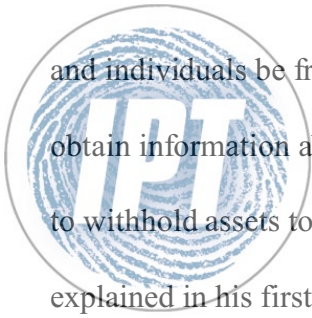


I find the first factor met. When analyzing the government’s actions under this factor, courts undertake a “close review” to find whether the “purpose actually served . . . is ultimately indistinguishable from the general interest in crime control.” Ferguson, 532 U.S. at 81-82 (internal citation and quotations omitted) (policy was directed at “arrest and prosecution of drug-abusing mothers”). Courts consider the “programmatic purpose” and “distinguish[] general crime control programs and those that have another particular purpose, such as protection of citizens against special hazards or protection of our borders. . . . The nature of the ‘emergency,’ which is simply another word for threat, takes the matter out of the realm of ordinary crime control.” In re: Sealed Case, 310 F.3d 717, 745-46 (FISA Ct. Rev. 2002); see also Heckenkamp, 482 F.3d at 1147 (consider whether the search or seizure is “motivated by a need to collect evidence for law enforcement purposes or at the request of law enforcement agents”); Edmond, 531 U.S. at 41 (evaluate whether the “primary purpose [is] to detect evidence of ordinary criminal wrongdoing,” comparing approved purposes of “policing the border” or “ensuring roadway safety” versus “uncover[ing] evidence” of drug crimes).⁸

Applying these cases, then, the primary focus of the asset seizure scheme used to freeze AHIF-Oregon’s assets is not for criminal law enforcement purposes. Rather, the President declared a national emergency due to the terrorist attacks in New York, Pennsylvania and the Pentagon, and directed that assets and property in the hands of specified governments, entities

⁸Based on these cases, I respectfully disagree with KindHearts for Charitable Humanitarian Development, Inc. v. Geithner, No. 3:08CV2400, ___ F. Supp. 2d ___, 2009 WL 2514057, * 18-19 (N.D. Ohio Aug. 18, 2009). In that case, the court considered the “method” and “modus operandi” of the asset seizure program, rather than the purpose behind the program, and concluded the blocking actions had “more in common with ordinary law enforcement activity.” Id. As is clear from the cases I cite above, the focus of the inquiry is on the programmatic purpose of the activity, not the method by which the activity is carried out.



and individuals be frozen to stop future attacks. The purpose of the asset seizure scheme is not to obtain information about whether the asset owner has committed an act of terrorism, but rather is to withhold assets to ensure future terrorist acts are not committed. As OFAC Director Szubin explained in his first declaration, the purpose of the freezing order is to “depriv[e] the designated person of the benefit of the property . . . that might otherwise be used to further ends that conflict with U.S. interests. Blocking assets of designated terrorists and their supporters prevents their possible use in the orchestration, assistance or support of unlawful and dangerous global terrorist plots.” Szubin Decl. at ¶ 11. Director Szubin also explains that blocking assets preserves them for future legal judgments and allows the President to use the assets in negotiations with foreign governments.

My finding is consistent with cases in the context of searches of mass transit operations, like ferries and airplanes, in which courts have concluded that “[p]reventing or deterring large-scale terrorist attacks present problems that are distinct from standard law enforcement needs and go well beyond them.” Cassidy v. Chertoff, 471 F.3d 67, 82 (2nd Cir. 2006) (searches on Lake Champlain ferries justified as special need) (citing MacWade v. Kelly, 460 F.3d 260, 272 (2^d Cir. 2006) (searches of baggage on subways justified as special need)).

As for the second factor, the government has persuasively explained why it is impracticable to obtain a warrant. First, the government must act quickly to prevent asset flight. I agree with plaintiffs that this reason alone would be insufficient to satisfy the impracticability requirement since the government could seize first and obtain a warrant later. The government has also explained, however, how impossible it would be to meet the specificity requirements in



an application for a warrant, and how difficult it would be to track down assets belonging to the designated individual and apply for a warrant in each jurisdiction in which the asset is located.

Pursuant to the Fourth Amendment, a warrant requires a description of the “place to be searched and the persons or things to be seized.” Here, however, as Szubin explains in his supplemental declaration, OFAC and the President have Congressional authority to seize a wide variety of property interests, ranging from money to mortgages, options to insurance policies, merchandise to accounts payable, located both in the United States and elsewhere, the existence of which are not always known to the agency at the time of the blocking order. Szubin explains that OFAC and the President often rely on the holder of the property to freeze the asset and report to OFAC about the existence of the asset. As a result, it would be difficult to apply for a warrant for every asset in each jurisdiction in which the asset might be located. Such a requirement would interfere with the President’s and OFAC’s ability to act fast in blocking assets that are often very liquid and transferrable.

Szubin further explains, “In many cases, the holders of blocked property have access to substantially more information about the property than does OFAC and will be in the best position to determine whether a blocked person has an interest in the property, particularly where a third party is the nominal owner of the property and the blocked person’s interest is indirect, beneficial or contingent.” Supp. Decl. of Adam J. Szubin ¶ 8. OFAC provides notice of blocking actions through press releases and by updating its website, as well as by publishing a notice in the Federal Register. Once they have obtained notice, OFAC relies on holders of blocked property “to comply with their obligations to identify and take appropriate steps to freeze the property, including placing blocked funds into an interest-bearing blocked account in



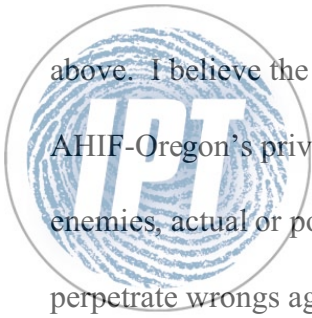
accordance with OFAC regulations. *See, e.g.*, 31 C.F.R. § 594.203.” *Id.* at ¶ 9. Szubin also explains that, technologically, banks and other financial institutions are in the best position to track ownership of blocked assets and use interdiction software to identify assets that potentially belong to a designated person.

In this way, the challenging circumstances OFAC faces are similar to the difficulties faced by the probation officer in Griffin. Just as requiring a warrant prior to entering a probationer’s home would interfere with the probation system and make it difficult for a probation officer to respond quickly to a potential violation of the conditions of probation, so too would a warrant requirement here “make it more difficult to . . . respond quickly to evidence of misconduct[.]” Griffin, 483 U.S. at 876.

Since I have determined that both the first and second factors apply in this special needs analysis, I must now “assess the constitutionality of the search by balancing the need to search against the intrusiveness of the search.” Henderson v. Simi Valley, 305 F.3d 1052, 1059 (9th Cir. 2002); Ferguson, 532 U.S. at 78 (“we employ[] a balancing test that weigh[s] the intrusion on the individual’s interest in privacy against the ‘special needs’ that support[] the program”).

As I noted in AHIF, the effect of the seizure of assets on AHIF-Oregon is “substantial. The effect of the government’s blocking and designation orders is effectively to close AHIF-Oregon’s doors.” 585 F. Supp. 2d at 1259. AHIF-Oregon’s assets have now been frozen for more than five years. Nevertheless, a designated entity may seek a license from OFAC to engage in any transaction involving blocked property. 31 C.F.R. §§ 501.801-.802.

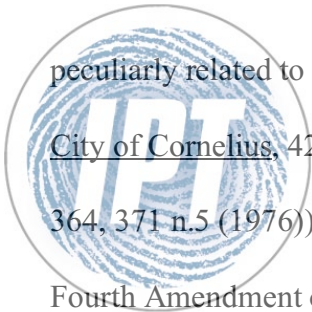
On the other side of the scale, the government’s interest in seizing the assets of organizations with links to international terrorist organizations are substantial, as I have indicated



above. I believe the government’s interest in stopping the financing of terrorism outweighs AHIF-Oregon’s privacy interests. See Propper, 337 U.S. at 481-82 (TWEA used to “deprive enemies, actual or potential[,] of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States” and does “necessitate[] some inconvenience to our citizens and others”).

Finally, plaintiffs contend I must consider whether there are safeguards in place that act as “constitutionally adequate substitute[s] for a warrant.” New York v. Burger, 482 U.S. 691, 703 (1987). This factor is explicitly called for in the category of “closely regulated” businesses where administrative searches take place to ensure compliance with a regulatory scheme. See Griffin, 483 U.S. at 873 (citing cases for proposition that searches in such circumstances must meet “reasonable legislative or administrative standards”). Where “some quantum of individualized suspicion” is missing, the “safeguards are generally relied upon to assure that the individual’s reasonable expectation of privacy is not ‘subject to the discretion of the official in the field.’” See Delaware v. Prouse, 440 U.S. 648, 653-55 (1979) (quoting Camara, 387 U.S. at 532).

Here, however, OFAC froze AHIF-Oregon’s assets due to its “reason to believe” that AHIF “may be engaged in activities that violate” the IEEPA. This reasonable suspicion standard is equivalent to the standard applied in other special needs cases, such as T.L.O. and Griffin, and is consistent with the standard of review courts use to evaluate designation decisions. See AHIF, 585 F. Supp. 2d at 1252-53 (“rational,” “supported by the administrative record,” and “reasonable belief that AHIF-Oregon provided support to SDGTs”); Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156, 161-62 (D.C. Cir. 2003); IARA, 477 F.3d at 732. Such a standard is appropriate in cases of this kind, especially since “[t]he standard of probable cause is



peculiarly related to criminal investigations, not routine, non-criminal procedures.” Miranda v. City of Cornelius, 429 F.3d 858, 863 (9th Cir. 2005) (citing South Dakota v. Opperman, 428 U.S. 364, 371 n.5 (1976)); see also United States v. Knights, 534 U.S. 112, 121 (2001) (“Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term ‘probable cause,’ a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.”). Accordingly, because individualized suspicion is required before OFAC undertakes an asset seizure, no additional safeguards are necessary to act as a substitute for a warrant.

In sum, I find OFAC’s seizure of AHIF-Oregon’s assets was reasonable within the meaning of the Fourth Amendment because it was supported by the special needs of the government.

III. Attorneys’ Fees

OFAC authorizes licenses to release some blocked funds to pay legal fees and costs incurred “in seeking administrative reconsideration or judicial review of the designation or blocking pending investigation of a U.S. person . . . where alternative funding sources are not available.” Pls.’ Fed. R. Civ. P. Rule 56(f) Decl. of Counsel Ex. A; see also Pls.’ Notice of OFAC Guidance on Legal Fees and Expenses Ex. 1.

AHIF-Oregon’s attorneys submitted a request for fees through March 2008. OFAC denied AHIF-Oregon’s request because AHIF-Oregon’s attorneys “have already been paid from alternative funding sources in excess of the fee caps set forth in the policy.” Defs.’ Notice of OFAC’s Decision.

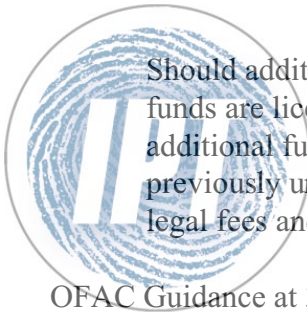


In AHIF, I agreed with the government that the Fifth Amendment does not require access to blocked fees to pay attorneys. I also agreed with the government that it has legitimate interests in blocking assets and that its decision to limit the fees counsel can obtain is rationally related to achieving those interests. I did not think that limiting the designated entity to two attorneys, caps on fees, or the fact that OFAC approves or denies the fee requests made the policy arbitrary and capricious.

Nevertheless, I concluded that OFAC’s denial of fees on the basis that AHIF-Oregon has “already been paid from alternative funding sources in excess of the fee caps set forth in the policy” is arbitrary and capricious because it allows an entity to seek fees from OFAC first and then seek fees from other sources later. AHIF, 585 F. Supp. 2d at 1272. I concluded that AHIF-Oregon should not be penalized for raising “fresh” funds first and seeking blocked funds second.

Furthermore, I found OFAC’s application of the caps on legal fees to be arbitrary and capricious in this case because OFAC caused the run-up in legal expenses in the administrative and judicial proceedings by not giving AHIF-Oregon a statement of the charges it faced when OFAC was considering designating it, and by redesignating it in the midst of this litigation. I concluded that applying the cap of \$7,000 each for administrative and judicial proceedings, or \$14,000 each for complex cases, without considering the events in this case, is arbitrary and capricious. I requested additional briefing on the appropriate remedy.

The government has clarified in its supplemental briefing that the policy does not unfairly allow a party to seek fees from other sources after it obtains a release of blocked funds from OFAC. Instead, OFAC’s guidance states:

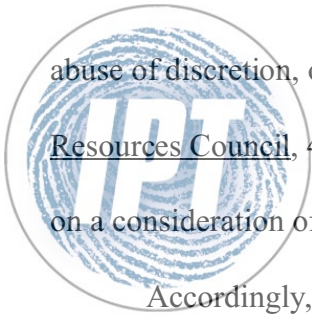


Should additional fresh funds or legal defense funds be received after blocked funds are licensed and used for payment of legal fees and/or costs, then such additional funds must first be deposited into a blocked account until the amount previously unblocked is restored. Any remaining funds may then be applied to legal fees and/or costs.

OFAC Guidance at 3. In other words, if a blocked party receives funds from a new source, after OFAC already provided funds for attorneys' fees from blocked assets, the blocked party is required to return an amount equal to the blocked funds it received. As a result, the timing I was concerned about is rectified by this portion of the policy and, accordingly, I rescind my ruling that the policy was arbitrary and capricious on this ground.

Plaintiffs' attorneys seek \$108,834.52 in unreimbursed attorneys' fees and expenses through January 2009. Plaintiffs' attorneys have been paid from other sources in the amount of \$128,972.83. They explain that they are seeking the difference in hourly fees between what they have been paid from other sources (at \$100/hour) and their reduced rate to their client (\$250/hour).

As I noted in AHIF, I am bothered by OFAC's actions in causing AHIF-Oregon to expend unnecessary resources in guessing at the charges it faced. Nevertheless, I agree with the government that since I previously concluded AHIF-Oregon does not have a constitutional right to access the blocked assets, that OFAC has a rational basis to maintain the asset freeze, and that OFAC's decision to limit fees is rationally related to the agency's interests, I must deny AHIF-Oregon's request for attorneys' fees. OFAC has a rational basis for its attorneys' fees policy, since it allows an entity to hire an attorney when the entity has no other access to funds, and I do not second guess the agency's rationale under the narrow review permitted by the Administrative Procedures Act. See 5 U.S.C. § 706(2)(A) (agency action must be "arbitrary, capricious, an



abuse of discretion, or otherwise not in accordance with law”); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989) (courts “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”).

Accordingly, I rescind my rulings to the contrary in AHIF and dismiss Count III of plaintiff’s Supplemental Complaint.

IV. MCASO’s Request for Clarification

In AHIF, I held that the term “services” in the executive order is not vague because the term is a defined term, and does not give limitless discretion to OFAC as to what constitutes a “service.” I held that, contrary to plaintiffs’ assertion, the focus of the prohibition is on the provision of “services *to or in support of*” an SDGT, which implies cooperation between the entities, as opposed to independent advocacy. AHIF, 585 F. Supp. 2d at 1270. The government reported that under this language MCASO could speak out and express its views about the case and AHIF-Oregon’s designation, could say whether it thinks the designation was right or wrong, and could promote multiculturalism. I concluded that MCASO’s proposed activities “do not fall within the prohibition on providing ‘services to or on behalf of’ AHIF-Oregon.” Id.

MCASO requests clarification of my ruling. Although the provision in the executive order prohibits services “to or in support of” a designated entity, the regulation prohibits providing services “on behalf of or for the benefit of” a designated entity. Cf. E.O. 13,224, §1(d)(i) with 31 C.F.R. § 594.406(a)(1). MCASO is concerned that while it may offer independent advocacy “in support of” AHIF-Oregon under the executive order, it will run afoul of the regulations’ prohibition on independent advocacy which is “for the benefit of” AHIF-Oregon. MCASO wishes to protest AHIF-Oregon’s designation, and advocate on its behalf and



for its benefit, by speaking about this case and AHIF-Oregon’s designation in public, writing to the newspaper, contacting government representatives, and demonstrating, but it is afraid its activities will fall within the prohibition on providing “services” “on behalf of or for the benefit of” a designated entity. MCASO believes I failed to address the constitutionality of the regulation.

The applicable regulation reads as follows:

§ 594.406 Provision of services.

(a) Except as provided in §594.207, the prohibitions on transactions or dealings involving blocked property contained in §§ 594.201 and 594.204 apply to services performed in the United States or by U.S. persons, wherever located, including by an overseas branch of an entity located in the United States:

(1) *On behalf of or for the benefit of a person* whose property or interests in property are blocked pursuant to § 594.201(a); or

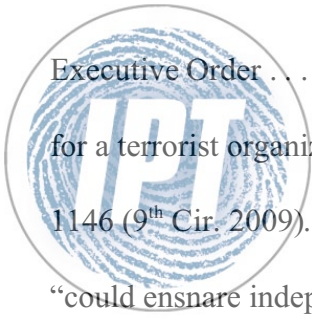
(2) With respect to property interests subject to §§ 594.201 and 594.204.

(b) Example: U.S. persons may not, except as authorized by or pursuant to this part, provide legal, accounting, financial, brokering, freight forwarding, transportation, public relations, educational, or other services to a person whose property or interests in property are blocked pursuant to § 594.201(a).

31 C.F.R. § 594.406 (emphasis added).

The government reiterates its position from its earlier briefing, that nothing in the regulations prohibit “independent advocacy in support of designated groups.” Defs.’ Response to Pl. MCASO’s Request for Clarification at 1 (quoting Humanitarian Law Project v. U. S. Treasury Dept., 463 F. Supp. 2d 1049, 1059-60 (C.D. Cal. 2007)).

The Ninth Circuit recently affirmed the district court’s conclusion in Humanitarian Law Project. The Ninth Circuit held that the “‘services’ ban in the regulations implementing the



Executive Order . . . indicate that one should not perform a useful professional or business task for a terrorist organization.” Humanitarian Law Project v. U. S. Treasury Dept., 578 F.3d 1133, 1146 (9th Cir. 2009). The court could “see no basis for supposing” that the term “services” “could ensnare independent advocacy undertaken for the benefit of” terrorist organizations. Id. at 1147.

The court relied in part on the Secretary of Treasury’s assertion that the “designation criteria [under the Executive Order] will be applied in a manner consistent with pertinent Federal law, including, where applicable the First Amendment to the United States Constitution.” Id. (quoting 72 Fed. Reg. 4,206 (January 30, 2007)). The Ninth Circuit then commented, “This reflects the Treasury Department’s intent to interpret its own regulations, including the ban on ‘services,’ to exclude independent advocacy because independent advocacy is always protected under the First Amendment.” Id. Additionally, the court noted that the plaintiff could identify “no instance where any person engaged in independent advocacy has been subject to civil or criminal penalties under IEEPA for engaging in such conduct.” Id. In the event of any concerns about compliance with the regulations, the court pointed out that the Department of Treasury offers multiple options to obtain advice about whether proposed activities would be permitted. These options include a telephone hotline, an e-mail hotline, and consultation with the Chief Counsel’s office. Id. at 1147 n.13.

In short, to the extent AHIF needed to be clarified, I find that neither the executive order nor the regulation is vague. So long as MCASO acts independently, it may engage in the kinds of activities it describes.



CONCLUSION

For the foregoing reasons, I dismiss Counts II, VIII, and III of plaintiffs’ Supplemental Complaint. Judgment will be entered dismissing plaintiffs’ complaint with the exception of MCASO’s Count X as to the vagueness of the term “material support,” in conformance with my decision in AHIF.

IT IS SO ORDERED.

Dated this 5 day of November, 2009.

/s/ Garr King
Garr M. King
United States District Judge