Notes

A Tale of Two Kadis:
*Kadi II, Kadi v. Geithner & U.S.*
Counterterrorism Finance Efforts

The European Court of Justice’s final decision in Kadi II—Yassin Abdullah Kadi’s challenge in Europe to his designation as an international terrorist financier—has stimulated significant discussion on the relationship between European and international law. Less attention has been paid to the Kadi II’s correlate in U.S. courts, Kadi v. Geithner, decided in the D.C. Circuit. The varying outcomes in these cases create a “transnational split record” that has implications for reform of multilateral counterterrorism sanctions.

This Note considers the impact of Kadi’s legal challenges in the United States and Europe from the perspective of U.S. counterterrorism policy. Part I describes the legal architecture of asset freeze designations in the United States and its relation to terrorist “blacklisting” at the United Nations. Part II compares the European Court of Justice and D.C. Circuit decisions, noting how the U.S. decision preserves unilateral U.S. sanctions enforcement, while the European decision threatens the multilateral enforcement process upon which U.S. counterterrorism policy substantially relies. Part III suggests steps the United States can take to address issues associated with targeted asset freeze sanctions after Kadi II, both under domestic law and internationally.

Acknowledging the concerns addressed by the European Court of Justice, in future domestic challenges, U.S. administrative law can be better utilized to acknowledge the rights of designees to meaningful ju-
dicial review. Internationally, U.S. support for an Implementing Protocol to the International Convention for the Suppression of Financing of Terrorism would ground multilateral obligations in international law and reinforce the legitimacy of the international counterterrorism finance regime.
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INTRODUCTION

On July 18, 2013, the Grand Chamber of the European Court of Justice (ECJ) handed down its final decision on appeal in the case of Yassin Abdullah Kadi. The case involved Kadi’s designation as an al-Qaeda financier and the subsequent freezing of his assets. Targeted sanctions—which may include asset freezes, travel bans, embargoes on goods, and other financial measures—are essential to both U.S. foreign policy and global governance in the fight against terrorism. Kadi’s challenge at the ECJ stemmed from a United Nations Security Council listing submitted by the United States and enforced against Kadi in the United Kingdom, pursuant to a European Union regulation. The complicated process that led to the ECJ’s final decision in his favor has made Kadi the standard-bearer for challenges to the implementation of targeted asset freeze sanctions.

Kadi’s story has its roots in the terrorist attacks of September 11, 2001. One of the first blows levied against al-Qaeda in the U.S.-
led response to the attacks aimed at the organization’s financial support. On September 24, 2001, President George W. Bush announced a broad grant of powers to the U.S. Department of Treasury to freeze and seize the assets of individuals and entities associated with al-Qaeda. Noting, “[m]oney is the lifeblood of terrorist organizations,” President Bush called this broad grant of powers “a major thrust of our war on terrorism.” In tandem with domestic, unilateral sanctions, the United States has relied on robust multilateral cooperation as a second prong in its effort to curtail al-Qaeda’s finances. The U.N. Security Council reconfigured sanctions it had earlier established against the Taliban under its Chapter VII enforcement powers to target those suspected of supporting al-Qaeda.


7. The attacks of 9/11 are estimated to have cost roughly $500,000, including costs for recruitment, training, lodging, and communication. In 2001, al-Qaeda’s estimated operating budget was between $30 and 50 million, with money being spent for activities such as bribing government officials, acquiring safe havens, acquiring false documents, printing and distributing ideological material, and supporting related groups. See JIMMY GURULÉ, UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM 3 (2010).


9. Id.

10. This is not to suggest that the move to enforce counterterrorism sanctions against al-Qaeda was solely a U.S. priority or not in the interest of the larger international community. Indeed, it has garnered significant international support from a range of actors. However, the United States was the architect of early efforts to construct the international counter-threat finance regime and remains a vocal supporter and powerful enforcer. See generally COUNTERING THE FINANCING OF TERRORISM (Thomas J. Biersteker & Sue Eckert eds., 2007).

charity that was part of Osama bin Laden’s fundraising network throughout the 1990s. In 1992, Kadi personally hired Shafiq Ben Mohamed al-Ayadi—an associate of Osama bin Laden who had received training at an al-Qaeda facility in Afghanistan and was the leader of the Tunisian Islamic Front—to head the European offices of Muwafaq. On October 12, 2001, the U.S. Treasury added Kadi to its list of Specially Designated Global Terrorists (SDGTs). The U.N. Security Council quickly followed suit, adding Kadi to its “Consolidated List” of terrorist financiers on October 19, 2001. This listing was then enforced in domestic jurisdictions around the world, including Europe, where it was implemented through a regulation of the Council of the European Union. Thus, shortly after 9/11, not only were Kadi’s assets in the United States frozen, but, based on information submitted by the United States, Kadi’s designation at the U.N. prevented him from travelling or accessing funds in 198 countries around the world.

As with similar post-9/11 initiatives, particularly those that involve terrorist watch-lists at the national or international level, serious questions have been raised in the sanctions designation process about internal oversight and potential infringement of individuals’ fundamental rights. These concerns have garnered substantial debate at the United Nations, among non-governmental organizations, and in foreign and regional courts. Kadi’s case, having been sin-

13. Id. ¶ 156.
16. EC Listing Regulation, supra note 5.
gled out as a particularly visible example in the sanctions context, has been described as “Kafkaesque.” 20 Kadi has challenged allegations that he has supported terrorist activities in multiple domestic fora, maintaining he is a philanthropist and that any links to Osama bin Laden ceased before bin Laden’s terrorist activities against the West. 21 In Europe, Kadi appealed twice to the ECJ to challenge his listing at the U.N. 22 Kadi’s early legal challenges to that body have already become the subject of much academic commentary. 23

The ECJ Grand Chamber’s July 2013 final decision on appeal in the case, colloquially referred to as Kadi II, was widely anticipated. Affirming the decision of the General Chamber in favor of Kadi,

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20. Frasier, supra note 17.
21. In Europe, Kadi objected to efforts by the Swiss, Turkish, and Albanian governments to pursue criminal investigations against him on the basis of material support for terrorism, before he launched his formal legal challenges at the ECJ. Kadi II Final Decision, supra note 1, ¶ 31. In the United States, as discussed in this Note, he petitioned to be delisted through OFAC and on appeal in the District of Columbia. For more information on the manner in which complaints and formal legal challenges interacted in the early stages of the global response to the 9/11 attacks, including how they impacted Kadi, see Craig Whitlock, Terrorism Financing Blacklists at Risk, WASH. POST, Nov. 2, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/01/AR2008110102214.html?nav=hcmodule&navsid=ST2008110200737&s_pos=.
22. Kadi’s case has now been decided four times at the ECJ: once in 2005, at the Court of First Instance (since renamed the General Court), on appeal in 2008, on remand to the General Court in 2010, and on appeal of that decision in 2013. The last of these cases is the subject of analysis in this Note. See Appeal Brought on 16 December 2010 by the Council of the European Commission Against the Judgment of the General Court (Seventh Chamber), 2011 O.J. (C 72) 9, 9.
the ECJ held that the procedures provided for Kadi to appeal his listing by the United Nations in Europe were insufficient to meet European Union standards. 24 Thus ended Kadi’s long legal saga in Europe. The ECJ decision contrasts with a decision against Kadi in the United States, in which Kadi challenged his listing by the U.S. Treasury Department. On March 20, 2012, Judge John Bates of the District Court for the District of Columbia granted the U.S. government’s motion for summary judgment, dismissing Kadi’s statutory and constitutional claims against his listing.25 In his submissions, Kadi sought to invoke findings made in courts of other states and at the international level, including the 2010 General Court Kadi II decision in which he had prevailed, then pending appeal at the ECJ Grand Chamber.26 Judge Bates was dismissive, noting that Kadi’s successful challenges abroad occurred under jurisdictions with different rules of evidence and standards of review.27

Judge Bates’ ruling in favor of the U.S. government highlights differences between the U.S. domestic counter-terrorism regime and its reliance on a larger multilateral regime, one supported by the Security Council and enforced broadly by the international community. This divergence is easy to overlook. There are important differences in the architecture of sanctions enforcement in the United States versus the transnational mechanism that operates through the Security Council. Even to the extent that the sanctions rely upon the same sets of underlying facts, differing interpretations of legal principles like due process and judicial review between the United States and Europe are neither uncommon nor inherently problematic.28

However, counterterrorism sanctions mechanisms are not so

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24. Kadi II Final Decision, supra note 1.
26. Id. at *7
27. Id. at *8.
28. Nor is the concept of differing interpretations of a common set of legal principles foreign to Europe. The European Court of Human Rights’ articulation of the margin of appreciation doctrine allows that court to take account of differing cultural, historic, and philosophical traditions among Member States. See Handyside v. U.K., 24 Eur. Ct. H.R. 5 (1976). This Note does not argue that there should not be a similar difference, akin to a margin of appreciation, allowing variance between the United States and European Union Member States in sanctions enforcement challenges. Rather, it argues that the nature of targeted asset freezes encourages, from a prudential standpoint, greater standardization between states and more dialogue on what constitutes meaningful judicial review and fair procedure, particularly as those procedures infringe upon individual liberties.
different as to elude meaningful comparison, nor do these enforce-
ment schemes operate wholly independently of one another. This
Note suggests the D.C. Circuit opinion in Kadi v Geithner and the
ECJ’s Kadi II final decision should be read in tandem. They address
two interconnected regimes, each of which is essential for the effec-
tiveness of U.S. counterterrorism finance efforts. The result of Ka-
di’s challenge to his designation under U.S. law preserves the ability
of the United States to enforce counterterrorism sanctions unilatera-
ly. But his challenges abroad have impacted the ability of the United
States to pursue its aims through multilateral cooperation.

This concern—important given the fungibility of assets and
the cross-border nature of the international financial system—
requires reconsideration in the wake of the ECJ Grand Chamber’s
Kadi II decision. Kadi’s case is characteristic of the relationship be-
tween the United States and those allies it relies upon in the fight
against al-Qaeda and its offshoots and affiliates. Early cooperation
has been followed by, over time, disagreement on fundamental issues
of law and claims of excess on the part of the United States by its Eu-
ropean allies.29 For the U.S. government, a finding at the ECJ that a
multilateral sanctions enforcement mechanism constitutes a violation
of fundamental values should spark a reexamination under interna-
tional law of the counterterrorism sanctions regime it helped create.
The different outcomes to Kadi’s legal challenges in the United
States and in Europe represent an important tension for the practical
implementation of targeted sanctions, one that balances effectiveness
in preventing acts of terrorism against protection of fundamental
rights. This tension may impact subsequent efforts to effectively en-
force targeted sanctions multilaterally against al-Qaeda branches or
successor organizations,30 as well as targeted sanctions beyond the

29. This pattern has manifested itself on multiple occasions in the so-called Global
War on Terror, including the use of extraordinary rendition, the legality of preventive
defense, the status of combatants in non-international armed conflict, detention, and the use
of surveillance for domestic and foreign intelligence collection. For a partial comparison in
the human rights context, see David Aronofsky & Mathew Cooper, The War on Terror and
(2008).

30. Recently, the Security Council has employed targeted measures against both Boko
Harem and ISIS under UNSCR 1267, the same regime it uses to target al-Qaeda, described
in Part II.B of this Note. See The List Established and Maintained by the Committee
Pursuant to Resolutions 1267 (1999) and 1989 (2001) with respect to Individuals, Groups,
Undertakings and Other Entities Associated with Al-Qaeda, SECURITY COUNCIL COMM.
au_sanctions_list.shtml (last visited Feb. 11, 2015).
counterterrorism context. Concerns about violations of fundamental rights could diminish the legitimacy of targeted asset freezes as tools of multilateral enforcement. But, a standard of review that undermines the U.N. listing mechanism and practically forecloses the use of asset freezes hurts the overall effectiveness of efforts to forge a multilateral regime against terrorism financing.

This Note compares two decisions, Kadi v. Geithner in the District of Columbia and the 2013 Kadi II Appeals Decision at the ECJ, to illustrate different attempts at addressing the need to balance fairness and efficiency in international counterterrorism sanctions. Part I gives background on the architecture of counterterrorism sanctions implementation in the United States and at the United Nations, describing how U.N. “blacklisting” provides an avenue for multilateral coordination. Part II analyzes the final Kadi decisions on both sides of the Atlantic. Part III suggests the United States would benefit from addressing how targeted financial measures can better respect the fundamental rights of those targeted, both domestically in future litigation and internationally in a larger dialogue with other states. U.S. judges who hear similar challenges should be given greater freedom under U.S. administrative law to examine whether a listing is still justified at the time of review. To improve international cooperation, greater transnational dialogue around the International Convention for the Suppression of Financing of Terrorism (“Terrorist Financing Convention”)—an international treaty signed and ratified by the United States and most E.U. member states—offers one avenue to reconfigure the multilateral component of counterterrorism sanctions enforcement. The United States should take a more active role in the standard-setting process, engaging with a group of “Like-

31. Concerns about the due process issues associated with targeted sanctions, first articulated in the U.N. counterterrorism context, have already been raised in challenges to E.U. autonomous sanctions against Iranian entities in the sanctions regime designed to curb their nuclear program. See Ulrich Unterweger, General Rulings on Iranian Banks Threaten to Torpedo E.U.’s Foreign Policy Ambitions, EUR. L. BLOG (Apr. 4, 2013), http://europeanlawblog.eu/?p=1639.


Minded States” whose efforts have already lead to significant reform in the U.N. sanctions process. 35 This should include discussions for an Implementing Protocol to the Terrorist Financing Convention, which would reinforce the legitimacy of the international counterterrorism finance regime, grounding multilateral obligations to respect a shared set of fundamental rights in international law and encouraging uniformity in the delisting review process.

I. THE POST-9/11 COUNTERTERRORISM FINANCE REGIME

Part I of this Note describes the international counterterrorism finance regime as it operates through three key actors: the United States, the U.N. Security Council, and the European Union. Sanctions enforcement in the United States is administered through the Department of the Treasury. A robust al-Qaeda sanctions listing and de-listing process occurs at the United Nations through the 1267 Committee. Created pursuant to the Security Council’s Chapter VII enforcement powers, the 1267 Committee’s designations are binding on all U.N. members. The European Union—whose position in the international financial system make its member states crucial to the effectiveness of financial measures—translates acts of the Security Council into regulations that its members then enforce in their respective jurisdictions. 36

This should be an example of ideal multilateral cooperation. States acting against a shared threat coordinate their efforts at the United Nations to facilitate broad enforcement. However, in the sanctions context, this process has illustrated the challenges of balancing efficiency and fairness. Because asset freezes target individuals, and because enforcement occurs across different national juris-


dictions and through a quasi-judicial U.N. process, sanctions de-listing challenges implicate fundamental rights to due process and meaningful judicial review.

A. Counterterrorism Finance in the United States

In the United States, a robust system to freeze and seize assets pre-dates the attacks of September 11, 2001. However, at the start of the “Global War on Terror,” many of these mechanisms were strengthened and used in ways that departed from past practice.

1. The International Emergency Economic Powers Act

The International Emergency Economic Powers Act (IEEPA) governs counterterrorism finance under U.S. law. IEEPA was passed in 1977 to restrict Presidential powers under the Trading With the Enemy Act of 1917 (TWEA). Congress’s stated intent was to cabin the President’s power to declare emergencies of unlimited duration.

Prior to the passage of IEEPA, TWEA principally addressed the President’s ability to restrict trade in times of declared war. However, it also granted the President power to declare “emergencies”—events that need not reach the level of war—and to restrict economic activity during those periods. Under TWEA as it was passed, Congress had little ability to check the emergency declaration power. At the discretion of the President, once declared, these emergencies could be of unlimited duration.

The Supreme Court famously limited the powers of the President in emergencies declared under the TWEA in Youngstown Sheet & Tube Co. v. Sawyer. Building upon this, since the holding in

37. See Hufbauer & Schott, supra note 3.
41. Id. at 1104–05.
42. Id.
43. Id.
44. Id.
45. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (limiting the power of the Executive to seize private property in the absence of either specifically enumerated authority under Article II or statutory authority conferred by Congress).
Youngstown did not go so far as to claim there was no presidential emergency declaration power, Congress legislated to redefine the President’s emergency power. Congress first passed the National Emergencies Act (NEA) to eliminate any presidential emergency power. It then passed IEEPA to create a new, less open-ended emergency power.

Under IEEPA, the President may declare an “unusual and extraordinary threat” to the United States if that threat originates “in whole or in part outside the United States.” Once such an emergency is declared, the President may exercise extensive powers over economic affairs. After a declaration, IEEPA authorizes the President to block and freeze assets in connection with the declared threat. However, consistent with the limiting purpose of IEEPA, a sunset provision in the NEA stipulates that the President must renew any national emergency under the statute annually; otherwise, the emergency expires one year after its enactment. IEEPA recognizes the potential sensitivity of any intelligence collected to make designations, stipulating that “judicial review of a determination made under this section, if the determination was based on classified information . . . such information may be submitted to the reviewing court ex parte and in camera.” Thus, IEEPA creates a system whereby the President may regulate economic affairs in the interest of national security and may expect courts to take the potential sensitivity of these actions into account in review of any challenges to executive action. However, through IEEPA, Congress intended to maintain an oversight role and curb potential excesses made apparent by prior in-

47. Id.
50. 50 U.S.C. § 1702(a)(1)(B) (2013) (Under this provision, the President is authorized to “investigate, block during the pendency of an investigation, 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.”).
51. 50 U.S.C. § 1622(d) (2014) (providing that the president must declare a continuation and publish it in the Federal Registry within ninety days prior to the expiration date).
52. 50 U.S.C. § 1702(c) (2013).
vocation of similar powers.\textsuperscript{53}

2. Executive Order 13,224

Two weeks after the attacks of 9/11, on September 23, 2001, President George W. Bush invoked his powers under IEEPA and the United Nations Participation Act\textsuperscript{54} to issue Executive Order 13,224 (EO 13,224).\textsuperscript{55} EO 13,224 declared a national emergency due to “grave acts of terrorism and threats of terrorism committed by foreign terrorist attacks,” specifically noting the attacks of September 11th, 2001 and “the continuing and immediate threat of further attacks on United States nationals or the United States.”\textsuperscript{56} Since 2002, EO 13,224 has been renewed annually.\textsuperscript{57} EO 13,224 included as an Annex a list of individuals and entities to be targeted by the Secretary of the Treasury, who was delegated the power to designate additional persons and entities based on their involvement in terrorist activities.\textsuperscript{58} The Secretary of State and the Attorney General may also participate in the designation process.\textsuperscript{59}

The Treasury Secretary has delegated the power to enforce this program to the Treasury Department’s Office of Foreign Assets Control (OFAC).\textsuperscript{60} OFAC designates individuals and entities whose

\begin{itemize}
\item 53. Note, supra note 40, at 1106.
\item 54. 22 U.S.C. § 287c (1945). The United Nations Participation Acts reads, in relevant part: “Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.”
\item 56. Id.
\item 58. EO 13,224, supra note 55, Annex.
\item 59. Id. § 1(c).
\item 60. 31 C.F.R. § 594.802 (2009). For a complete list of individuals and entities
property is subject to seizure under EO 13,224 as “Specially Designated Global Terrorists” (“SDGTs”). 61 SGDT designation must be based on any of the criteria stipulated in EO 13,224 § 1. This includes those deemed, “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,” 62 as well as “persons determined . . . to be owned or controlled by, or to act for or on behalf of those persons,” 63 and those deemed to “to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism” 64 or be “otherwise associated” 65 with those suspected of any of the above activities. In the interest of improving its intelligence-gathering capabilities, OFAC participates in coordination and evidence sharing with its peer agencies around the world. 66

3. U.S.A. PATRIOT Act

Another key expansion of powers to combat terrorist financing came through the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act). 67 Title III of the Patriot Act, known as the International Money Laundering Abatement and Anti-Terrorist Financing Act, amended the Bank Secrecy Act to promote prevention, detection, and prosecution of terrorist financing. 68 Among other powers, 69 the Patriot Act gives the President expanded power to freeze assets of those designated during the pendency of a civil inves-

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62. EO 13,224, supra note 55, § 1(b).
63. Id. § 1(c).
64. Id. § 1(d)(i).
65. Id. § 1(d)(ii).
66. This includes participation in the Terrorist Finance Tracking Program (TFTP) through the Society for Worldwide Interbank Financial Telecommunication (SWIFT), see Terrorist Finance Tracking Program, SWIFT, http://www.swift.com/about.swift/legal/terrorist_finance_tracking_program?rdct=t (last visited June 11, 2015).
68. Id.
69. Id. These powers include an expanded role for the FBI in prosecuting the financing of terrorism as a criminal offense.
Actions which advance prevention and detection can occur whether or not criminal charges are pursued—individuals and entities can have their funds frozen simply on the basis of an agency designation, without being charged with a crime and for the duration of what may be a drawn-out appeals process.71

4. Sanctions Administration and Review through OFAC

Challenges to an SDGT designation occur in a split system. Designees must first appeal their listing to OFAC through an intra-agency process; if unsuccessful, they may appeal this decision in federal court.72 As an Executive agency, reviews of OFAC’s decisions by the judiciary are subject to the Administrative Procedure Act (APA).73 Under the APA, agencies are tasked with reviewing the administrative record to resolve any factual disputes in the first instance.74 In contrast, the role of the judiciary in such cases is limited to determining whether the decision of the agency was justified in light of the administrative record available to the agency at the time of review.75 The relevant standard of review under the APA through which a court would be required to “hold unlawful and set aside agency action, findings, and conclusions” is that they must be “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.”76 In defining the arbitrary and capricious standard, the U.S. Supreme Court has held that the scope of review “is narrow and a court is not to substitute its judgment for that of the agency.”77 The Court grants the decisions of the agency a “presumption of regularity” and although “inquiry into the facts is to be searching and

70. Id.


75. Sec. & Exch. Comm’n v. Chenery Corp., 318 U.S. 80 (1943) [hereinafter Chenery I].


Both the type of evidence allowed on review and the manner in which the courts can review it accommodate national security concerns inherent in SDGT challenges. Due process as it relates to the right of SDGTs to examine the record against them is, as in other aspects of U.S. due process jurisprudence, subject to a balancing of the interests of the individual and the interests of the government. Federal courts have confirmed the permissibility of in camera and ex parte examination of classified evidence underlying a listing in SDGT challenges, when such information is not reviewable by the SDGT. While a listed individual is entitled to a written summary of a decision by OFAC following an agency appeal, he or she need not be given access to all specific pieces of classified evidence used to maintain his or her listing. In practice, OFAC has provided entities and individuals challenging their SDGT designations with extensive administrative records, although the completeness of those records has been a subject of contention on appeal. In Global Relief Foundation v. O’Neill, the Court of Appeals for the Seventh Circuit held that the use of classified information by Treasury was authorized under IEEPA in the case of a charity whose funds were blocked by OFAC. The District Court for the District of Columbia affirmed in Al-Aqeel v. Paulson that ex parte and in camera review of classified portions of the administrative record does not necessarily entitle the defendant to review the unclassified portions of the record. This standard of review, allowing recourse to classified evidence that a listed individual need not be given the opportunity to review, has seen further support beyond the designation process for seizure of as-

79. See, e.g., Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007) (“We acknowledge that the unclassified record evidence is not overwhelming but we reiterate that our review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential.”).
81. For an extensive discussion of the issues at stake in considering the nature and review of evidence in these cases, see KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 647 F. Supp. 2d 857 (N.D. Ohio 2009) (filed as KindHearts for Charitable Humanitarian Dev. Org. v. Paulson and changed sua sponte by the court to its current form).
82. See Lawyers Committee for Civil Rights, supra note 72, at 15.
84. Global Relief Found. v. O’Neill, 315 F.3d 748, 750 (7th Cir. 2002).
sets of SDGTs. Finally, the D.C. Circuit has held that OFAC may consider hearsay evidence as part of the administrative record in SDGT cases.

In summary, the use of asset freezes and other targeted sanctions in the United States pre-dates the attacks of September 11, 2001. They are authorized by a statutory scheme that resulted from efforts by Congress to limit the power of the President to declare emergencies of unlimited duration. However, despite these limiting efforts, the expansion and application of the President’s sanctioning powers has been a defining characteristic of efforts to combat international terrorism. Enforced through an Executive agency, challenges to sanction designations in domestic courts are granted a high level of deference, based on the arbitrary and capricious standard of review under the APA and courts’ desire to maintain the confidentiality of sensitive evidence, taking into account national security concerns.

B. Counterterrorism Finance at the United Nations

Post-9/11 counterterrorism finance efforts against al-Qaeda in the United States are intertwined with the growth of a parallel system at the United Nations, intended to facilitate broad multilateral enforcement. The United States played a lead role in the early development of this system. However, concerns about due process and whether a quasi-judicial, international body could adequately provide meaningful review for those designated have led to substantial reform of the system.

1. Sanctions, the Security Council, and International Terrorism Pre-9/11

The power of the U.N. Security Council to employ economic sanctions is explicit in the U.N. Charter. In practice, sanctions have long been an important component of international enforcement at

86. Kindhearts, 647 F. Supp. 2d at 857.
88. U.N. Charter art. 41(1) (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”).
the United Nations. 89 In the early 1990s, the U.N. began to move away from traditional, comprehensive sanctions that targeted entire countries or large industries. Following Iraq’s noncompliance with disarmament and inspection guarantees made during its surrender in the Persian Gulf War, comprehensive sanctions led to disproportionate suffering among the civilian population. 90 As a result, the international community moved towards “smart sanctions” targeted against individuals and entities. 91 The goal of targeted sanctions was to avoid widespread harm to civilian populations while maintaining the use of sanctions as a tool of global governance, one of the Security Council’s few policy options under Chapter VII that doesn’t involve the use of force. 92 Early targeted sanctions were directed against political leaders violating international norms in a way that threatened international peace and security. 93 Beyond tailoring the sanctions to pass the threat of a veto by any of the five permanent members of the Security Council, 94 little regard was paid to the individual legal rights of those targeted.

The move towards targeted sanctions coincided with an increase in international concern over terrorist bombings. 95 Consequently, the international community began to give more consideration to the status of terrorism under international law. General Assembly Resolution 50/53 (1995) called upon states to strengthen

89. One observer has noted that sanctions fall “between words and wars” as one of the few coercive mechanisms at the disposal of the Security Council. See Carina Staibano, Trends in UN Sanctions, in INTERNATIONAL SANCTIONS: BETWEEN WORDS AND WARS IN THE GLOBAL SYSTEM 31 (Peter Wallensteen & Carina Staibano eds., 2005). Recent scholarship has noted that sanctions have equally important effects for constraining behavior and signaling, both internationally and domestically. See FRANCESCO GIUMELLI, COERCING, CONSTRAINING AND SIGNALING: EXPLAINING U.N. AND E.U. SANCTIONS AFTER THE COLD WAR (2011).

90. For a discussion of Iraq and other cases that catalyzed the shift away from comprehensive sanctions, see generally POLITICAL GAIN AND CIVILIAN PAIN: HUMANITARIAN IMPACTS OF ECONOMIC SANCTIONS (Thomas G. Weiss et al. eds., 1997).

91. GIUMELLI, supra note 89, at 154.


93. Id.


international cooperation to combat terrorism.\textsuperscript{96} Two notable treaties were concluded under the aegis of the U.N. General Assembly that clarified state obligations to combat terrorism: the International Convention for the Suppression of Terrorist Bombings (1997)\textsuperscript{97} and the International Convention for the Suppression of the Financing of Terrorism (1999).\textsuperscript{98} Both efforts were hampered by failure to agree on a clear definition of terrorism and the treaties have failed to play a large role in subsequent international cooperation to combat transnational terrorism.\textsuperscript{99} Subsequent efforts to conclude a comprehensive convention on international terrorism have likewise stalled at the international level.\textsuperscript{100}

In October 1999, the Security Council passed Resolution 1267.\textsuperscript{101} Targeting the Taliban leadership of Afghanistan, 1267 was designed to coerce the Taliban into surrendering Osama bin Laden after evidence linked him to the August 1998 bombings of the U.S. embassies in Tanzania and Kenya.\textsuperscript{102} Bin Laden was not a direct target of the initial sanctions, though the sanctions were instituted in response to his actions and intended to lead to his capture.\textsuperscript{103} Resolution 1267 specifically called on the international community to, \textit{inter alia}:

Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are

\begin{itemize}
\item[98] Terrorist Financing Convention, supra note 33. For more information on the two conventions, see Sean D. Murphy ed., \textit{Contemporary Practice of the United States Relating to International Law—Conventions on the Suppression of Terrorist Bombings and on Financing}, 96 \textsc{Am. J. Int’l L.} 237, 255–58 (2002).
\item[99] See generally Gurulè, supra note 7.
\item[101] S.C. Res. 1267, supra note 11.
\item[103] Id.
\end{itemize}
made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban . . . .

Tasked with monitoring this and other provisions of the resolution was the 1267 Committee. As a subsidiary body of the Security Council, the 1267 Committee is comprised of representatives of all members of the Security Council during a given appointment period. Most of the individuals on the 1267 list prior to 9/11 were associated with the Taliban, rather than al-Qaeda. Much of the 1267 Committee’s work at the time concerned petitions for humanitarian exemptions to flights controlled by the Taliban.

2. Post-9/11: The 1267 Committee and Resolution 1373

The attacks of September 11, 2001 led to fundamental changes in the international sanctions regime, with consequences for the individual rights of those targeted. On September 28, 2001, the Security Council passed Resolution 1373, condemning the attacks and invoking in general terms the duties of its members to combat the financing of terrorist acts. The 1267 regime, still in force against the Taliban at the time, was expanded by Resolution 1373 to include al-Qaeda and others thought to be associated with Osama bin Laden. The 1267 Committee’s role also changed with Resolution 1373. Its exact listing and delisting procedures have been updated

104. S.C. Res. 1267, supra note 11, ¶ 4(b).
105. Id. ¶ 6.
106. S.C. Res. 2083, supra note 11. Comprised of diplomats representing all of its fifteen members, the Committee is assisted by the Analytical Support and Sanctions Monitoring Team (Monitoring Team), which consists of independent experts.
108. Id.
109. S.C. Res. 1373, ¶ 1(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001) (calling upon all U.N. member states, pursuant to their obligations under Art. 25 of the U.N. Charter, to “[f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities”).
110. Id.
111. Id.
as the 1267 regime has evolved, but the majority of its work now concerns listing and de-listing petitions for those suspected of supporting al-Qaeda. Upon the suggestion of any U.N. Member State, the 1267 Committee may add or remove names from its Consolidated List of global terrorists. Procedurally, after an addition or removal request is made by an individual state, a Committee Member State has forty-eight hours to object, after which the change automatically goes into effect.

The 1267 regime is unique in that, while derived from sanctions against the Taliban in Afghanistan, after its post-9/11 transformation, it targeted a transnational group not tethered to any particular state. Enforcing a sanctions regime against individuals who need not be linked to a territory or regime was a policy innovation that came with risks to the due process rights of individuals. Nationals targeted through state-centric sanctions could, at least in theory, depend upon that state’s voice at the U.N. and on the international stage. Accused terrorists have few state supporters at the U.N. and had fewer still in the early days of the “Global War on Terror.”

3. Due Process Objections to the 1267 Process

The 1267 Committee process has raised fairness concerns both for listing individuals at the international level and for enforcement at the domestic and regional level. Many early targets included

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113. Id. ¶ 4 (Decision-making), ¶ 6 (Listing).

114. Id. ¶ 7 (De-listing). A distinct body, the Counter Terrorism Committee (CTC), is tasked with monitoring the implementation of Res. 1373. Unlike the 1267 Committee, it does not maintain lists of designated individuals and is tasked with reviewing states’ progress in implementing Res. 1373’s general provisions. Our Mandate, SECURITY COUNCIL COUNTER TERRORISM COMMITTEE, http://www.un.org/en/sc/ctc/ (last visited June 11, 2015).

on the U.N. 1267 Consolidated List were added through the urging of the United States, often based on secret intelligence, accepted on a good-faith basis in the post-9/11 climate of solidarity and deference. In this sense, the 1267 regime has been called “the mother regime of all sanctions regimes” for the potential due process violations it has invited.

Originally, new listing proposals contained a minimum of information outlining an individual’s affiliation with al-Qaeda. Following 9/11, many listing requests made by the United States were accepted with little challenge, often without a formal meeting of all 15 members of the 1267 Committee. There was not only little debate prior to listings, but also no way for individuals designated to challenge their listing. This dragnet approach caught not only those the 1267 Committee meant to target, but innocent individuals with similar names to suspected terrorists or individuals who had been listed on the basis of false evidence. However, as excesses of the early “Global War on Terror” were brought to light, the 1267 process received increased scrutiny. Critics from within government, academia, and civil society pointed out that in addition to maintaining peace and security, an express purpose of the United Nations is to promote respect and protection of basic human rights among members, including due process rights. By taking on a quasi-judicial role of determining which individuals should be subject to a deprivation of access to property, the 1267 Committee was infringing on that purpose.


118. See generally, Eckert & Biersteker, supra note 32.

119. ROACH, supra note 107, at 28.

120. Id. at 37.


123. See discussion of the Interlaken, Bonn-Berlin, and Stockholm processes, supra note 35 and accompanying text.
Former Secretary General Kofi Annan appointed the “High Level Panel on Threats, Challenges, and Change,” a group of eminent global experts charged with assessing how well U.N. and other global institutions were equipped to handle a range of modern challenges, including transnational terrorism.\footnote{Chaired by Anand Panyarachun (Thailand), the Panel was comprised of Robert Badinter (France), João Baena Soares (Brazil), Gro Harlem Brundtland (Norway), Mary Chinery Hesse (Ghana), Gareth Evans (Australia), David Hannay (United Kingdom of Great Britain and Northern Ireland), Enrique Iglesias (Uruguay), Amre Moussa (Egypt), Satish Nambiar (India), Sadako Ogata (Japan), Yevgeny Primakov (Russian Federation), Qian Qiqian (China), Salim Salim (United Republic of Tanzania), Nafis Sadik (Pakistan) and Brent Scowcroft (United States of America). U.N. Secretary-General, Note by the Secretary-General, ¶ 2, U.N. Doc. A/59/565 (Dec. 2, 2004); see Kofi Annan, U.N. Secretary-General, Address to the General Assembly (Sept. 23, 2003), available at http://www.un.org/webcast/ga/ 58/statements/sg2eng030923.} In its final report, the panel concluded, \textit{inter alia}, “[t]he way entities or individuals are added to the terrorist list maintained by the Council in the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions.”\footnote{U.N. Secretary-General, \textit{A More Secure World: Our Shared Responsibility: Rep. of the Secretary-General’s High Level Panel on Threats, Challenges and Change}, U.N. Doc. A/59/565 ¶ 152, (Dec. 2, 2004), available at http://www.unrol.org/files/gaA.59.565_En.pdf.} Among U.N. Member States, a core group of “Like Minded States” led by Germany, Switzerland, and Sweden encouraged reform for the sanctions targeting process.\footnote{Thomas J. Biersteker, \textit{Scholarly Participation in Transnational Policy Networks: The Case of Targeted Sanctions}, in \textit{Scholars, Policymakers, and International Affairs: Find a Common Cause} 137, 142 (Abraham F. Lowenthal & Mario E. Bertucci eds., 2014).} These efforts resulted from a series of diplomatic-academic conferences that began before 2001 but took on a new urgency following the proliferation of targeted measures after 9/11.\footnote{See id.} The first such meeting, the Interlaken Process, convened by the Swiss Government in March 1998 and again in March 1999, focused on the targeting process.\footnote{Interlaken Process, supra note 35.} The Bonn-Berlin Process, convened by the German government, addressed arms embargoes and travel-related sanctions.\footnote{Bonn-Berlin Process, supra note 35.} The Stockholm Process, convened by the Swedish government in 2002, focused on implementation of targeted sanctions, including in the domestic context.\footnote{Stockholm process, supra note 35.} Institutionalizing their efforts through the creation of a global “Targeted Sanctions Consortium,” individuals involved in the reform process
have continued to suggest mechanisms to improve fairness and effectiveness in U.N. targeted sanctions, including through the establishment at the U.N.-level of a “High Level Review of United Nations Sanctions.”

One of the major suggestions this group proposed was the creation of an independent ombudsperson review mechanism to engage directly with the Security Council. The Security Council adopted this suggestion via resolution, creating the Office of the Ombudsperson. The only independent body that may review specific decisions of the Council, the Ombudsperson mechanism was passed for an initial period of eighteen months and its mandate has been periodically renewed.

The U.N. Ombudsperson mechanism allows for some measure of review at the international level. The Ombudsperson’s specific functions include investigating de-listing requests, gathering and compiling evidence to present to the 1267 Committee, and engaging in a dialogue with de-listing petitioners. Importantly, the Ombudsperson is entitled to consider subsequent developments, not simply the information available to the 1267 Committee at the time a listing occurred. On the basis of these activities, the Ombudsperson prepares a comprehensive report summarizing the justifications for de-listing a particular individual. The first Ombudsperson, Judge Kimberly Prost, has been praised for adding a measure of de facto, if not formal, due process and review to the 1267 sanctions pro-


133. The Ombudsperson was authorized pursuant to U.N. Security Council Res. 1904, passed on Dec. 17, 2009. S.C. Res 1904, supra note 11, ¶ 20. Appointed by the Secretary-General, the Ombudsperson is intended to be “an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism, and sanctions.” Id.


135. Id. at 24.

136. Id. at 6; see Colum Lynch & Jamila Trindle, Cashed Out, FOREIGN POL’Y (Jan. 6, 2014), http://www.foreignpolicy.com/articles/2014/01/06/cashed_out_sanctions_iran_europe (“Prost has been roundly praised by European diplomats for serving as an energetic advocate for listed individuals who merit removal from the U.N. blacklist.”).

137. Prior to her appointment as the first ombudsperson, Prost served as a judge with the International Criminal Tribunal for the Former Yugoslavia (ICTY) and for over twenty years as a federal prosecutor in her home state of Canada. Eckert & Biersteker, supra note 32, at 6; see Press Conference to Present Ombudsperson, supra note 117.
Through 2011’s UNSCR 1989, the Security Council strengthened the powers of the Ombudsperson, making her recommendations final and automatic after 60 days unless they are unanimously opposed by the 1267 Committee or by vote of the Security Council.

The Office of the Ombudsperson is not a cure-all to the issues inherent in targeting individuals for asset freezing. Providing individuals with a meaningful opportunity to challenge their designation before it can be implemented in a large number of domestic jurisdictions remains a challenge. Institutionally, the Office of the Ombudsperson is limited by resource constraints. Its mandate is subject to periodic renewal, rather than being of indefinite duration, hindering its long-term strategic planning. Further, the Ombudsperson may be limited in her ability to access classified information in a timely manner. Some of the Office’s effectiveness is attributable to the personal influence of the Ombudsperson and the rapport she has built with members of the Security Council. There is no guarantee that a future Ombudsperson will be able to replicate this rapport.

Rejecting the claim that sanctions are not punitive and therefore need not guarantee the same rights to due process as criminal proceedings, critics have questioned whether the U.N. terrorist blacklisting procedure, even with expanded powers of the Ombudsperson, violates international human rights standards. Even if the Ombudsperson process is sufficient, its mandate is limited to the 1267 Committee sanctions; a future sanctions regime that falls outside of the 1267 process would not necessarily have the same protections unless the mandate of the Ombudsperson were extended or a separate ombudsperson was mandated. Neither has occurred for any of the

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138. See generally Eckert & Biersteker, supra note 32.
139. Id. at 7.
140. S.C. Res. 1904, supra note 11, ¶ 20.
142. Indeed, this was one of the major holding of the ECJ’s Kadi II decision, which has been the subject of much academic commentary on the relationship between E.U. and international law. See infra INTRODUCTION. See also Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, transmitted by Note of the Secretary-General, U.N. Doc. A/67/396 (Sept. 26 2012) (by Ben Emmerson). See also Press Release, General Assembly, Human Rights Not Luxuries, but Rather “Inalienable Entitlements” to Be Exercised Everywhere by All Members of Human Family, Third Committee Told, U.N. Press Release GA/SHC/4049 (Nov. 2, 2012) available at: http://www.un.org/News/Press/docs/2012/gashc4049.doc.htm.
143. There has been significant discussion among U.N. member states about extending the mandate of the Ombudsperson to other sanctions regimes. See Working Methods
roughly dozen sanctions regimes currently in place, suggesting un-
willingness among influential U.N. Member States to see the ombu-

Regardless of whether the mandate of the 1267 Ombudsperson is extended, an international ombudsperson mechanism does not solve the underlying problem that designees who seek to challenge their listing in different national jurisdictions face a varying set of standards for what constitutes due process and meaningful judicial review. For the United States, multilateral enforcement through the U.N. is advantageous in terms of its potential scope and comprehen-
siveness. Under Article 25 of the U.N. Charter, all U.N. Member States are committed to enforcing these sanctions since they constitute binding actions of the Security Council.\footnote{U.N. Charter art. 25.} In theory, being included on the 1267 List should therefore lead to a nearly universal freeze on funds. Additionally, listing by the Security Council has a strong stigmatizing effect and may hamper the ability of individuals to conduct transactions in the future,\footnote{A M. CIV. LIBERTIES UNION, \textit{U.S. GOVERNMENT WATCHLISTING: UNFAIR PROCESS AND DEVASTATING CONSEQUENCES} (Mar. 2014), available at https://www.aclu.org/sites/default/files/assets/watchlist_briefing_paper_v3.pdf; see Anna Oehmichen, \textit{U.N.-E.U.-Terrorist Listing—Legal Foundations and Impacts}, 9 \textit{ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK} 412, 417 (2014), available at http://www.zis-online.com/dat/artikel/2014_9_847.pdf.} important if they are being targeted not only for past conduct, but also for future proclivity. But this sheer scope of the internationalization of a designation complicates the ability of targets to launch a meaningful challenge to their inclusion on the 1267 List and raises the harm of an erroneous designation. Despite reforms to the U.N. system and the strong record of the Ombudsperson, the current system is far from a complete solution to the due process concerns of individuals, exemplified by the challenges of Yassin Kadi.

C. Counterterrorism Finance in Europe

As it sought to establish a multilateral counter-financing regime robust enough to counter the threat posed by al-Qaeda, the United States engaged with its allies in Europe. Due to their prominent roles in the global financial system, European governments are essential partners for any successful counter-threat finance system. Like the United States, European governments had pre-existing policies for enforcing targeted measures that were enhanced after 9/11. The power to enforce terrorist designations and to ultimately freeze and seize funds has remained with domestic institutions at the individual state level. However, as a matter requiring substantial interstate regulation, European states coordinate policy through the European Union. The E.U. Council serves as a conduit for U.N. Security Council decisions, translating them into E.U. regulations enforceable by Member States through their own domestic laws. The result is a complex multilateral system for enforcing counterterrorism

147. An additional impetus for early European cooperation in the fight against al-Qaeda were fears that European cities could be targeted for attacks, as some ultimately were, as well as revelations that many accused of links to al-Qaeda, including those directly implicated in the 9/11 attacks, had established bases of operation or received training in Europe.


151. European governments retain the ability to enforce their own unilateral sanctions, and the E.U. coordinates a set of “E.U. autonomous sanctions” that are independent of action taken by the U.N. Security Council. Due to the way in which Yassin Kadi’s particular case proceeded and the implications his appeal have on the U.N. blacklisting process, this Note focuses on the mechanism through which the European Union incorporates actions of the Security Council into regulations enforceable by E.U. Member States.
sanctions throughout Europe.

1. The Council of the European Union

Following the passage of Resolution 1373 by the U.N. Security Council, the General Affairs Council of the European Union instituted a coordinated response, invoking its powers under Articles 11, 15, and 29 of the Treaty of the European Union and Articles 60, 301, and 308 of the Treaty Establishing the European Community.\(^{152}\) This led to Resolution 1373’s implementation by the Common Position 2001/930/CFSP on combating terrorism and 2001/931/CFSP on the application of specific measures to combat terrorism, both passed on 27 December 2001.\(^{153}\) An Annex pursuant to the latter included a list of individuals and entities subject to asset seizure.\(^{154}\) The Common Position then served as the basis for Council Regulation 2580/2001, an implementing law incorporating the U.N.’s 1267 Consolidated List.\(^{155}\) The blacklist provided a basis for national implementation.\(^{156}\) States within the E.U. of course retain their ability to impose unilateral sanctions, and therefore may have more expansive lists. However, the E.U. list not only provides a minimum set of designations that E.U. Member States must enforce domestically, but is an efficient way to standardize the designation process without having to resort to national agencies each independently building a case to justify a designation.

II. EXPOSING THE GAP: KADI ON APPEAL AT THE D.C. CIRCUIT AND ECJ

Yassin Kadi was universally blacklisted in the weeks after the 9/11 attacks.\(^{157}\) At the time of his listing, Kadi had substantial assets


\(^{153}\) Miller, supra note 121, at 49.

\(^{154}\) Id.


\(^{156}\) Id.

\(^{157}\) Gerth & Miller, supra note 2; see also Security Council Press Release, supra note 4.
and business dealings in the United States and in Europe. Addi-
tionally, the stigma of his blacklisting had repercussions for his abil-
ity to travel and conduct business globally. Kadi’s legal chal-
lengees are emblematic of the hydra-headed problem faced by individu-
als designated as terrorist financiers: a designation in one forum may be
replicated in many others before the first can be addressed. Through
a decade of parallel litigation, his appeals have challenged and often
catalyzed the evolution of the post-9/11 international counter-
terrorism sanctions. Part II of this Note examines Yassin Kadi’s le-
gal challenges in U.S. court and at the ECJ. It details the dismissal of
his claim in the D.C. Circuit in Kadi v. Geithner and compares this
to his successful challenge of his U.N. designation’s enforce-
ment in Europe, the Kadi II decision at the ECJ.

A. Kadi’s Legal Challenges in the U.S

1. Designation and Agency-Level Appeal

Kadi was designated by OFAC as an SDGT on October 12,
2001. In December, 2001, Kadi petitioned OFAC for an internal
agency reconsideration of this designation. As part of his agency-
level appeal, Kadi met in person with representatives from OFAC.
He was given access to a two-page fax summarizing the evidence
against him, along with other unclassified portions of the administra-
tive record. On March 12, 2004, OFAC notified Kadi that his peti-
tion had been denied and thus he remained on the SDGT list.

158. Kadi claimed to have a net worth of approximately US$65 million at the time of
his listing. Notably, Kadi’s assets in Europe were kept in the United Kingdom and
Switzerland. He lodged legal challenges in both jurisdictions. See Eckert & Biersteker,
supra note 32, at 20. It is unclear how much—if any—of this wealth was kept within
accounts in the United States. However, his inability to access the U.S. financial system or
conduct business in the United States impacted his ability to access and transfer funds
broadly. Landon Thomas Jr., A Wealthy Saudi, Mired in Limbo Over an Accusation of
middleeast/13kadi.html?pagewanted=all&_r=0.
159. Frasier, supra note 17.
162. Gerth & Miller, supra note 2.
164. Id.
165. Id.
166. Id.
Consisting of over 2,800 pages of evidence, the agency record included classified and unclassified evidence, as well as limited submissions made by Kadi to the agency in his own defense. In maintaining his designation, OFAC stated in its decision:

No one element, no one contact, no one accusation of funding is taken as being determinative of the assessment that AL-QADI has been providing support to terrorists through his actions. Rather, when considering the number of sources, the numbers of activities and length of time, the totality of the evidence, both classified and unclassified, this provides a reason to believe Yasin AL-QADI has funded terrorist and extremist individuals and operations.

Kadi himself did not have access to the “totality of the evidence.” His first opportunity to have the record examined in its totality outside of OFAC was on appeal.

2. 2012 D.C. Circuit Opinion

On January 19, 2009, Kadi appealed the Treasury Department’s agency-level decision in the District Court for the District of Columbia. On March 20, 2012, Judge Bates granted the government’s motion for summary judgment, dismissing Kadi’s statutory and constitutional claims. Applying the arbitrary and capricious standard under the APA, Judge Bates found OFAC was justified in making the designation under evidence available to it in 2001 at the time of Kadi’s designation.

In challenging OFAC’s final agency decision, Kadi made two important claims relating to his parallel challenges at the ECJ. First, he argued that the evidence on the record, reviewed by OFAC in his 2004 petition hearing, was incomplete. He claimed that review of an incomplete record constituted a violation of the arbitrary and capricious standard of review stipulated by the APA. As part of

167. Id. at *7.
168. Id. at *6 (citing the language of the OFAC decision).
169. Id.
170. Id. at *36.
171. Id. at *5–6.
172. Id. at *31. Kadi additionally claimed that OFAC’s decision to block his assets violated his free speech rights and Executive Order 13,224 naming him an SDGT was an illegal Bill of Attainder. Both of these arguments were likewise dismissed. Id. at *26, *35.
173. Id. at *5.
this claim, Kadi emphasized that the administrative record reviewed by OFAC did not reflect decisions in his favor that had occurred in foreign courts.174 In his submissions, Kadi sought to invoke findings made in other national jurisdictions and at the regional and U.N. level, including the 2010 Kadi II General Court decision in which he had prevailed.175 Kadi argued that the U.S. District court should look at the sum of these decisions, which had “considered the same or similar terrorism allegations against him, and ‘vindicated’ him in every forum.”176 Based on the incompleteness of this record, Kadi argued he should be able to supplement the record upon review before the court;177 in essence, he was asking the court for a *de novo* consideration of the merits of his designation in which he, as the defendant, could take a more active part in the adversarial process by supplementing the record. Judge Bates was dismissive, noting:

Notwithstanding the impropriety of considering such decisions, the Court would, in any event, be reluctant to rely on the decisions of other countries based on information that likely differed from the administrative record compiled by and available to OFAC. Moreover, these decisions have been reached under different standards of proof or review, which further undermines any persuasiveness they would have.178

In dicta, Judge Bates noted Kadi’s failure to petition OFAC to supplement the record after the 2004 agency decision but prior to his appeal in court.179 Having not done so, Judge Bates cited to Supreme Court precedent to assert that a reviewing court is limited to the record available to the agency at the time the decision was made.180 But

174. *Id.*
175. *Id.* at *8.
176. *Id.*
177. *Id.* at *5.
178. *Id.* at *8.
179. *Id.* at *10 (“Subsequent to the 2004 decision, Kadi has had several years and opportunities to petition OFAC to supplement the administrative record, but he has not done so.”).
180. *Id.* at *4 (citing Camp v. Pitts, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”)). This author contends that for sanctions challenges in particular, the principle cited by Judge Bates is misapplied. Limiting the record considered by the court is intended to protect the rights of the individual from actions by an executive agency thought to, by virtue of its access to information and control over the record, be in a position to augment the record in its own favor. See Sec. & Exch. Comm’n v. Chenery Corp., 318 U.S. 80 (1943).
in his holding, Judge Bates suggests that supplemental information would have been unlikely to affect the outcome of the court’s decision, or even to allow the case to proceed to discovery, based on the highly deferential standard that U.S. courts award to executive agency decisions under the arbitrary and capricious standard. The Court cited *Islamic Am. Relief Agency* and *Holy Land Foundation* to indicate that, at least in the D.C. Circuit, SDGT designations are entitled to a highly deferential review that goes beyond that which is provided under the already deferential arbitrary and capricious standard.

Kadi also attacked his lack of access to the classified information that was contained in the agency record. He claimed that OFAC’s failure to afford him an opportunity to view and rebut the evidence against him violated his fundamental due process rights. Kadi claimed that despite a 2,800 page record, his own access was far more limited, having been forced to rely principally on a two-page summary of the evidence. Of those parts of the record he was able to observe, he contested the accuracy of the affidavit of an FBI agent, the inclusion of news articles that he claimed constituted impermissible hearsay, and a two-page fax sent from the United States to the United Kingdom, which contained evidence from “non evidential sources” such as public websites. Citing precedent that OFAC was

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181. Kadi, 2012 WL 898778, at *5 (“Even if the Court permitted discovery, it is doubtful that it would garner additional facts that would help to decide whether the agency action was arbitrary and capricious, given the deferential review of such actions.”).


185. Id. at *18 (“And Kadi’s claim that the two-page fax, and the articles cited and the sources represented therein, contained deficiencies, is besides the point. While providing Kadi a window into OFAC’s reasoning, these items do not represent the whole picture—the information relied on by OFAC that Kadi attacks as unsubstantiated is further supported by the classified record, which confirms Kadi’s financial transactions and relationships with SDGTs.”).

186. Kadi alleged that despite claiming that OFAC had relied on the totality of the heavily classified record, the “principal source” upon which OFAC linked the Muwafaq organization to al-Qaeda was a magazine article published in 1999 by *USA Today* that the publication had later retracted and whose author had subsequently been found to have “fabricated several high-profile stories.” Id. at *11.

187. Id. (“Kadi contends that this article was unreliable because *USA Today* later conceded that it had ‘several errors’ and because Kelley was subsequently found ‘to have fabricated several high-profile stories.’”).

188. Id. at *7.
entitled to rely on hearsay evidence in SGDT cases and that evidence could come from a broad range of sources, the court denied Kadi’s claims that part of the evidence included in OFAC’s report was impermissible.189 In deciding the case, Judge Bates was entitled to exercise in camera and ex parte review of the evidence, so the court was able to review the entire 2,800 page OFAC record.190 Despite Kadi’s inability to do so, the court was satisfied under its own review of both the classified and unclassified portions of the record that OFAC was justified in its denial of Kadi’s delisting request.191

The opinion in Kadi v. Geithner is a straightforward application of U.S. administrative law under the APA and under evidentiary standards for prior SDGT challenges. Judge Bates adhered closely to past precedent in rejecting Kadi’s claims. His reading of the APA arbitrary and capricious standard does not deviate from well-established U.S. Supreme Court precedent.192 Even its application of an additional gloss of deference for matters touching on foreign policy decisions of the Executive branch, when Congress has not spoken to the contrary, is uncontroversial.193 It is this lack of controversy that gives Kadi v. Geithner importance, considering the enormous influence that Kadi’s successful delisting petitions based on the same set of facts have had at the U.N. and the ECJ.

B. Kadi’s Challenge to his Designation in the UK Through the ECJ

1. Initial Blacklisting and Kadi I

In October 2001, Kadi was listed at the United Nations by the 1267 Committee on the basis of secret evidence of his affiliation with al-Qaeda; this evidence was submitted by the United States.194 Kadi’s assets were frozen in the United Kingdom after his 1267 Committee listing was transmitted to Europe through E.U. regulation, enacted on October 20, 2001.195 Kadi challenged the E.U. regulation

189. Id. at *15 (citing Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, (D.D.C. 2002) aff’d, 333 F.3d 156, 162 (D.C. Cir. 2003) (rejecting the contention that OFAC may not rely on hearsay evidence, and stating that designations can be based on a broad range of evidence, including intelligence data and hearsay declarations)).


191. Id. at *5.


195. EC Listing Regulation, supra note 5.
that had implemented UNSCR 1267 in the E.U. Court of First Instance (CFI), the predecessor to the General Court (GC), citing a denial of fundamental due process. The CFI declined to rule on the permissibility of the action, holding that U.N. Security Council actions taken under Chapter VII were not subject to review. In 2008, Kadi appealed the decision of the CFI to the ECJ. The ECJ reversed, finding that it did indeed have authority to hear the case, as it pertained to “fundamental rights” guaranteed under the treaty establishing the European Community. Referred to as Kadi I, the ECJ further held that in preventing Kadi from viewing the evidence against him, the E.U. regulation had prevented him from being able to present a “meaningful challenge” to his designation. This was held to be a violation of the fundamental right to be heard, the right to property under European law, as well as a deprivation of adequate judicial review. The ECJ granted the E.U. Commission three months to amend the listing mechanism at the E.U. level, without which the U.N. listing would be considered null and void.

2. Kadi II in the General Court

The E.U. listing mechanism was revisited in the interim. Under the amended procedure, Kadi was re-listed. This time, the E.U. Commission forwarded Kadi a brief summary, provided by the 1267 Committee, of the reasons for his listing. Kadi challenged his continued listing at the General Court. Known as Kadi II, the GC ruled in favor of Kadi, interpreting Kadi I to require a substantive review of the evidence upon which the Court based its

196. For an abridged summary of the various cases within Kadi’s ECJ cases, see Maya Lester, Kadi Wins 2nd Case in the ECJ, EUROPEAN SANCTIONS: LAW AND PRACTICE (July 18, 2013), http://europeansanctions.com/2013/07/18/kadi-wins-2nd-case-in-the-ecj/.
198. Id.
199. Id. ¶ 326.
200. Id. ¶ 352.
201. Id. ¶¶ 334, 353, 371.
202. Id. ¶ 376.
203. Lester, supra note 196.
205. Id.
listing decision.\textsuperscript{206}

The scope of review envisioned by the GC stands in contrast to the arbitrary and capricious review of agency decisions required under U.S. law for OFAC sanctions.\textsuperscript{207} The General Court noted the seriousness of erroneous deprivation in asset seizure cases, and specifically referenced developments that had occurred in the decade since Kadi had originally been listed at the U.N.\textsuperscript{208} The Court further stipulated that the basis for which the designation was made should be disclosed to the listed individual.\textsuperscript{209} In addition to highlighting deficiencies in the ability of designated individuals to address the evidence against them, the General Court noted that the U.N. Ombudsperson process did not establish sufficient due process guarantees.\textsuperscript{210}

Temporally, the 2010 decision in Kadi’s favor was rendered before the enactment of Resolution 1989 enhanced the powers of the U.N. Ombudsperson. Thus, when the decision went up for appeal, the ECJ had an opportunity to comment on its view of the adequacy of the Resolution 1989 reforms.\textsuperscript{211} On November 16, 2011, while the case was on review, the U.N. Ombudsperson began a formal review of Kadi’s listing. After a review and recommendation by the Ombudsperson, Kadi was de-listed by the Security Council on October 5, 2012.\textsuperscript{212} The E.U. blacklist was updated accordingly.\textsuperscript{213} Thus, when

\begin{itemize}
  \item \textsuperscript{206} Id. ¶¶ 192–95.
  \item \textsuperscript{207} See discussion of the arbitrary and capricious standard in Part A(4) above.
  \item \textsuperscript{208} Kadi II, supra note 204, ¶ 149 (“Such measures are particularly draconian . . . . All the applicant’s funds and other assets have been indefinitely frozen for nearly 10 years now and he cannot gain access to them without first obtaining an exemption from the Sanctions Committee . . . [T]he U.K. Supreme Court took the view that it was no exaggeration to say that persons designated in this way are effectively ‘prisoners’ of the State: their freedom of movement is severely restricted without access to their funds and the effect of the freeze on both them and their families can be devastating.”).
  \item \textsuperscript{209} Id. ¶ 173.
  \item \textsuperscript{210} Id. ¶ 128 (“In essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee . . . Moreover, the evidence which may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee’s list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively (he need not even be informed of the identity of the State which has requested his inclusion on the Sanctions Committee’s list).”).
  \item \textsuperscript{211} S.C. Res. 1989, supra note 11, ¶¶ 22–23.
  \item \textsuperscript{212} Security Council Press Release, supra note 4.
\end{itemize}
the Grand Chamber of the ECJ announced it would issue an opinion on the appeal in Kadi II. Kadi was no longer subject to counterterrorism sanctions at the U.N. or in the E.U. Rather than declare the case moot, the ECJ’s decision to issue an opinion can be read as an attempt to set standards for future discussions on targeted asset freezes.

3. The Grand Chamber’s Kadi II Appeals Decision

Eighteen European Union Member States joined with the United Kingdom and the European Council in appealing the decision in favor of Kadi.214 In its 2013 decision, the Grand Chamber confirmed the ruling of the GC. The Grand Chamber reiterated what had been emphasized in the GC’s decision: a searching judicial review is “indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned.”215 Stressing the importance of formal judicial process, the Grand Chamber held “the essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court . . .” (emphasis added).216

Notably, the Grand Chamber was not as extreme as the GC in its criticism of Kadi’s inability to review all of the evidence leading to his listing. Addressing the adequacy of the evidence presented to Kadi, the GC in 2010 had condemned the limited information in the summary transmitted to Kadi as containing only “general, unsubstantiated, vague and unparticularised allegations.”217 It was on this basis that “the GC opined that the European Commission . . . did not grant him even the most minimal access to the evidence against him.”218 In contrast, the Grand Chamber explicitly acknowledged the challenges of using classified evidence in the sanctions context.219 The Grand Chamber noted that providing a summary might allow European courts to properly strike a balance between an individual’s procedural rights and the national security prerogatives of states.220 The Chamber did, however, emphasize that European courts have a duty to request evidence, whether classified or not, from the “competent

214. Kadi II Final Decision, supra note 1, ¶ 1.
215. Id. ¶ 131.
216. Id. ¶ 134.
218. Id. ¶¶ 172–73.
219. Kadi II Final Decision, supra note 1, ¶¶ 78–80, 125.
220. Id. ¶¶ 125, 129.
European Union authority” to establish whether the reasons for a listing are well-founded.\textsuperscript{221} The burden is on the listing entity to prove the validity of listing and not on the challenging individual to disprove it (though authorities need not produce all evidence justifying information contained in a listing summary).\textsuperscript{222} If evidence is provided, European courts have a responsibility to determine what evidence should be made available to the accused, through either full or partial disclosure.\textsuperscript{223} As a threshold inquiry, courts must examine whether, on balance, the probative value of disclosure to the accused outweighs any security concerns by states seeking to protect classified information.\textsuperscript{224} Should authorities fail to comply with requests to supply information, the Grand Chamber instructed European courts to base their decisions only on evidence made available to the accused and any exculpatory evidence provided by the accused.\textsuperscript{225}

In its discussion of the “fundamental values” at issue, the Grand Chamber adopted a “dualist” approach in which it noted that it was interpreting not international law per se, but values protected under European Union law.\textsuperscript{226} This raises the question of what the European Union, not only through the ECJ but also through its Member State governments, believe to be their international law obligations in providing due process and judicial review for individuals subject to an asset freeze, and how those compare to the specific procedural safeguards the Grand Chamber described in its decision.

C. Reading Kadi v. Geithner & Kadi II in Tandem

\textit{Kadi v. Geithner} and \textit{Kadi II} invite comparison not only because they address the same underlying facts, but also because of the parallel legal issues the two courts considered in adjudicating the claims. Kadi’s legal challenges in the United States and Europe reveal differences over fundamental notions of due process, judicial review, and access to evidence under these jurisdictions. Both courts held that as a basic matter, an individual designated for an asset freeze must have some opportunity to challenge that designation and further, an opportunity to appeal a challenge to a neutral arbiter. Where they differed in the first instance is what constitutes meaning-

\textsuperscript{221} \textit{Id.} ¶ 121.
\textsuperscript{222} \textit{Id.} ¶¶ 120–22.
\textsuperscript{223} \textit{Id.} ¶¶ 121, 124, 127.
\textsuperscript{224} \textit{Id.} ¶¶ 124–29.
\textsuperscript{225} \textit{Id.} ¶ 123.
\textsuperscript{226} For more information on this interpretation, see De Burca, \textit{supra} note 23.
ful judicial review on appeal.

The ECJ was unwilling to show the designation review process provided for by the U.N. Ombudsperson mechanism similar deference to that which U.S. courts must grant OFAC under the arbitrary and capricious standard of the APA. This is partially attributable to the more self-contained U.S. system, where U.S. courts and OFAC belong to a unified system of government in which Congress provides an independent check on both. Nonetheless, it is worth considering whether the U.S. process, mutatis mutandis, would meet the standards of fundamental fairness that the ECJ has attempted to set for future cases. Phrased differently, would the ECJ have upheld OFAC’s listing review decision if it had been in a position to hear that appeal?

On the one hand, the ECJ appears to emphasize a review procedure that occurs in a court of law, including a judge as a neutral arbiter. In that sense, the logic employed by the ECJ in *Kadi II* might not preclude the kind of review afforded in the United States for OFAC review challenges. But the ECJ decision can also be interpreted as emphasizing that asset freezes are meant to be preventative, not punitive. They involve neither criminal nor civil charges. In the United States, this manifests as an Executive agency determination that occurs outside of the Article III courts, while for the ECJ the U.N. system stands in for OFAC. In both cases, it is a sort of “pre-crime” determination that, if maintained longer than absolutely necessary, is anathema to fundamental conceptions of when a government may infringe on property rights in the interest of national security.227 U.S. courts are no less a venue to vindicate individual rights violated by the U.S. government then the ECJ is an extra check on infringements of individual rights by European governments. As such, the high level of deference afforded to OFAC determinations undercuts the idea that designees should be afforded access to meaningful judicial review in their appeals of agency final decisions. The restrictive approach to review that U.S. courts take in SDGT appeals under the arbitrary and capricious standard of the APA, in particular their inability to consider any new evidence that would encourage de-listing, should be reconsidered in light of its contrast to the ECJ’s *Kadi II* holding.

The comparison between the cases also indicates that the process envisioned by the ECJ as meeting fundamental European values puts states in a difficult position concerning information sharing. In *Kadi v. Geithner*, OFAC compiled an extensive classified record that

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the court had the power to review *ex parte* and *in camera*. Placing sole responsibility for reviewing the entire record with the judge, versus making that record available to the accused to rebut, assured the U.S. government that judicial review would not lead to disclosure of sensitive intelligence. In contrast, the ECJ held that a determination must be made on substantial evidence. While European courts may limit the review of some portions of that evidence by the accused, there appears to be a presumption in favor of at least partial disclosure. 228 The evidence transmitted by the 1267 Committee to the European Union, and later forwarded to Kadi as a summary, was found insufficient in a way that the summary of evidence that OFAC provided to Kadi was not. Nor is it clear that states would want the ECJ to serve a similar role in European challenges, undertaking review of extensive classified records against listed individuals. The U.N. 1267 regime rests on the ability of states to list individuals based on classified evidence that states may be reluctant to fully share with an international body like the 1267 Committee, and further to have transmitted to the ECJ.

Finding a balance whereby national courts may have greater access to detailed, classified records compiled by the intelligence agencies may necessitate greater direct state-to-state exchanges of evidence, which undermines the 1267 Committee as a conduit to facilitate information sharing. Even in cases of direct information sharing, states with greater intelligence gathering capabilities may be hesitant to share classified information with other states if that evidence may then be subject to a public examination by a regional court like the ECJ. OFAC may now rightly fear one of two scenarios. In the first, evidence OFAC shares with its counterparts could simply be ruled inadmissible on appeal to a regional court in Europe, allowing a de-listing in a case that might otherwise be justified. Second, upon review, a court like the ECJ may force an agency to choose between annulment of sanctions or disclosure of classified information provided by OFAC that a partner agency be under an obligation not to disclose. By forcing this choice, the ECJ decision in *Kadi II* may undermine the use of targeted asset freezes as vital tools in the fight against transnational terrorism.

While there is no obligation for U.S. courts to consider the decisions of foreign courts in determining their own jurisprudence, it has long been established that foreign judgments should be afforded “full credit and effect” provided “the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proof, and op-

portunity to defend against them . . . . 229 Looking to a foreign decision may be particularly illuminating in cases where fundamental values are at issue, as in a variety of post 9/11 Supreme Court decisions. 230 By refusing to look at foreign jurisprudence in counterterrorism sanctions cases—an area in which the United States has been criticized for not adhering to international standards 231—courts do little to counter claims that the United States does not respect international law.

In Europe, the most notable aspect of the Grand Chamber’s Kadi II Final Decision was the ECJ’s assertion that it would continue to review E.U. implementation of U.N. sanctions due to lack of equivalent judicial review at the U.N. level. 232 This has two major implications for the use of Security Council sanctions as a means of multilateral enforcement. As a seeming indictment of the adequacy of the Ombudsperson mechanism, it suggests that the 1267 Committee process has left sanctions enforcement standards muddled as a matter of international law. 233 Second, the Ombudsperson system, a result of years of reform efforts led by a core group of European states, has been discredited. 234 It is therefore in the interest of states on both sides of the Atlantic to discuss a set of shared standards for review of asset freezes listing challenges. Not doing so leaves their respective courts as the only bodies offering interpretations of what constitutes fair process for sanctions delisting review.


231. See supra INTRODUCTION.


233. Id. ¶¶ 133–37

234. Interestingly, the European Court of Justice never uses the term “ombudsperson” or refers to the office directly in its Kadi II Final Decision. However, both prior to the decision and in its aftermath, it has been read to imply that the Ombudsperson process, falling short of formal judicial review, is inadequate to meet fundamental standards of due process. See De Burca, supra note 23; Posch, supra note 23.
III. RETHINKING THE INTERNATIONAL FINANCE COUNTERTERRORISM REGIME

The *Kadi II* Appeal decision is not just the final chapter in one man’s long-running legal dispute; its comparison to *Kadi v. Geithner* invites a wider discussion of the future of multilateral cooperation to combat the financing of terrorism. Part III of this Note suggests that in light of the problems that the ECJ’s *Kadi II* Appeals decision is likely to pose regarding the ability of states to enforce U.N. counterterrorism sanctions, the international community would benefit from greater transnational dialogue on targeted asset freezes, and the related right to challenge them, under domestic and international law. Most suggestions for reform in the wake of *Kadi II* have emphasized the need to reform the U.N. Ombudsperson process. While some such suggestions have merit, the politicized nature of the Security Council, through which any reforms to the Ombudsperson must pass, necessitate that states look outside the Security Council process in order to build consensus around a shared set of norms.

A widely enforceable multilateral sanctions regime is in the United States’ national interest. The U.S. government should encourage and sustain transnational dialogue around respecting fair and clear procedures for counterterrorism sanctions and the right to a meaningful review of such designations. If the United States does not take a more vocal role in engaging with other states on these subjects, it will remain in a reactive posture, with clarifications on what constitutes fair process and meaningful review deriving from subsequent decisions of European courts.

As a first step, the United States should reconsider how its own judicial system accounts for the “fundamental values” identified in the ECJ *Kadi II* decision. Congress should legislate to specify that

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A *de novo* standard of review be used in SGDT cases on appeal in U.S. courts, given the non-punitive, preventive nature of the listing process. A *de novo* standard would give U.S. judges more flexibility in reviewing delisting requests, allowing them to account for changes in facts that may have removed the impetus for listing an individual since the time of an agency review, to the extent the absence of that information reflects inadequacy in the agency’s fact-finding process. Secondly, the United States should encourage clarification of duties undertaken by all states enforcing targeted asset freezes. The framework used for the Interlaken, Bonn-Berlin, and Stockholm processes provides a useful blueprint. However, a broader group of states should be involved in the process, including the United States, but also states whose input would extend this beyond simply a transatlantic dialogue. Participants in this process should look outside of the Security Council to treaty-based law, where individual states may better articulate what they believe to be shared obligations. By moving outside of the 1267 process and encouraging states to clarify their own domestic commitments, it would prevent the U.N. Ombudsman process from serving as a scapegoat for a failure to address deeper structural issues in implementation of asset freezes across multiple legal orders. Due to the large number of states who have signed and ratified it, the Terrorist Financing Convention provides a promising instrument around which to organize these efforts. An Implementing Protocol to the Convention would build consensus and allow better bilateral and multilateral engagement on commitments to judicial review and evidence sharing in asset freeze efforts. Over the long term, this will allow for a more effective counterterrorism finance system.

237. A *de novo* standard of review is provided under APA, 5 U.S.C. § 706(2)(F) as an alternative standard to arbitrary and capricious review. § 706(2)(F) would allow a court to set aside agency action, findings, or conclusions when “unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.” APA, 5 U.S.C. § 706(2)(F). Section 706 provides no guidance as to when the facts should be subject to trial *de novo* by the reviewing court. However, the U.S. Supreme Court has limited *de novo* review to situations in which agency action is adjudicatory in nature and the agency fact-finding procedure is inadequate or issues that were not before the agency are raised to enforce non-adjudicatory agency action. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

238. While ongoing negotiations over the so-called Comprehensive Convention on International Terrorism provide a possible alternative, the author contends that limiting the nature of any negotiations to states’ commitments to combat the financing of terrorism, an area on which substantial agreement has already been reached, avoids the contentious issue of lack of agreement on a single definition of terrorism that has stalled progress on a more comprehensive convention. See infra Part II.
A. U.S. Domestic Reform

The ability of courts to exercise a broad, searching review in SDGT appeals are precluded in U.S. courts by the well-established jurisprudence in U.S. administrative law that agency final decisions are reviewable under the arbitrary and capricious standard outlined in §706(2)(d) of the APA. Because arbitrary and capricious review is highly deferential to agency determinations, it is not well suited for sanctions listing reviews. When making a listing, OFAC assesses evidence of past material support for terrorism, but as a proxy for the probability of future support. Unlike criminal penalties, sanctions are meant to be preventative, not punitive. The ability to remove sanctions is essential to their fairness as conditions change that would impact future behavior or lessen the exigencies that may have justified a short-term asset freeze. Arbitrary and capricious review forecloses a court from examining evidence that may have surfaced since the time of the initial agency determination, potentially finding that a listing, which may have been justified at the time of designation, is no longer justified.

De novo review would allow courts greater leeway to account for additional evidence and updated information. While an alternate standard of review under APA §702(2)(f) allows courts to hold unlawful agency action “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court,” this is a rarely invoked by U.S. courts. De novo review would better reflect the non-punitive, future-oriented nature of sanctions listings, in particular the unusual nature of the listing process. Although use of de novo review under APA §796(2)(F) is rare, the Supreme Court has ruled it available when an agency’s fact-finding procedure in an adjudicatory manner is inadequate, a standard that could be present in SDGT cases, based on a fact-specific analysis of the manner in which evidence for a listing was collected and maintained. While de novo review has been suggested by challengers to SDGT listings, this argument has not been given serious consideration in a climate that otherwise urges extreme deference to the Executive.

The simplest way to ensure courts use this more expansive standard of review in SDGT cases would be for Congress to legislate

239. Daskal, supra note 227, at 336–44.
242. Id.
to that effect. Congress should particularly consider doing so if the
President continues to renew the economic emergency, invoked
shortly after September 11, 2001, that underlies the grant of power to
OFAC to maintain its al-Qaeda SDGT list. IEEPA was intended to
curb the President’s ability to declare economic emergencies of in-
definite duration. Congress should act to limit the excesses of ex-
tended economic emergencies by necessitating that appeals of agency
listing decisions are entitled to de novo consideration of the facts,
perhaps if a set number of years has elapsed since the agency desig-
nation decision at the time of the appeal hearing. Additionally, judg-
es may, of their own accord, find that an SDGT challenge necessi-
tates de novo review in so far as it implicates the adequacy of OFAC
fact-finding process in a particular case.

B. An Implementing Protocol to of the Terrorist Financing
Convention

The ECJ’s Kadi II decision implies that Security Council ac-
tion alone, even with the availability of the Ombudsperson review
mechanism, may not be enough to compel compliance with Security
Council listing without fear that it will conflict with E.U. Mem-
ber State obligations to provide a searching judicial review. But
Kadi II left unclear what may constitute sufficient review by the
courts of Member States, and how evidence sharing can best be tai-
lored to allow review without compromising national security con-
cerns. One possible entry-point for states to discuss international
standards of judicial review for targeted sanctions designations is in
the context of their obligations under the Terrorist Financing Conve
vention. Signed into force in 1999, the Terrorist Financing Conve
vention currently has 132 signatories and 185 State Parties. The
United States, the United Kingdom, and leading members of the Eu-
ropean Union were founding members. While the Convention is
mostly focused on prohibition and on the prosecution of terrorist fi-
nancing as a crime, Article 7(5) places an affirmative duty on

243. See infra Part I.A.
244. Citizens to Preserve Overton Park, 401 U.S. at 415
245. De Burca, supra note 23.
246. Terrorist Financing Convention, supra note 33.
247. For a list of signatories to the Terrorist Financing Convention, see U.N. Treaty
src=TREATY&mtdsg_no=XVIII-11&chap ter=18&lang=en
248. For information on the history and background of the Convention, see GEOFFREY
KIELEY, THE INTERNATIONAL CONVENTION ON THE SUPPRESSION OF THE FINANCING OF
states to coordinate their enforcement actions over offences, stating:

When more than one State Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.

Multiple states have attempted to assert jurisdiction over the offenses defined under U.N. Resolution 1373 and legal efforts to combat the financing of international terrorism, a fact evidenced by the multiple legal battles Kadi fought as a result of his listing by the U.N. Security Council. The contours of how states can “coordinate their actions appropriately,” in cases like that of Yassin Kadi, should be a starting point for a broader discussion of the duties states undertake in the targeted sanctions context under international law.

Further, Article 12(4) of the Convention explicitly invites coordination on evidence sharing, stating:

Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5. (emphasis added)

In the event that domestic agencies are dissuaded from sharing evidence with each other based on the belief that it may either be futile or will be disclosed without due regard to its sensitivity, states would benefit from greater clarity as to the obligations of a State Party to the Convention to implement Article 12(4).

It would be a stretch to claim the Convention places affirmative and immediate obligations on its state parties. Unlike human rights treaties, which are understood to implicate rights of individuals, states are hesitant to read such obligations into treaties describing the reciprocal duties of states.

249. Article 2 defines the financing of terrorism substantively similarly to the offence described in U.N. Security Council Res. 1373. Terrorist Financing Convention, supra note 33, art. 2.

250. Id. art. 7(5).

251. Id. art. 12(4).

252. For example, the International Convention on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination Against Women, and Convention on the Rights of the Child are examples of international human rights treaties which, by their nature, are understood to obligate rights owed to individuals by states, including rights to a judicial remedy for violations. But see Avena and Other Mexican
national law has created a state system where governments are typically reluctant to read extra obligations into any treaties which they have signed and ratified. Simply invoking the obligations of states under the International Convention on the Suppression of the Financing of Terrorism may encourage efforts to reform the international count-threat finance regime. However, a more robust option is for interested states to consider an Implementing Protocol to the Terrorist Financing Convention. Implementing and optional protocols to pre-existing treaties build off of consensus based around a prior agreement while clarifying and supplementing state legal obligations. In particular, they allow states to play a coordinated, proactive role in addressing changing circumstances to which international legal regimes must be responsive. An Implementing Protocol to the Terrorism Financing Convention would help to reinvigorate the movement to codify international law in regards to terrorism, an effort whose momentum was stalled in the aftermath of the 9/11 attacks.

An Implementing Protocol to the Terrorism Finance Convention would clarify the commitments of Member States to review challenges to targeted sanctions designations and help address the due process concerns that inherently arise from the use of such tools. An Implementing Protocol could clarify general principles of international law that apply to reviews of designations for counterterrorism sanctions. It would provide a viable forum in which states could address their human rights obligations in the context of asset freezes and have any disputes adjudicated. For example, to help harmonize state practices and provide clarity on the specific procedures of individual states, an Implementing Protocol could include a treaty review body to which states periodically report, similar to the commitments states accept under various human rights regimes. An Implementing Protocol could also include a binding adjudicatory mechanism, made up of judges nominated by states party to the protocol. Such a mechanism could be called to hear disputes that enforcing states and states whose nationals are subject to U.N. asset freezes could refer, based on the consent of all relevant parties. In a case like that of Kadi, it would provide a single forum to adjudicate a shared set of facts, ra-

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Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (Mar. 31), where the International Court of Justice found that the Vienna Convention on Consular Relations created rights enforceable by individuals, despite being based on reciprocity between states.

253. This Note conceives an Implementing or Optional Protocol as any attempt by state parties to a treaty to use the existing treaty regime as a framework to negotiate a follow-up agreement, which, though it would require independent subsequent signature and ratification by states, would create obligations supplemental to those of the existing instrument. Examples include the Implementing Protocol to the United Nations Law of the Sea Convention and the First and Second Additional Protocols to the Geneva Conventions.
ther than forcing an individual subject to an U.N. Security asset freeze order to adjudicate that claim in multiple fora. Giving states the opportunity to nominate judges to serve as part of a small panel of review might lessen fears about information sharing to the 1267 Committee or to a regional court like the ECJ, while providing a form of formal, judge-led judicial review absent in the 1267 review process.

Any review body would facilitate public dialogue on the merits of different sanctions enforcement mechanisms and allow a large array of actors—including individual states, NGOs, policy entrepreneurs, and government agencies—to have input. The “Like-Minded States” upon whose initiative the Ombudsperson mechanisms gained traction, may seek to institutionalize the due process gains that Kadi II calls into question by codifying the right to an independent review mechanism in any cases of targeting for sanctions by an international institution.

An Implementing Protocol to the Terrorism Financing Convention would have its limitations. International legal documents can be long and costly to negotiate. They mostly rely on voluntary enforcement. However, encouraging the international community to engage in the process of discussing how such a document might be codified would likely, through a process of transnational judicial dialogue, spur exchange over the international norms governing counter-terrorism finance sanctions.254

CONCLUSION

Targeted sanctions against individuals and entities associated with al-Qaeda are a defining feature of efforts to combat international terrorism. As a tool to enforce the will of the international community, the use of targeted sanctions has multiplied significantly since the terrorist attacks of September 11, 2001 and appear to be a relatively permanent tool of enforcement. However, their use has posed significant risks to the rights of those targeted. This Note has presented a focused comparison of litigation brought by Yassin Abdullah Kadi in the United States and in Europe challenging his designation as a global terrorist financier. The two Kadi cases expose a gap in what the United States and its closest allies believe to be adequate due process and a meaningful standard of judicial review for targeted asset

254. For more information on how “transnational judicial dialogue” centered on legal obligations helps enforce state compliance, see generally Harold H. Koh, Why Do Nations Obey International Law?, 106 YALE L.J. 2599 (1997).
freezes in the “Financial War on Terror,” a battleground that is likely to continue beyond the cessation of active hostilities against core al-Qaeda. This Note has suggested that the two Kadi cases should be understood through their combined impact on efforts to craft an international counterterrorism finance regime. Their comparison reveals implications for U.S. efforts to counter the threat posed by international terrorist financing.

Targeted sanctions will retain their usefulness in a globalized world where small groups and individuals operate in a cross-border financial system. Acknowledging and understanding challenges to combating global counterterrorism financing will be crucial in establishing a more unified set of standards as states besides the United States and the European Union play an increasing role in global finance. Insofar as the United States has an interest in a robust multilateral sanctions regime to combat terrorism, it would be wise to participate in a global dialogue around these issues. As an international standard setter, the United States should consider clarifying how its own system operates, appealing to general principles of international law that go beyond considerations unique to U.S. enforcement. An ideal vehicle for it to do so would be through dialogue on an Implementing Protocol to the International Convention on the Suppression of Financing of Terrorism. As an addendum to an instrument signed and ratified by a large number of states globally, this instrument provides a way to better articulate fair and clear procedures in the sanctioning process as a matter of international law.

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