

To: Our Clients and Friends

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## Court Holds for First Time That OFAC Blocking Order Was Unconstitutional

In an unprecedented case, a federal judge has held that the Office of Foreign Assets Control violated the U.S. Constitution by blocking a company's assets without obtaining a warrant and by not providing adequate notice of the blocking order or opportunity for the company to be heard. The company involved is an Ohio-based charity that OFAC says coordinated activities with Hamas leaders and made contributions to Hamas-affiliated organizations.

Central to the case was the judge's conclusion that, despite several Supreme Court cases upholding OFAC blocking orders and even though the executive branch has authority in the area of foreign affairs and national security, blocking orders are subject to the constitutional prohibition against unreasonable searches and seizures. According to the judge, the Supreme Court cases never addressed that prohibition because they involved assets of foreign governments not protected by the Constitution. He also described the issue not as being whether the government had the authority to block but whether the means through which it did so were constitutional. The judge's explanation of these points, however, is not particularly illuminating, making them likely targets for an appeal, which is also likely given the unprecedented nature of the case.

Another central issue was whether an OFAC blocking order is one of the "special needs" or "exigent circumstances" cases that involve instances not requiring a warrant. The judge concluded that blocking orders are unlike "special needs" cases, in part, because warrants are not practical in those cases. He concluded that this case did not involve "exigent circumstances" primarily because there was no risk that relevant evidence would be lost without a warrant. The judge's reasoning is persuasive in these areas and suggests a successful government appeal might depend on the persuasiveness of an argument that precedent or inherent executive branch power makes asset blocks immune from warrant requirements.

With respect to the holding that OFAC did not provide adequate due process, OFAC is unfortunately well-known for not offering an abundance of information on its activities and for responding unreasonably late, if at all, to inquiries. In this case, it was not surprising that the notice of the blocking order did not explain the reason for the order. What was somewhat surprising was that, after inviting the charity to challenge the blocking order, OFAC did not respond to the challenge until well over a year later. With any luck, this case might prompt improvements in the information OFAC shares with the public about the basis for its actions in blocking the assets of those alleged to be engaged in wrongdoing and its responsiveness to those who challenge those allegations.

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