Case No. 10-35032

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*,

Plaintiffs/Appellants

v.

UNITED STATES DEPARTMENT OF THE TREASURY, *et al.*,

Defendants/Appellees

On Appeal from the United States District Court for the District of Oregon
D.C. No. 3:07-cv-01155-KI (The Honorable Garr King)

APPELLANTS' REPLY BRIEF

David D. Cole, D.C. No. 438355
Amanda Shanor, N.Y. No. 4849378
c/o Georgetown Univ. Law Center
600 New Jersey Avenue N.W.
Washington, D.C. 20001-2075
Telephone: (202) 662-9078

Lynne Bernabei, D.C. No. 938936
Alan R. Kabat, D.C. No. 464258
Bernabei & Wachtel, PLLC
1775 T Street, N.W.
Washington, D.C. 20009-7124
Telephone: (202) 745-1942

Thomas H. Nelson, OSB No. 78315
Thomas H. Nelson & Associates
P.O. Box 1211
Welches, Oregon 97067-1211
Telephone: (503) 622-3123

J. Ashlee Albies, OSB No. 05184
Creighton & Rose, P.C.
815 SW Second Avenue, Suite 500
Portland, Oregon 97204-3026
Telephone: (503) 221-1792

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INTRODUCTION

This appeal principally asks whether the Fourth and Fifth Amendments permit the executive branch to seize an American corporation's assets indefinitely, without probable cause or a warrant, without providing notice of the charges until the administrative process is complete and the opportunity to present responsive evidence has passed, and almost entirely on the basis of classified evidence, without sharing even an unclassified summary with the affected corporation.

In this Court, as below, defendants advance no reason why the Office of Foreign Assets Control (OFAC) could not have provided the Al Haramain Islamic Foundation of Oregon (AHIF-Oregon) with notice of the charges at the beginning of the administrative process—namely, after OFAC had frozen its assets but before it had been designated—rather than at its end, after the record was closed and OFAC had reached its final decision. ER 0076. Under *Mathews v. Eldridge*, 424 U.S. 319 (1976), that is dispositive, because AHIF-Oregon's substantial property interests and the fairness and accuracy of the proceeding would both have been furthered by timely notice, while defendants have identified *no cost* associated with providing such notice.

Similarly, defendants offer no reason why OFAC could not have

provided AHIF-Oregon with greater access to the classified evidence upon which its decision critically rested. An unclassified summary by definition would not reveal classified secrets, and has been provided by OFAC in other designation proceedings. And affording AHIF-Oregon's counsel access to the classified evidence subject to a security clearance and protective order would similarly increase fairness without sacrificing confidentiality. Here, too, under *Mathews v. Eldridge*, that is dispositive.

OFAC's contention that its failure to provide notice was harmless fails. First, not informing AHIF-Oregon of the charges until the proceeding was over is a structural error that pervaded the entire process and is not susceptible to "harmless-error" analysis. Second, AHIF-Oregon did not somehow divine the nature of the charges against it. It had to guess, and it guessed wrong. Third, defendants' harmless-error argument rests on faulty legal premises. They maintain that it does not matter that OFAC has not shown that AHIF-Oregon supported any "specially designated global terrorist" (SDGT), but Executive Order 13224 is to the contrary. And they erroneously claim that even if Al-Buthe had resigned long before AHIF-Oregon was designated, it would have made no difference to the outcome. Fourth, virtually OFAC's entire case rests not on evidence, but on unsupported government assertions. It is as if a prosecutor sought to

establish guilt by citing the indictment. The absence of any reliable evidence for OFAC's assertions refutes defendants' argument that AHIF-Oregon is so clearly subject to designation that denying it a meaningful opportunity to defend itself was harmless beyond a reasonable doubt.

Defendants argue that the more-than-six-year indefinite freeze on AHIF-Oregon's assets was permissible under the "special needs" exception. But they fail to satisfy that exception's threshold requirement–a showing that *both* the probable cause and warrant requirements are impracticable. Defendants never even *assert* that the probable cause requirement would be impracticable, and fail to offer any convincing reason why a warrant would impermissibly interfere with the program.

Defendants offer no response whatsoever to plaintiffs' contention that the district court prematurely resolved the "merits" of AHIF-Oregon's designation on a defective, one-sided record. Once it determined that OFAC denied AHIF-Oregon an opportunity to respond to the charges, it should have remanded to the agency.

Finally, defendants fail to satisfy the strict scrutiny required by their application of the material-support law to prohibit plaintiff Multicultural Association of Southern Oregon's (MCASO) efforts to coordinate advocacy with AHIF-Oregon in support of its challenge to designation. Where, as

here, American citizens seek to speak in coordination with an American entity, and there is no risk of freeing up funds that are entirely frozen, the First Amendment protects MCASO's speech rights.

I. DEFENDANTS' FAILURE TO IDENTIFY ANY COSTS ASSOCIATED WITH PROVIDING AHIF-OREGON WITH TIMELY AND MORE EFFECTIVE NOTICE CONFIRMS THAT OFAC VIOLATED DUE PROCESS

OFAC violated AHIF-Oregon's due process rights by: (1) failing to provide AHIF-Oregon with notice of the charges until AHIF-Oregon's only opportunity to respond had passed; and (2) failing to provide AHIF-Oregon with *any* notice regarding the classified evidence upon which its decision critically rested. Defendants' inability to offer any reason why providing either type of notice would have undermined its interests confirms that due process was violated.

A. The Failure to Provide Notice Until the Administrative Proceeding Was Completed Violated Due Process.

The district court correctly concluded that OFAC violated due process when it did not inform AHIF-Oregon of the charges against it until *after* the administrative process was closed. Under *Mathews v. Eldridge*, 424 U.S. at 334-35, the Court must balance the private interest affected, the likelihood of erroneous results, and the cost to the government of providing additional procedures. Where, as here, the government has identified no costs from

providing notice at the outset rather than the end of the process, the balance can be struck in only one way. Private interests would be more effectively protected by timely notice, the likelihood of error would be reduced, and, decisively, timely notice would impose no burden on defendants.

Moreover, defendants do not even address, much less distinguish, this Court's controlling decision in *Gete v. INS*, 121 F.3d 1285, 1297-98 (9th Cir. 1997), which held that due process is violated where, as here, notice lacks the "factual and legal bases" for official action and requires a property owner to "guess incorrectly why their [property] has been seized." *See* Pl. Op. Br. 22-24.

B. OFAC's Critical Reliance on Classified Evidence Violated Due Process.

The same analysis applies to OFAC's reliance on classified evidence. Here, too, defendants have identified no cost to providing AHIF-Oregon with an unclassified summary, and/or providing access to the classified evidence to AHIF-Oregon's attorneys, subject to security clearances and a protective order. Both measures would increase fairness to AHIF-Oregon and reduce error by permitting at least some adversarial testing. Defendants do not contend that they could not provide an unclassified summary. Indeed, OFAC has done so in other designation proceedings. *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857,

868 (N.D. Ohio 2009). Nor do defendants offer any reason why counsel for AHIF-Oregon could not have access to the evidence via security clearance. OFAC's own attorneys have been given such access to litigate this case, and defendants offer no reason why only one side should have that advantage. The *Mathews* balance thus tips decisively in favor of such measures, and defendants' failure to pursue them violates due process.[1]

Defendants do not defend the district court's misguided rationale for distinguishing *American-Arab Anti-Discrimination Comm. v. Reno (ADC)*, 70 F.3d 1045, 1070 (9th Cir. 1995), which establishes that reliance on secret evidence is unconstitutional except in "the most extraordinary circumstances." *See* Pl. Op. Br. 37-40 (district court reasoning). Defendants suggest that *ADC* rested on regulatory, not constitutional grounds. Def. Br. 43. But the *ADC* Court expressly held otherwise, concluding after an extensive section titled, "THE DUE PROCESS CHALLENGE TO THE USE OF CLASSIFIED INFORMATION," that "use of undisclosed classified information under these circumstances *violated due process*." *ADC*, 70 F.3d at 1066, 1070 (original capitals; emphasis added).

[1] A summary and/or attorney access would not necessarily satisfy due process. The question would be whether they afforded plaintiff a meaningful opportunity to respond. But where, as here, OFAC did not even *attempt* to pursue these readily available means to increase fairness, due process was indisputably denied.

Defendants erroneously suggest that Congress concluded that the government's security interests outweigh plaintiff's interest in a fair process. Def. Br. 44-45. Congress generally authorized reliance on classified evidence, but did not address what procedural protections might be required in the rare instance where, as here, the affected entity has due process protections—presumably because the vast majority of designations involve foreign entities or persons with no presence in the United States, and no due process rights. *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999). Where a U.S.-based entity is designated, due process requires more than what Congress has provided. *See National Council of Resistance of Iran v. Dep't of State* (*NCRI*), 251 F.3d 192, 201-03 (D.C. Cir. 2001). Plaintiffs do not challenge the classified evidence provision on its face, Def. Br. 41, but only the *application* of that provision in this case, where OFAC has designated a U.S. based entity, relied critically on classified evidence, and failed to pursue readily available measures to afford AHIF-Oregon greater notice.

Defendants are also wrong that a decision in plaintiff's favor would conflict with "numerous decisions of this Court and its sister Circuits upholding the use of classified *ex parte* evidence in national security cases." Def. Br. 43. The only decisions of this Court that defendants cite, *United*

States v. Ott, 827 F.2d 473 (9th Cir. 1987), and *Pollard v. FBI,* 705 F.2d 1151 (9th Cir. 1983), are plainly distinguishable. In neither case did the government seek to use classified evidence *affirmatively*, but merely opposed disclosure of evidence it was *not* using against the other party. In *Ott,* the government opposed Ott's discovery request for access to a government affidavit asserting that statutory minimization requirements were followed. The Court held that where no facts "'indicate[d] a need for disclosure,'" the affidavit, which was not used as evidence against Ott, need not be disclosed. 827 F.2d at 476.[2]

Similarly, in *Pollard*, the government opposed a request for disclosure under the Freedom of Information Act. Even so, the Court held that resort to *in camera* procedures is disfavored, and should be employed only "provided the preferred alternative to *in camera* review—government testimony and detailed affidavits—has first failed to provide a sufficient basis for a decision." 705 F.2d at 1153-54; *id.* at 1154 (court should make "'as complete a public record as is possible'" before resorting to *in camera* review) (quoting *Phillippi v. CIA*¸ 546 F.2d 1009, 1013 (D.C. Cir. 1976)).

Here, OFAC is using classified evidence *affirmatively* to deprive AHIF-Oregon of its property. There is an evident "need for disclosure," and

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[2] *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968), similarly involved the *defensive* invocation of the state secrets privilege to bar discovery.

OFAC has not made "as complete a public record as possible," by, for example, providing an unclassified summary.

Numerous courts have recognized the difference the government seeks to elide, and have ruled that, where the government seeks to rely affirmatively on classified evidence and that evidence is necessary to the resolution of a civil case, the government must at a minimum give some form of access to that evidence to opposing counsel. *See, e.g.*, *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 595 F. Supp. 2d 1077, 1089 (N.D. Cal. 2009) (ordering government to process plaintiffs' counsel for "security clearances necessary to be able to litigate the case"); *Horn v. Huddle*, 647 F. Supp. 2d 55, 66 (D.D.C. 2009) (same), *vacated due to settlement*, 699 F. Supp. 2d 236 (D.D.C. 2010);[3] *Doe v. Gonzales*, 386 F. Supp. 2d 66, 71 (D. Conn. 2005) (same); *see also Al Odah v. United States*, 559 F.3d 539, 547-48 (D.C. Cir. 2009) (affirming that Guantánamo habeas counsel are entitled to access to classified evidence or an adequate substitute, if feasible); *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, 2009 WL 50155 (D.D.C. Jan. 9, 2009) (same); *Anderson v. ITT Indus. Corp.*, 92 F. Supp. 2d 516, 519 (E.D. Va. 2000) (counsel given security clearance); *United States*

[3] Chief Judge Lamberth vacated his opinion in *Horn* to consummate the government's $3,000,000 settlement offer, but was "mindful" that vacatur would leave the "reasoning [of his opinion] unaltered, to the extent it is deemed persuasive." 699 F. Supp. 2d at 238.

v. Lockheed Martin Corp., No. 1:98-CV-731, 1998 WL 306755, at *5 (D.D.C. 1998) (same).

Decisions of "sister Circuits" are not to the contrary. As the D.C. Circuit explained recently in *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 230-31 (D.C. Cir. 2010), that Court's prior terrorist-designation cases establish only that reliance on *in camera* evidence "can satisfy due process requirements, at least where the [government] has not relied critically on classified material and the unclassified material provided to the [designated entity] is sufficient to justify the designation." *Id.* "[N]one of the [terrorist-designation] cases decides whether an administrative decision relying critically on undisclosed classified material would comport with due process because in none was the classified record essential to uphold [the] designation." *Id.* at 231.[4]

C. Decisions of Foreign Courts Further Support the Conclusion that Due Process Was Violated.

Foreign courts facing similar issues and applying similar rights have also recognized the fundamental need to afford the affected party sufficient notice to permit a meaningful response. In *A and Others v. United*

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[4] *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002), similarly held only that the statutory authorization to use classified evidence did not on its face invalidate the government's power to designate, and did not address its constitutionality as applied to a designation resting critically on classified evidence. *Id.* at 754.

Kingdom,[5] the European Court of Human Rights ruled that use of classified evidence to justify preventive detention of suspected terrorists violated the European Convention on Human Right's guarantee of a fair hearing unless the government provided the detainee "with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate." *Id.* at ¶ 220. Merely providing "cleared counsel" with access to secret information, the Court held, was insufficient, because the detainee himself must be apprised of enough detail to allow him to instruct his attorney regarding a response. *See also Sec'y of State for the Home Dep't v. AF* [2009] UKHL 28 (UK Law Lords' decision applying same principles to imposition of "control orders," a form of curfew or house arrest on suspected terrorists).[6]

In *Kadi and Al Barakaat Int'l Found. v. Council and Comm'n*, 2008 E.C.R I-6351, the European Court of Justice, Europe's highest court, held that the United Nations Security Council's listing of an individual as a designated terrorist, triggering laws freezing his assets in Europe, violated his European constitutional rights of defence and judicial review because the

[5] App. no. 3455/05, Eur. Ct. H.R. (2009), *available at* http://www.unhcr.org/refworld/docid/499d4a1b2.html.

[6] *Available at* http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090610/af.pdf.

Security Council did not communicate to Kadi the evidence used against him or afford him an opportunity to respond.[7] *See also HM Treasury v. Ahmed* [2010] UKSC 2 (UK Supreme Court applying same principle to UK law freezing assets of designated terrorists)[8]

The Canadian Supreme Court has ruled that use of secret evidence to deport a foreign national violates due process where less restrictive alternatives, such as providing access to "cleared counsel," are not pursued. *Charkaoui v. Canada (Citizenship and Immigration),* [2007] 1 S.C.R. 350, at ¶¶ 76-87.[9]

Most recently, the General Court of the European Community ruled that a statement of reasons that the Security Council provided to Mr. Kadi after the ECJ decision was also constitutionally deficient, because it "did not grant him even the most minimal access to the evidence against him," *Kadi v. Council and Comm'n*, Case No. T-85/09, 2010 E.C.R. II-__, at ¶ 173,[10] and the "few pieces of information and the imprecise allegations in the

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[7] *Available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML

[8] *Available at* http://www.supremecourt.gov.uk/docs/uksc_2009_0016_judgment.pdf.

[9] *Available at* http://csc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html.

[10] *Available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-85/09.

summary of reasons appear clearly insufficient to enable the applicant to launch an effective challenge to the allegations against him." *Id.* at ¶ 174.

Two core principles are reflected in these decisions: (1) where the government relies on classified evidence affirmatively, it must provide the affected party with sufficient details regarding the facts and charges to allow it a meaningful response; and (2) where means are available that would increase fairness without undermining confidentiality, there is no justification for failing to pursue them. The fact that decisions from multiple courts have coalesced around these principles underscores that their abrogation here violated due process.

II. DEFENDANTS HAVE NOT ESTABLISHED HARMLESS ERROR

Defendants' argument that OFAC's failure to notify AHIF-Oregon of the charges against it was harmless fails for multiple reasons.

A. Failing to Provide Notice of the Charges Until the Proceeding Was Over is a Structural Error Not Susceptible to Harmless Error Analysis.

Failing to inform AHIF-Oregon of the charges until the proceeding was over fundamentally infected the entire process in a way that is impossible to disentangle. "Structural errors" are not defined by a subjective assessment of their "egregiousness," as defendants suggest, Def. Br. 52, but by whether they so pervade the factfinding process that they "would require

the reviewing court to engage in an inquiry that was 'purely speculative.'" *Coleman v. McCormick*, 874 F.2d 1280, 1289 (9th Cir. 1989) (quoting *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988)).[11]

Admission of a coerced confession, for example, is surely an egregious due process violation. But where the rest of the trial was fair, the impact of the confession can be assessed post hoc, by considering whether the untainted evidence is so overwhelming as to render the confession immaterial beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Where, by contrast, the entire process is conducted with one party in the dark, there is *no* untainted aspect of the proceeding that can be isolated and assessed. The effect of not telling AHIF-Oregon what was at issue until the proceeding was over cannot be segregated from the otherwise fair remainder of the proceeding—because there was no otherwise fair remainder. The only remedy is to start over. *Coleman*, 874 F.2d at 1289 (due process violation that "had a pervasive effect on the composition of the trial record" was structural error not subject to harmless-error analysis).

[11] Defendants assert that this Court has not applied structural error analysis to a civil proceeding, but the Supreme Court appears to have done so. *See Caperton v. A. T. Massey Coal Co.,* 129 S. Ct. 2252 (2009) (finding due process violated by bias of state supreme court judge in civil tort proceeding, and reversing and remanding state supreme court decision without conducting harmless-error analysis). In any event, defendants offer no reason why the approach should differ in civil proceedings.

B. AHIF-Oregon Did Not Guess the Charges in the Absence of Notice.

OFAC argues that AHIF-Oregon managed to guess the charges anyway. The record belies this. It is true that AHIF-Oregon submitted hundreds of pages of evidence. But because it had to do so without knowing the charges against it, it had to guess—and it guessed wrong. It said nothing about Al-Buthe and Al-Aqil's ownership or control, because OFAC never informed it that this was an issue. Defendants claim that AHIF-Oregon was aware that its "affiliation" with AHIF-SA was at issue, Def. Br. 46-48, but AHIF-Oregon did not know in what way its relationship to AHIF-SA might be of concern, and certainly had no reason to foresee OFAC's "branch" theory, as AHIF-SA itself was not designated.

C. Defendants' Harmless-Error Argument Rests on a Misunderstanding of the Legal Criteria for Designation.

OFAC maintains that its error was harmless because "there is no dispute" that AHIF-Oregon supported AHIF-SA and AHIF-Albania "at a time when they were funding both separatist fighters and humanitarian efforts in Chechnya," and that is sufficient "as a matter of law" to support designation. Def. Br. 49-50. The district court employed the same rationale. ER 69-70. But even if these facts were undisputed—and they are not, *see* Point II.D., *infra*—they would not support designation as a matter of law.

The Executive Order authorizes designation for material support of SGDTs. E.O. 13,224, § 1(d). OFAC alleges that through AHIF-SA, AHIF-Oregon provided support to "Al Qaeda and other SDGTs." ER 2331. But AHIF-Oregon's $2,000 donation in 1999 to AHIF-Albania cannot conceivably have supported any SDGTs, as there were none at the time. The Executive Order creating that status did not even exist until two years later. AHIF-Albania itself was not designated until 2004.

Nor does OFAC show that the $150,000 donation in 2000 to AHIF-SA supported any SDGT. AHIF-SA was not designated until more than eight years later, and OFAC offers no proof that the donation supported Al Qaeda or any SDGT. Vague references to unidentified "separatist fighters" are not enough. OFAC must show that AHIF-Oregon provided material support to an identified SDGT. It has not done so. Nor has it refuted any of AHIF-Oregon's voluminous evidence showing that the money was used for government-approved humanitarian ends. ER 476-507, 509-522, 542-444, 706, 796-808, 1105-1116, 2181-2182, 2200-2298.

Defendants argue that it is sufficient that AHIF-Oregon was a branch of AHIF-SA, citing *Islamic Amer. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007). Def. Br. 32-33. But that case held only that an entity may be designated where it is a subsidiary of a *designated* organization. It does

not follow that it is enough to be a branch of a *non-designated* organization.[12]

Defendants' legal arguments regarding Al-Buthe are similarly legally unfounded. Al-Buthe and AHIF-Oregon board member Thomas Nelson have both stated under oath that had OFAC told AHIF-Oregon that Al-Buthe's ownership or control could be an issue, Al-Buthe would have resigned. ER 2343, 2348. Defendants say that would not have mattered. But had Al-Buthe resigned in February 2004, when AHIF-Oregon was initially frozen and before he was designated, there would have been no basis in 2008 to designate AHIF-Oregon because of Al-Buthe's control, just as the district court found OFAC could not rely on Al-Aqil's control once he had resigned. ER 65-66.

In addition, had OFAC notified AHIF-Oregon that Al-Buthe's control was at issue, it could have challenged the basis for Al-Buthe's designation. Defendants claim, without any authority, that AHIF-Oregon would lack

[12] OFAC's belated designation of AHIF-SA and all its branches in June 2008, shortly before oral argument in the district court and well after the redesignation at issue here, was a transparent litigation tactic, and cannot sustain OFAC's prior redesignation of AHIF-Oregon. By that time, AHIF-SA had already been defunct for more than three years, so AHIF-Oregon could not then have been a "branch" of it. And if AHIF-Oregon was a branch of it, the June 2008 designation was patently unconstitutional, as OFAC never provided notice or an opportunity to respond, as is constitutionally required. *NCRI*, 251 F.3d at 206-09.

"standing" to challenge Al-Buthe's designation. Def. Br. 50-51. But AHIF-Oregon has a legally cognizable interest in Al-Buthe's designation, as the latter's designation was a predicate for its own designation. Moreover, the *only* fact OFAC cites in support of Al-Buthe's designation is his delivery of the $150,000 donation. As explained above, that donation does not support designation.[13]

D. Defendants' Harmless-Error Argument Is Based on a Misrepresentation of the Record.

Finally, defendants' harmless-error argument rests on a phantom factual foundation. They argue, in essence, that the evidence of AHIF-Oregon's guilt is so overwhelming that there is nothing conceivable that AHIF-Oregon could have said or done to defend itself. Yet as shown above, they never identify a penny that AHIF-Oregon provided to any SDGT. Moreover, when one examines the citations for defendants' assertions, Def. Br. 9-17, 31-38, virtually all are based not on *evidence*, but on unsupported government allegations or newspaper articles. The paucity of reliable evidence confirms that that OFAC's due process error was not harmless beyond a reasonable doubt.

As the D.C. Circuit held in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir.

[13] Defendants' claim that Al-Buthe did not challenge his own designation is false. ER 715-21.

2008), the mere repetition of allegations by government officials does not transform allegations into evidence. The government in *Parhat* sought to prove that a Guantanamo detainee was an "enemy combatant" by citing government intelligence reports that relayed accusations without identifying their sources. As the Court stated:

> We … reject the government's contention that it can prevail by submitting documents that read as if they were indictments or civil complaints, and that simply assert as facts the elements required to prove that a detainee falls within the definition of enemy combatant. To do otherwise would require the courts to rubber-stamp the government's charges . . . .

Id. at 850. Absent evidence that identifies its source, establishes his or her credibility, and shows that the source obtained the information in a reliable way, a government allegation has no evidentiary weight, no matter how many times it is repeated.

Yet for most of their assertions, defendants rely exclusively on the declaration of OFAC Director Adam Szubin, who does not claim to have *any* direct knowledge of the relevant parties; OFAC press releases, which contain only naked assertions unsupported by any actual evidence; and other government documents that repeat assertions but do not cite sources. And most of the non-government sources defendants cite are newspaper articles that are equally unreliable.

Consider, for example defendants' assertion that AHIF-Oregon

donated to AHIF-SA and AHIF-Albania "at a time when they were funding both separatist fighters and humanitarian efforts in Chechnya." Def. Br. 49, 34, 12. Wholly apart from its *legal* insufficiency, this allegation is unsupported by any reliable evidence. Regarding AHIF-SA, defendants cite one Russian and one Italian news article, which merely relay statements of unidentified Russian government officials. ER 924, 1132.[14] Defendants proffer no reason to trust those news agencies or their sources, or to refute plaintiff's evidence that on issues of Chechnya, such sources are unreliable. ER 541, 1117-1130, 1259-1266, 1611-2018. One article dates from 2003, three years *after* the only donation AHIF-Oregon made to AHIF-SA, and cites a Russian "intelligence" report based on unidentified sources. ER 924. The other article cites Russia's Federal Security Services Public Relations Center, and provides no basis for assessing its reliability. ER 1132. Moreover, neither says that AHIF-SA, much less AHIF-Oregon's donation, supported an SDGT.

Defendants cite the district court opinion below, but that opinion adds no reliable support. Def. Br. 34, 49 (citing ER 68). The opinion notes that

[14] Def. Br. 12 (citing and quoting ER 1132, Moscow *Rossiyskaya Gazeta* article dated 5/20/2000, citing the Russian Federal Security Services Public Relations Center); Def. Br. 34 (citing ER 924, Milan *Panorama* article citing unidentified Russian intelligence report, and ER 1132, the same Moscow *Rossiyskaya Gazeta* article).

AHIF-SA's website (*not* AHIF-Oregon's website) "carried articles supportive of Chechen mujahideen and a link through which funding could be provided to the mujahideen," but cites only government counsel's assertion of this point at oral argument. *Id.* The record contains no copy of the website or the linked website. In any event, defendants do not allege that AHIF-Oregon was responsible for AHIF-SA's website, much less an unidentified website "linked" from AHIF-SA's site. Nor do they allege that the website or link supported any SDGT.

The court below noted that a search of AHIF-Oregon's offices found electronic files of photos and passports of dead Russian soldiers on a computer. ER 68. But the images do not indicate that they are of Russian soldiers, and in any event, do not prove that AHIF-Oregon's donation to AHIF-SA for humanitarian aid provided material support to an SDGT, the only relevant issue.

Defendants' citations for AHIF-Oregon's support of "separatist fighters" through AHIF-Albania are equally unfounded. Defendants cite only the lower court opinion, ER 68, and the same two news articles discussed above, ER 924, 1132. Neither the opinion nor the articles even *mentions* this allegation regarding AHIF-Albania. Def. Br. 34, 49.

The government is equally cavalier with respect to its allegations

regarding AHIF-SA. All of the following assertions, which refer to AHIF-SA, not AHIF-Oregon, are supported in the unclassified record by *nothing* other than government assertions, often from press releases:

- AHIF-SA "played a central role in financing terrorism around the world."[15]

- AHIF-SA is "'one of the principal Islamic NGOs providing support for the al Qaida network' and has funded, and operated as a front for, numerous other terrorist organizations designated by the United States."[16]

- "[AHIF-SA] and its branch offices had direct connections to numerous persons and entities designated by the President in the original Annex to E.O. 13224. For example, Osama Bin Laden is

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[15] Def. Br. 10 (cites to Szubin and to Classified Supplemental ER). In the pages the brief cites, Szubin cites to a Monograph on Terrorist Financing by the 9/11 Commission, but that monograph in turn states that it is based on government documents and interviews with unnamed government officials. ER 752 n.127. Moreover, the Monograph's only reference to AHIF-Oregon makes no mention of terrorist ties or support for terrorism, and merely reports that it was under investigation for "alleged money laundering and income tax and currency reporting violations." ER 1252 (quoting ER 765).

In addition Szubin cites OFAC's blocking order, three OFAC press releases (AR Exh. 137 now ER 451-455; AR Exh. 99 now ER 324-328; AR Exh. 98 now ER 321-322), and a transcript of a press conference at the Embassy of Saudi Arabia with both Saudi and U.S. officials, AR Exh. 135 p. 7-8 now ER 438-439, the latter and only for what the Saudi government announced it was going to do. Szubin's reliance on undisclosed classified evidence raises the due process issue discussed *supra.*

[16] Def. Br. 10. (citing Szubin and an OFAC press release ER 323-326). Szubin cites the Monograph and a different OFAC press release, ER 453. The OFAC press release identifies no sources, much less provides sufficient information to assess their credibility or reliability.

reported to have financed the establishment of Al Haramain's branch in Albania, which has been used as a cover for terrorist activity in that country and throughout Europe."[17]

- AHIF-SA "has numerous connections to al Qaeda. The organization's operatives and former officials had advanced knowledge of, and provided advice and financial support for, the al Qaeda bombings of United States embassies in Kenya and Tanzania in 1998."[18]

- A branch of AHIF-SA "provided financial support to the al Qaeda-affiliated (and U.S.-designated) terrorist group Jemaah Islamiya, which killed 202 people and injured an additional 300 during a 2002 bombing of a nightclub in Bali."[19]

- AHIF-SA "deployed a Bangladeshi national to conduct surveillance on U.S. consulates in India so that they might be targeted in terrorist attacks."[20]

- AHIF-SA "has further been linked to Makhtab al-Khidamat ('MK'), the Bin Laden-financed group that was precursor to al Qaeda and was designated by the President in the Annex to E.O. 13224."[21]

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[17] Def. Br. 10-11 (citing to Szubin and an OFAC press release, ER 452; Szubin cites only the same press release).

[18] Def. Br. 11 (citing Szubin and OFAC press release, ER 326; Szubin cites only the same press release).

[19] *Id.*

[20] *Id.* (citing Szubin and an OFAC press release at ER 452, Szubin cites only same release).

[21] *Id*. (citing Szubin, who cites two OFAC press releases, ER 324-328 and ER 451-455; a 2001 State Department designation list, ER 185; the same two OFAC press releases, ER 327 and ER 454; and OFAC's re-designation memo, ER 2029, which alleges that MK was the precursor of al Qaeda, but <u>not</u> that AHIF-SA was linked to MK, and in turn cites only a government

- "An MK director instructed that the group's funds should be deposited with Al Haramain accounts in Pakistan, and transferred from there to other accounts."[22]

- AHIF-SA's "branch in Ethiopia similarly provided support to another terrorist group listed in the original Annex to E.O. 13224 – Al-Ittihad Al-Islamiya."[23]

- "[M]onitoring by the United States and Saudi Arabia revealed that some branches and/or their former officials were continuing to operate; the Bosnian branch of [AHIF-SA], for example, reconstituted itself under an alias."[24]

- "Until [Al-Aqil's] departure in 2004, however – and, according to some reports, even after that time – Al-Aqil 'retained effective control over the activities of all branches.'"[25]

In short, aside from newspaper articles, OFAC's "case" rests almost entirely on assertions by its own government officials—largely from its own press releases. Just as a prosecutor cannot prove his case by repeating the

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affidavit in support of an arrest warrant, AR Exh. 70, now ER 236-267, which does not mention AHIF-SA).

[22] Def. Br. 12. (citing Szubin and OFAC press release at ER 327; Szubin cites same release and one other OFAC press release at ER 451-455).

[23] *Id.* (citing Szubin, the 2001 State Department designation list, ER 185, and an OFAC press release, ER 452; Szubin cites only same press release, ER 451-455).

[24] Def. Br. 13 (citing Szubin and two OFAC press releases, ER 321 and ER 454; Szubin cites one of those OFAC press releases, ER 451-455).

[25] Def. Br. 15 (citing a footnote in a letter from Szubin, ER 2331 n.2, which makes this assertion without citation to evidence other than stating vaguely "according to some reports").

allegations in the indictment, *Parhat*, 532 F.3d at 850, much less his press conferences, so OFAC cannot prove its case by repeating its allegations in a declaration by its Director or a press release. The paucity of reliable evidence supporting OFAC's allegations against AHIF-Oregon conclusively refutes defendants' argument that its evidence was so overwhelming that it did not matter that AHIF-Oregon never had an opportunity to respond to the charges.

III. DEFENDANTS' SEIZURE WITHOUT PROBABLE CAUSE OR A WARRANT WAS UNREASONABLE

Defendants all but concede that their six-plus-year indefinite freeze of AHIF-Oregon's assets is a seizure that must satisfy the Fourth Amendment. They offer no argument to the contrary other than to cite two district courts. Def. Br. 55 (citing *Islamic Amer. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 48 (D.D.C. 2005); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 78-79 (D.D.C. 2002). Both courts erroneously conflated the standards for Fourth Amendment seizures and Fifth Amendment takings. The courts below and in *KindHearts*, 647 F. Supp. 2d at 871-72, by contrast, applied Fourth Amendment, not Fifth Amendment, law, and were guided by *Soldal v. Cook County*, 506 U.S. 56, 61 (1992), which held that any "meaningful interference with an individual's possessory interest" is a seizure, and *United States v. Place*, 462 U.S. 696

(1983), which held that even temporarily detaining a traveler's luggage for ninety minutes is a seizure requiring probable cause. *See* Pl. Op. Br. 42.

Defendants maintain that if the Fourth Amendment applies to OFAC, it would also apply to the President. But the Fourth Amendment has always applied to searches and seizures by the executive branch, even though it is headed by the President. There is no "Presidential exception" to the Fourth Amendment. And even if there were, it could not extend to lower-level executive agencies such as OFAC without eviscerating the amendment altogether.[26]

The government invokes the "special needs" exception. Def. Br. 56-59. To do so, it must as a threshold matter show that *both* the warrant and probable cause requirements are impracticable. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1057 (9th Cir. 2002) ("special needs" exception applies "only" where warrant and probable cause are impracticable); Pl. Op. Br. 42-43. Yet defendants do not even *assert* that it would be impracticable to apply a probable cause standard, and therefore the "special needs" exception is

[26] It does not appear that any of the 27 entities or individuals originally designated by President Bush had a presence in the United States, and therefore the Fourth Amendment did not restrict those designations—but only because they had no Fourth Amendment rights, not because the President designated them. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

inapplicable at the threshold. *Henderson*, 305 F.3d at 1057.

Nor have defendants shown that a warrant is impracticable. Defendants note that designations may sometimes need to be done swiftly, without time to seek judicial approval. Def. Br. 58. But the "exigent circumstances" exception accommodates that need, and defendants cite no exigency here. Defendants contend that a court might not be able to act with as broad-ranging authority as OFAC can. Def. Br. 57-58. But if Congress can authorize OFAC to issue nationwide freezes *unilaterally*, as defendants presume, there is no conceivable reason why Congress could not require OFAC to do so only after obtaining judicial approval. As *KindHearts* held, "OFAC has shown no cause to believe or conclude that requiring it to develop probable cause and submit such cause to judicial evaluation would have impaired its enforcement efforts." 647 F. Supp. 2d at 881. Defendants' invocation of "special needs" fails at the threshold.

Moreover, even where the government can show impracticability, "special needs" exceptions generally permit only limited intrusions accompanied by substitute safeguards. Pl. Op. Br. 46-51. Defendants cite no "special needs" case authorizing as intrusive a seizure as involved here, and merely assert that the "surpassing interest in 'stopping the financing of terrorism'" trumps all other considerations. Def. Br. 59 (quoting ER 35).

But if such a simplistic "balance" governed Fourth Amendment analysis, there would be no warrant or probable cause requirements for any searches or seizures enforcing the anti-terrorism, espionage, sabotage, or any of a multitude of other national security laws. The Supreme Court long ago rejected such sweeping claims. *United States v. United States District Court*, 407 U.S. 297 (1972).

Finally, defendants offer *no response whatsoever* to the third requirement of "special needs" searches and seizures; namely, that they must include some safeguard that substitutes for the warrant and probable cause requirements. Pl. Op. Br. 49-51. There are no such safeguards here. In short, defendants have satisfied none of the requirements for a "special needs" exception.[27]

IV. DEFENDANTS OFFER NO RESPONSE TO PLAINTIFF'S CONTENTION THAT THE DISTRICT COURT ERRED IN PREMATURELY UPHOLDING AHIF-OREGON'S DESIGNATION ON A DEFICIENT RECORD

Defendants offer no response to AHIF-Oregon's contention that the district court erred in prematurely addressing the "merits" of its designation. Pl. Op. Br. 52-53. Once the court concluded that OFAC had denied AHIF-

[27] Defendants' argument that the Fourth Amendment violation can be ignored as a matter of "constitutional avoidance" if AHIF-Oregon was properly designated, Def. Br. 60, makes no sense. If the seizure violates the Fourth Amendment, it is null and void, regardless of the validity of the designation.

Oregon an opportunity to respond, the proper course was not to resolve the merits on the necessarily defective administrative record, but to remand with directions that OFAC give AHIF-Oregon an opportunity to respond after receiving legally adequate notice. Wholly apart from the constitutional violations detailed above, therefore, a remand to OFAC is required because OFAC's process produced a deficient administrative record.

V. AS APPLIED TO COORDINATED ADVOCACY WITH A DOMESTIC ORGANIZATION, THE MATERIAL-SUPPORT BAN VIOLATES THE FIRST AMENDMENT

Defendants argue that it is constitutional to ban MCASO's attempts to coordinate advocacy with AHIF-Oregon in support of its designation challenge because (1) this Court upheld a ban on the provision of "services" to foreign organizations in *Humanitarian Law Project v. Dep't of Treasury*, 578 F.3d 1133 (9th Cir. 2009); and (2) the Supreme Court upheld a ban on the provision of human rights training and peacemaking services to foreign terrorist organizations in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). Neither case supports the prohibition as applied here.

First, this Court in *Humanitarian Law Project v. Dep't of Treasury* reasoned that IEEPA was a ban not on speech, but on "constitutionally unprotected conduct." 578 F.3d at 1148. The Supreme Court subsequently held, however, that where a ban on support prohibits speech, it is a content-

based regulation of speech, and must be subjected to strict scrutiny. *Holder*, 130 S. Ct. at 2724. This Court's analysis has therefore been superceded, and the government must show that barring coordinated advocacy in support of AHIF-Oregon's challenge to its designation is narrowly tailored to further a compelling interest.

The government cites a generalized interest in cutting off support to designated entities that "'increases the means at their disposal for terrorist acts.'" Def. Br. 62 (quoting *HLP v. Dep't of Treasury*, 578 F.3d at 1148). But as explained previously, Pl. Op. Br. 62-63, that rationale makes no sense as applied to a domestic group such as AHIF-Oregon, as all of its resources are frozen by the government. MCASO's advocacy will not "increase[] the means at [AHIF-Oregon's] disposal for terrorist acts," because it literally has no means at its disposal; none of its funds can be used absent specific OFAC approval.

Second, *Holder* is distinguishable for the same reason. That case concerned aid to *foreign* organizations, whose funds and means were beyond the control of the United States. The Supreme Court expressly limited its decision to aid to *foreign* groups, not aid to domestic groups. 130 S. Ct. at 2730. In addition, the Court declined to address the issue of coordinated advocacy, because the Humanitarian Law Project had provided insufficient

detail regarding its desire to engage in such conduct. *Id.* at 2729.

MCASO, by contrast, has described in detail the coordinated advocacy in which it seeks to engage. It seeks to do so only with AHIF-Oregon, a domestic entity. That defendants designated AHIF-Oregon "because it was part of a foreign organization," AHIF-SA, does not alter the analysis. Defendants have not even attempted to explain how MCASO coordinating advocacy with AHIF-Oregon might somehow translate into terrorist acts committed by the long-defunct AHIF-SA. And Congress found the Communist Party to be part of an international conspiracy, yet speaking and associating with the Communist Party is protected. *See, e.g.*, *United States v. Robel*, 389 U.S. 258 (1967); *Scales v. United States*, 367 U.S. 203 (1961).

Finally, through a general license OFAC permits the provision of unlimited "legal services" in support of AHIF-Oregon's challenge to its designation. 31 C.F.R. § 594.506(a). To satisfy strict scrutiny, therefore, defendants would have to explain why it is necessary to suppress the speech of non-lawyers, but not of lawyers. OFAC offers no justification for privileging the speech of lawyers over non-lawyers, where both are engaged in the same enterprise.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

/s/ David Cole

____

David Cole
Amanda Shanor, Thomas H. Nelson,
J. Ashlee Albies, Lynne Bernabei, and
Alan R. Kabat
Attorneys for Plaintiffs-Appellants

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, because this brief contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Microsoft Word in Times New Roman 14 point.

By: /s/ Alan R. Kabat
Alan R. Kabat, Esquire

Statement of Related Cases

Pursuant to Circuit Rule 28-2.6, the undersigned hereby certifies that there are no related cases presently pending before this court.

By: /s/ Alan R. Kabat
Alan R. Kabat, Esquire

Certificate of Service

I hereby certify that on this 27th day of October, 2010, a copy of the foregoing Appellants' Reply Brief was served on counsel of record by this Court's ECF system, and by electronic mail, to:

Douglas N. Letter, Esquire
Michael P. Abate, Esquire
U.S. Department of Justice, Civil Division
950 Pennsylvania Avenue, N.W., No. 7318
Washington, D.C. 20530

/s/ Alan R. Kabat

Alan R. Kabat
Bernabei & Wachtel, PLLC
1775 T Street, N.W.
Washington, D.C. 20009-7124
(202) 745-1942 (Tel)
(202) 745-2627 (Fax)
Kabat@bernabeipllc.com
Attorney for Plaintiffs-Appellants

Alan Kabat

From: Abate, Michael (CIV) [Michael.Abate@usdoj.gov]
Sent: Thursday, September 30, 2010 1:44 PM
To: Alan Kabat; Letter, Douglas (CIV)
Subject: RE: Al Haramain

Yes, of course.

From: Alan Kabat [mailto:kabat@bernabeipllc.com]
Sent: Thursday, September 30, 2010 1:36 PM
To: Letter, Douglas (CIV); Abate, Michael (CIV)
Subject: Al Haramain

Counsel,

As David Cole will be away from the office for part of October, I intend to request a 14-day extension of time from the Ninth Circuit Clerk's office for the reply brief in the Al Haramain case. May I have your consent to this short extension?

Thank you, Alan

Alan R. Kabat
Bernabei & Wachtel, PLLC
1775 T Street, N.W.
Washington, D.C. 20009-7124
tel. (202) 745-1942 (ext. 242)
fax (202) 745-2627
email: Kabat@BernabeiPLLC.com

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