 (1993).

—an eight-month delay in amending the FRYSR to reflect the Bosnian Serb sanctions,<sup>208</sup>

—a nearly thirteen-month delay issuing the TSR under the Middle East terrorist program,<sup>209</sup>

—a six-month delay in amending the ITR to reflect new sanctions on Iran for its continuing support of international terrorism,<sup>210</sup>

—a sixteen-month delay in issuing the NTSR under the narco-trafficking program,<sup>211</sup>

—an eight-month delay in issuing the SDR under the Sudanese program,<sup>212</sup>

—a four-month delay in issuing the KSR under the Kosovo program,<sup>213</sup>

—a seven-month delay in issuing the WMDTCR under the recent sanctions program aimed at the proliferators of weapons of mass destruction,<sup>214</sup>

—a twenty-month delay to further amend the ITR to reflect the President's "clarification" of those sanctions,<sup>215</sup>

—and a twelve- to twenty-month delay updating and reissuing the USAR following announcements of two different sets of revisions to those sanctions.<sup>216</sup>

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208. Executive Order Number 12,934 was issued on October 27, 1994, *see* 59 Fed. Reg. 54,117 (1994), and the regulations were published on June 30, 1995, *see* 60 Fed. Reg. 34,144 (1995).

209. Executive Order Number 12,947 was issued on January 23, 1995, *see* 60 Fed. Reg. 5,079 (1995), and the regulations were published on February 2, 1996, *see* 61 Fed. Reg. 3,805 (1996).

210. Executive Order Number 12,957 was issued on March 17, 1995, *see* 60 Fed. Reg. 14,615 (1995), and Executive Order Number 12,959 was issued on May 6, 1995, *see* 60 Fed. Reg. 24,757 (1995), and the regulations were amended on September 11, 1995, *see* 60 Fed. Reg. 47,061 (1995).

211. Executive Order Number 12,978 was issued on October 21, 1995, *see* 60 Fed. Reg. 54,579 (1995), and the regulations were published on March 5, 1997, *see* 62 Fed. Reg. 9,959 (1997).

212. Executive Order Number 13,067 was issued on November 5, 1997, *see* 62 Fed. Reg. 59,989 (1997), and the regulations were published on July 1, 1998, *see* 63 Fed. Reg. 35,809 (1998).

213. Executive Order Number 13,088 was issued on June 9, 1998, *see* 63 Fed. Reg. 32,109 (1998), and the regulations were published on October 13, 1998, *see* 63 Fed. Reg. 54,575 (1998).

214. Executive Order Number 13,094 was issued on July 28, 1999, *see* 63 Fed. Reg. 40,803 (1998), and the regulations were published on February 23, 1999, *see* 64 Fed. Reg. 8,715 (1999).

215. Executive Order Number 13,059 was issued on August 19, 1997, *see* 62 Fed. Reg. 44,531 (1997), and the regulations were published on April 26, 1999, *see* 64 Fed. Reg. 20,168 (1999).

216. Executive Order Number 13,069 was issued on December 12, 1997, *see* 62 Fed. Reg. 65,989 (1997), and Executive Order Number 13,098 was issued on August 18, 1998,

In the interim between the Presidential announcement of a new sanctions program and the issuance of implementing regulations, OFAC's practice is to run the sanctions by administrative fiat, often through unpublished "general licenses" or "notices." When regulations are subsequently published in the Federal Register, several of the regulatory provisions may simply embody these previously unpublished licenses and notices. For example:

—when the Iraqi regulations were issued in 1991, they codified twelve previously unpublished general licenses which were issued between August and October of 1990;<sup>217</sup>

—the Haitian regulations issued in 1992 codified eight unpublished general licenses issued between November, 1991, and February, 1992;<sup>218</sup>

—the Yugoslav regulations issued in 1993 codified seven unpublished general licenses which were issued in June and July of 1992;<sup>219</sup>

—the September, 1995, amendments to the Iranian Transactions Regulations codified twelve general licenses issued over the preceding five months;<sup>220</sup>

—and the Kosovo Sanctions Regulations issued in October of 1998 codified yet another general license which had been issued three months previously.<sup>221</sup>

With the issuance of the Terrorism Sanctions Regulations in 1996, OFAC even included a specific regulatory provision preserving and acknowledging the republication of an unspecified number of general licenses issued during the thirteen months which had elapsed from the date of the President's Executive Order imposing the sanctions.<sup>222</sup> A similar provision was included in the Narcotics Trafficking regulations, issued in 1997, sixteen months after the imposition of sanctions.<sup>223</sup> This practice has now been further

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see 63 Fed. Reg. 44,771 (1998), requiring so many changes that the USAR were entirely reissued on August 12, 1999, see 64 Fed. Reg. 43,924 (1999).

217. See 56 Fed. Reg. 2,112 (1991).

218. See 57 Fed. Reg. 10,820, 10,821 (1992).

219. See 58 Fed. Reg. 13,199, 13,200 (1993).

220. See 60 Fed. Reg. 47,061, 47,062 (1995).

221. See 63 Fed. Reg. 54,575, 54,577 (1998). Three other unpublished General Licenses for the Kosovo program have since been created, but have yet to appear in the regulations. See "General License No. 2" regarding trade transactions with Montenegro, "General License No. 3" regarding exports and reexports, and "General License No. 4" addressing trade and investment, which briefly appeared on the OFAC website. Office of Foreign Assets Control, U.S. Dep't of Treasury, *What's New*, May 21, 1999, and August 18, 1999, <http://www.ustreas.gov/ofac/t11edit.txt> (copies on file with *Hastings Law Journal*).

222. See 31 C.F.R. § 595.801 (1997). See also *supra* note 209.

223. See 31 C.F.R. § 536.801 (1997). See also *supra* note 211. The language used in this

institutionalized in OFAC's Reporting and Procedures Regulations (RPR),<sup>224</sup> where it states,

General Licenses may also be issued authorizing under appropriate terms and conditions certain types of transactions which are subject to prohibitions contained in economic sanctions *programs the implementation and administration of which have been delegated to the Director of the Office of Foreign Assets Control but which are not yet codified.* . . .<sup>225</sup>

As most of the details of precisely who is "controlled" and what transactions are affected are contained in these provisions, rather than in the underlying legislation or Executive Orders which impose sanctions on a particular target, the failure to promptly and publicly publish the implementing provisions leads to great uncertainty<sup>226</sup> and uneven application of the sanctions themselves.<sup>227</sup> This is exacerbated by the fact that OFAC rules and regulations are commonly characterized as involving a "foreign affairs function," which exempts them from the prior notice and comment requirements of the Administrative Procedure Act.<sup>228</sup>

It is also interesting to note that while the submission of a formal request for a "license" is typically required to obtain OFAC's approval for a given transaction which would otherwise be

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provision and in the analogous provision under the TSR, first appeared in the HTR. See 31 C.F.R. § 580.801 (1993).

224. See 62 Fed. Reg. 45,101 (1997) and 31 C.F.R. § 501 *et seq.* (1999).

225. 31 C.F.R. § 501.801 (1999) (emphasis added).

226. See, for example, *The OFAC Merry-Go-Round: Looking for Answers on Bosnia Restrictions*, EXPORT CONTROL NEWS, May 28, 1993, available in 1993 WL 2519306, describing one individual's futile attempt to determine the precise scope of the sanctions on the Bosnian Serbs announced on April 27, 1993 by Executive Order No. 12,846, 58 Fed. Reg. 25,771 (1993), but prior to OFAC's amending the FYRSR on July 1, 1993, see 58 Fed. Reg. 35,828 (1993).

227. See *Veterans Peace Convoy, Inc. v. Schultz*, 722 F. Supp. 1425 (S.D. Tex. 1988); *infra* notes 450-458 and accompanying text, discussing the case-by-case application of unpublished "interpretations" to license applications.

Consistent enforcement of OFAC's requirements may also be problematic, as there is a sizable gap between the letter of the law and the exercise of OFAC's prosecutorial discretion. For example, retail cash transactions with blacklisted parties, what is sometimes referred to as the "McDonald's problem," are prohibited by the regulations but not prosecuted. Similarly, non-banking transactions historically were less likely to be pursued, although this may be changing. See FITZGERALD, *supra* note 27, at 95-96. Additionally, there are occasionally allegations that OFAC's exercise of discretion is influenced by personal or political considerations. In the early 1990s an investigation was conducted into the propriety of several OFAC enforcement actions, which found that while there may have been an appearance of impropriety, however, there was no actionable wrongdoing. See, e.g., Benjamin Weiser, *Sanctions Czar: "Big Gun" or "Loose Cannon?"*, WASHINGTON POST, August 4, 1996, at H-1; see also *infra* note 352.

228. See 5 U.S.C. § 553(a)(1), (b)-(e) (1994); 31 C.F.R. § 501.804 (1999). See also *infra* notes 229, 373-383 and accompanying text.

proscribed, or an interpretation confirming that a transaction is outside the scope of the controls, there are no time limits whatsoever established in the regulations within which OFAC must act and render a decision.<sup>229</sup> In some cases it has taken OFAC as much as two years to respond,<sup>230</sup> and in others no formal response was ever forthcoming.<sup>231</sup> Similarly, there are no time limits for OFAC to act on an application to unblock assets due to mistaken identity,<sup>232</sup> nor on an application to remove an entry from the consolidated master blacklist.<sup>233</sup> The result, for those striving to comply in good faith with the terms of the controls is a significant burden in determining precisely what is or what is not permissible under the various sanctions.

### (b) Problems Removing Outdated Controls

Moreover, OFAC has sometimes been just as lax in removing outdated controls from its regulations as in initially publishing the

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229. See 31 C.F.R. § 501.801 (1999). The Reporting and Procedures Regulations (RPR), were issued in 1997. Like the creation of a master blacklist in the appendices to the regulations the year before, the RPR represent an attempt to consolidate and standardize some aspects of the various OFAC sanctions programs. The RPR primarily address licensing procedures and common recordkeeping and reporting requirements which previously were found in the individual sanctions programs themselves. The RPR apply even where OFAC has yet to issue specific regulations detailing the controls for a particular sanctions program. Even these common procedures were deemed to involved a "foreign affairs function," and therefore exempt from the requirements of the Administrative Procedure Act. They accordingly were issued without prior notice or comment. See 62 Fed. Reg. 45,098, 45,099 (1997); *supra* note 228 and accompanying text. See also *infra* note 346 and accompanying text.

230. For example, in communications with the author, IBM reported it received an OFAC license approval on a minor matter which had been submitted two years previously, and long since abandoned. Email from IBM Export Regulation Office to author (May 25, 1999) (copy on file with *Hastings Law Journal*). Additionally, the Center for Constitutional Rights sent a letter on February 5, 1999, to the Treasury Department, State Department, and the National Security Council complaining *inter alia* of numerous examples of OFAC's failure to act in a timely fashion on license applications for travel to Cuba, and suggesting that a maximum time period be established for OFAC licensing decisions. Letters from Center for Constitutional Rights to U.S. Dep't of Treasury, U.S. Dep't of State, and Nat'l Security Council (Feb. 5, 1999) (copy on file with *Hastings Law Journal*).

231. For example, in communications with the author, IBM reported that no formal response was ever made to a letter sent on June 10, 1996 requesting guidance on how internet service providers should address the possibility that online transactions might, without their direct knowledge or participation, involve blacklisted parties. Additionally, the Center for Constitutional Rights letter of February 5, 1999, also complains of numerous examples where OFAC failed to respond to license applications it received. See *supra* note 230.

232. See 31 C.F.R. § 501.806 (1999).

233. See *id.* § 501.807.

details of the sanctions. For example, there was more than a month's delay in unblocking Cambodian assets following the lifting of sanctions and the conclusion of a claims settlement agreement in 1994,<sup>234</sup> and almost a two and a half month delay in unblocking Vietnamese assets in 1995.<sup>235</sup> Similarly, four months lapsed between the Executive Order terminating the emergency which was the basis of the sanctions against Nicaragua, and the retroactive lifting of OFAC's controls.<sup>236</sup> However, it is OFAC's handling of the Panamanian, Kuwaiti, Haitian, and Yugoslav controls which perhaps provides the most dramatic examples of the problems associated with the termination or lifting of their sanctions programs.

OFAC prospectively lifted the Panamanian sanctions in 1990, a little over a month after the President directed that they do so,<sup>237</sup> but left the two associated blacklists in place for another five years.<sup>238</sup> The ostensible reason for leaving the blacklists in place was to ensure that monies owed to "Panamanian Governmental Entities," blocked prior to the lifting of sanctions, remained blocked and could not be transferred without OFAC's approval.<sup>239</sup> However, despite the ostensible lifting of the sanctions, two specific government-controlled entities on the blacklist, Marinexam, S.A. and Transit, S.A. remained fully subject to the old controls.<sup>240</sup> To make matters more confusing, while a license approval procedure for monies owed to those on the list of blocked "Panamanian Governmental Entities" was created and amended several times over the next five years,<sup>241</sup> nothing was done with regard to the separate blacklist of "Persons and

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234. See 59 Fed. Reg. 60,558 (1994).

235. See 60 Fed. Reg. 12,885 (1995).

236. See 55 Fed. Reg. 28,613 (1990). The NTCR also remained in the Code of Federal Regulations, for transactions which occurred prior to the lifting of sanctions, until they were finally removed in 1995. See 60 Fed. Reg. 33,725 (1995).

237. See 55 Fed. Reg. 3,560 (1990), which introduced two new provisions into the PTR; 31 C.F.R. §§ 565.410, 565.510 (1990), lifting sanctions with respect to all transactions occurring after December 20, 1989.

238. See 60 Fed. Reg. 33,725 (1995); 31 C.F.R. § 565 apps. A (Panamanian Governmental Entities); B (Persons and Organizations Acting on Behalf of the Noriega/Solis Regime) (1996).

239. 31 C.F.R. § 565.511 (1990). One might certainly argue that it is not necessary to maintain outdated laws, regulations, or blacklists "on the books" in order to prosecute violations which occurred prior to their termination or repeal.

240. See *id.* § 565.410.

241. See 55 Fed. Reg. 3,560 (1990); 59 Fed. Reg. 24,643 (1994); 59 Fed. Reg. 46,720 (1994); 59 Fed. Reg. 55,209 (1994). Ironically, no licenses were ever submitted under this procedure to OFAC. Panama settled all outstanding claims against it, and the government controlled Air Panama, without using the blocked funds. Accordingly the funds were completely unblocked in late 1994. See 59 Fed. Reg. 46,720 (1994). Nevertheless, OFAC did not remove the PTR and their associated blacklists for another nine months. See 60 Fed. Reg. 33,725 (1995).

Organizations Acting on Behalf of the Noriega/Solis Regime.”<sup>242</sup> Both lists remained as part of the regulations<sup>243</sup> until the PTR were completely removed in 1995.<sup>244</sup> Additionally, although both blacklists continued to appear in the Code of Federal Regulations (CFR) throughout this period, neither appeared in the “comprehensive” List of Blocked Persons and Specially Designated Nationals which OFAC published for the first time in the Federal Register 1994.<sup>245</sup>

The Kuwaiti controls were handled in a somewhat similar fashion at about the same time. At the request of the Kuwaiti Government following its liberation as a result of the Gulf War, the controls imposed to protect Kuwaiti assets from expropriation during the Iraqi occupation were lifted.<sup>246</sup> The blocking measures directed at blacklisted Kuwaiti Governmental Entities were removed accordingly, first with regard to all but seven named banks,<sup>247</sup> and later, in 1991, to include those banks.<sup>248</sup> Nevertheless, this blacklist - including all seven banks - remained as part of the CFR<sup>249</sup> until the Kuwaiti Sanctions Regulations were completely removed in 1995.<sup>250</sup> However, as with the Panamanian blacklists, this Kuwaiti blacklist was not included in the “comprehensive” List of Blocked Persons and Specially Designated Nationals that OFAC published in the Federal Register in 1994.<sup>251</sup>

The removal of the Haitian controls was handled differently, even though it occurred during roughly the same time period. The Haitian controls were suspended in late 1993 within days of the execution of the Governor’s Island Agreement on the return of President Aristide’s government, and the extensive roster of individual names in the blacklist of “Blocked Entities of the Defacto Regime in Haiti” was removed.<sup>252</sup> When the prospects of settlement broke down a month later, the regulatory controls were promptly reimposed.<sup>253</sup> Over the following five months, the list of blocked

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242. See *supra* note 241.

243. See 31 C.F.R. § 565 apps. A, B (1995).

244. See 60 Fed. Reg. 33,725 (1995).

245. See 59 Fed. Reg. 59,460 (1994). This list was later replaced (after the removal of the PTR) by the consolidated master list in the appendices to 31 C.F.R. Chapter V (1999). See also *supra* note 193.

246. The related controls on Iraq, however, still remain. See *supra* note 88 and accompanying text.

247. See 56 Fed. Reg. 12,450 (1991).

248. See 56 Fed. Reg. 26,034 (1991).

249. See 31 C.F.R. § 570 app. A (1994).

250. See 60 Fed. Reg. 33,725 (1995).

251. See 59 Fed. Reg. 59,460 (1994).

252. See 58 Fed. Reg. 46,540, 46,541 (1993).

253. See 58 Fed. Reg. 54,024 (1993).

individuals was also substantially reconstituted.<sup>254</sup> The President subsequently terminated the sanctions in 1994 when the democratically-elected government returned to Haiti, but it took OFAC over two months to announce the retroactive lifting of its controls,<sup>255</sup> and a further seven months before the HTR and its associated blacklist were removed from the regulations.<sup>256</sup> As with the Panamanian and Kuwaiti programs, the Haitian blacklist was also omitted from the “comprehensive” List of Blocked Persons and Specially Designated Nationals published in the interim.<sup>257</sup>

In the case of the former Yugoslavia, the sanctions on the FRY (S & M) and Bosnia were suspended as a result of the Dayton Peace Accords in 1996, although assets which were blocked at that time remain so pending the resolution of outstanding claims.<sup>258</sup> The President reimposed economic sanctions on the Federal Republic in June of 1998 as a result of the Serbian actions in Kosovo,<sup>259</sup> but it took OFAC four months to reestablish the controls with new regulations.<sup>260</sup>

Unlike the Panamanian, Kuwaiti, and Haitian programs, the blacklists associated with the Yugoslav sanctions were initially contained in a “General Notice” and not as part of the regulations themselves.<sup>261</sup> Later, the blacklisted Yugoslav parties were included in the “comprehensive” blacklist OFAC published in the Federal

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254. Forty-one individuals were again blacklisted almost immediately. *See* 58 Fed. Reg. 58,480 (1993). A further 564 names, mostly from the Haitian armed forces, were subsequently added. *See* 59 Fed. Reg. 16,548 (1994).

255. *See* 59 Fed. Reg. 66,476 (1994).

256. *See* 31 C.F.R. §580, app. B (1995). The 1995 Federal Register notice which finally removed the Panamanian, Kuwaiti, and Haitian regulations from the CFR similarly removed a number of other outdated controls at the same time. These included the Nicaraguan Trade Control Regulations which were terminated in 1990, the South African Transaction Regulations which were terminated in 1991, the related ban on the importation of gold coins embodied in the Soviet Gold Coin Regulations which were terminated in 1992, and the residual World War II era asset blocking measures of the Foreign Funds Control Regulations which effectively expired with the independence of the Baltic States in 1992. *See* 60 Fed. Reg. 33,725 (1995).

257. *See* 59 Fed. Reg. 59,460 (1994).

258. *See* 61 Fed. Reg. 1,282, 1,283 (1996). The suspension of sanctions on the FRY (Serbia & Montenegro) occurred within a month of the Presidential Determination that the controls should be suspended. *See* Presidential Determination No. 96-7, 61 Fed. Reg. 2,887 (1996). With regard to Bosnia, however, OFAC did not suspend the controls until three months after the determination was made that they had met the requirements of the Dayton Accords. *See* 61 Fed. Reg. 24, 696 (1996).

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

260. *See* 63 Fed. Reg. 54,575 (1998).

261. The Yugoslav blacklist was first published in the Federal Register in 1992 as “General Notice No.1.” *See* 57 Fed. Reg. 32,051 (1992).



Register in 1994.<sup>262</sup> The blacklisting of Bosnian Serbs was introduced with another "Notice" in 1995,<sup>263</sup> but was also not included in the regulations themselves. Accordingly, when the Yugoslav sanctions were suspended in 1996, there was no need to modify or remove a Yugoslav blacklist from the regulations. However, when OFAC created the new consolidated master blacklist in a series of appendices in the regulations in June, 1996, it nevertheless chose to include the names of the parties blacklisted under the Yugoslav program despite the suspension of the sanctions at that time.<sup>264</sup> The fact that this same Yugoslav blacklist is employed with the sanctions imposed in 1998 as a result of the Serbian actions in Kosovo<sup>265</sup> makes the four-month delay in re-establishing the sanctions on those particular parties under the KSR all the more striking.<sup>266</sup>

(c) Problems Managing the Blacklists

Entirely apart from the problems associated with delays in issuing or removing detailed controls and their associated blacklists, the manner of their distribution also raises issues. OFAC historically placed great reliance upon unpublished notices and general licenses in administering its sanctions programs.<sup>267</sup> Since OFAC is primarily focused on controlling assets and financial dealings, for many years its practice was to emphasize communications with the Federal Reserve and major commercial banks regarding changes in its controls,<sup>268</sup> and otherwise simply respond to inquiries from those who might have a compliance concern. For example, in establishing the Iraqi and Kuwaiti sanctions programs following the invasion of Kuwait, the Director of OFAC is reported to have first "alerted the Federal Reserve Bank in New York, which conducts international governmental transactions, and as many of the major banks as possible about the prospect of freezing Kuwaiti and Iraqi assets. *Then* he summoned his staff to draw up the technical executive orders

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262. See 59 Fed. Reg. 59,460 (1994).

263. See 60 Fed. Reg. 19,448 (1995).

264. See 61 Fed. Reg. 32,936, 32,936-937 (1996). The blacklisted Yugoslav parties were kept in a separate section of the list, noting that the Yugoslav sanctions were then suspended.

265. See 31 C.F.R. §§ 586.201; 586.306; 586.307 (1999).

266. See *supra* note 221 and accompanying text.

267. See *supra* notes 217-228, 259-260 and accompanying text.

268. Other banking channels OFAC uses to communicate with the financial community include the Office of the U.S. Comptroller of the Currency, the U.S. Council on International Banking (now known as the International Financial Services Association), the International Banking Operations Association, and the New York Clearing House Association. See NEWCOMB, *supra* note 200, at 299-300. See also *infra* notes 319-330 and accompanying text.

President Bush had to sign to launch the sanctions.<sup>269</sup> While the President's Executive Orders were issued the next day, it was another four months before the Kuwaiti regulations were actually issued in the Federal Register<sup>270</sup> and nearly another month more before the Iraqi regulations followed.<sup>271</sup> As Professor Michael Malloy has noted, the difficulties created by this approach to administering a sanctions program are not trivial.

The situation was fraught with risk for those potentially subject to the prohibitions and who critically needed guidance to ensure good-faith compliance with the more generally worded prohibitions found in the executive orders themselves. It approaches the dimensions of a minor scandal that Treasury's Office of Foreign Assets Controls (OFAC) had, throughout the crucial months when sanctions were first put into place, not formally promulgated any regulations. For that entire period, the U.S. sanctions continued to be administered on the basis of informally issued ad hoc regulations. . . . [T]his situation placed an unfair burden on U.S. nationals affected by the embargo, and it put counsel in an almost untenable position as they struggled in good faith to comply with the sanctions.<sup>272</sup>

The "informally issued ad hoc regulations" to which Professor Malloy refers, were the thirteen general licenses which remained unpublished until they appeared incorporated into the announcement of the Iraqi Sanctions Regulations in the Federal Register.<sup>273</sup>

Until the early 1990s, OFAC literally distributed these unpublished general licenses and notices by placing them on the radiator in the vestibule to the Treasury Department Annex Building in Washington D.C. It was incumbent upon those who wished to comply with the sanctions to contact OFAC to learn if new rules or announcements were available.<sup>274</sup> This "radiator distribution system," combined with OFAC's inconsistent approach toward publishing blacklists in the regulations, greatly complicated the task

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269. Kendrick, *supra* note 60, at H-1 (emphasis added).

270. See 55 Fed. Reg. 49,856 (1990).

271. See 56 Fed. Reg. 2,112 (1991).

272. MICHAEL P. MALLOY, *supra* note 40, at 247-248 (Supp. 1996).

273. *Id.* at 234-236.

274. See *Guidelines for Complying with Restrictions on Specially Designated Nationals*, EXPORT CONTROL NEWS, July 30, 1993, available in 1993 WL 2519249, which states:

U.S. Exporters may procure the SDN lists by contacting OFAC. . . . However the SDN lists are by no means static; OFAC periodically updates them by adding and subtracting names and companies. Unfortunately, OFAC has been inconsistent in placing the SDN lists and the periodical updates in the Federal Register as official rules. As a result, U.S. companies must monitor closely OFAC's activities to ensure that their SDN screening lists are current.

of complying with the various sanctions programs' blacklisting requirements.

Prior to the creation of the consolidated master blacklist in the Appendices to 31 C.F.R., Chapter V, in 1996, the only blacklists actually published in the regulations were those associated with the Libyan,<sup>275</sup> Panamanian,<sup>276</sup> Iraqi,<sup>277</sup> Kuwaiti,<sup>278</sup> or Haitian<sup>279</sup> sanctions.<sup>280</sup> None of the blacklists associated with the older sanctions ever appeared in their respective programs' regulations, nor do the blacklists for all the newer programs consistently appear in the regulations either. For example, neither the Narcotics Trafficking<sup>281</sup> nor the Middle East Terrorist<sup>282</sup> sanctions programs' blacklists appear, and the extensive blacklists created for the Yugoslav embargo programs were also absent from the regulations.<sup>283</sup>

The blacklists for these other programs either appeared in the Federal Register at irregular intervals, or remained unpublished. For example, although the Cuban embargo was instituted in 1963, the first publication of the Cuban SDN list in the Federal Register did not occur until 1986,<sup>284</sup> and fifteen changes to entries in that blacklist occurred prior to the incorporation of the consolidated master blacklist into the regulations in 1996.<sup>285</sup> Additionally, there were two Federal Register notices concerning Blocked Yugoslav entities,<sup>286</sup> two concerning North Korean SDNs,<sup>287</sup> two concerning Vietnamese SDNs,<sup>288</sup> and one concerning Cambodian SDNs,<sup>289</sup> prior to the creation of the consolidated list. Since publication of the consolidated blacklist as Appendices to the C.F.R. began in 1996, there have been fifteen interim changes issued.<sup>290</sup>

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275. See 31 C.F.R. § 550 apps. A, B (1995).

276. See 31 C.F.R. § 565 apps. A, B (1990).

277. See 31 C.F.R. § 575 apps. A, B (1995).

278. See 31 C.F.R. § 570 app. A (1991).

279. See 31 C.F.R. § 580 app. A (1994).

280. The South African sanctions included a cross reference to the list of "South African Parastatal Organizations" which was published by the State Department, but did not include this "blacklist" in the regulations themselves. See 31 C.F.R. § 545.315 (1987).

281. See *supra* notes 177-180 and accompanying text.

282. See *supra* notes 174, 190 and accompanying text.

283. See *supra* notes 258-266 and accompanying text.

284. See 51 Fed. Reg. 44,459 (1986).

285. See 53 Fed. Reg. 44,398 (1988); 54 Fed. Reg. 3,446, 9,431, 14,215, 38,810, 45,750, 49,258 (1989); 55 Fed. Reg. 2,644, 12,172, 24,556, 31,179, 38,326 (1990); 59 Fed. Reg. 59,460 (1994); 60 Fed. Reg. 19,447, 33,029 (1995).

286. See 57 Fed. Reg. 32,051 (1992); 59 Fed. Reg. 59,460 (1994).

287. See 54 Fed. Reg. 32,064 (1989); 59 Fed. Reg. 59,460 (1994).

288. See 53 Fed. Reg. 44,397 (1988); 54 Fed. Reg. 32,064 (1989).

289. See 51 Fed. Reg. 44,459, 44,462 (1986).

290. Since the onetime publication of the "comprehensive" blacklist in the Federal Register in 1994, the entire "consolidated" master blacklist has been published in the

The Yugoslav program also illustrates how OFAC sometimes “mixes and matches” distribution mechanisms, variously employing unpublished notices, press releases, or the Federal Register, at different times even within the same sanctions program, and with varying levels of detail. Moreover, it also highlights the interrelationship between these “blacklist management” issues and the “regulatory management” problems related to publishing the detailed implementing provisions for the different sanctions programs.

The blacklist of Controlled or Blocked Yugoslav Entities, General Notice No. 1, was published in the Federal Register in July of 1992.<sup>291</sup> It listed several hundred entities by name, but without addresses or any other identifying information. The names provided ranged from the easily recognized, such as “Yugotours,” to the all encompassing “Yugoslav National Army,” and the common but indefinite name “Global.”<sup>292</sup> Eleven of the blacklisted parties, however, were identified as being located in the U.S.<sup>293</sup> All of these were deemed to be owned or controlled by the Government of the Federal Republic of Yugoslavia, and therefore subject to the sanctions imposed by the President’s Executive Orders<sup>294</sup>—even though OFAC would not issue detailed regulations elaborating upon the precise scope of the sanctions for another eight months.<sup>295</sup> The release of this initial Yugoslav blacklist was followed by a series of Treasury Department press releases, naming several hundred additional individuals, front companies, shipping firms, and even vessels, deemed to be within the scope of the Yugoslav sanctions.<sup>296</sup>

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Federal Register on two occasions, timed so as to be included as the Appendices to Chapter V in the annual revision of the volume containing 31 C.F.R. This occurred in June of 1996 and again in June of 1997. See 61 Fed. Reg. 32,936, 32,939-33,027 (1996); 62 Fed. Reg. 34,934, 34,935-35,035 (1997). Apart from those two occasions, thirteen separate notices have appeared in the Federal Register adding or subtracting individual names from the master list in the Appendices to 31 C.F.R. Chapter V. See 61 Fed. Reg. 43,459; 54,334; 64,289 (1996); 62 Fed. Reg. 2,903; 19,499; 19,500; 19,672; 41,850; 48,177; 67,729 (1997); 63 Fed. Reg. 28,896; 29,608 (1998); 64 Fed. Reg. 34,984; 34,992; 35,575; 60,660 (1999).

291. See 57 Fed. Reg. 32,051 (1992).

292. See *id.* at 32,053-054.

293. This list also included I.P.T. Company Inc., and identified it being located in the U.S., but as with all the entries no other address information was provided. See *id.* at 32,052-053.

294. See *id.* at 32,052.

295. See 58 Fed. Reg. 13,199 (1993).

296. See *Treasury Exposes Yugoslav Shipping Fronts*, U.S. Department of the Treasury, News Release, March 11, 1993, available in 1993 WL 71078; *Treasury Unmasks Yugoslav Network*, U.S. Department of the Treasury, News Release, May 20, 1993, available in 1993 WL 170565; *Treasury Names Yugoslav Financial Fronts in Cyprus*, U.S. Department of the Treasury, News Release, May 10, 1994, available in 1993 WL 183007.

Despite the belated publication of the regulations in March, 1993, OFAC did not republish the expanded Yugoslav blacklist in the Federal Register until November of 1994.<sup>297</sup> This convoluted process was the subject of much criticism and concern from those who were trying to comply with the terms of the sanctions and needed to establish internal business compliance procedures to prevent transactions with the listed entities. It prompted at least one compliance administrator to declare that, “[p]ress releases have no legal authority.”<sup>298</sup>

OFAC appeared implicitly to recognize that some of its blacklisting and blocking actions during this period may have been overly aggressive. When new regulations were issued to reflect the tightening of the initial sanctions on Yugoslavia in April of 1993 pursuant to U.N. Security Council Resolution No. 820<sup>299</sup> and Executive Order No. 12,846,<sup>300</sup> OFAC stated that:

Section 1(a) of Executive Order 12846 expressly blocks property subject to U.S. jurisdiction of many entities, both U.S. and foreign, heretofore *blocked pursuant to the working presumption* of the Office of Foreign Assets Controls (“FAC”) that all entities organized or located in the FRY (S&M), as well as entities owned or controlled by them, are controlled directly or indirectly by the Government of the FRY (S&M). Regulations, [31 C.F.R.] § 585.311. See also, General Notice No. 1 of July 6, 1992, 57 FR 32051 (July 20, 1992).<sup>301</sup>

This revision to the Yugoslav regulations occurred in July, two months after the tightening in the controls announced by the President’s Executive Order, and *retroactively* expanded the blocking

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297. See 59 Fed. Reg. 59,460 (1994). This was also the first time addresses for the blocked or controlled entities appeared in the Federal Register, and also the first time the list of sanctioned vessels was published. This list also represents OFAC’s first attempt at responding to criticism regarding the multiplicity of blacklists which were developing, by publishing a “comprehensive” blacklist covering all of the blacklists associated with the then currently effective programs in one document. This was the only such attempt at publishing a comprehensive blacklist outside of the regulations themselves. In 1996, OFAC began publishing an annual consolidated master blacklist in the appendices to 31 C.F.R., Chapter V. See *supra* notes 193, 261-66 and accompanying text.

298. *OFAC Augments List of Blocked Yugoslav Entities*, EXPORT CONTROL NEWS, May 28, 1993, available in 1993 WL 2519304. The same compliance administrator is reported as continuing to state, “you’d think that if OFAC was serious about getting U.S. companies to comply, it would have rushed the list to the Federal register.” *Id.*

*But see* *United States v. Arch Trading Co.*, 987 F.2d 1087 (4th Cir. 1993) which upheld a conviction based, in part, on enforcement of regulations issued after acts occurred which violated Executive Orders imposing sanctions on Iraq and Kuwait.

299. S.C. Res. 820, U.N. SCOR, 48th Sess., 3200th mtg. at 3, U.N. Doc. S/RES/820 (1993).

300. 58 Fed. Reg. 25,771 (1993).

301. 58 Fed. Reg. 35,828 (1993) (emphasis added).

of the assets of blacklisted parties.<sup>302</sup>

Similar problems occurred as the sanctions expanded beyond Serbia and Montenegro to include Bosnia. Pursuant to Executive Order No. 12,934,<sup>303</sup> sanctions were imposed in October 1994 on the Serbian controlled portion of Bosnia-Herzegovina as the situation in the former Yugoslavia deteriorated. A blacklist of blocked "Bosnian Serb Civilian and Military Authorities" was then released in April, 1995, along with an update to the main Yugoslav blacklist.<sup>304</sup> However, once again, regulations detailing the expanded sanctions

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302. *See id.* As initially promulgated in March 1993, 31 C.F.R. § 585.201 read:

*Prohibited transactions involving blocked property; transactions with respect to securities.*

(a) Except as authorized by regulations, orders, directives, rulings, instructions, licenses, or otherwise, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before 11:59 p.m. Eastern Daylight Time ("EDT"), May 30, 1992, no property or interest in property of the Government of the FRY (S&M), or that are held in the name of the Federal Republic of Yugoslavia or the former Government of the Socialist Federal Republic of Yugoslavia, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of U.S. persons, including their overseas branches, may be transferred, paid, exported, withdrawn or otherwise dealt in.

(b) Unless otherwise authorized by this part or by a specific license expressly referring to this section, the transfer (including the transfer on the books of any issuer or agent thereof), the endorsement or guaranty of signatures on, or any other dealing in any security (or evidence thereof) registered or inscribed in the name of the Government of the Federal Republic of Yugoslavia or the former Government of the Socialist Federal Republic of Yugoslavia and held within the possession or control of a U.S. person is prohibited, irrespective of the fact that at any time either at or subsequent to the effective date the registered or inscribed owner thereof may have, or appears to have, assigned, transferred, or otherwise disposed of any such security.

58 Fed. Reg. 13,199, 13,202 (1993).

Subparagraph (b) was then modified in July, 1993, to read:

(b) Except as otherwise authorized, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before 12:01 a.m. EDT, April 26, 1993, no property or interest in property of any commercial, industrial, or public utility undertakings or entities organized or located in the Federal Republic of Yugoslavia (Serbia and Montenegro), including, without limitation, the property and all interests in property of entities (wherever organized or located) owned or controlled by such undertakings or entities, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, may be transferred, paid, exported, withdrawn or otherwise dealt in.

58 Fed. Reg. 35,828, 35,828-829 (1993).

303. 59 Fed. Reg. 54,117 (1994).

304. *See* 60 Fed. Reg. 19,448, 19,450 (1995).

were not issued until two months later, and were made retroactive to the date of the Executive Order issued some eight months earlier.<sup>305</sup>

Moreover, the Yugoslavian sanctions program was not the only one in which the associated blacklists were released before the controls themselves were detailed in the regulations. OFAC initially released its blacklist of "Banks Controlled by the Government of Iran" as an Annex to a General License issued in 1995,<sup>306</sup> and the Specially Designated Terrorist List (SDT) was created and updated twice<sup>307</sup> prior to the creation of the Terrorist Sanctions Regulations in February, 1996.<sup>308</sup> More recently, the blacklisting of the Sudanese SDNs<sup>309</sup> also predated the issuance of the Sudanese Sanctions Regulations in 1998.<sup>310</sup>

Additionally, OFAC is sometimes not entirely clear on precisely who is, in fact, blacklisted.<sup>311</sup> As noted previously, the list of "Banks Controlled by the Government of Iran" was initially appended to an unpublished General License which restricted the ability of U.S. financial institutions to service or maintain Iranian accounts, or to follow directions pertaining to those accounts given by the "Government of Iran, entities owned or controlled by the Government of Iran, and persons located in Iran."<sup>312</sup> The restrictions are equally applicable to branches or affiliates of the named institutions located both inside or outside of Iran. While it was not expressly stated as such at the time,<sup>313</sup> presumably those subject to the regulations were to disregard instructions provided by any of the named institutions, as that would come within the scope of being an "export of banking services" by those subject to the U.S. regulations, in OFAC's view.<sup>314</sup> Nor could parties obliged to follow the U.S.

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305. See 60 Fed. Reg. 34,144 (1995).

306. See 60 Fed. Reg. 40,881, 40,883 (1995).

307. See 60 Fed. Reg. 5,084; 41,152; 58,435 (1995) which followed the imposition of sanctions upon terrorists and terrorist organizations which threaten the Middle East peace process under Exec. Order 12,947, 60 Fed. Reg. 5,079 (1995).

308. See 61 Fed. Reg. 3,805 (1996).

309. See 63 Fed. Reg. 29,608 (1998). This blacklist was issued on June 1, 1998 pursuant to Executive Order Number 13,067 of November 3, 1997, 62 Fed. Reg. 59,989 (1997).

310. The regulations followed the creation of the Sudanese SDN list by a month. See 63 Fed. Reg. 35,809 (1998).

311. See *supra* notes 130-137 and accompanying text.

312. This General License was issued on May 9, 1995, but did not appear in the Federal register until August 10, 1995. See General License No. 3, 60 Fed. Reg. 40,881, 40,883 (1995).

313. See *id.* Additional guidance has since been issued in amendments to the ITR. See 31 C.F.R. § 560.204-560.208 (1999).

314. See the entries for "Financial Dealings with Iran" and "Other Banking Services" in United States Department of the Treasury, OFAC, *Iran: What You Need to Know About U.S. Economic Sanctions*, <http://www.ustres.gov/ofac/t11iran.pdf> (visited May 11, 1998) (copy on file with *Hastings Law Journal*); 31 C.F.R. § 560.517 (1998).

controls engage in any “new investments” in the named entities.<sup>315</sup> The amended regulations issued four months after the creation of this blacklist did not clarify the nature of the controls any further.<sup>316</sup> Despite the fact that compliance with these requirements necessitates the same sort of screening applicable to any other blacklist, this list of Iranian Controlled Financial Institutions was not incorporated into the Appendices to 31 C.F.R., Chapter V. However, this list of Iranian controlled banks did appear appended to the version of the consolidated master blacklist which appears on OFAC’s website, prior to being incorporated into a special Appendix to the ITR in 1999, just over four years after it was initially issued.<sup>317</sup> This again raises the question of the legal efficacy of material which is being distributed via “unofficial” means, in this case electronically rather than via a press release.

Another group which does not appear in the consolidated master blacklist in the Appendices to Chapter V of 31 C.F.R. is the list of “Designated Foreign Parties” who are subject to the recently imposed sanctions for weapons proliferation activities. These “DFPs” do, however, appear in a special Appendix to their own control regulations in an apparent return to pre-1996 practices.<sup>318</sup>

The proliferation of OFAC sanctions programs during the late 1980s and early 1990s, and the accompanying concern over the legal effectiveness of these unpublished actions, prompted increased use of the Federal Register and other means of distribution for OFAC’s blacklists and other materials. While OFAC published its

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315. See *supra* note 314. There was an attempt to clarify the confusion over the precise controls to be applied with Exec. Order No. 13,059 issued in August of 1997. See 62 Fed. Reg. 44,531 (1997). However, no regulatory changes were made in the basic prohibitions of the ITR as a result of this Order until April of 1999. See 64 Fed. Reg. 20,168, 20,170-171 (1999) and 31 C.F.R. §§ 560.204; 560.206-560.208 (1999).

316. The ITR were amended to reflect the new controls on September 11, 1995, codifying the twelve general licenses which had been issued in the interim. See 60 Fed. Reg. 47,061, 47,062 (1995). Further “clarifying” amendments to the regulations would not be forthcoming until four years later. See *supra* note 315.

317. See 31 C.F.R. § 560 app. (1999); Office of Foreign Assets Control, *SDN List: Alphabetical Master List of Specially Designated Nationals and Blocked Persons* (visited Oct. 22, 1999) <<http://www.ustreas.gov/ofac/t11sdn.pdf>> [hereinafter *Web-based SDN List*] (copy on file with *Hastings Law Journal*). The list of Iranian banks appears at the end of this list on OFAC’s web-page which otherwise is aligned with 31 C.F.R. Chapter V, Appendix A (1999), with the notation that:

The following banks are owned or controlled by the Government of Iran. Transactions with them are severely restricted. For a summary of prohibitions, please see OFAC’s brochure entitled *Iran: What You Need to Know About U.S. Economic Sanctions*. For details please see the Iranian Transactions Regulations at 31 C.F.R. Part 560.

Web-based *SDN List*, *supra* at 64.

318. See 31 C.F.R. § 539 app. I (1999).



comprehensive blacklist in the Federal Register in 1994, and the newer consolidated master blacklist appeared in the Federal Register on two occasions in addition to appearing in the appendices to the regulations, OFAC continues to rely largely on other distribution means for much of its information.<sup>319</sup> In particular, OFAC now places great emphasis on electronic distribution of its material<sup>320</sup> on its own website<sup>321</sup> and its fax-on-demand service;<sup>322</sup> the Treasury Department's Electronic Library;<sup>323</sup> the Commerce Department's Economic Bulletin Board,<sup>324</sup> National Trade Data Bank,<sup>325</sup> and fax-on-demand service;<sup>326</sup> the Custom's Service's Electronic Bulletin Board;<sup>327</sup> the Government Printing Office's Federal Bulletin Board and GPO Access website,<sup>328</sup> and a variety of other electronic

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319. See *supra* notes 193, 267-283 and accompanying text.

320. This is an outgrowth of an effort begun in 1995, when OFAC issued its notice concerning "Electronically-Available Information Sources on Economic Sanctions Programs." See 60 Fed. Reg. 41,909 (1995). See also NEWCOMB, *supra* note 200, at 294-300.

321. OFAC Home Page, (visited Oct. 22, 1999) <http://www.ustreas.gov/ofac/>. OFAC uses its website to distribute copies of brochures providing guidance on compliance obligations, summarizing its various sanctions programs, the master (SDN) blacklist, and links to related material such as licensing guidelines and Federal Register notices. See also NEWCOMB, *supra* note 200, at 295.

322. The fax-on-demand service provides access to both OFAC's general and program specific brochures, the master (SDN) blacklist, licensing guidelines, and Federal register notices. See NEWCOMB, *supra* note 200, at 295.

323. The Treasury Department Electronic Library (TEL) is one of several electronic bulletin boards maintained on the Fedworld bulletin board network provided by the National Technical Information Service (NTIS). Like the website and fax-on-demand service, TEL also included the OFAC brochures and master (SDN) blacklist along with some related information. See *id.* at 296.

324. The Economic Bulletin Board (EEB) is maintained by the Commerce Department as a subscription service, used primarily by exporters. OFAC publications are found within the Global Business Opportunities (GLOBUS) area of the EEB. See *id.* at 296-297.

325. The National Trade Data Bank is another subscription service available from the Commerce Department which distributes a variety of trade related information, including that provided by OFAC, monthly via a CD-ROM format. See *id.* at 297.

326. The Commerce Department fax-on-demand service, STAT-USA/FAX, also includes the various OFAC brochures and master (SDN) blacklist. See *id.*

327. The Customs Service's bulletin board is intended primarily for use by customs brokers, and also includes the various OFAC brochures and master (SDN) blacklist. See *id.* at 298.

328. GPO's Federal Bulletin Board (FBB) is available both as a traditional dial-up electronic bulletin board service, and via its own website, <<http://fedbbs.access.gpo.gov/>> (visited Oct. 24, 1999). The OFAC brochures, master (SDN) blacklist, Federal Register notices, CFR sections and press releases are all available within their own section of the FBB. OFAC also posts press releases and other materials to the FBB which are not available on any of the other electronic sites, including its own website. See also NEWCOMB, *supra* note 200, at 298.

distribution systems geared to the financial community,<sup>329</sup> including the Federal Reserve Bank's Fedwire system.<sup>330</sup>

However, OFAC's reliance on electronic means of distribution can also cause confusion when the same information does not promptly appear in the Federal Register. For example, postings on OFAC's website noted changes being made to the consolidated master blacklist on nine different occasions in 1999, prior to the annual update to its consolidated blacklist in the Appendices to 31 C.F.R., Chapter V,<sup>331</sup> which affected 457 individual entries.<sup>332</sup> During the same time period only four notices appeared in the Federal Register concerning these changes, which failed to address 112 of these entries altogether.<sup>333</sup> OFAC nevertheless asserts that this

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329. These include the electronic bulletin boards maintained by the International Financial Services Association (formerly known as the U.S. Council on International Banking), the International Banking Operations Association, and the New York Clearing House Association. See also *supra* note 265; NEWCOMB, *supra* note 200, at 299-300.

330. The Fedwire system sends messages to 5,000 online depository institutions around the country, but the messages are of limited length. Accordingly, OFAC tends to use this service for major announcements. See NEWCOMB, *supra* note 200, at 300.

331. Although the annual volume of the C.F.R. which contains the OFAC regulations is nominally dated July 1, it often ships much later. For example, the 1999 volume was actually shipped on November 5, 1999. (Time stamped copy on file with *Hastings Law Journal*).

332. Ninety-seven entries were changed on May 26, 1999, affecting the Angolan, Cuban, Iranian, Iraqi, Sudanese and Narco-Trafficking program's blacklists; on May 28, 1999, five entries were added to the Yugoslav (Kosovo) blacklist; 135 changes were made to the Narco-Trafficking blacklist on June 8, 1999; forty-two changes were made to the Yugoslav (Kosovo) blacklist on June 17, 1999; forty-five changes were made to the Libyan, Terrorist, and Yugoslav (Kosovo) blacklists on June 25, 1999; on July 6, 1999, seven entries for the newly sanctioned Taliban were added; on August 18, 1999, fourteen entries were added to the Taliban and Yugoslav (Kosovo) program blacklists; 101 changes were made to the Narco-Trafficking, Terrorist, and Foreign Terrorist Organization blacklists on October 12, 1999; and eleven changes were made to the Taliban and Kosovo blacklists on October 22, 1999. See Office of Foreign Assets Control, *Changes to List of Specially Designated Nationals and Blocked Persons Since January 1, 1999* (visited December 22, 1999) <http://www.ustreas.gov/ofac/t11sdnew.pdf> [hereinafter OFAC, *Changes 1999*] (reflecting changes through October 22, 1999) (copy on file with *Hastings Law Journal*).

Interestingly, it actually took over a week for the last two Taliban entries to appear in the *Changes . . . Since January 1, 1999* document. The blacklisting of these Afghani airlines was actually announced on another part of the OFAC web site, the *What's New* webpage on August 10, 1999, with the notation that OFAC would "update the TXT and PDF versions of the SDN list, the PDF version of the SDN Changes List, and the delimited and fixed field [computer] files as soon as feasible." See Office of Foreign Assets Control, *What's New*, August 10, 1999 (visited August 11, 1999) <http://www.ustreas.gov/ofac/t11edit.txt> (copy on file with *Hastings Law Journal*).

333. See 64 Fed. Reg. 34,984; 34,991; 35,575; 60,660 (1999). When compared to the changes noted on OFAC's website, see *supra* note 332, these Federal Register notices fail to pick up the changes made on May 26, 1999 to the list of Iranian controlled banks; the changes to the Libyan blacklist made on June 25, 1999; or the July 6, 1999 addition of the Taliban to the blacklist and its modification on October 22, 1999.

electronic form of notification is fully effective, as it prefaced its website postings with the following statement:

The latest changes may appear here [on the website] prior to their publication in the Federal Register, and *it is intended that users rely on changes indicated in this document that post-date the most recent Federal Register publication* with respect to a particular sanctions program in the appendices to chapter V of Title 31, Code of Federal Regulations. Such changes reflect official actions of OFAC, and will be reflected as soon as practicable in the Federal Register. . . . *Users are advised to check the Federal Register and this electronic publication routinely for additional names or other changes to the listings.*<sup>334</sup>

OFAC continued in the same document to explain the relationship of its licensing actions to the blacklist in terms which, when combined with the previous text, almost sound as if it is establishing a "virtual radiator distribution system" on its website.<sup>335</sup>

Entities and individuals on the list are occasionally licensed by OFAC to transact business with U.S. persons in anticipation of removal from the list or because of foreign policy considerations in unique circumstances. Licensing in anticipation of official *Federal Register* publication of a notice of removal based on the unblocking of an entity's or individual's property is reflected in this [website] publication by removal from the list. . . .<sup>336</sup>

Thus, those who rely upon the official Federal Register to ensure that they are complying with the controls on dealings with the various blacklisted parties would be checking their transactions against a version of the blacklist which is both out of date and incomplete, according to OFAC. The implications of this approach are particularly striking when the omissions and delays reflected in recent Federal Register notices are examined. For example, the names of Slobodan Milosevic and the four other individuals indicted for war crimes by the United Nations International Criminal Tribunal for the Former Yugoslavia, all of whom were added to the Yugoslav blacklist on OFAC's website on May 28, 1999, did not appear in the Federal Register until November 8, 1999, and 110 entries in the web-based blacklist had yet to appear in either the federal Register or the Appendices to 31 C.F.R. Chapter V, by the end of 1999.<sup>337</sup> Similarly,

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334. See OFAC, *Changes 1999*, *supra* note 331 (*emphasis added*).

335. See *supra* note 274 and accompanying text (discussing OFAC's practice through the early 1990's of distributing many of its materials by placing them on the radiator in the entry vestibule of the Treasury Annex building).

336. See OFAC, *Changes 1999*, *supra* note 331.

337. Compare, OFAC, *Changes 1999*, *supra* note 331 with 64 Fed. Reg. 34,984, 34,991,

the interpretative guidance explaining that the city of Kabul falls within the sanctioned “territory of Afghanistan controlled by the Taliban” is found only on OFAC’s website, and not in any documents published in the Federal Register.<sup>338</sup>

Irrespective of how notice is provided of OFAC’s various actions, from time to time errors or mistakes will occur, particularly in managing the thousands of entries on the blacklists. For example, OFAC once apparently blacklisted the Spanish tobacco monopoly, Tabacalera, as a “specially designated national of Cuba” apparently not realizing it was actually an arm of the Spanish Government.<sup>339</sup> It was officially removed a little over a month later.<sup>340</sup> Historically, OFAC provided little guidance on how to remedy errors or otherwise challenge their decisions, and the limited procedural guidance which was available provided focused primarily on how to obtain a license for otherwise-proscribed dealings. Until the 1990s, there were no common procedures for the various sanctions programs at all. As each sanctions target was addressed with a stand-alone set of regulations, the administrative procedures for that particular program were published within each program’s own set of regulations. Over time, anomalies crept into the regulations and in 1993 OFAC simultaneously revised the separate regulations for the Asian, Cuban, Haitian, Iraqi, Libyan, and Yugoslav sanctions programs to harmonize the registration and reporting requirements for those holding “blocked” property.<sup>341</sup> However, it was another four years

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35,575, 60,660 (1999), and the Appendices to 31 C.F.R. Chapter V (1999).

338. A State Department determination was made, in consultation with the Treasury Department, to modify the description of the “territory of Afghanistan controlled by the Taliban” on July 22, 1999. A notice to this effect appears in Office of Foreign Assets Control, *An Overview of U.S. Sanctions Against the Taliban (in Afghanistan)*, September 1, 1999 (visited September, 2 1999) <http://www.ustreas.gov/ofac/t11tali.pdf> (copy on file with *Hastings Law Journal*). In the September 20, 1999, *What’s New* file on OFAC’s website an additional notice was published stating, “[w]e also wish to alert the public to the fact that the term “Territory of Afghanistan controlled by the Taliban” used in Section 4(d) of Executive Order 13129 signed by the President on July 4, 1999 . . . currently includes the city of Kabul, Afghanistan and that fact is reflected in OFAC’s literature.” Office of Foreign Assets Control, *What’s New*, September 20, 1999 (visited September 21, 1999) <http://www.ustreas.gov/ofac/t11edit.txt> (copy on file with *Hastings Law Journal*).

The September 20, 1999 *What’s New* file also illustrates a different, more helpful, use of the OFAC website by publishing the text of the White House Press Secretary’s “FACT SHEET: Easing of Sanctions Against North Korea,” thereby providing information regarding the yet to be implemented loosening of the sanctions which did not appear in the Federal Register. *See id.*

339. *See* 54 Fed. Reg. 49,258, 49,259 (1989).

340. *See* 55 Fed. Reg. 2,644, 2,645 (1990). Another firm, Reemstma, also affiliated with a NATO ally, West Germany, was similarly blacklisted and then removed at the same time. *See id.*; *see also supra* note 339.

341. *See* 58 Fed. Reg. 47,643 (1993).

before OFAC actually consolidated the various programs' information collection,<sup>342</sup> registration,<sup>343</sup> licensing,<sup>344</sup> and annual reporting requirements<sup>345</sup> into the Reporting and Procedures Regulations (RPR), and removed the duplicative provisions from the separate regulations maintained for each sanctions target.<sup>346</sup>

There is even less regulatory guidance regarding how to challenge OFAC's decision making process. The Asian and Cuban controls were modified in 1994 to permit the imposition of civil penalties if certain formal or informal administrative processes were followed,<sup>347</sup> but these processes were not fully detailed until 1998.<sup>348</sup> The revisions to these two regulatory programs were prompted by an amendment to the TWEA providing for civil penalties which was passed in 1992, six years prior to the issuance of the amendments to the FACR and CACR.<sup>349</sup> These procedures require the issuance of a pre-penalty notice before OFAC imposes a civil penalty or forfeiture,<sup>350</sup> and provide an opportunity to challenge their imposition in administrative hearings.<sup>351</sup> However, the Treasury Department has yet to appoint an Administrative Law Judge ("ALJ") to conduct any such hearings. While the absence of an ALJ does not deter OFAC from issuing pre-penalty notices, and from attempting to negotiate settlements with alleged violators, attempts to invoke the discovery and hearing rights provided in the regulations apparently results in a suspension of further proceedings until such time as an ALJ is appointed.<sup>352</sup>

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342. See 31 C.F.R. §§ 501.602; 501.603(b); 501.604(d); 501.605 (1999).

343. See *id.* §§ 501.603(a); 501.604(a); 501.605.

344. See *id.* § 501.801.

345. See *id.* § 501.603(b)(2).

346. See 62 Fed. Reg. 45,098 (1997). The RPR appear at 31 C.F.R. § 501 *et seq.* (1999). Interestingly, the provisions of the RPR are also applicable to those sanctions programs for which there may not be any separate regulations, which implicitly recognizes OFAC's difficulty in issuing detailed implementing regulations in a timely fashion. See *id.* § 501.808. See also *supra* notes 200-233 and accompanying text.

347. See 59 Fed. Reg. 16,775; 31,142 (1994).

348. See 63 Fed. Reg. 10,321 (1998). Many of these provisions were first suggested in a proposed rule which had been issued a year earlier, one of the few examples of OFAC not employing the "foreign affairs" exception to the usual notice and comment process for rulemaking. See 62 Fed. Reg. 6,896 (1997).

349. Prior to passage of the amendments contained in the Cuban Democracy Act, 22 U.S.C. 6000, section 16 of the TWEA only provided for criminal penalties in the event a violation occurred. See Cuban Democracy Act, Pub. L. No. 102-284, div. A, tit. XVII, §1710(c), 1992 U.S.C.C.A.N. (106 Stat. 2580) 1878 (codified at 22 U.S.C. § 6009).

350. See 31 C.F.R. §§ 500.702 (FACR), 515.702 (CACR) (1999).

351. See *id.* §§ 500.703 (FACR), 515.703 (CACR).

352. For example, the Center for Constitutional Rights (CCR) reports that they are representing a number of individuals who have received a "Requirement to Furnish Information" regarding possible violations of the CACR resulting from travel to Cuba.

No equivalents to these procedures have been established in the regulations for the IEEPA-based sanctions programs, despite the longstanding civil penalty authority granted by that statute.<sup>353</sup> Most of the IEEPA-based sanctions programs do require OFAC to issue a pre-penalty notice and to permit a written response, but none of them provide for an administrative hearing before an ALJ at which to challenge OFAC's intent to impose a penalty.<sup>354</sup>

There are, however, two new means of challenging particular OFAC decisions embodied in the consolidated procedures of the RPR. The RPR created a new, explicit procedure for "unblocking" funds or assets blocked due to mistaken identity,<sup>355</sup> and another procedure for seeking reconsideration of blacklisting.<sup>356</sup> In either case, the gist of the procedure is simply to write a letter to OFAC providing the details.<sup>357</sup>

As initially promulgated, the regulations permitted those who sought an administrative reconsideration of their blacklisting to review the factual basis and materials OFAC used for their

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Out of roughly 80 such cases in which the respondents declined to answer OFAC's information demands on First and Fifth Amendment grounds, 20 were followed by the issuance of Pre-Penalty Notices. In each case, CCR submitted discovery requests and demanded a hearing in accordance with 31 C.F.R. §515.703, which it followed with a motion to dismiss when OFAC failed to participate in discovery or set a hearing. OFAC wrote to CCR that the regulatory procedures and processes were "suspended" stating:

An administrative law judge has yet to be selected to preside over the civil penalty administrative hearing process, which was added to the regulations on March 3, 1998 (63 Fed. Reg. 10321). Thus, there is currently no arbiter to respond to [CCR's] or OFAC's discovery-related requests and motions. OFAC expects that an administrative law judge will be in place shortly. Until that time, OFAC has suspended all discovery deadlines that follow receipt of hearing and pre-hearing discovery requests, including the 20-day time limit from the filing of a written response for [CCR] to serve interrogatories. Additionally, the time limit for interrogatory responses are suspended, as well as all other discovery deadlines.

With this letter, OFAC does not admit, deny, or in any other way respond to the claims set forth in [CCR's letter], including [CCR's] due process claims. As requested, OFAC will forward a copy of [CCR's] Motion [to Dismiss] and Proposed Order to the appropriate administrative law judge as soon as s/he is in place.

Letter from William B. Hoffman, Chief Counsel, (Foreign Assets Control) U.S. Department of the Treasury, to Gabor Rona, Staff Attorney, Center for Constitutional Rights 1-2 (Dec. 31, 1998) (on file with *Hastings Law Journal*).

353. See 50 U.S.C. § 1705.

354. See 31 C.F.R. §§ 535.702-535.704 (IACR); 536.702-536.704 (NTSR); 537.702-537.704 (BSR); 538.702-538.704 (SSR); 539.702-539.704 (WMDTCR); 550.702-550.704 (LSR); 560.702-560.704 (ITR); 575.702-575.704 (ISR); 585.702-585.704 (FRYSR); 586.702-586.704 (KSR); 590.702-590.704 (USR); 597.702-597.704 (FTOSR) (1999).

355. See *id.* § 501.806.

356. See *id.* § 501.807.

357. See *id.* §§ 501.806(b)-(d); 501.807.

designation,<sup>358</sup> although those materials could be redacted or withheld if legitimately privileged.<sup>359</sup> However, less than a year later, in February 1999, OFAC withdrew the ability to obtain this material without explanation or fanfare.<sup>360</sup> Parties may still request that their blacklisting be administratively reconsidered, but they no longer have a regulatory right to review the factual basis for their initial designation.<sup>361</sup> They are left to argue that OFAC erroneously blacklisted them, without knowing the basis of the initial decision to do so.<sup>362</sup> In essence, this returns the blacklisted party to the *status quo ante*, prior to the adoption of the RPR, when an OFAC blacklisting meant lengthy private meetings with OFAC to try and reverse or mitigate the adverse effects of being caught up in one of its sanctions programs through negotiation.

The RPR are even less useful in those instances where OFAC seeks to employ its sanctions tools in advance of actually naming a particular party to any of its blacklists. This reportedly occurred with Salah Idris, the owner of the El Shifa manufacturing plant bombed in the strikes against Osama bin Laden's terrorist network as a reaction to the attacks on the U.S. Embassies in Kenya and Tanzania in August of 1998.<sup>363</sup> Four days after the missile strike on the El Shifa plant, the Treasury Department ordered the Bank of America to freeze \$24 million on deposit in Idris's accounts in the United Kingdom, "pending investigation" into whether he should be named as a Specially Designated Terrorist.<sup>364</sup> Those accounts remained frozen until early May, 1999, when they were unblocked in response to a suit challenging Treasury's actions in the absence of any blacklisting.<sup>365</sup> Technically, neither the procedures established in the

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358. See 31 C.F.R. § 501.807(a)-(b) (1998).

359. See *id.* § 501.807(c).

360. See 64 Fed. Reg. 5,614 (1999) (*revising* 31 C.F.R. § 501.807(a)-(b) (1998)). This revision also deleted a provision (31 C.F.R. § 501.807(g)(1998)) which specifically stated that the OFAC decisions on these reconsideration requests constituted "final agency action" for purposes of judicial review.

361. See *id.*

362. These regulatory changes also roughly coincided with the filing of a lawsuit challenging OFAC's grounds for issuing an asset blocking order without actually blacklisting the named party. See *infra* notes 363-368 and accompanying text.

363. Although the U.S. Government alleges that the El Shifa facility was producing precursors for chemical weapons, Idris asserts that it was merely a pharmaceutical plant. See Vernon Loeb, *A Dirty Business*, WASH. POST, July 25, 1999, at F1; Daniel Pearl, *After the Bombings*, WALL ST. J., October 28, 1998, at A1.

364. See Loeb, *supra* note 362. While Osama bin Laden is blacklisted as a Specially Designated Terrorist, neither Salah Idris nor the El Shifa manufacturing plant were named in the OFAC blacklists. See Exec. Order 13,099, 63 Fed. Reg. 45,167 (1998); 31 C.F.R. ch. V app. A (1999).

365. The U.S. Government asserts that the blocking action was dropped rather than risk disclosing the intelligence sources and methods upon which the action was predicated

RPR for obtaining relief due to mistaken identity nor for actual blacklisting are applicable to parties, such as Salah Idris, whose assets are specifically and intentionally frozen or blocked by OFAC pending a decision on whether or not they should be blacklisted.<sup>366</sup> However, neither do the Executive Orders imposing the terrorist program sanctions, nor the regulations themselves, clearly contemplate and empower OFAC to take such actions “pending” a blacklisting decision.<sup>367</sup> Rather, while presumably rare, this sort of *de facto* blacklisting appears to be wholly outside the regulatory scheme, and perhaps the ultimate example of the issues created by an agency arguably more focused on “making a statement” or “taking action” in support of various foreign policy objectives<sup>368</sup> than with the effective and practical implementation of its own programs.

## II. The Legal Morass

Blacklisted individuals or entities such as IPT face a daunting situation. Their property and accounts are often blocked where they stand, and dealings with U.S. parties, and frequently their overseas affiliates as well, are essentially cut off with little or no warning by virtue of decisions made by a relatively small and obscure office within the Treasury Department. As Melita Jaric discovered, U.S. businesses can be blacklisted, and these restrictions can even extend to a firm’s employees. The practical consequence of being touched by one of the OFAC economic sanctions programs may be the economic equivalent of capital punishment. By virtue of the restrictions, the blacklisted business may cease to exist as a viable entity.

Moreover, OFAC’s actions appear characterized by a lack of sensitivity or concern for the impact of its blacklisting decisions upon third parties who may be caught up in some larger program aimed at a particular foreign policy target or objective. Similarly, the interests of those who are endeavoring to comply in good faith with the complex requirements of the multitude of OFAC sanctions programs also become subordinated to the larger political objective.

While in all regulatory control schemes “the devil is in the detail,” OFAC often appears surprisingly uninterested in those details. It frequently evidences little interest in promptly defining the

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in litigation. See Loeb, *supra* note 363; Milt Bearden, *U.S. Should Admit Its Mistake in Sudan Bombing*, WALL ST. J., May 20, 1999, at A20; David S. Cloud, *U.S. Unfreezes Accounts in Suit on Sudan Bombing*, WALL ST. J., May 4, 1999, at A8.

366. See 31 C.F.R. § 501.806 (1999).

367. See Exec. Order 12,947, 60 Fed. Reg. 5,077, 5,079 at §1 (1995); Exec. Order 13,099, 63 Fed. Reg. 45,167 (1998); 31 C.F.R. §§ 595.201; 595.301; 595.311 (1999); *supra* notes 173-176, 181-187 and accompanying text.

368. See *supra* notes 65-72 and accompanying text.



precise scope of a given sanctions program, for lifting outdated controls, or even in providing proper notice of its actions. It also lacks detailed procedures for redressing mistakes or considering challenges to its actions, and has even avoided appointing an ALJ to comply with those procedures which Congress mandated it must establish.

The historical accident of the relative obscurity in which OFAC labored for so many years combines with the increased political utility of economic sanctions in the post Cold War era to create a trade control agency which exercises tremendous discretion with unprecedented freedom from judicial or congressional oversight. Indeed, the general approach utilized in administering its programs starts from the assumption that all business should stop until OFAC can be consulted and declares that it can proceed on a case by case basis, but this begs the question of just what business transactions are in fact affected and need to be stopped. This presents a variety of serious issues which are not easily resolved without taking a broad view of the problems.

#### **A. Obstacles to Individual Challenges to OFAC Controls**

##### *(1) Practical Obstacles to Individual Challenges*

Challenging OFAC's actions in any given case is difficult because of both practical and legal obstacles. On a practical level, OFAC's historically lackadaisical administrative practices,<sup>369</sup> combined with its broad authority under TWEA and IEEPA<sup>370</sup> and the deference courts show to foreign policy measures,<sup>371</sup> can intimidate those who are subject to OFAC's controls. In order to challenge a particular decision, the stakes would have to be sufficiently large to offset the fear of upsetting future dealings with an agency vested with a tremendous amount of authority and subject to relatively little oversight. Accordingly, it often takes something like being placed on the blacklist itself, which threatens the ongoing viability of a business, before a party is inclined to initiate action against OFAC. Those who are not themselves blacklisted but only subject to restrictions on their dealings with other blacklisted parties may be unwilling to institute a formal challenge to OFAC's authority or actions, even if the restrictions affect a major customer, as their other business dealings will likely continue. Moreover, most of the parties who do find themselves blacklisted will be foreign individuals and entities, and

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369. See *supra* notes 197-368 and accompanying text.

370. See *infra* notes 388-389 and accompanying text.

371. See *infra* notes 384-390 and accompanying text.

therefore arguably less inclined to bring a challenge in the U.S. even if they have the legal ability to do so.<sup>372</sup> Thus, it is primarily when U.S. parties, such as IPT, are blacklisted that the harm is serious enough that a challenge will be brought. This is most likely to occur when a new sanctions program is created, or an existing sanctions program is significantly expanded. There are admittedly, however, relatively few such cases when compared to the thousands of foreign individuals and entities who are themselves named in OFAC's blacklists.

Additionally, OFAC's penchant for using unpublished general licenses and notices to detail or amend its controls<sup>373</sup> contrary to the rulemaking requirements of the Administrative Procedure Act (APA),<sup>374</sup> and its reliance upon numerous informal means of distribution for making its materials available<sup>375</sup> in contravention of both the Federal Register Act<sup>376</sup> and the APA,<sup>377</sup> are the type of legal deficiencies which are easily remedied when challenged. While part of the legislative purpose behind passage of the APA<sup>378</sup> was to "avoid

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372. The foreign parties' ability to bring suit is arguably more likely to be adversely impacted by issues relating to standing, the "finality" of the agency's action, whether the agency has "primary jurisdiction," exhaustion, and ripeness, than is the case with a domestic party. See *infra* notes 427-431 and accompanying text.

Additionally, as stated in *People's Mojahedin Org. of Iran v. United States Dep't of State* (upholding the designation of various groups as "foreign terrorist organizations"), "[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." 182 F.3d 17, 22 (D.C. Cir. 1999). While carefully noting that the narrow facts of that case involved neither the seizure of assets within U.S. control nor the rights of U.S. parties who might wish to donate to the designated organizations, the court continued to observe, "[a]liens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country." *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)) (alteration in original).

373. See *supra* notes 217-228 and accompanying text.

374. See 5 U.S.C. § 553 (1994). However, as noted previously, the applicability of the advance notice and comment requirements may be arguable to the extent that OFAC may legitimately assert the "foreign affairs" exception to this portion of the APA. See *supra* note 228 and accompanying text. While this exception may remove agency rulemaking from the APA requirements in appropriate cases, see, e.g., *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1486 (D.C. Cir. 1994), it is not a talisman which exempts all agency rulemaking. See, e.g., *Zhang v. Slattery*, 55 F.3d 732, 746-47 (2d Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996).

375. See *supra* notes 267-298, 319-330 and accompanying text.

376. The Federal Register Act requires that documents having "general applicability and legal effect," including "every document or order which prescribes a penalty," are to be published in the Register. See 44 U.S.C. § 1505(a) (1994). This requirement may only be suspended in the event of an actual or threatened attack on the continental United States. See *id.* § 1505(c).

377. See 5 U.S.C. § 552(a)(1) (1994). This portion of the APA became the Freedom of Information Act. Compare S. REP. NO. 79-752, at 33 (1945) with 5 U.S.C. § 552.

378. 5 U.S.C. §§ 551-559, 701-706 (1994).

the inherently arbitrary nature of unpublished *ad hoc* determinations,<sup>379</sup> several cases brought before the courts have been rendered moot, at least in part, by proper publication of the appropriate provisions during the course of the litigation.<sup>380</sup> Moreover, OFAC's failure to properly publish its rules and blacklists would not provide a defense for a failure to comply by those who have actual notice of their contents.<sup>381</sup> This creates the anomalous situation where those who take steps to try and comply with OFAC's controls by striving to stay informed are placed at a disadvantage relative to those who remain ignorant, whether by choice or happenstance.<sup>382</sup> Lastly, those who are trying to comply in good faith with OFAC's requirements are also perhaps reluctant to complain too much about the formalities of the APA and the Federal Register Act, fearing that the result might be that the various "unofficial" means of distribution OFAC has employed for its materials in recent years will cease to be used, but without any compensating improvement in the use of the Federal Register.<sup>383</sup>

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379. *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). The creation of a "Federal Register," and the accompanying "publication" requirements, reflects a compromise between a desire to have the public know what the law requires and providing for the effective operation of the various government agencies. Accordingly, publication in the Register is actually used as a basis for asserting that the public has "constructive notice" of the law. See 5 U.S.C. § 552(a)(1).

380. See, for example, *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1440 (9th Cir. 1996), in which one of several grounds for rejecting a vagueness challenge to OFAC rules banning travel to Cuba were amendments to the regulations which were issued after the complaint arose. See also *Bergerco Canada v. OFAC*, 129 F.3d 189, 195 (D.C. Cir. 1997) (issuance of an (unpublished) General License and its subsequent incorporation into the ISR was sufficient to support denial of a pending license application); *Milena Ship Management Co. v. Newcomb*, 995 F.2d 620 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994), *infra* notes 423-426 and accompanying text. But see *Zittman v. McGrath*, 341 U.S. 446, 463-64 (1951), *infra* notes 405-407 and accompanying text (declining to annul valid state attachments on the basis of a "General Ruling" issued several months after the attachments, and an Order from the Alien Property Custodian issued more than four years after the levy of the attachments); *Saba v. U.S. Department of the Treasury*, C.A.No. 92-1812 (WBB), (D.D.C. November 18, 1994), *infra* notes 459-478 and accompanying text (holding that a subsequent change in policy could not retroactively be applied to a license application).

381. See 5 U.S.C. § 552(a)(1) which states: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." (*emphasis added*). See also *United States v. Aarons*, 310 F.2d 341, 348 (1962). The actual notice exception is, however, strictly construed. See *Appalachian Power Co. v. Train*, 566 F.2d 451, 456 (4th Cir. 1977).

382. Of course, "ignorance" is often unavailing as a defense, even when a specific intent is required for criminal liability, once the government decides that a prosecution is appropriate. See, e.g., *United States v. Tooker*, 957 F.2d 1209, 1214, 1218 (5th Cir. 1992).

383. No one who deals with OFAC would want to see a return to the days of the "radiator distribution system." See *supra* note 274 and accompanying text.

(2) *Legal Obstacles to Individual Challenges*

Broad legal challenges to the Executive branch's authority to impose or implement its economic sanctions programs typically fail for a variety of reasons. Sanctions necessarily involve the application of foreign policy and national security concerns intertwined with political issues. Accordingly, challenges to the political judgments underlying the various sanctions programs may well raise non-justiciable "political questions" which are entirely outside of the courts' competence,<sup>384</sup> such as those relating to the recognition accorded to foreign governments or state succession.<sup>385</sup> "The federal courts," it is said, "cannot decide cases on the basis of political theories that incorporate no statutory, constitutional or common-law basis."<sup>386</sup>

Challenges that do raise justiciable questions may similarly fail because of the great deference the courts afford to the Executive and Legislative branches in the conduct of foreign policy. "Matters relating to the conduct of foreign relations," the Supreme Court has stated, "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."<sup>387</sup> Moreover, given the very broad grants provided by Congress to the Executive branch in both TWEA<sup>388</sup> and IEEPA,<sup>389</sup>

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384. Although it has long antecedents, the modern formulation of the "political question doctrine" is found in *Baker v. Carr*, 369 U.S. 186 (1962), and rooted in the notion that political matters were entrusted to "coordinate branches of government" under separation of powers principles. *See id.* at 217. *See also* *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

385. *See*, for example, *To v. Bank of New York*, Nos. 95-7755, 95-7877, 95-7879, 1996 U.S. App. LEXIS 6198 (2d Cir. April 1, 1996); *To v. Rubin*, No. 95-6068, 1995 U.S. App. LEXIS 39826 (2d Cir. Dec. 6, 1995); *Can v. United States*, 14 F.3d 160, 164 (2d Cir. 1994) in which the court declined to rule on matters of state succession in a series of actions by parties claiming ownership of blocked Vietnamese assets. *See also* *United States v. Pink*, 315 U.S. 203, 229 (1942).

386. *Can*, 14 F.3d at 162.

387. *Regan v. Wald*, 468 U.S. 222, 242 (1984) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)).

388. The pertinent provision in TWEA reads:

(b)(1) During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, transactions involving, 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; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the 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. . . .

....

(4) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. . . .

50 U.S.C. app. § 5(b) (1994). TWEA was initially passed as a wartime measure, *see* Act of Oct. 6, 1917, ch. 106, 40 Stat. 411, 414 (1917), which was then expanded to also apply "during any other period of national emergency declared by the President. *See* Act of Mar. 9, 1933, ch. 1, tit. I, § 2, 48 Stat. 1 (1933). Responding to a number of "stale" declarations of emergencies, Congress (prospectively) limited TWEA to wartime use in 1977 with the passage of IEEPA, but "grandfathered" the then current sanctions programs issued under its authority. *See* 50 U.S.C. app. § 5 note (Extension and Termination of National Emergency Powers Under the Trading with the Enemy Act).

389. The pertinent provision in IEEPA reads:

(a)(1) At the times and to the extent specified in section 1701 of this title [Presidential declaration of national emergency], the President may, under such regulations as he may prescribe, by means of instructions, licenses or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, 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.

....

(b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—

(1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value;

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering. . . .

(3) the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but

the President's authority to impose and implement sanctions is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."<sup>390</sup> Virtually all of the cases directly challenging the President's authority to impose sanctions<sup>391</sup> or to blacklist various parties<sup>392</sup> have failed due to this combination of deference and the concomitant heavy "burden of persuasion."

A variety of related challenges to specific OFAC regulations or actions as being beyond the agency's statutory powers similarly failed. These include, for example, cases addressing import restrictions on publications and other materials from embargoed destinations as an infringement of First Amendment rights;<sup>393</sup> restrictions on charitable

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not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. . . .

(4) any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages.

50 U.S.C. § 1702 (1994). Thus, the grant of authority provided by IEEPA is substantially similar to that contained in TWEA, with the exception of TWEA's provisions for the "vesting" of property, and certain communications, or humanitarian donations. *See supra* note 388.

390. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952). In Justice Jackson's classic formulation of the bases for executive authority, presidential power is at its greatest when acting pursuant to an express or implied authorization from Congress because he is then relying upon both his own authority and that of the Congress. In areas of concurrent authority, but without actual congressional authorization, presidential power is in an uncertain "zone of twilight." Finally, presidential authority is at its weakest when the President acts in contravention of the "will" of Congress, and can only be sustained if the Congress is disabled from acting on the subject at issue. *See id.* at 637-638. The question of the President's "inherent" authority to impose sanctions under his foreign affairs powers, Justice Jackson's last category, is rarely raised because each of the various OFAC sanctions programs is also predicated on some legislative authorization such as TWEA or IEEPA. *See supra* notes 388-389; *see also Dames & Moore v. Regan*, 453 U.S. 654 (1981).

391. *See, e.g., Regan*, 468 U.S. 222 (upholding authority to restrict travel to Cuba under "grandfathering" provisions of TWEA); *Dames & Moore*, 453 U.S. 654 (upholding authority to suspend and settle international claims under both statutory grant and Congressional acquiescence); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (upholding "plenary and exclusive" power of the President).

392. *See, e.g., People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999) (upholding the designation of various groups as "foreign terrorist organizations"); *Paradissiotis v. Rubin*, 171 F.3d 983 (5th Cir. 1999) (upholding authority to define who is within the scope of sanctions); *Nielsen v. Secretary of the Treasury*, 424 F.2d 833 (D.C. Cir. 1970) (upholding blocking U.S. assets of Cuban corporation).

393. *See, e.g., Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007 (S.D.N.Y. 1990) (upholding regulatory licensing requirements on broadcasting sporting events from Cuba); *Veterans and Reservists for Peace in Vietnam v. Regional Comm'r of Customs*, 459 F.2d

contributions to sanctioned entities as implicating the free exercise of religion;<sup>394</sup> the impact of sanctions as affecting access to the courts<sup>395</sup> and the execution of judicial processes;<sup>396</sup> travel restrictions as infringements of both the First and Fifth amendment rights;<sup>397</sup> and the act of blocking or freezing assets as a compensable "takings" of property under the Fifth Amendment.<sup>398</sup>

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676 (3d Cir.), *cert. denied*, 409 U.S. 933 (1972) (upholding restrictions on import of Chinese informational materials from North Vietnam); *American Documentary Films, Inc. v. Secretary of the Treasury*, 344 F. Supp. 703 (S.D.N.Y. 1972) (upholding denial of import license for Cuban films following to refusal to answer questions regarding their origin and supply); *Teague v. Regional Comm'r of Customs*, 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977, *reh'g denied*, 395 U.S. 930 (1969) (upholding ban on importing informational materials from China, North Korea, & Vietnam). Each of these cases upheld the "incidental" First Amendment restrictions which resulted from the Executive's exercise of its foreign affairs powers. Much of the concern over possible limitations on the freedom of speech in the various sanctions programs was alleviated by the 1988 "Berman Amendments" which withdrew Presidential authority to regulate transfers of, *inter alia*, books, publications, films, posters, phonograph records, photographs, microfilm, microfiche, tapes and other informational materials from TWEA, *see* 50 U.S.C. app. § 5(b)(4), and from IEEPA, *see* 50 U.S.C. § 1702(b)(3).

394. *See, e.g., Welch v. Kennedy*, 319 F. Supp. 945 (D.D.C. 1970) (upholding restrictions on contributions to Canadian Friends Service Committee for relief work in Vietnam).

395. *See, e.g., Comet Enters. v. Air-A-Plane Corp.*, 128 F.3d 855 (4th Cir. 1997); *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800 (D. Del. 1990); *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355 (11th Cir. 1984); *American Airways Charters, Inc. v. Regan*, 746 F.2d 865 (D.C. Cir. 1984). Each of these cases held that the applicable OFAC licensing provisions were not "jurisdictional," and the failure to obtain a license had no impact on the federal courts' ability to consider the matters submitted to them for resolution. *See infra* notes 440-449 and accompanying text.

396. *See, e.g., Dames & Moore*, 453 U.S. 654 (upholding suspension of pending claims pursuant to international settlement); *Orvis v. Brownell*, 345 U.S. 183 (1953) (holding that attachment liens do not transfer property interest in funds held by Alien Property Custodian); *Cities Serv. Co. v. McGrath*, 342 U.S. 330 (1952) (TWEA permits vesting of debenture or bearer bonds in Alien Property Custodian even when the instruments are outside of the U.S.); *Zittman v. McGrath (Zittman II)*, 341 U.S. 471 (1951) (upholding mandatory substitution of the Alien Property Custodian for bank holding property subject to state liens); *but see Zittman v. McGrath (Zittman I)*, 341 U.S. 446 (1951) (denying the authority of Alien Property Custodian to retroactively void liens created under state law).

397. *See, e.g., Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996) (upholding Cuban travel restrictions under both First and Fifth Amendments); *United States v. Arch Trading Co.*, 987 F.2d 1087 (4th Cir. 1993) (rejecting vagueness challenge to restrictions on travel to Iraq); *Walsh v. Brady*, 927 F.2d 1229 (D.C. Cir. 1991) (upholding restrictions on travel to Cuba to acquire informational materials covered by Berman Amendment to TWEA); *Regan*, 468 U.S. 222 (1984) (upholding restrictions on travel to Cuba); *Haig v. Agee*, 453 U.S. 280 (1981) (holding that the liberty interest in international travel not accorded the same stature as the fundamental interest in interstate travel); *Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding invalidation of passports for Cuban travel).

398. *See, e.g., 767 Third Ave. Assocs. v. United States* 48 F.3d 1575 (Fed. Cir. 1995); *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988). *See also, e.g., Tran Qui Than v. Regan*, 658 F.2d 1296 (9th Cir. 1981), *cert. denied*, 459 U.S. 1069 (1982); *Cheng Yih-Chung v. Federal Reserve Bank of New York*, 442 F.2d. 460 (2d Cir. 1971); *Nielsen v. Secretary*

IPT, itself, lost its challenge to its own sudden blacklisting—a challenge asserting that their blacklisting amounted to a “taking” accomplished without proper due process—because of the breadth of the underlying statutory grants and the deference given to the Executive branch in dealing with sanctions.<sup>399</sup> The court followed the traditional rationale, that blocking or freezing orders only effect a temporary deprivation of property, notwithstanding the consequences they may cause in particular cases. When lifted, the property is released into the custody of the owner,<sup>400</sup> and accordingly pre-deprivation hearings are not required.<sup>401</sup> Additionally, the constitutionality of blocking or freezing orders was established in *Propper v. Clark*.<sup>402</sup>

The power [to issue Executive Orders] in peace and war must be given generous scope to accomplish its purpose. Through the Trading with the Enemy Act, in its various forms, the nation sought to deprive enemies, actual or potential of the opportunity to secure advantages to themselves or to perpetuate wrongs against the United States or its citizens through the use of assets that happened to be in this country. To do so necessitated some inconvenience to our citizens and others who, as here, are

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of the Treasury, 424 F.2d 833 (D.C. Cir. 1970); *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106 (2d Cir. 1966), *cert. denied*, 385 U.S. 898 (1966). These cases build upon the rationale of *Propper v. Clark*, 337 U.S. 472 (1949), quoted *infra* note 403 and accompanying text. See also *United States v. Chemical Found. Inc.*, 272 U.S. 1 (1926) (holding that there is no constitutional prohibition against confiscation without compensation of property of the nationals of a hostile government). *But cf.* *E-Systems, Inc. v. United States*, 2 Cl. Ct. 271 (1983) (blocking property interest of U.S. national may constitute a “taking”); *Tagle v. Regan*, 643 F.2d 1058 (5th Cir. 1981) (reversing OFAC refusal to partially unblock SDN decedent’s assets for benefit of U.S. heirs); *Real v. Simon*, 510 F.2d 557, *reh’g denied*, 514 F.2d 738 (5th Cir. 1975) (reversing OFAC refusal to unblock SDN decedent’s assets for benefit of U.S. heirs). See also *infra* notes 410-417 and accompanying text.

399. See *IPT Co. v. United States Dep’t of the Treasury*, No. 92 Civ. 5542, 1994 U.S. Dist. LEXIS 15807 (S.D.N.Y. Nov. 4, 1994).

400. This highlights a distinction between “vesting” title to property in the Government or its taking actual possession, and simply “freezing” the assets in the hands of whomever might have control over them at the time the blocking order takes effect. TWEA gives the Government the power to seize possession or vest title in the Alien Property Custodian during wartime, see 50 U.S.C. app. § 7 (1994), but IEEPA grants no equivalent “vesting” authority during the exercise of “emergency” powers. *But see, E-Systems*, 2 Cl. Ct. 271 (a “blocking” of assets which deprives U.S. national or corporation of all economic value may constitute a “taking”).

401. See *Matthews v. Eldridge*, 424 U.S. 319, 333-334 (1976). The sole exception to the temporary deprivation rule involves the deprivation of welfare benefits. See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (pre-deprivation hearing required because of importance of benefits to survival of recipients awaiting a hearing). See also *IPT*, 1994 U.S. Dist. LEXIS 15807, at \*16-17.

402. 337 U.S. 472 (1949).



not involved in any actions adverse to the nation's interest. That fact, however, cannot lead us to narrow the broad coverage of the Executive Order.<sup>403</sup>

Accordingly, and noting the longstanding use of such Orders, the court ruled against IPT and declared, "[t]he temporary freezing of foreign-owned assets in this country falls within the constitutional limits of the Fifth Amendment."<sup>404</sup>

Only rarely have the courts held that the Government exceeded its legitimate sanctions authority. In a World War II era case, *Zittman v. McGrath*,<sup>405</sup> the Supreme Court declined to permit the Alien Property Custodian, the wartime predecessor to OFAC, to use its authority under TWEA to nullify preexisting state attachments of frozen German funds with a subsequently issued "General Ruling" and Order,<sup>406</sup> but then permitted such actions in other cases.<sup>407</sup> Thirty years later when similar issues arose regarding the President's authority under IEEPA to nullify preexisting attachments and judgments, suspend pending litigation, and order the transfer of

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403. *Id.* at 481-482, quoted in *IPT*, 1994 U.S. Dist. LEXIS 15807, at \*13-14.

404. *IPT*, 1994 U.S. Dist. LEXIS 15807, at \*14.

405. 341 U.S. 446 (1951) (*Zittman I*).

406. While the issue was not expressly analyzed as a problem revolving around the retroactive application of the Alien Property Custodian's General Ruling and Order, that seem to be inherently a part of the decision. The Germans' accounts held in the U.S. bank were frozen on June 14, 1941 pursuant to Exec. Order No. 8,785, 6 Fed. Reg. 2,897 (1941). The President's Executive Order essentially prohibited all "transactions" or "transfers" involving blocked funds, but it did not specifically address provisional measures such as attachments. Based upon preexisting claims against the German debtors, *Zittman* and the other petitioners obtained pre-judgment attachment warrants against the German's accounts held at Chase National Bank in New York in late 1941, and eventually obtained a default judgment in January of 1942 in state court. It was not until the issuance of the Custodian's General Ruling No.12 on April 21, 1942, that the term "transfer," as used in the Executive Order, was defined to include "the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment." 7 Fed. Reg. 2,991 (1942). The Alien Property Custodian later issued a Vesting Order in October 1946, more than four years after the initial attachments, seeking to substitute itself for the German debtors, and subsequently sought a declaratory judgment invalidating the state liens. See *Zittman I*, 341 U.S. at 448-449.

407. See *Orvis v. Brownell*, 345 U.S. 183, 188 (1953) in which the court stated "the question is not whether a lien, concededly valid because obtained prior to the freezing order, may be 'annulled' by the Custodian, but rather whether the freezing order prevented the subsequent acquisition, by attachment, of such a property interest as the Custodian would have to recognize under [TWEA]. Because of the supremacy of the Federal Government on matters within its competence, the freezing order . . . prevented the subsequent acquisition of a lien which would bind the Custodian." See also *Zittman II*, 341 U.S. at 473, where the court permitted the Alien Property Custodian to take possession of frozen accounts held by the Federal Reserve Bank of New York, notwithstanding pending state attachments and liens, based in part upon the use of a "turnover directive" as part of its Vesting Order, which was not used in *Zittman I*.

blocked assets to the Federal Reserve Bank for disposition in accordance with decisions of the Iran-U.S. claims settlement process, the Supreme Court readily upheld the Executive branch's actions in *Dames & Moore v. Regan*.<sup>408</sup>

In another instance with equally mixed results, two Fifth Circuit decisions held that OFAC exceeded its statutory authority with its regulations and refusals to "unblock" Cuban nationals' property following their death for the benefit of U.S. heirs, reasoning that TWEA only authorizes measures "to prevent or prohibit . . . transactions involving . . . property in which any [sanctioned] foreign country or a national thereof has any interest."<sup>409</sup> Both *Real v. Simon*<sup>410</sup> and *Tagle v. Regan*<sup>411</sup> declared that the "Cuban interest" in blocked U.S. assets of a Cuban national terminated when the individual died, and the property should accordingly be unblocked for the benefit of the U.S. resident heirs.<sup>412</sup> According to the Fifth

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408. 453 U.S. 654 (1981). In doing so, the Court expressly rejected the notion that *Zitman I* or *Orvis* would support the maintenance of "an attachment that is subject to a revocable license and that has been obtained after the entry of a freeze order to limit in any way the actions the President may take under the [IEEPA] regarding the frozen assets. An attachment so obtained is in every sense subordinate to the President's power under IEEPA." *Id.* at 672-73, n. 5.

It should be noted however, that the Court did not base its decision solely upon the powers granted by IEEPA, but also on Congressional "acquiescence" in historical Presidential practices.

Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action we are not prepared to say that the President lacks the power to settle such claims.

*Id.* at 688.

409. 50 U.S.C. app. § 5(b)(1)(B) (1994).

410. 510 F.2d 557 (5th Cir.), *reh'g denied*, 510 F.2d 738 (5th Cir. 1975).

411. 643 F.2d 1058 (5th Cir. 1981).

412. In 1975 in *Real* the heirs of a Cuban national, who died intestate in Cuba, successfully sued to require OFAC to unblock the decedent's U.S. securities account. The surviving heirs consisted of former Cuban nationals who were either permanent resident aliens or U.S. citizens at the time of suit, and there were no remaining claimants in Cuba. Although OFAC policy was to "unblock" the assets of refugees and others who took up residence outside Cuba, OFAC had refused to "unblock" the decedent's account based upon its position that the Cuban national decedent has an "interest" in the assets of the estate for the purposes of the sanctions. See 510 F.2d at 558-559, 562, 564; 31 C.F.R. 515.327 (1974).

Six years later in *Tagle* the U.S. heirs of a Cuban national, who died intestate in Cuba, successfully sued to require OFAC to unblock their share of the decedent's U.S. bank accounts. Unlike the situation in *Real*, in this case one of the three heirs remained a citizen and resident of Cuba. At the urging of OFAC, the *Tagle* court also considered the conflicting intervening decision rendered by the Second Circuit in *Richardson v. Simon*,

Circuit, for OFAC to “determine that a deceased person retains an interest in his estate. . . is arbitrary and without basis in either the language or the purpose of the Trading with the Enemy Act.”<sup>413</sup> The Second Circuit disagreed in *Richardson v. Simon*,<sup>414</sup> and declined to follow the Fifth Circuit’s reasoning largely on the basis of the deference courts owe to the political branches of government.<sup>415</sup> Not surprisingly, OFAC asserts that the two Fifth Circuit cases, which bracketed *Richardson*, were incorrectly decided<sup>416</sup> and has declined to make any alterations in the applicable regulation for nearly a quarter century.<sup>417</sup>

Nevertheless, OFAC’s implementation of the various sanctions programs’ provisions with its blacklisting, licensing, and civil enforcement decisions are reviewable agency actions under the Administrative Procedure Act, creating an avenue for more modest challenges to the Executive branch’s actions.<sup>418</sup> Unlike some of the

560 F.2d 500 (2d Cir. 1977), *appeal dismissed sub nom, Richardson v. Blumenthal*, 435 U.S. 939 (1978), but reaffirmed its belief in the correctness of its earlier decision in *Real*, 643 F.2d at 1058-1059, 1064-1067.

413. *Tagle*, 643 F.2d at 1064 (quoting *Real*, 510 F.2d at 564).

414. 560 F.2d 500 (2d Cir. 1977), *appeal dismissed*, 435 U.S. 939 (1978).

415. After reviewing the reasoning for the Fifth Circuit’s decision in *Real*, and finding its analysis of legislative pronouncements on TWEA unpersuasive, the Second Circuit deferred to the political branches of government and quoted the following passage from *Matthews v. Diaz*, 426 U.S. 67, 81 (1976):

Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.

560 F.2d at 504. For a discussion of the Fifth Circuit’s subsequent rejection of *Richardson* in the *Tagle* decision, see *supra* note 412.

416. See *Tagle*, 643 F.2d at 1064, n. 9.

417. 31 C.F.R. 515.327 (1999), entitled “Blocked estate of a decedent,” continues to provide:

The term *blocked estate of a decedent* shall mean any decedent’s estate in which a designated national has an interest. A person shall be deemed to have an interest in a decedent’s estate if he:

- (a) Was the decedent;
- (b) Is a personal representative; or
- (c) Is a creditor, heir, legatee, devisee, distributee, or beneficiary.

418. See 5 U.S.C. § 551(13), 704 (1994). Subject matter jurisdiction is not conferred by the APA itself, although it does waive sovereign immunity for purposes of a declaratory judgment or injunctive relief. See *Califano v. Sanders*, 430 U.S. 99, 107 (1977). Rather jurisdiction would need to be based upon some other statute such as the general federal question statute, 28 U.S.C. § 1331 (1994); the Declaratory Judgment Act, 28 U.S.C. § 2201 (1994); the Mandamus and Venue Act, 28 U.S.C. § 1361 (1994); or that providing jurisdiction arising out of Acts regulating commerce, 28 U.S.C. § 1337 (1994). Moreover, if damages were sought for the agency’s actions, as opposed to injunctive or declaratory relief, the suit would need to be brought under the Tucker Act, 28 U.S.C. § 1491 (1994),

other major trade control statutes,<sup>419</sup> neither of the two principal statutory foundations for OFAC sanctions, TWEA and IEEPA, attempt to specifically preclude review under the APA. While both these statutes are broadly worded, they are not so broad as to give OFAC “unreviewable” discretion to act.<sup>420</sup> Furthermore, while particular challenges may raise non-justiciable political questions,<sup>421</sup> judicial review of OFAC’s administrative actions is not automatically precluded simply because sanctions necessarily involve foreign policy or political issues.<sup>422</sup>

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where the Government consented to be sued for damages resulting from an uncompensated “taking,” or under the Federal Tort Claims Act, 28 USC §§ 1346, 2674 (1994). *See also* 5 U.S.C. § 702 (1994).

419. *See, e.g.*, § 13(a) of the Export Administration Act, 50 U.S.C. App. § 2412(a) (1994). The EAA lapsed on August 20, 1994, and the Executive Branch’s controls on exports of U.S. origin goods and technology are currently maintained under the President’s authority under IEEPA pending the renewal or replacement of the Act. During a prior similar lapse at least one court determined that the effect of the shift to IEEPA as the statutory basis for the controls was to remove the § 13(a) preclusion of judicial review. *See Nuclear Pac. Inc. v. United States Dep’t of Commerce*, No. C84-49R, 1984 U.S. Dist. LEXIS 16060, at \*3 (W.D. Wash. June 8, 1984).

*See also* the exemption from judicial review provided for “classification” decisions concerning which items qualify as “defense articles” or “defense services” under the International Traffic in Arms Act, 22 U.S.C. § 2778(h) (1994).

420. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), narrowed the “committed to agency discretion” exception to judicial review under the APA to “those rare instances where . . . there is no law to apply.” *Id.* at 410. *See also Abbott Labs v. Gardner*, 387 U.S. 136 (1967). But see *Webster v. Doe*, 486 U.S. 592, 600-01 (1988), and *Department of the Navy v. Egan*, 484 U.S. 518 (1988), which suggest that the Court might be more willing to find judicial review precluded as being committed to agency discretion when dealing with matters of national security, at least with regard to the merits of a particular decision as opposed to the procedures used to reach that decision.

421. *See supra* notes 384-385 and accompanying text.

422. The presence of a “political question,” however, may severely circumscribe any review which is available. For example, in *People’s Mojahedin Organization of Iran v. United States Dep’t of State*, Nos. 97-1646, 97-1670, 1999 WL 420471 (D.C. Cir., June 25, 1999), the designation of two groups as “foreign terrorist organizations” under the Antiterrorism and Effective Death Penalty Act was challenged pursuant to the statute’s judicial review provision. No constitutional rights were at issue, as the groups were entirely foreign based and with no substantial connection to the United States. However, the statutory scheme required three separate findings prior to making such a designation, that the group was a “foreign organization,” that it was engaged in “terrorist activity,” and that its activities threatened U.S. “national security.” The D.C. Circuit agreed with the government that the determination that there was a “threat” to national security involved a nonjusticiable political question, based upon *Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), but was clearly uncomfortable with the effect that had on its ability to carry out its review of the other elements of the designation in accordance with Congress’ statutory scheme. The court stated:

The statute before us is unique, procedurally and substantively. On the basis of an “administrative record” the Secretary of State is to make “findings” that an entity is a foreign organization engaging in terrorist activities that threaten the

For example, in *Milena Ship Management Company v. Newcomb*,<sup>423</sup> a case which arose shortly after the Yugoslav sanctions were imposed but prior to the issuance of the FRYSR, the court was asked to rule on a Maltese plaintiff's application to "unblock" Maltese flag vessels detained by the U.S. Customs Service because they were "deemed" to be owned or managed by a blacklisted entity.<sup>424</sup> The District Court ultimately denied the application, but

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national security of the United States. . . . This language . . . is commonplace . . . But unlike the run-of-the-mill administrative proceeding, here there is no adversary hearing, no presentation of what courts and agencies think of as evidence, no advance notice to the entity affected by the Secretary's internal deliberations. When the Secretary announces the designation, through publication in the Federal Register, the organization's bank accounts in the United States become subject to seizure and anyone who knowingly contributes financial support to the named entity becomes subject to criminal prosecution. . . . There is a provision for "judicial review" confined to the material the Secretary assembled before publishing the designation. . . . Because nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet, or other hearsay regarding the organization's activities, the administrative record may consist of little else.

. . . .  
If we are not competent to pass on the Secretary's national security finding under §1189(a)(1)(c), and we interpret Waterman to hold that we are not, how can we perform the function Congress assigned to us, which was to pass upon the validity of the designation? For all we know the designation may be improper because the Secretary's judgement that the organization threatens national security is completely irrational, and devoid of any support. Or her finding about national security may be exactly correct. We are forbidden from saying. That we cannot pronounce on the question does not mean that we must assume the Secretary was right. It means that we cannot make any assumption, one way or the other.

. . . .  
We reach no judgement whatsoever regarding whether the material before the Secretary is or is not true. As we wrote earlier, the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. As we see it, our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism. Her conclusion might be mistaken, but that depends upon the quality of the information in the reports she received—something we have no way of judging.

*People's Mojahedin Organization*, 1999 WL 420471, at \*1, \*4-5.

423. *Milena Ship Management Co. v. Newcomb*, 804 F. Supp. 846 (E.D. La. 1992) *aff'd* 995 F.2d 620 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994). *Milena* deals with sanctions which are in part grounded on IEEPA. For a similar discussion in the case of TWEA based sanctions on Vietnam, *see* *Tran Qui Than v. Regan*, 658 F.2d 1296 (9th Cir. 1981), *cert. denied*, 459 U.S. 1069 (1982).

424. The Yugoslav sanctions were imposed on May 30, 1992, but the FRYSR were not issued for another nine months, in March 1993. *See supra* notes 206, 208 and accompanying text. OFAC released General Notice No. 1 blacklisting several hundred individuals and firms located in the Federal Republic of Yugoslavia on July 20, 1992. *See supra* notes 291-298 and accompanying text. The firm of Jugoslavanska Oceanska

also noted that the mere “fact that judicial review of an OFAC decision would somehow involve United States foreign policy is not determinative,” of whether the case presents a non-justiciable political question.<sup>425</sup> The Court stated:

... the plaintiffs here have not advanced a comprehensive challenge to the President’s strategy or authority regarding how this nation and others confront the present Yugoslav problem. Plaintiffs have not challenged the President’s decision to declare a national emergency. Nor have they questioned the validity of the executive Orders imposing economic sanctions against Yugoslavia, including the blocking of government controlled assets. If plaintiffs had asked for court review of these types of executive decisions, it is arguable that this Court ought not take review. . . . Plaintiffs have requested judicial review of agency action, OFAC, taken pursuant to an unchallenged executive order. Review of administrative decisions is clearly a time-tested judicial function; in fact agency actions are presumptively reviewable by federal courts. . . . OFAC’s decision in this case to block plaintiff’s vessels does not so directly implicate U.S. foreign policy that it is insulated from review. Judicial review of administrative decisions implementing these orders does not hamper the executive’s conduct of foreign policy by injecting unacceptable sweeping challenges to foreign policy choices. . . . Instead the quite limited “arbitrary and capricious” review authorized by the act merely provides a mechanism to ensure evenhanded application of administration policy.<sup>426</sup>

While questions regarding agency actions may be justiciable in the courts, there are a number of other requirements that may limit the availability of judicial review in any particular case, including standing,<sup>427</sup> ripeness,<sup>428</sup> and exhaustion doctrines,<sup>429</sup> and the related

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Plovdiva (JOP) was included on that blacklist announcement, and JOP was alleged to be the parent of the Maltese companies which nominally owned and managed the detained vessels. See *Milena*, 804 F. Supp. at 848.

425. *Milena*, 804 F.Supp at 848-849. But see *Regan v. Wald*, 468 U.S. 222 (1984), *rehearing denied*, 469 U.S. 912 (1984); *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106 (2d. Cir. 1966), *cert. denied*, 385 U.S. 898 (1966).

426. *Id.* at 849-850. See also *Cernuda v. Heavy*, 720 F. Supp. 1544 (S.D. Fla. 1989); *Behring Int’l Inc. v. Miller*, 504 F. Supp. 552 (D.N.J. 1980); *Tagle v. Regan*, 643 F.2d 1058 (5th Cir. 1981); *Real v. Simon*, 510 F.2d. 557 (5th Cir. 1975), *reh’g denied*, 579 F.2d 738 (5th Cir. 1975); but cf. *Havana Club Holding, S.A. v. Galleon S.A.*, 961 F. Supp. 498 (S.D.N.Y. 1997); *Beacon Prod. Corp. v. Reagan*, 633 F. Supp. 1191 (D.Mass. 1986), *aff’d*, 814 F.2d 1 (1st Cir. 1987).

427. “Standing” to assert a claim generally depends upon injury in fact, a causal connection to the injury, and redressability. See *Lujan v. Defenders of Wildlife*, 504 U.S. (1992). For cases under the APA the injury complained of must also fall within the “zone of interests” sought to be protected under the statute which is at issue. See *Air Courier Conference of Am. v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 523-43 (1991); *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 395-96 (1987); *Association of Data Processing Org. v. Camp*, 397 U.S. 150, 153-54 (1970).

428. “Ripeness” refers to whether or not the claim is sufficiently mature and developed

concept of “final agency action.”<sup>430</sup> Assuming these requirements are met in an appropriate case, under the APA the courts may set aside agency actions, findings, or conclusions which are:

- contrary to constitutional right, power, privilege, or immunity;
- in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
- or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>431</sup>

These judicial powers are, however, tempered by the deference courts traditionally give to the agency’s expertise, particularly when the agency is interpreting its own statutes, policies, or rules.<sup>432</sup> This deference is also reflected in the APA’s direction to the courts to give due consideration to the “whole administrative record,”<sup>433</sup> and in the provisions affecting the standard of review to be employed.<sup>434</sup> A *de novo* review of agency action is very seldom called for,<sup>435</sup> and it is

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so as to be amenable to judicial resolution, and whether withholding review would result in a substantial hardship upon the claimant. *See* *Abbott Labs v. Gardner*, 387 U.S. 186 (1967). *See also* *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1434 (9th Cir. 1996).

429. While similar to “ripeness” in that the intent of this doctrine is to try and resolve all matters within an agency whenever possible, “exhaustion” focuses more upon the availability of further processes or avenues of appeal which might be available within the agency. *See* *McCarthy v. Madigan*, 503 U.S. 140, 144-46 (1992); *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 735 (D.C. 1987).

430. The APA states that only “final” agency actions are reviewable. *See* 5 U.S.C. § 703 (1994). A particular action is deemed to be sufficiently “final” and reviewable if it is stated as such by statute. If a particular type of action is not expressly declared to be reviewable, it must be analyzed under the exhaustion and ripeness doctrines to see if judicial review would be appropriate. *See, e.g.,* *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980). However, the Courts may not use these doctrines to impose more onerous “finality” requirements than those which may be declared in the applicable statute. *See* *Darby v. Cisneros*, 509 U.S. 137, 145-47 (1993).

431. 5 U.S.C. § 706(2) (1994). The courts also have the ability to overturn agency actions which are unsupported by the evidence, and even to compel the agency to act when its refusal to do so is unreasonably delayed or withheld. *See id.* at § 706(1).

432. *See* *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513 (1994); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See also* *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695 (D.C. Cir. 1994) (stating that OFAC’s interpretation of its “own regulations receives an even greater degree of deference than the Chevron standard, and must prevail unless plainly inconsistent with the regulation.” *Id.* at 702).

433. *See* 5 U.S.C. § 706 (1994). *See also* *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951).

434. *See* 5 U.S.C. § 706(2)(E)-(F). While not explicitly stated as such in the APA, the courts are most free to substitute their judgment for that of an agency when dealing with questions of “law,” and most reluctant to do so when dealing with questions of “fact.” *See e.g.,* *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944); *Gray v. Powell*, 314 U.S. 402 (1941).

435. Typically, for *de novo* review to be available, it must be specified in a statute. *See,*

much more likely that courts will look to see if “substantial evidence” supports the agency’s actions.<sup>436</sup> However, the residual standard of review under the APA, and the one most likely to be applied when examining OFAC’s actions, is the limited “arbitrary and capricious” standard referred to in the *Milena* case.<sup>437</sup> While one might argue that the courts could take judicial notice of the long history of administrative problems associated with the various sanctions and conclude that OFAC’s general administration of those programs is “arbitrary and capricious,”<sup>438</sup> few challengers have actually met this burden and succeeded in overturning OFAC’s actions in a particular case or controversy.<sup>439</sup>

One example is the 1984 case of *American Airways Charters Inc. v. Regan*, involving OFAC’s attempt to impose a requirement upon a Florida corporation to apply for and obtain a license approval prior to retaining legal counsel to challenge its designation as a specially designated national of Cuba.<sup>440</sup> OFAC communicated this requirement to AAC orally, and then in a follow-up letter, but did not specifically include such a requirement in its regulations.<sup>441</sup> The Court struck down OFAC’s extraordinary claim of the authority to approve the hiring of counsel, but not the requirement to obtain a license prior to making any payments to the counsel of AAC’s choice. It stated that the “administrative authority asserted in this case has never been

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*e.g.*, 5 U.S.C. § 552(a)(4)(B) (1994). Alternatively, *de novo* review may also be available if an adjudicatory action is being challenged and the agency’s fact finding procedures are inadequate, or when a proceeding to enforce a non-adjudicatory action is involved. See *Overton Park*, 401 U.S. at 415. In practice it is rare for a court to substitute its judgment for that of an agency. It is much more likely that a court would consider the same sorts of agency deficiencies as falling under the 5 U.S.C. § 706(2)(A) (1994) rubric of not being “in accordance with law” and simply remand the matter to the agency for further proceedings. See also *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

436. The substantial evidence standard of review traditionally applies to formal adjudicatory hearings or formal rulemaking. See 5 U.S.C. § 706(2)(E).

437. 5 U.S.C. § 706(2)(A) (1994). In practice, the “substantial evidence” and “arbitrary and capricious” standards approximate one another, further evidencing the court’s great reluctance to overturn an administrative determination or finding unless there is no rational basis for the agency’s actions. See *Association of Data Processing Serv. Orgs. v. Board of Governors of Federal Reserve Sys.*, 745 F.2d 677, 686 (D.C. Cir. 1984).

438. See *supra* notes 198-368 and accompanying text.

439. “Arbitrary and capricious” agency actions may also constitute a denial of substantive due process. Accordingly, most of the broad constitutional challenges to the various programs have also included allegations that the agency has acted in an arbitrary and capricious manner. See cases cited *supra* notes 384-426 and accompanying text.

440. 746 F.2d 865, 866 (D.C. Cir. 1984).

441. See *id.* at 868-869. OFAC asserted that its approval was required because contracting for legal services necessarily involved a transfer of AAC’s assets or property. See *id.* at 871.



asserted on any prior occasion,”<sup>442</sup> that it was entirely “novel . . . [and a]. . . newly minted claim of authority to preview, and then permit or restrain, a designated national’s choice of counsel,” which was unsupported by the underlying statute, TWEA.<sup>443</sup> The Court continued:

Even in the absence of a marked constitutional dimension to the problem, sensible construction of the [TWEA] would not encompass OFAC’s current, unprecedented, reading of highly general clauses. The agency, we believe, has gone beyond mere interpretation. It has effectively legislated in an area in which our tradition indicates the lawmakers themselves — Congress — should speak with a clear voice in advance of administrative action. . . [W]e find the case against OFAC’s position overwhelming. As OFAC would have it, once an entity, although incorporated in the United States has been administratively designated a foreign national, and therefore placed under government control regarding commercial matters, the designated corporation can be subjected to the decision of a government office, bounded by no standards that have been presented to us, even as to the very question whether the corporation can meaningfully challenge the designation through counsel. We reject that bold view. Instead, we construe the Act and regulations thereunder “in a manner that not only upholds their constitutionality but also steers clear of uncertainty on that score.”<sup>444</sup>

Interestingly, one result of this focus on statutory and regulatory interpretation in the *American Airways* decision is that OFAC has now issued regulations under most of its IEEPA based programs<sup>445</sup> requiring that a license be obtained before any payments are made for legal services provided in connection with dealings with blacklisted parties or sanctioned destinations,<sup>446</sup> but simultaneously authorizing the provision of broad categories of legal services to sanctioned parties.<sup>447</sup> In effect, OFAC is reasserting its authority to

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442. *Id.* at 867.

443. *Id.* at 872.

444. *Id.* at 873-874 (citing *Kelsey v. Weinberger*, 498 F.2d 701, 708 (D.C. Cir. 1974)).

445. See 31 C.F.R. §§ 536.506 (NTSR); 538.505 (SSR); 550.517 (LSR); 560.525 (ITR); 585.517 (FRYSR); 586.509 (KSR); 595.506 (TSR); and 597.505 (FTSOR) (1999). The process of OFAC’s reasserting authority over the provision of “legal services” actually began in 1992, eight years after the *American Airways* decision, with the issuance of a regulatory prohibition on the “export of services” to Haiti under the HTR, although the regulations did not then define how “services” could be “exported.” See 31 C.F.R. 580.206 (1992).

446. These provisions generally depend upon legal representation being considered as a “service” and, as was done with the HTR (see *supra* note 445) the presence of a regulatory prohibition on the “exportation of services” without OFAC approval. See 31 C.F.R. §§ 536.406 (NTSR); 538.406 (SSR); 550.202, 550.422 (LSR); 560.204, 560.410 (ITR); 585.205, 585.416 (FRYSR); 586.406 (KSR); 595.201, 595.406 (TSR) (1999).

447. The “General License” authorization for the provision of legal services in the

regulate the formation of the attorney-client relationship while minimizing the chances of a direct challenge to its position by authorizing the most common types of legal services. In doing so, it is establishing a record of administrative practice and policy on the "export" of legal services, and remedying at least one of the major deficiencies identified in the *American Airways* case, the then "unprecedented" nature of its claim of authority to regulate the formation of an attorney-client relationship.<sup>448</sup> Accordingly, the

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Yugoslav sanctions (FRYSR) is typical, and provides:

(a) The provision to the Government of the FRY (S&M), or to a person in the FRY(S&M), of the legal services set forth in paragraph (b) of this section is authorized, provided that all receipt of payment therefor must be specifically licensed. The provision of any other legal services as interpreted in §585.416 requires the issuance of a specific license.

(b) Specific licenses are issued, on a case-by-case basis, authorizing receipt, from unblocked sources, of payment of professional fees and reimbursement of incurred expenses for the following legal services by U.S. persons to the Government of the FRY (S&M), or to a person in the FRY (S&M):

(1) Provision of legal advice and counseling to the Government of the FRY (S&M), or to a person in the FRY (S&M) on the requirements of and compliance with the laws of any jurisdiction within the United States, provided that such advice and counseling is not provided to facilitate transactions in violation of subpart B of this part;

(2) Representation of the Government of the FRY (S&M), or of a person in the FRY (S&M) when named as a defendant in or otherwise made a party to domestic U.S. legal, arbitration, or administrative proceedings;

(3) Initiation of domestic U.S. legal, arbitration, or administrative proceedings in defense of property interests subject to U.S. jurisdiction of the Government of the FRY (S&M) that were in existence prior to May 20, 1992, or of a person in the FRY (S&M);

(4) Representation of the Government of the FRY (S&M), or of a person in the FRY (S&M) before any federal agency with respect to the imposition, administration, or enforcement of U.S. sanctions against the FRY (S&M); and

(5) Provision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense.

(c) Enforcement of any domestic lien, judgment, arbitral award, decree, or other order through execution, garnishment or other judicial process purporting to transfer or otherwise alter or affect a property interest of the Government of the FRY (S&M) is prohibited unless specifically licensed in accordance with § 585.202(e).

*Id.* at § 585.517.

448. OFAC is also implicitly re-imposing the requirement that it approve the mere formation of an attorney-client relationship in those situations which fall *outside* the five broad categories typically found in the general license authorization. *See, e.g., id.*

Moreover, it is interesting to note that these recent claims of authority to regulate the mere formation of an attorney-client relationship go far beyond what was asserted in the AAC case, which only involved an attempt to regulate the blacklisted party's choice of legal counsel. Read literally, however, the current regulations would also require OFAC's approval for U.S. lawyers to represent third parties who might be (legitimately)

courts may yet be asked to address the “constitutional dimension” of the counsel selection problem if OFAC refuses a specific license application to retain counsel or decides to withdraws the broad authorizations contained in its regulatory general licenses regarding the provision of legal services.<sup>449</sup>

In a 1988 case, *Veterans Peace Convoy, Inc. v. Schultz*, a U.S. District Court in Texas used an approach similar to that employed in *American Airways* when it held that OFAC’s interpretation of the “humanitarian aid” limitation on its IEEPA based sanctions on Nicaragua was overly narrow.<sup>450</sup> The organizers of the Peace Convoy challenged the detention of some of their vehicles at the Texas border as they attempted to drive aid supplies to Nicaragua<sup>451</sup> as being

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negotiating or dealing with blacklisted entities. As stated in the FRYSR Subpart D “Interpretations” regarding the “Exportation of Services; performance of service contracts; legal services”:

....

(b) The prohibitions contained in §§ 585.201 and 585.209 apply to services performed by U.S. persons, wherever located:

....

(2) With respect to property interests of the Government of the FRY (S&M) [which includes, by definition, blacklisted parties, *see* 31 C.F.R. § 585.311 (d)(1998)]; or

(3) In support of an industrial or other commercial or governmental project in the FRY (S&M).

(c) *Example:* U.S. persons may not, without specific authorization from the Office of Foreign Assets Control, represent an individual or entity with respect to contract negotiations, contract performance, commercial arbitration, or other business dealings with the Government of the FRY(S&M). *See* § 585.517 on licensing policy with regard to the provision of legal services.

*Id.* at § 585.416(b).

The referenced “general license” for legal services does not pre-authorize, however, any representation of third parties in their dealings with blacklisted entities or the Government of the FRY. *See supra* note 447.

449. At least one challenge has already been brought against these new legal services provisions, in the context of the FRYSR. In *Beobanbka D.D. Belgrade v. United States*, Nos. 95 Civ. 5138 (HB), 95 Civ. 5771 (HB), 1997 WL 23812, at \*1-2 (S.D.N.Y. Jan. 22, 1997), the Court upheld the licensing scheme embodied in 31 C.F.R. § 585.517, in a case where OFAC licensed the respective plaintiffs retention of counsel, but required that they not be paid from blocked funds. However, the plaintiffs only challenged the basis for OFAC’s decision regarding the source of the funds to be used for payment, and did not pursue any constitutional claims of right to counsel in civil proceedings or the impact of OFAC’s decision on their effective access to the courts.

In another case, a defendant in a civil suit successfully convinced the trial court that it lacked subject matter jurisdiction because of the Iranian plaintiff’s failure to obtain OFAC’s approval of its counsel, but this position was reversed on appeal. OFAC submitted an amicus brief asserting that it “never interpreted its regulation to strip federal courts to hear civil suits brought by foreign corporations.” *See Comet Enters Ltd. v. Air-A-Plane Corp.*, 128 F.3d 855, 859 (4th Cir. 1997).

450. 722 F. Supp. 1425, 1429-32 (S.D. Tex. 1988).

451. U.S. Customs authorities turned back the Convoy’s initial attempts to leave the

contrary to IEEPA's "humanitarian exemption" which reads:

(b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly,

....

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to relieve human suffering. . . .<sup>452</sup>

OFAC asserted that a license was required to export the vehicles to Nicaragua, as they were outside the scope of the "articles" described in the exemption.<sup>453</sup> The Court found the statutory language ambiguous, and OFAC's processes inappropriate:

The [Government] Defendants... have asserted that... the exemption "might encompass for example, blankets, tents, stretchers, rescue equipment, or other items in the event of a natural disaster."... What constitutes "rescue equipment"? Why would such equipment be inherently like food, clothing, and medicine? How would it qualitatively differ from a pickup truck, bus, or van? What other "items" would come within the exemption in the event of a natural disaster? What constitutes a "natural disaster," and who makes that determination? Defendant's implicit response to these questions is essentially "ask us and we will tell you." This is the gist of 31 C.F.R. §540.540, which states:

"Applications for specific licenses to export goods to Nicaragua for humanitarian, educational, or religious purposes will be considered on a case-by-case basis."

Defendants describe this provision as an "administrative remedy," whereby anyone seeking to donate articles to Nicaragua can "ask for an interpretation or apply for a license from [OFAC]." The difficulty with this approach is that it contravenes the statutory scheme. IEEPA does not create a scheme whereby all persons seeking to donate articles to a blocked country must obtain advance approval from [OFAC] on a case by case basis. On the contrary, IEEPA provides that the Executive may not regulate qualifying humanitarian donations "directly or indirectly." This restriction would be effectively nullified by a scheme which would require all potential donors to seek a license in order to ascertain which articles come within the statutory exemption.<sup>454</sup>

Moreover, as OFAC's case-by-case decisions were rendered under an unpublished interpretation that only those articles which were intended to be "used *solely* to relieve human suffering" qualified for the exemption, as opposed to those which could reasonably be

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United States, and detained three pickup trucks, a 1985 Nissan, a 1980 Toyota, and a 1979 Chevrolet, and a 1982 Chevrolet van. The vehicles were subsequently released and the Convoy did proceed to Nicaragua. *See id.* at 1427

452. 50 U.S.C. § 1702(b)(2) (1994).

453. *See Veteran's Peace Convoy*, 722 F. Supp. at 1430.

454. *Id.* at 1430.

expected to serve that purpose,<sup>455</sup> the Court declined to defer to the agency. It stated:

[t]he Court cannot defer to the agency's interpretation when there is no consistent, published interpretation of §1702(b)(2). Moreover, no interpretation by [OFAC] can frustrate the clearly expressed intent of Congress. . . . The Court must reject an agency's statutory interpretations "that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."<sup>456</sup>

However, the *Veterans Peace Convoy* Court also carefully limited its decision by emphasizing that it was merely interpreting a statutory provision regarding uncompensated humanitarian donations, which Congress was free to change.<sup>457</sup> Moreover, it noted that the statute itself allows the President to eliminate the exemption entirely, if it impairs his policies in particular emergencies, a power which was not exercised in the case of Nicaraguan sanctions.<sup>458</sup>

More recently, the U.S. District Court for the District of Columbia ruled in an unpublished 1994 decision, *Saba v. U.S. Department of the Treasury*, that OFAC abused its discretion by denying a license application on the basis of a change in policy which had not been promulgated nor announced in accordance with the APA and the Federal Register Act.<sup>459</sup> Mohammad Ali Saba sought a license to import Iranian origin rugs from Germany where they had been stored since before the Iranian sanctions were imposed.<sup>460</sup> The ITR included a specific provision which authorized such imports upon submission of "documentary proof" that the carpets were outside of Iran when the sanctions became effective,<sup>461</sup> with which Saba

455. *Id.* at 1431-32 (noting that OFAC's interpretation was at odds with the legislative history of the exemption).

456. *Id.* at 1431.

457. *Id.* at 1432.

458. *See id.* and 50 U.S.C. § 1702(b)(2) (1994).

459. *See Saba v. United States Dep't of the Treasury*, C.A. No. 92-1812 (WBB), slip op. at 17 (D.D.C. November 18, 1994).

460. *Id.*, slip op. at 3-4.

461. *See* 31 C.F.R. § 560.504 (1987), which read:

(a) Specific licenses may be issued authorizing the importation of non-fungible goods of Iranian origin, such as carpets . . . , provided the applicant submits satisfactory documentary proof that the goods are located outside of Iran prior to the effective date and that no payment or other benefit has accrued or will accrue to Iran after the effective date (October 29, 1987). . .

....

(c) The type of documentation that would constitute satisfactory proof . . . may vary depending upon the facts of a particular case. However, independent corroborating documentary evidence issued and certified by a disinterested party will be required. This might include contracts, insurance documents, shipping documents, warehouse receipts, and appropriate customs documents, accompanied by a certification of an insurance agent, warehouse agent, or other

complied.<sup>462</sup> However, OFAC denied Saba's license application, declaring that the "documentary proof" submitted was insufficient<sup>463</sup> on the basis of new and stricter requirements which would not appear in the Federal Register for another month.<sup>464</sup>

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appropriate person, identifying with particularity the goods sought to be imported and attesting that the goods were located outside Iran at a time prior to the effective date. In general, affidavits, statements, and other documents prepared by the applicant or another interested party will not, by themselves, constitute satisfactory proof.

EXAMPLE: A Persian carpet stored in a warehouse in Europe since January 1986, and purchased by a U.S. resident in November 1987, may be licensed for importation into the United States if the importer provides, for example, (1) a warehouse receipt dated prior to the effective date, and a certification from the warehouse that the carpet sought to be imported is the same carpet that was in storage, identifying such characteristics as predominant colors and design by description or photograph; and (2) insurance documents dated prior to the effective date and containing sufficient information to identify the specific carpet insured in a location outside Iran.

462. Saba's application for a license included the original 1986 sales contract and bank records showing the dates of payment; petitions filed with Iranian customs for the initial export of the rugs to Germany in early 1987 which described each carpet by pattern, color, size, condition, and value; bills of lading for the timely shipment of the rugs to Germany; and German customs clearance forms showing the receipt of the rugs in Germany by February 1987. See *Saba*, C.A. No. 92-1812 (WBB) (D.D.C. November 18, 1994), slip op. at 3-4.

463. See *id.*, slip op. at 4-5. The court also noted that OFAC had similarly denied other applicant's licenses once it decided to change its policy, and frankly noted in those denials that "this Office may have previously granted import licenses pursuant to §560.504 of the [Iranian Transactions] Regulations based upon documentation substantially similar to that submitted in [the denied license] application." *Id.* at 14 n. 7.

464. See 56 Fed. Reg. 61,373 (codified at 31 C.F.R. § 569.409) (1991), which promulgated a new "interpretation" of the documentary evidence necessary to take advantage of the licensing authorization provided in § 560.504.

OFAC's concern was apparently prompted by one of its officials visiting Germany and concluding that the requirements of § 560.504 regarding description of the qualifying goods did not provide sufficient protection against the possible fraudulent substitution of other goods (*i.e.*, post-embargo Iranian rugs) which did not qualify for the license. Accordingly, Saba was informed of the new, stricter documentary requirements in a letter denying his license application in November 1991, in terms which mirrored what was published as §560.409 on December 3, 1991. See *Saba*, C.A. No. 92-1812 (WBB) (D.D.C. November 18, 1994), slip op. at 4-5. That provision read:

(a) Section 560.504 states that specific licenses will be issued to import non-fungible goods of Iranian origin, including carpets, upon submission of documentary proof that the goods were located outside of Iran prior to the effective date and that no financial benefit will accrue to Iran after the effective date. Section 560.504(c) identifies documents that may serve to satisfy the requirements of this section. Documents submitted must specifically identify the particular item to be imported.

(b) Because of the similarity of carpets of commercial grade, commercial documents which contain only a generic description of a carpet, such as size and style or region of manufacture (*e.g.*, 2.05m. x 1.05m., Tabriz) generally will be

The court rejected OFAC's argument, "that courts should only review agency departures from existing regulations and procedures to determine whether these deviations lack a 'rational basis'."<sup>465</sup> The court stated that,

[t]his argument...conflates two distinct agency obligations. While agencies surely cannot act without a "rational basis" for doing so, they also must adhere to their own rules until they have properly changed them. These two requirements create different inquiries for judicial review, and the Plaintiff here primarily challenges the consistency of OFAC's conduct rather than its reasonableness.<sup>466</sup>

In holding for *Saba*, the court declared that,

[a]lthough Congress has generally given the administrative agencies wide latitude in carrying out their statutory mandates, no agency has the authority to act with unfettered discretion. Indeed one of the most venerable principles in the field of administrative law requires agencies to abide by the rules, regulations, and procedures they have adopted even when those policies limit the discretion more strictly than does a statutory scheme.<sup>467</sup>

Applying the new stricter policy to *Saba* prior to its publication, the court went on to note, also violated the provisions of the Freedom of Information Act which require agencies to provide guidance to the public by publishing "substantive rules of general applicability" and "statements of general policy or general applicability" in the Federal Register.<sup>468</sup> Accordingly, *Saba* should not be "adversely affected" by

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insufficient to satisfy the documentary requirement. Documents intended to prove that a particular carpet has been located outside of Iran since the effective date must identify the carpet and its location... with sufficient particularity to eliminate the possibility of substitution by another carpet that would not be eligible for importation. Accordingly, transportation documents, invoices, inventory lists, or warehouse receipts that provide only general descriptions will not be considered to provide sufficient assurance that a particular carpet has been located outside Iran since the effective date to justify issuance of a specific license for importation.

31 C.F.R. § 560.409 (1992). Both § 560.409 and § 560.504 were removed from the regulations in September of 1995. See 60 Fed. Reg. 47,061 (1995).

465. See *Saba*, C.A. No. 92-1812 (WBB), slip op. at 8, n. 3.

466. *Id.* The court also rejected OFAC's argument that "its role in assisting the President in regulating international trade, protecting national security, and executing foreign policy mitigates against placing restrictions on its exercise of discretion," stating that the agency's ability to implement the President's Executive Orders was not at issue. Rather the court declared that the issue was OFAC's obligation to "abide by its own regulations and policies even when developing the nation's foreign policy." *Id.*, slip op. at 10, n. 4.

467. *Id.*, slip op. at 7.

468. *Id.*, slip op. at 14-15 (citing 5 U.S.C. § 552(a)(1)(D)). The FOIA is actually part of the APA. For a detailed discussion of what might be considered rules of "general applicability and legal effect," see Randy S. Springer, *Gatekeeping and the Federal Register: An Analysis of the Publication Requirement of Section 552(a)(1)(D) of the*

a policy which was not properly published.<sup>469</sup> Publication in the Federal Register, “thus further formalizes the principle discussed above, ensuring that agencies announce to the public how they will exercise their discretion before they actually begin doing so.”<sup>470</sup> “In a manner of speaking,” the court concluded, “OFAC simply pulled the rug out from under the Plaintiff and his legitimate expectations of consistent treatment. OFAC’s denial of the Plaintiff’s request for an application therefore was ‘arbitrary, capricious an abuse of discretion or otherwise not in accordance with the law’ within the meaning of [the APA].”<sup>471</sup>

In contrast to *Saba*, in *Feizy Import & Export Co v. U.S.*—another unpublished decision arising out of virtually the same facts—the U.S. District Court for the Northern District of Texas denied relief and found no abuse of discretion nor any arbitrary and capricious actions by the agency.<sup>472</sup> “The court finds no inconsistency between the regulations and OFAC’s interpretation of them.”<sup>473</sup> The *Saba* court distinguished the Texas decision on the grounds that Feizy challenged the rational basis for OFAC’s interpretation, and not the timing of its application.<sup>474</sup> Feizy claimed that the new “documentary proof” requirements were excessive and so strict as to be impossible to meet, thereby foreclosing all imports of pre-embargo Iranian carpets.<sup>475</sup> The concern over the ease with which an embargoed rug may be substituted for one exported from Iran prior to the imposition of sanctions was not manifestly irrational, however.<sup>476</sup> Moreover, both courts recognized that OFAC clearly has the power under the President’s Executive Orders to ban *all* imports from Iran.<sup>477</sup> Thus, merely tightening the documentary proof requirements to address a

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*Administrative Procedure Act*, 41 ADMIN. L. REV. 533, 535-38 (1989). Similar requirements are found in the Federal Register Act, *see* 44 U.S.C. § 1505 (1994).

469. “[A] person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal register and not so published absent actual and timely notice.” *See* 5 U.S.C. § 552(a) (1994). The court held that *Saba* did not have actual notice of the revised policy at the time it submitted its license application to OFAC. *See Saba*, C.A. No. 92-1812 (WBB), slip op. at 15-17.

470. *Id.*, slip op. at 15.

471. *Id.*, slip op. at 14.

472. *See Feizy Import and Export Co. v. United States*, C.A. No. 3:92-CV-0506-D, slip op. (N.D. Tex., June 4, 1992). Like the plaintiff in *Saba*, Feizy sought a license to import Iranian rugs from Germany in November 1991, which was denied just prior to the Federal Register announcement of OFAC’s new “interpretation” regarding the documentary proof necessary to meet the requirements of 31 C.F.R. §560.504. *See Feizy*, C.A. No 3:92-CV-0506-D., slip op. at 1.

473. *Id.*, slip op. at 7.

474. *See Saba*, C.A. No. 92-1812 (WBB), slip op. at 8, n. 3.

475. *See Feizy*, C.A. No. 3:92-CV-0506-D, slip op. at 5.

476. *See id.*

477. *See id.* at 6; *Saba*, C.A. No. 92-1812 (WBB), slip op. at 5-6.



legitimate concern is not in and of itself an "arbitrary and capricious" act. Rather, it was the *Saba* court's concern for the timing and manner of the change that accounts for the differing result.<sup>478</sup> Of course, the *Saba* court's concern is also easily resolved with the proper publication of the new policy or regulation.

These decisions demonstrate that judicial processes are ill suited to broad challenges to the problems arising with the proliferation of OFAC's sanctions programs. Broadly-worded enabling statutes, deferential doctrines, and even the basic "cases and controversies" requirement, all generally preclude major changes in the sanctions programs being brought about through litigation. Comparing the Supreme Court's decisions in *Regan v. Wald*<sup>479</sup> or *Dames & Moore*<sup>480</sup> with the earlier *Orvis*<sup>481</sup> or the *Zitman* cases,<sup>482</sup> one would hardly suspect that three decades, and major changes in the nature, scope, and use of economic sanctions, had passed between them. Even greater changes, and a host of contentious issues occasioned by those changes, are at issue when the entire post-war development of the use of sanctions is considered. Moreover, in those rare instances when an individual challenge can be successfully brought against the arbitrary and capricious actions which have characterized OFAC's administration of its sanctions programs, the ultimate effects may be minimal.<sup>483</sup> Accordingly, for longer term solutions it is necessary to look outside of the courts, to the legislature.

## B. Legislative Measures

With the growth in the use of economic sanctions in recent years, there has been increasing concern regarding the general effectiveness of these programs in achieving their stated aims, and their collateral impact upon U.S. industry and the U.S. industrial base.<sup>484</sup> The primary focus of this concern has been on the use of unilateral, as opposed to multilateral, sanctions.<sup>485</sup> One result has been a call for

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478. See *id.* at 8 n.3; see also *supra* note 465-466 and accompanying text.

479. See *supra* notes 387, 391, 397, 425 and accompanying text.

480. See *supra* notes 391, 295, 408 and accompanying text.

481. See *supra* notes 407-408 and accompanying text.

482. See *supra* notes 396, 405, 407-408 and accompanying text.

483. See *supra* notes 439-478 and accompanying text.

484. See, e.g., Congressional Budget Office, *The Domestic Costs of Sanctions on Foreign Commerce* (last modified Mar. 1999) <http://www.cbo.gov/showdoc.cfm?index=1133&sequence=0&from=1>; DIANNE E. RENNACK & ROBERT D. SHUEY, ECONOMIC SANCTIONS TO ACHIEVE U.S. FOREIGN POLICY GOALS: DISCUSSION AND GUIDE TO CURRENT LAW, Report 97-949F, Congressional Research Service, (June 5, 1998); National Association of Manufacturers, *A Catalog of New U.S. Unilateral Economic Sanctions for Foreign Policy Purposes, 1993-1996*, (1997); SANCTIONS RECONSIDERED, *supra* note 65.

485. See *id.*; see also Raj Bhala, *Mrs WATU and International Trade Sanctions*, 33 INT'L

new legislation directing the manner and nature of any new sanctions imposed in the future.<sup>486</sup> Accordingly, in early 1997 the Enhancement of Trade Security, and Human Rights through Sanctions Reform Act (SRA)<sup>487</sup> was introduced, but this initial bill was tabled after hearings were held by the Senate Foreign Relations Committee, and it failed to pass in the 105<sup>th</sup> Congress. However, it was reintroduced in the 106<sup>th</sup> Congress in March of 1999.<sup>488</sup>

The SRA is notable in its attempt to provide a long term framework for the Executive Branch's use of sanctions, rather than seeking to impose or influence sanctions aimed at a particular target, as was the case with over thirty bills in the 105th Congress<sup>489</sup> and fourteen other bills in the current Congress.<sup>490</sup> As currently drafted, the SRA:

—applies only to unilateral sanctions imposed by the U.S., not those imposed as part of a multilateral control regime;<sup>491</sup>

—has a set of guidelines and requirements which seek to provide for advance notice,<sup>492</sup> a series of reports and consultations on the possible impact of the sanctions,<sup>493</sup> and public comment,<sup>494</sup> in advance of imposing any new unilateral sanctions;

—but permits, however, a Presidential waiver of the notice requirements in the event assets will be frozen or blocked, and also permits the reports and consultations to follow rather than precede the imposition of sanctions if in the “national interest;”<sup>495</sup>

—suggests that any sanctions which are imposed be narrowly

LAWYER 1, 1-4 (1999); ERNEST H. PREGG, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, FEELING GOOD WITH SANCTIONS (April, 1999).

486. See, e.g., JOSEPH J. COLLINS & GABRIELLE D. BOWDOIN, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, BEYOND UNILATERAL ECONOMIC SANCTIONS: BETTER ALTERNATIVES FOR U.S. FOREIGN POLICY, (March 1999); CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, ALTERING U.S. SANCTIONS POLICY: FINAL REPORT OF THE CSIS PROJECT ON UNILATERAL ECONOMIC SANCTIONS (February 1999).

487. S. 1413, 105th Cong. (1997); H.R. 2708, 105th Cong. (1997).

488. S. 757, 106th Cong. (1999); H.R. 1244, 106th Cong. (1999). A similar measure, the Economic Sanctions Reform Act of 1999, was introduced by Senator Christopher J. Dodd, one of the cosponsors of the original bill, on May 27, 1999. See S. 1161, 106th Cong. (1999).

489. See USA\*ENGAGE, *Federal Sanctions Watch List for the 105th Congress*, (last modified Sept. 28, 1999) <http://usaengage.org/news/fedwatch.html>.

490. See USA\*ENGAGE, *Federal Sanctions Watch, 106th Congress*, (May 17, 1999) <http://usaengage.org/news/fedwatch99.html>.

491. See S. 757, 106th Congress § 4(1) (1999); H.R. 1244, 106th Cong. §4(1) (1999).

492. The notice requirement applies to both legislatively imposed sanctions and those imposed by the Executive branch. See *id.* at §§ 6(a), 7(a)(1)(A).

493. See *id.* at §§ 6(d); 7(b), (e), (f), (g).

494. See *id.* at §§ 6(a); 7(c).

495. See *id.* at § 7 (a)(1)(B),(h)

drawn,<sup>496</sup> respect the sanctity of preexisting contracts (except when freezing assets or blacklisting specific parties),<sup>497</sup> prohibits the use of unilateral sanctions in connection with food or medicine,<sup>498</sup> and establishes a (renewable) two year maximum time period for the sanctions.<sup>499</sup> Even though the SRA would leave existing unilateral sanctions largely unaffected<sup>500</sup> and is completely inapplicable to multilateral sanctions, the bill is opposed by the current Administration.<sup>501</sup>

The Congressional approach to the SRA evidences a level of deference to the Executive branch and a reluctance to become involved with the details of the administering agency's activities, which is in marked contrast to the approach to dealing with commodity-based export controls under the Export Administration Act of 1979 (EAA).<sup>502</sup> Unlike the relatively terse, but broad, grant of authority to the President in IEEPA,<sup>503</sup> and the analogous provisions of the TWEA,<sup>504</sup> the EAA seeks to simultaneously promote<sup>505</sup> and

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496. *See id.* at § 5 (5).

497. *See id.* at §§ 5 (3), 7(d)(1)(B).

498. *See id.* at §§ 5 (5)(B), 7(d)(1)(E).

499. *See id.* at §§ 5 (2), 7(d)(1)(C).

500. *See id.* at § 7 (a)(2).

501. *See Hearing on the Use and Effect of Unilateral Trade Sanctions Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 106th Cong. (1999) (statement of Stuart E. Eizenstat, Under Secretary of State for Economic, Business and Agricultural Affairs), available at <http://www.usaengage.org/eizenstat.html>; *see also* Press Release, *Lugar Statement on Sanctions Reform*, (visited Oct. 18, 1999), <http://usaengage.org/news/99lugarstatement1.html>.

502. 50 U.S.C. §§ 2401-2420 (1994). The EAA has lapsed, and the export controls which it authorized are temporarily being continued under the President's authority under IEEPA pending new legislation. Senator Gramm introduced a bill to reauthorize the EAA in late 1999, *see infra* notes 521-525 and accompanying text, entitled the Export Administration Act of 1999 (EAA-99), S. 1712, 106th Cong. (1999), the bill was favorably reported by the Senate Committee on Balancing, Housing, and Urban Affairs on October 8, 1999. *See S. Rep. No. 106-180* (1999).

503. 50 U.S.C. § 1702 (1994). IEEPA essentially provides for the exercise of virtually the same range of powers, in peacetime, as TWEA permits during wartime. It differs from TWEA in requiring that the President declare a specific "national emergency" with regard to a specific threat, *see id.* at § 1701(a), and consult with Congress, *see id.* at § 1703, before the powers the statute grants may be exercised. Beyond these procedural differences, IEEPA also differs from TWEA substantively in that IEEPA does *not* provide the President with the authority to "vest" or expropriate property, regulate domestic transactions, regulate gold/silver coins or bullion, nor does it grant the power to seize records. *Compare id.* at § 1702(a) with 50 U.S.C. app. § 5(b)(1) (1994).

504. 50 U.S.C. app. § 5(b) (1994). Since the passage of IEEPA in 1977, the powers granted to the President under TWEA are confined to wartime use, with the exception of the then preexisting Asian and Cuban sanctions programs. *See id.* at § 5 note, (Pub. L. No. 95-223 § 101 (b)).

505. *See* 50 U.S.C. app. §§ 2401(1)-(2) (1994). *See also* EAA-99, *supra* note 502, at §§ 104, 401- 402.

control<sup>506</sup> exports. Perhaps it is the tension between these dual purposes behind the EAA, a tension absent from the sanctions laws, which prompts Congress to extensively detail both the nature<sup>507</sup> and operation<sup>508</sup> of the export controls system.

The EAA grants the President wide authority to regulate export trade for national security,<sup>509</sup> foreign policy,<sup>510</sup> and short supply<sup>511</sup> purposes, which are substantively not unlike the broad grants in IEEPA and TWEA. More significantly, however, the EAA accompanies these grants of authority with numerous other provisions describing the control system in tremendous detail. The EAA contains elaborate provisions establishing precisely what may be controlled,<sup>512</sup> what may not be controlled,<sup>513</sup> who in the government and among the public must be involved in formulating the controls,<sup>514</sup> when relief from the controls in the event of

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506. See 50 U.S.C. app. §§ 2401(3)-(5) (1994). See also EAA-99, *supra* note 502, at §§ 101, 201(b), 301(b).

507. See 50 U.S.C. app. §§ 2404-2406 (1994). See also EAA-99, *supra* note 502, at §§ 101, 201(a), 301(a), 701.

508. See 50 U.S.C. app. §§ 2407-2409 (1994). See also EAA-99, *supra* note 502, at §§ 101-904.

509. See 50 U.S.C. app. § 2404(a) (1994). See also EAA-99, *supra* note 502, at § 201.

510. See 50 U.S.C. app. § 2405(a) (1994). See also EAA-99, *supra* note 502, at § 301.

511. See 50 U.S.C. app. § 2406(a) (1994).

512. See 50 U.S.C. app. § 2404(c) for national security controls [governing the formulation of the Commerce Control List], (d) [governing the formulation of the Militarily Critical Technologies list]; § 2405(b) for foreign policy controls [criteria for foreign policy based controls], (j) [detailing controls on countries which support terrorism], (l) [governing controls on missile related technology], (m) [governing controls related to chemical & biological weapons], (n) [governing controls related to crime control instruments], (o) [governing the formulation of the Commerce Control List], (p) [governing controls on spare parts]; § 2406(d) for short supply controls [governing controls on domestic crude oil], (e) [governing controls on refined petroleum products], (f) [governing controls on other petroleum products], (g) [governing controls on agricultural commodities], (i) [governing controls on unprocessed red cedar], and (k) [governing controls on oil exports for the military]. See also EAA-99, *supra* note 502, at §§ 101, 202-214, 302-310.

513. See 50 U.S.C. app. § 2404(f) for limits on national security controls [exceptions to controls based upon "foreign availability"], (g) [indexing mechanisms for revising control levels], (m) [establishing *de minimis* content levels for controlling foreign produced goods], (q) [excluding agricultural products]; § 2405(g) for limits on foreign policy controls [excluding certain foods, medicines, and medical supplies], (h) [exceptions to controls based upon "foreign availability"], (i) [excluding controls based upon treaty obligations]; § 2406(g) for limits on short supply controls [excluding agricultural products]. See also EAA-99, *supra* note 502, at §§ 104, 401-403.

514. See 50 U.S.C. app. § 2403(f) [general policy on notice to public and consultation with business]; §2404(h) [establishment of "technical advisory committees"], (k) [negotiations with other countries on national security controls]; § 2405(c) [consultations with industry on foreign policy controls], (d) [consultations with other countries on foreign policy controls]; §2409 (d), (e), (g) [consultations with other governmental agencies on

“hardship” is appropriate,<sup>515</sup> how licenses are to be handled and decided,<sup>516</sup> the times within which actions must be taken by the administering agency,<sup>517</sup> the administrative procedures to be employed,<sup>518</sup> and the avenue for appeals and extent of judicial review.<sup>519</sup> The national security and foreign policy concerns addressed in the EAA and the export control system are no less compelling than those at issue when dealing with economic sanctions programs, and indeed the two sets of controls have become increasingly intertwined in recent years.<sup>520</sup> Accordingly, the example of the EAA suggests that

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licenses]; § 2412(b) [public participation in rulemaking]; § 2413 [annual reporting to Congress]. See also EAA-99, *supra* note 502, at §§ 103, 105, 214, 302, 304, 307, 310, 601, 701, 901.

515. See 50 U.S.C. app. § 2408. See also EAA-99, *supra* note 502, at § 501.

516. See 50 U.S.C. app. § 2409(b) [initial screening of licenses], (d) [referral of license application to other agencies], (e) [actions on license applications by other agencies], (f) [action on license applications by Commerce Department], (f)(3) [inform applicant of “intent to deny” a license, grounds for the proposed decision, steps possible to avoid denial, and appeal procedures], (g) [special procedures for licenses considered by Defense Department], (m) [procedures for licenses requiring multilateral review]. See also EAA-99, *supra* note 502, at § 501.

517. See 50 U.S.C. app. § 2409(b) [10 days for initial screening], (c) [60 days for final decision on “ordinary” license applications], (d) [referrals to other agencies to occur within 20 days], (e) [other agencies to respond within 20 days of referral], (f) [license applicant has 30 days to respond to any issues (including proposed denial), Commerce Department decision rendered within 60 days of receipt of other agencies’ and applicant’s response(s)], (g) [Defense Department given 20 days to recommend disapproval of national security exports; President given 20 days to consider this recommendation], (h) [40 days provided for multilateral review], (j) [applicant given right to seek mandamus 20 days after petitioning Commerce regarding a failure to meet any of the proscribed deadlines], (l) [Commerce Department to decide “classification requests” within 10 days], (n) [reports to Congress on license applications required to include detailed information on timeliness of licensing actions and decisions]. See also EAA-99, *supra* note 502, at §§ 501-502.

518. See 50 U.S.C. app. § 2412. See also *supra* notes 432-439; EAA-99, *supra* note 502, at §§ 501-502.

519. See 50 U.S.C. app. § 2409(j) [appealing denial of license application]; § 2410(c) [administrative sanctions and civil penalties], (e)-(f) [refunds and actions to recover penalties], (g) [forfeiture provisions and procedures]; § 2410(a) [procedures for multilateral control violations]; § 2410(b) [procedures for missile proliferation control violations]; § 2410(c) [procedures for chemical/biological weapons proliferation controls]; § 2412(c) [procedures for civil penalties and sanctions], (d) [procedures for “temporary denial orders”], (e) [administrative appeals form license denials]. See also EAA-99, *supra* note 502, at § 502.

520. In fact the export control system has also imported many of the “tools” and approaches used by OFAC into the export control system. This is particularly true in the case of blacklisting, where the Commerce and State Department blacklists were used primarily, if not exclusively, for parties who were being sanctioned for violating U.S. export controls. Now, following the OFAC model, new blacklists have been created which are employed solely to influence the behavior of foreign parties, behavior which while contrary to U.S. policy objectives, may be entirely legal and encouraged in the jurisdiction

Congress need not be so deferential to the Executive Branch in the SRA.

However, in marked contrast to TWEA and IEEPA, the EAA does contain an expiration date to help ensure that Congress periodically debates the appropriateness of its policies and these detailed directions as to how the Executive branch should conduct its trade control processes.<sup>521</sup> Accordingly, the EAA lapses if Congress does not provide for its timely reauthorization. This has happened on five occasions, most recently in 1994.<sup>522</sup> During these periods, the detailed regulatory mechanisms enabled and created under the EAA are temporarily continued in place and unaltered based upon the President's authority under IEEPA.<sup>523</sup> Senator Gramm of Texas

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where it occurs. See Fitzgerald *supra* note 27, at 28-35.

521. See 50 U.S.C. app. § 2419 (1994).

522. Originally the EAA expired on September 30, 1983. That date was extended to October 14, 1983 by Pub. L. No. 98-108, when the Act lapsed. New legislation was passed in December, 1983, which set an expiration date of February 29, 1984, see Pub. L. No. 98-207. Then Pub. L. No. 98-222 extended that date to March 30, 1984, when the EAA again lapsed. In July 1985, the Act was again reauthorized, by Pub. L. No. 99-64 with a new expiration date of September 30, 1989. The Act was then extended until September 30, 1990 by Pub. L. No. 100-418. It lapsed for a third time in 1990 until it was reauthorized in September, 1993, with Pub. L. No. 103-10, which established an expiration date of June 30, 1994. It lapsed for a fourth time before being briefly extended to August 20, 1994 by Pub. L. No. 103-277 on July 5, 1994. Since the EAA last expired in August of 1994, the Commerce Department's trade controls have continued to be maintained under the President's authority under IEEPA. See also *infra* note 523.

523. The President has continued to maintain the export control system developed under the EAA, by invoking his emergency powers under IEEPA, each time it has lapsed. For the most recent instance, the period since August 20, 1994, see Exec. Order No. 12,924, 59 Fed. Reg. 43,437 (1994) (Continuation of Export Control Regulations); Notice: Continuation of Emergency Regarding Export Control Regulations, 60 Fed. Reg. 42,767 (1995); Notice: Continuation of Emergency Regarding Export Control Regulations, 61 Fed. Reg. 42,527 (1996); Notice: Continuation of Emergency Regarding Export Control Regulations, 62 Fed. Reg. 43,629 (1997); Notice: Continuation of Emergency Regarding Export Control Regulations, 63 Fed. Reg. 44,121 (1998); Notice: Continuation of Emergency Regarding Export Control Regulations, 64 Fed. Reg. 44,101 (1999). For the period of June 30-July 5, 1994, see Exec. Order No. 12,923, 59 Fed. Reg. 34,551 (1994) (Continuation of Export Control Regulations). For the period September 30, 1990-September 30, 1993, see Exec. Order No. 12,730, 55 Fed. Reg. 40,373 (1990) (Continuation of Export Control Regulations); Notice: Continuation of Emergency Regarding Export Control Regulations, 56 Fed. Reg. 49,385 (1991); Notice: Continuation of Emergency Regarding Export Control Regulations, 57 Fed. Reg. 44,649 (1992); Exec. Order No. 12,867, Termination of Emergency Authority for Certain Export Controls, 58 Fed. Reg. 1,993 (1993). For the period March 30, 1984-July 12, 1985, see Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984) (Continuation of Export Control Regulations); Notice: Continuation of Emergency Regarding Export Control Regulations, 50 Fed. Reg. 12,513 (1985); Exec. Order No. 12,525, 50 Fed. Reg. 28,757 (1985) (Termination of Emergency Authority for Certain Export Controls). For the period October 14-December 20, 1983, see Exec. Order No. 12,444, Continuation of Export Control Regulations, 48 Fed. Reg. 48,215 (1983); Exec. Order No. 12,451, 48 Fed. Reg. 56,563 (1983) (Continuation of Export

intended to introduce legislation in the latter half of 1999 to reauthorize and update the lapsed EAA.<sup>524</sup>

The ability to substitute one legislative predicate for another, one broad and deferential and the other arguably equally broad but with much more detailed direction, lends credence to notion that Congress need not defer quite so much to the Executive branch. Congress could well exercise more oversight over the administration of the OFAC sanctions programs, just as it has done with the other trade control offices in other Departments. The SRA would provide a ready vehicle for it to do so.<sup>525</sup>

### Recommendations and Conclusion

Seven years have passed since Melita Jaric's employees were surprised by the delivery of OFAC's "temporary" blocking orders as they returned from lunch. Although few of the people working in the nearby businesses can remember why it happened, IPT's warehouse office outside of Philadelphia remains closed. Neither the trucks on Bristol Road nor the freight cars traveling on the Reading Railroad behind the industrial park now carry any of the grinding machines and other tools IPT distributed for nearly a quarter century. Occasionally, Laslo Kovac makes the twenty minute drive from his home in neighboring Southhampton to check on the old office. A serviceman, he is the last of IPT's former employees to remain in the area. However, there is little to do beyond oiling the small remaining inventory of machines, and his visits are becoming more infrequent over the years.<sup>526</sup> IPT's New York office on Fifth Avenue is gone, and the state has a lien pending for non-payment of taxes.<sup>527</sup> But for the name on the door in Warminster, the IPT Company has ceased to

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Control Regulations).

524. See S. 1712, 106th Cong. (1999). See also *supra* note 502.

525. Alternatively, these issues could be addressed in the new EAA if the scope of the bill were expanded, for example, to consolidate all the various provisions affecting the government's trade control agencies.

526. Following the service of the blocking orders, OFAC licensed the delivery of a number of machines in IPT's inventory to KBC Tools in Michigan, because they had purchased the machines from IPT prior to the date its assets were blocked. Payments received after the effective date of the orders, however, were required to be deposited into blocked bank accounts. OFAC also licensed certain activities regarding the servicing of machinery and the access and maintenance of the premises. Most of these provisions were revoked or suspended following the issuance of Executive Order Number 12,846. See OFAC Licenses Nos. Y-0058 (July 23, 1992) and Y-0096 (July 31, 1992); Exhibit Nos. 5-6 (August 3, 1992) Declaration of R. Richard Newcomb (copies on file with *Hastings Law Journal*). See *IPT Company v. United States Dep't of the Treasury*, No. 92-Civ. 5542 (JFK), 1992 U.S. Dist LEXIS 12796 (S.D.N.Y., August 24, 1992).

527. See *IPT Company*, Judgment Docket, 6/2/1995, Index No. E009541867, available in LEXIS JGT Library, ALLJGT file.

exist.

The blacklisting of individuals or companies, such as occurred with IPT, is a powerful tool with dramatic impact for those who are directly or indirectly affected. As is the case with the sanctions themselves, it is a tool with many important applications augmenting and broadening the reach of the Government's economic sanctions programs and its foreign policy. The power and impact of these tools highlights the importance of ensuring that they are applied properly and consistently, in a manner maximizing their utility and promotes the widest possible compliance with their requirements. Historically, however, procedural defects have plagued virtually all of the OFAC sanctions programs.

OFAC's origins and substantial responsibilities, combined with its historical isolation when compared to other trade control agencies, results in a tendency to take an adversarial approach to those it encounters while carrying out its mission, rather than one which emphasizes cooperation with the individuals and companies who must implement its dictates within the world trading system. Its small size, and the increasing demands for its services by policymakers seeking to "take action" on complex and diverse political issues, has exacerbated this tendency and produced a record replete with procedural deficiencies, *ad hoc* or selective application of its requirements, and a lack of concern for proper notice and distribution of the details of its controls. Thus, there is a certain resonance in Melita Jaric's emotional plea to treat those who become ensnared in sanctions with the same care as if it were their human rights, rather than just property rights, at issue. This plea has increasing appeal the further removed the particular blacklisted party is from a direct presence or involvement in the primary target of the sanctions.

Nevertheless, as Ms. Jaric also discovered, individual lawsuits challenging OFAC's actions are both difficult and unlikely to produce a change in approach. Procedural irregularities are often remediable during the course of an administrative or judicial challenge, leading to inconclusive results for those seeking a long term change in agency practices. Moreover, the adversarial context is not one which is well suited to having the agency appreciate the merit of a challenger's complaints with the process. Additionally, there are sound reasons for the various deferential doctrines and other obstacles which limit judicial review of agency actions which should not, and cannot, be easily overcome.

However, Congress is well-positioned to consider OFAC's administrative record from a broader perspective than that presented in any individual administrative appeal or judicial action. In addition to providing new guidance on the use of unilateral economic sanctions, Congress could expand the SRA to address many of the



procedural issues which affect OFAC operations and programs in a manner not unlike the specific direction it provides for the Bureau of Export Administration's operations in the EAA. It can mandate, for example, that preexisting notice and comment requirements of the APA and Federal Register Act be followed. OFAC's desire to respond quickly when establishing new sanctions or adjusting existing controls to accommodate shifts in policy certainly does not preclude the use of "interim final" rules, and the subsequent consideration of comments from the trading community and public, prior to issuing "final" rules. Additionally, a harmonized or master menu of possible sanctions measures which could be selectively invoked for particular targets would greatly simplify and streamline the existing regulatory scheme, which is unnecessarily complex because of its dependence upon ostensibly separate sets of regulations for each sanctions target. Congress can and should play a greater role in defining that menu of possible sanctions measures, establishing the substantive administrative review procedures to be applied, and ensuring that its directions are carried out in practice by the Executive branch.<sup>528</sup>

With particular regard to blacklisting, Congress should prescribe the proper procedural and factual prerequisites for naming a party to the OFAC blacklists, the requirements for making that information available to the concerned party, and for appealing or challenging a blacklisting action. Congress should also clarify that the blacklisting tool should ordinarily focus on parties of concern located *outside*, rather than within, the sanctioned target destination or territory. Additionally, blacklisting should be used sparingly and only for those parties whose blacklisting is essential to meeting the policy objectives of the sanctions. With literally thousands of names appearing in the current blacklists, it is virtually impossible to administer without a fairly sophisticated computer-driven screening process. Moreover, a compliance staff is also required, as no computer program can fully deal with all the subtle nuances of the various regulatory requirements. While financial institutions and larger companies can afford these measures, full and effective compliance with the obligations imposed by these complex requirements is beyond the capability of many others. Simply asserting that when in doubt one

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528. In providing for review of agency actions, under the traditional "arbitrary and capricious" standard of the APA or whatever other standard is selected, care must be exercised to be sufficiently specific as to what may be reviewed in order to avoid inadvertently making judicial review logically dependent upon nonjusticiable political questions, as occurred with the Antiterrorism and Effective Death Penalty Act. See 8 U.S.C. § 1189(a)(1)(c). See *People's Mojahedin Organization of Iran v. United States Dep't of State*, Nos. 97-1646, 97-1670, 1999 WL 420471 (D.C. Cir., June 25, 1999); *supra* note 422 and accompanying text.

should “ask for an interpretation or apply for a license,”<sup>529</sup> begs the question and is manifestly impractical in the age of the global economy. Accordingly, and again in a manner similar to that done with the commodity oriented export control system, Congress should establish a *de minimis* level below which the sanctions would not apply, a level that matches the historical lack of enforcement of these controls for minor or incidental dealings outside of a sanctioned target destination.<sup>530</sup> This action, along with establishing appropriate limits on blacklisting parties who may have only indirect connection or involvement with a particular sanctioned target, would greatly contribute towards the creation of a more manageable blacklist. When combined with greater Congressional direction regarding the nature and process for imposing economic sanctions, these steps would help the OFAC sanctions to become more clear, more consistent, and more effectively implemented, and therefore better suited to promoting the long-term aims and policy objectives underlying the Government’s various economic sanctions programs.

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529. See *supra* note 454 and accompanying text.

530. OFAC took the first tentative steps in this direction in April, 1999, when the ITR were amended to exclude from their coverage U.S. contributions to third country exports to Iran which contain “insubstantial” amounts of U.S. goods or technology. See 64 Fed. Reg. 20,168 (1999) (codified at 31 C.F.R. §560.511). The method OFAC uses to determine what is “insubstantial” borrows heavily from the Export Administration Regulations (EAR) provisions which exempt foreign items with *de minimis* U.S. content from control. However, the OFAC approach is less stringent in calculating the U.S. content than are the EAR provisions. Compare 31 C.F.R. § 560.111 with 15 C.F.R. § 734.4 (1998).

