



The “Specially-Designated Global Terrorist” Designation Scheme and its Constitutional Flaws

The International Emergency Economic Powers Act (“IEEPA”) gives the president broad authority to declare a national emergency with respect to a specified threat, and to take action in response to it. Invoking this authority, President Bush issued Executive Order 13224 in 2001, and claimed the power to impose broad sanctions on any person or organization designated a “specially designated global terrorist” (“SDGT”). Executive Order 13224 can apply to U.S. and foreign organizations and individuals.

The SDGT regime uses vague criteria and lacks an evidentiary standard for designating entities as SDGTs, and the designation process itself is unclear. At the same time, the consequences of SDGT designation are draconian. The Bush administration claimed the power to immediately freeze the assets of a designated entity without notice, effectively preventing it from carrying out its regular business and activities. Other institutions and individuals are prohibited from conducting any transaction or dealing—broadly defined—with a designated entity, unless they obtain a license from the government. The designated entity cannot hire and pay a lawyer to defend against the designation without a government license; unpaid representation does not require a license. Designation also carries with it the severe stigma of being labeled by the government as a terrorist.

Congress has given the Executive Branch the authority to block an entity’s assets “pending investigation” into whether it is an SDGT, meaning that all of these draconian consequences of designation can be imposed based on suspicion alone.

Federal courts twice held that this SDGT scheme as applied to U.S. non-profit groups violated the Constitution. The courts in *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009), and *Al Haramain Islamic Foundation, Inc. v. United States Department of Treasury*, 686 F.3d 965 (9th Cir. 2012), made clear that critical procedural protections are necessary under the Fourth and Fifth Amendments when a U.S. non-profit has its assets blocked pending an investigation or is designated an SDGT. At the very least, the government is required to obtain a warrant based upon probable cause before seizing or freezing a U.S. organization or individual’s assets, and there must be a meaningful opportunity before a neutral decisionmaker to defend against the designation or freeze.

This background paper provides an overview of the SDGT designation scheme and its constitutional flaws.

Legal Authority for SDGT Designation or Block Pending Investigation

Citing authority under IEEPA, enacted in 1977, President Bush issued Executive Order 13224 on September 23, 2001.¹ E.O. 13224 prohibits transactions with, and freezes all assets of, any organization or individual the government designates an SDGT. E.O. 13224 delegates this designation power to the Secretary of the Treasury and the Secretary of State, in consultation with the Attorney General. The Secretary of Treasury determines the designations of U.S. groups or individuals (referred to in this paper as “U.S. persons”), in consultation with the Secretary of State and the Attorney General. The USA PATRIOT Act of 2001 amended IEEPA to permit the Secretary of the Treasury to block the assets of an entity pending investigation.²

Criteria for SDGT Designation or Block Pending Investigation

E.O. 13224’s criteria for designation or blocking pending investigation as an SDGT are vague, and may rest on guilt by association. There is no set evidentiary standard that the government must meet. The same criteria apply if an entity is blocked pending investigation. These criteria apply to entities and individuals (both referred to as “persons”):

- (1) foreign persons on an annexed list created at the time the order was issued and added to thereafter (“the SDGT list”);³
- (2) foreign persons determined by the Secretary of State to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States;⁴
- (3) foreign or U.S. persons determined by the Secretary of the Treasury to be owned or controlled by, or to act for or on behalf of the persons included in the SDGT list;⁵
- (4) foreign or U.S. persons the Secretary of the Treasury determines (a) assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to, such acts of terrorism or the persons listed on the SDGT list, or (b) are “otherwise associated” with persons on the SDGT list.⁶

¹ International Emergency Economic Powers Act, 50 U.S.C. § 1701; Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), *amended in part by* Exec. Order No. 13,372, 70 Fed. Reg. 8,499 (Feb. 16, 2005).

² 50 U.S.C. § 1702(a)(1)(B). The Department of Treasury has issued regulations to implement E.O. 13224 at 31 C.F.R. pt. 594.

³ Since E.O. 13224 was issued, other designated organizations and individuals, both foreign and domestic, have been added to the SDGT list.

⁴ Under the regulations implementing E.O. 13224, “terrorism” means an activity that: (a) involves a violent act or an act dangerous to human life, property, or infrastructure; and (b) appears to be intended (1) to intimidate or coerce a civilian population; (2) to influence the policy of a government by intimidation or coercion; or (3) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking. 31 C.F.R. § 594.311.

⁵ E.O. 13224 defines U.S. persons to include U.S. citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States.

E.O. 13224 does not specifically incorporate or refer to organizations designated as a Foreign Terrorist Organization (FTO) under the separate FTO designation scheme. In practice, it appears that when the government designates an entity as an FTO, it also designates that entity as an SDGT.

⁶ Under regulations implementing E.O. 13224, “otherwise associated with” means: (a) to own or control; or (b) to attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or

Consequences of designation or block pending investigation

When an entity or individual is designated an SDGT, all property and interests in property in the United States—or that later come within the United States or within the possession or control of U.S. persons—are blocked. This means that the property is or can be seized by the government. E.O. 13224 also prohibits “any transaction or dealing” with an SDGT by a U.S. person or within the United States, including making or receiving any contribution of funds, goods, or services to or for the benefit of a designated entity. The same consequences apply for an entity or person blocked pending investigation. Criminal and civil penalties may apply for violations.⁷

A designated entity or an entity that is blocked pending investigation cannot lawfully pay for an attorney to defend itself unless the attorney first obtains a license from the Office of Foreign Assets Control (OFAC); a license is not needed for unpaid representation.⁸

Designation or a block pending investigation of designation imposes a severe reputational stigma: the stamp of a government label that an organization or individual is a terrorist or suspected of being one.

Entities designated as SDGTs are included on the government’s Specially Designated Nationals and Blocked Persons (SDN) list, an umbrella list that also includes organizations and individuals in other financial-sanctions programs. Entities blocked pending investigation are placed on the SDN list with a “BPI” label.

SDGT Designation Procedure and Administrative Review

The process for designating a person or organization as an SDGT is somewhat unclear, as it is not laid out in any statute or regulation. Furthermore, the Treasury Department’s descriptions of the process on its website, in litigation filings, and in congressional testimony do not comport with the past experience of some designated organizations and individuals.

As described by the Treasury Department, SDGT designation involves an investigation into the party to be designated, creation of an administrative record (which can include classified information), and consultations with the Secretary of State and the Attorney General. According to the Treasury Department, if it deems the administrative record “legally sufficient”—meaning the record demonstrates “a reasonable basis” to determine that the designee meets “the criteria for designation”—the entity can be designated as an SDGT, its assets can be frozen without prior notice, and the designation will be published in the *Federal Register*.⁹

technological support, or financial or other services, to. 31 C.F.R. § 594.316. Any entity in which an SDGT has a 50% or greater interest is also blocked, even if the sub-entity is not designated an SDGT. 31 C.F.R. § 594.412.

⁷ 50 U.S.C. § 1705; *see also* 31 C.F.R. § 594.701.

⁸ 31 C.F.R. § 594.506.

⁹ *Anti-Money Laundering: Blocking Terrorist Financing & Its Impact On Lawful Charities: Hearing before the H. Comm. on Fin. Serv., Subcomm. on Oversight & Investigations*, 111th Cong. 4-5 (2010) (written statement of Daniel L. Glaser, Deputy Assistant Sec’y, Terrorist Financing & Financial Crimes, U.S. Dep’t of Treasury) <https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/FINAL%20GLASER%20TESTIMONY%20ON%20CHARITIES%205-26-2010%20edited%20PDF.pdf>.

The Treasury Department has also blocked entities' assets before completing an investigation into whether designation is warranted.¹⁰ These blocks pending investigation have been imposed without prior notice.

An entity that has been designated or blocked pending designation as an SDGT may seek relief through an administrative process. That process is set forth in very general terms in a regulation, 31 C.F.R. § 501.807, which provides that the entity may submit arguments or evidence to attempt to establish that there is not a sufficient basis for the designation or block. The entity may also propose remedial steps, "such as corporate reorganization, resignation of persons from positions in a blocked entity," or similar steps that the entity believes would negate the basis for designation.¹¹ A designated or blocked entity may request a meeting with the Treasury Department, but the Treasury Department reserves the right to refuse a meeting.¹² After considering the submission, the Treasury Department will issue a written decision.¹³ There are no time limits for an entity to seek this relief, or for the Treasury Department to respond to a request for relief.

Constitutional Flaws

The courts in *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009), and *Al Haramain Islamic Foundation, Inc. v. United States Department of Treasury*, 686 F.3d 965 (9th Cir. 2012), made clear that critical procedural protections are necessary under the Fourth and Fifth Amendments when a U.S. person has its assets blocked pending an investigation or is designated an SDGT.¹⁴ There is no public indication, however, that the Treasury Department has revised its designation procedures to comport with these constitutional requirements. Any future designation under a similar scheme would at the very least be vulnerable to the constitutional claims asserted and upheld in *KindHearts* and *Al Haramain*.

Fourth Amendment: Unreasonable Seizures. The Fourth Amendment protects against unreasonable searches and seizures. Since 2008, courts have held that the Treasury Department's freezing of an entity's assets is a seizure and therefore must comply with the Fourth Amendment. The courts in *Kindhearts* and *Al Haramain* held that the government must obtain a warrant based upon probable cause before blocking a U.S. person's assets. The same would be true for non-U.S. persons with assets in the United States, or a presence and substantial connections here.

¹⁰ 50 U.S.C. § 1702(a)(1)(B).

¹¹ 31 C.F.R. § 501.807(a).

¹² 31 C.F.R. § 501.807(c).

¹³ 31 C.F.R. § 501.807(d).

¹⁴ See also *In re Search of Kindhearts for Charitable Humanitarian Development*, 594 F. Supp. 2d 855 (N.D. Ohio 2009) (granting counsel for and officers of blocked charity access to its seized documents and information and finding that a government protective order preventing such access impaired due process and Sixth Amendment right to counsel); *KindHearts v. Geithner*, 676 F. Supp. 2d 649 (N.D. Ohio 2009) (granting temporary restraining order enjoining blocked charity's designation as SDGT, including based on irreparable reputational harm if designation were to go forward); *KindHearts v. Geithner*, 710 F. Supp. 2d 637 (N.D. Ohio 2010) (providing remedies for constitutional violations, including notice of basis for block pending investigation and procedure for counsel's access to classified information or summaries of classified information).

Fifth Amendment: Due Process. The Fifth Amendment's Due Process Clause provides that no person shall be deprived of life, liberty or property without notice and a meaningful opportunity to contest the deprivation. In the *KindHearts* and *Al Haramain* cases, the government claimed the authority to blacklist organizations and individuals with virtually no procedural or substantive safeguards before or after the fact. The government argued it could effectively shut down organizations or freeze individuals' assets, labeling them terrorists in the process, without notice or a hearing and on the basis of classified evidence, without any judicial review. It sought to ensure that post-blocking judicial review of the government's evidence would be conducted in secret and without the designated entity present.

The *Kindhearts* and *Al Haramain* courts held that the designations violated the Fifth Amendment right to due process, and established that the Treasury Department must provide entities that are designated or blocked pending investigation as SDGTs actual notice of the charges against them and a meaningful opportunity to defend themselves, including access to, or summaries of, classified information the government relied upon in making its decisions.

First Amendment: Free Association and Speech; Free Exercise of Religion; Establishment Clause. The First Amendment protects the rights of free association and speech. In *Al Haramain*, the court found that the SDGT designation violated the right to freely associate because it prohibited a non-designated organization from holding joint press conferences and otherwise coordinating advocacy with a designated organization. Designation under the SDGT scheme may also violate the First Amendment by sweeping too broadly and restricting constitutionally protected speech and conduct.

The Free Exercise Clause of the First Amendment bars the government from interfering with or restricting religious practice. Thus, for example, designation of a Muslim non-profit or charity may violate the Free Exercise Clause because donating to charity is one of Islam's central tenets and OFAC's designation scheme imposes vague rules that put Muslims at risk for fulfilling their religious obligations.

The First Amendment's Establishment Clause guarantees that the government will not establish, favor, discriminate against, or condemn any religion. To the extent that an SDGT designation is implemented in a way that targets or disfavors Muslims, it may violate the Establishment Clause.

Fifth Amendment: Equal Protection. Designation under the SDGT scheme may violate the Fifth Amendment if it is enforced in ways that unfairly target Muslim organizations or individuals, denying them the equal protection guaranteed under the Constitution.