IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LUKA KARADZIC	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1-21-cv-03019 (TNM)
	)	
ANDREA M. GACKI, DIRECTOR OF THE OFFICE OF FOREIGN ASSETS CONTROL, in her official capacity, and THE OFFICE OF FOREIGN ASSETS CONTROL,	)	
	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This is a request for judicial review of an administrative decision by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") denying Luka Karadzic's request to have his name removed from its Specially Designated Nationals and Blocked Persons ("SDN") list.

OFAC added Luka Karadzic to the SDN list in 2003 for helping his older brother, Bosnian Serb President Radovan Karadzic, evade arrest. Radovan was arrested in 2008. He is serving a sentence of life imprisonment imposed by the International Criminal Tribunal for the former Yugoslavia ("ICTY"). Ten years after his brother's arrest, Luka asked OFAC to remove the sanctions. OFAC refused, citing his earlier support for his brother and Luka's more recent statements critical of the court that convicted Radovan.

Luka Karadzic asks this Court to overturn OFAC's decision. He contends that the reasons for the sanctions no longer apply now that his brother has been arrested and imprisoned. He further contends that OFAC (1) used the wrong legal standard when concluding that Luka's public statements critical of the judicial process in his brother's case "actively obstructed" the Dayton Peace Accords in Bosnia and Herzegovina; (2) made an arbitrary and capricious decision when refusing to delist him based on his public statements; and (3) was prohibited by its own regulations from continuing the sanctions based solely on Luka's decade-old conduct of helping his brother to evade arrest.

Luka Karadzic requests that this Court deny defendants' motion for summary judgment, grant his cross-motion for summary judgment, reverse OFAC's decision, and direct OFAC to issue a new decision based on the correct legal principles.

BACKGROUND

I. Statutory and Regulatory Provisions

A. Statute

As early as 1795, James Madison viewed economic sanctions as 'the most likely means of obtaining our objects without war.'" *Rakhimov v. Gacki*, No. 19-cv-2554, 2020 WL 1911561, (D.D.C. Apr. 20, 2020), quoting James Madison, "Political Observations" (Apr. 20, 1795).

In 1917, Congress codified economic sanctions for the first time by enacting the Trading with the Enemy Act ("TWEA"), which "gave the President broad authority to impose comprehensive embargoes on foreign countries as one means of dealing with both peacetime emergencies and times of war." *Regan v Wald*, 468 U.S. 222,225-26 (1984). In 1997, the TWEA was amended to apply only in wartime. *Id*, at 227.

For peacetime, Congress enacted the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq*. That statute permits the President "to deal with any unusual or extraordinary threat, which has its source in whole or in substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701(a).

IEEPA authorizes the President to "regulate, . . . prevent or prohibit, . . . any importation or exportation of, or dealing in, . . . 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." 50 U.S.C. § 1702(a)(1)(B).

IEEPA provides, however, that these powers "may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared." 50 U.S.C. § 1701(b). These powers are the primary source of the economic sanctions that OFAC administers.

2. Executive Orders

Luka Karadzic was placed on OFAC's SDN List pursuant to Executive Order ("EO") 13219, 66 Fed. Reg. 34777 (June 26, 2001), as amended by EO 13304, 68 Fed. Reg. 32315 (May 28, 2003). A.R. 032.

On June 26, 2001, President George W. Bush issued Executive Order ("E.O.") 13219 declaring a national emergency and finding that "persons engaged in, or assisting, sponsoring, or supporting…(ii) acts obstructing implementation of the Dayton Accords in Bosnia…" were a threat to peace and "the security and stability of those areas." 66 Fed. Reg. 34,777 (June 26, 2001). A.R. 022

E.O. 13219 was amended in 2003 by E.O. 13304. That order authorised the blocking of property of designated persons determined, *inter alia*, (1) "to have actively obstructed, or pose a significant risk of actively obstructing . . . the Dayton Accords . . ."; or (2) "to have materially assisted in, sponsored, or provided financial, material, or technological support for, or goods or services in support of, such acts of violence or obstructionism or any person listed in or designated pursuant to this order." A.R. 028

The Dayton Accords were a peace treaty signed in Dayton, Ohio and ratified in Paris, France on 14 December 1995. They ended the war in the former Yugoslav

republic of Bosnia and Herzegovina and obligated the parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law that had taken place there. A.R. 084.

Among those sought for war crimes and other violations of international humanitarian law was former Bosnian Serb President Radovan Karadzic. The ICTY, based in The Hague, had indicted Karadzic and his wartime general, Ratko Mladic, in 1995. A.R. 049.

The declaration of a national emergency with respect to the Western Balkans. has been renewed annually. The most recent renewal was on June 8, 2021 when President Biden issued E.O. 14033. 86 Fed. Reg 31079.

3. Regulations

Title 31 of the Code of Federal Regulations, section 501.807 provides:

> **§ 501.807 Procedures governing delisting from the Specially Designated Nationals and Blocked Persons List.**
> A person may seek administrative reconsideration of his, her or its designation or that of a vessel as blocked, or assert that **the circumstances resulting in the designation no longer apply**, and thus seek to have the designation rescinded pursuant to the following administrative procedures: (emphasis added)
>
> (a) A person blocked under the provisions of any part of this chapter, including a specially designated national, specially designated terrorist, or specially designated narcotics trafficker (collectively, "a blocked person"), or a person owning a majority interest in a blocked vessel may submit arguments or evidence that the person believes establishes that insufficient basis exists for the designation. The blocked person also may propose remedial steps on the person's part, such as corporate reorganization, resignation of persons from positions in a blocked entity, or similar steps, which the person believes would negate the basis for designation. A person owning a majority interest in a blocked vessel may propose the sale of the vessel, with the proceeds to be placed into a blocked interest-bearing account after deducting the costs incurred while the vessel was blocked and the costs of the sale. This submission must be made in writing and addressed to the Director, Office of Foreign Assets Control, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW. - Annex, Washington, DC 20220.

> (b) The information submitted by the blocked person seeking unblocking or by a person seeking the unblocking of a vessel will be reviewed by the Office of Foreign Assets Control, which may request clarifying, corroborating, or other additional information.
>
> (c) A blocked person seeking unblocking or a person seeking the unblocking of a vessel may request a meeting with the Office of Foreign Assets Control; however, such meetings are not required, and the office may, at its discretion, decline to conduct such meetings prior to completing a review pursuant to this section.
>
> (d) After the Office of Foreign Assets Control has conducted a review of the request for reconsideration, it will provide a written decision to the blocked person or person seeking the unblocking of a vessel.

4. OFAC Guidance

OFAC has provided answers to frequently asked questions on its website. Among the information provided is

> "Some examples of situations that may result in delisting include: a positive change in behavior, the death of an SDN, **the basis for the designation no longer exists**, or the designation was based on mistaken identity." (emphasis added)
>
> and
>
> If OFAC requires additional information or clarification from the petitioner in order to evaluate the delisting request, it will send the petitioner one or more questionnaires. If needed, OFAC typically endeavors to send the first questionnaire within 90 days from the date the petition is received by OFAC. Because OFAC often learns new information in response to a questionnaire, it is not uncommon for OFAC to send one or more follow-up questionnaires and to engage in additional research to verify claims made by a petitioner…Review timing depends upon a range of factors including: whether OFAC needs additional information, how timely and forthcoming the petitioner is in responding to OFAC's requests, and the specific facts of the case…"[1]

II. Statement of Facts

A. Personal History

[1] https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/petitions.aspx

Luka Karadzic was born in Montenegro in 1951. He is the younger brother of Radovan Karadzic. Luka worked as a postal clerk in Montenegro from 1972 until 1995. A.R. 046.

In 1995, Luka moved to Belgrade, the capital of Serbia. He made his living selling paints, varnishes, and cosmetics. A.R. 046-47. In 2000, he operated a company known as "Komotko" that leased two gas stations for a year, but the business was unprofitable. A.R. 182. Beginning in 2001 he operated a company known as "Zdravko" that sold fruit juices and bread. A.R. 047. Between 2006 and 2010, he was unemployed because of the operation of OFAC's sanctions against him. A.R, 048. He is now retired. A.R. 046.

B. Designation

On May 28, 2003, Luka Karadzic was added to OFAC's SDN list by Executive Order 13304 for materially assisting his brother Radovan to evade arrest. A.R. 028.

On July 7, 2003, the Office of High Representative to Bosnia and Herzegovina ("OHR"), the entity tasked with administering the Dayton Accords on behalf of the international community (A.R. 149), issued an order freezing Luka Karadzic's bank accounts. The High Representative stated publicly that "the actions had been coordinated with similar measures taken by Washington and Brussels." A.R. 073.

Radovan Karadzic was arrested on July 21, 2008. A.R. 064.

On June 10, 2011, the OHR rescinded the order freezing Luka Karadzic's bank accounts following the arrest the last remaining Bosnian Serb fugitive, General Ratko Mladic. A.R. 125.

On March 24, 2016, the ICTY convicted Radovan Karadzic and sentenced him to 40 years imprisonment. On March 20, 2019, his sentence was increased to life imprisonment on appeal. He is currently serving that sentence. A.R. 067

C. Delisting Request

On November 13, 2018, Luka Karadzic requested to be removed from the SDN List. He contended that the reasons for placing him on the list were no longer applicable given that his brother had now been apprehended for ten years. A.R. 038

OFAC sent him four questionnaires between February 2019 and March 2021, which he dutifully answered with statements under penalty of perjury. A.R. 040-48, A.R. 180-83. In submitting Luka Karadzic's final statement in April 2021, his counsel stated:

> While Luka Karadzic has emphatically denied, in his petition and in answer to your four questionnaires, that he provided material support to his brother during the time that he was a fugitive, the more pertinent question OFAC should consider is whether the circumstances resulting in his designation in 2003 continue to apply in 2021. We contend that even if OFAC decides to credit the rumors that Luka Karadzic helped his brother evade arrest some 20 years ago, there is no reason to maintain the sanctions against him in 2021.
>
> I have noticed that your four questionnaires have not sought any information that would justify keeping Mr. Karadzic on the sanctions list for activity since his brother's arrest in 2008. While it may be that in some instances, past conduct alone might justify retaining a person on the sanctions list, such as where the behavior was so egregious or of such a duration to lead one to believe that a person would violate the sanctions again if removed from the list, that is not the case here. Assisting one's brother in evading arrest, even if true, hardly warrants maintaining sanctions 20 years later. A.R. 190-91.

D. Decision

On July 16, 2021, OFAC issued its decision denying Luka Karadzic's request for delisting. The relevant part of the decision is as follows:

> OFAC has determined that your client materially assisted, sponsored, or provided financial, material, or technological support to Radovan Karadzic, an individual listed in the Annex to E.O. 13304. For example, on 7 July 2003, the High

> Representative to Bosnia and Herzegovina (BiH) Paddy Ashdown signed a decision to freeze Luka Karadzic's and 13 others' bank accounts in BiH for their role in helping indicted war criminals evade arrest. The High Representative specifically targeted Luka Karadzic and other family members for being a part of Radovan Karadzic's support network. OFAC has also determined that your client has actively obstructed or poses a significant risk of actively obstructing the Dayton Accords or the Conclusions of the Peace Implementation Conference held in London on December 8-9, 1995, including the decisions and conclusions of the High Representative, the Peace Implementation Council, or its Steering Board, relating to BiH. For example, according to news sources from March 2019, Luka Karadzic publicly declared the Hague Tribunal as illegitimate and illegal and claimed that Radovan Karadzic was convicted based on false proof, fake witnesses, and various planting of evidence by the Prosecution, thereby challenging the credibility of the international institutions that contribute to the regional stability.
>
> Foreign policy guidance provided by the Department of State supports OFAC's determination. Consequently, your client's request for reconsideration is denied, and his name will remain on OFAC's SDN list pursuant to E.O. 13304.
> A.R. 001-02

Before seeking judicial review, counsel for Luka Karadzic requested and received the administrative record from OFAC. The administrative record included a memorandum and exhibits setting forth the case against removing Luka Karadzic from the SDN list.

First, the memorandum concluded that Luka Karadzic had materially assisted, sponsored, or provided financial, material, or technological support to his brother Radovan. It based that conclusion on:

(1) OHR's "undisclosed specific information" that Luka and other family members were part of Radovan Karadzic's support network;

(2) a statement at a press conference by a NATO officer that an operation had been conducted in Serbia against known supporters of Radovan Karadzic including his brother, Luka;

(3) a news report that at the end of January 2003, officials at the U.S. Embassy in Belgrade informed the Yugoslav president that Luka Karadzic was "an important source of financial support to Radovan Karadzic" through his gas stations; and

(4) a book by a London journalist revealing that a telephone call from Luka Karadzic had led to his brother's arrest in 2008. A.R. 007-10.

Second, the memorandum cited the following media reports for its conclusion that Luka Karadzic had actively obstructed or poses a significant risk of actively obstructing the Dayton Accords and its implementing organs:

(1) a July 30, 2008 article in the *Sydney Morning Herald* (Australia) indicating that Luka Karadzic had attended a demonstration in Belgrade on July 30, 2008 opposing the transfer of his brother to the ICTY, A.R. 123-24;

(2) an October 24, 2009 Associated Press transcript, two days before the trial of Radovan Karadzic was scheduled to begin, (A.R. 199) quoting Luka Karadzic as saying:

"Given that the trials of many Serbs ended in convictions at the Hague tribunal, I do not think this trial is going to be fair either, and these are the first signs that the trial will not be fair. The indictment was presented to him 2 to 3 days ago and the trial is due to start in 2 to 3 days. This is unheard of in legal procedure.", A.R. 099;

(3) a March 20, 2019 article in *Kurir*, a daily newspaper based in Belgrade, Serbia (A.R. 142) quoting Luka Karadzic, on the occasion of the imposition of a life sentence on Radovan Karadzic on appeal, as saying:

"I was optimistic about this, though I feared the worst, but I didn't expect him to get what he did [life sentence]. Last night when I spoke to him, I asked what kind of council this is, without [Judge Jean-Claude] Antonetti. He told me, this is practically [Judge Theodor] Meron's council. And last night my optimism had already disappeared a little,"

The article further reported that Luka Karadzic repeated his view that the Hague Tribunal is illegal and illegitimate and emphasized his brother's merits for the creation of Republika Srpska. A.R. 113-15;

(4) a March 21, 2019 article in the *Depo* portal, reporting a quote from Luka Karadzic that appeared in the *Novosti* newspaper the day after the imposition of the life sentence on his brother, as follows:

"When he calls me for the first time, what am I supposed to tell him? But I know him. He'll be comforting us. He'll be cheering us up, not the other way around. That's how he always was. Those who know Radovan know

> he's a humanist, a good man. They can give him a hundred life sentences, we'll still be proud of him. Now I just want to see him as soon as I can' said Luka Karadzic after his brother Radovan's verdict."
>
> "This is an awful and huge injustice."
>
> "All of his friends, and his enemies, know well that Radovan never hated anyone, let alone that he had genocidal intentions. With the Serbian people, he created Republika Srpska and that is his greatest 'sin'. That's what they won't forgive him."
>
> "My brother was convicted based on false proof and fake witnesses, and various planting of evidence by the Prosecution. They did not take into account any of the real evidence nor the facts which were irrefutable, and which would have helped Radovan's case. But when the devil is judging in the devil's court, there is no trace of justice." A.R. 116-19.

The memorandum linked these statements to the Dayton Accords by quoting from a 2017 statement by the High Representative in which he stated that to achieve true reconciliation and a better future, the verdicts of the ICTY "must be respected and not politicised". A.R. 012. Although that same High Representative had lifted the OHR's sanctions against Luka Karadzic in 2011, OFAC claimed that OHR's decision was based on different evidence and standards. A.R. 015.

The memorandum also concluded that "Luka Karadzic maintains a position of prominence in Bosnia and Herzegovina on the matter of his brother's time in hiding, arrest, trial, and conviction based on the media's continued publication of his comments on the topic over a period exceeding ten years." A.R. 013.

The administrative record also includes a memorandum from the U.S. State Department indicating that they did not support Luka Karadzic's delisting. A.R. 108. According to the State Department, "Luka Karadzic continues to occupy a significant place in political life in the region from which he could amplify alternative histories and

destabilizing narratives that undermine the international community's work to advance rule of law in Bosnia and Herzegovina and the Western Balkans writ large." A.R. 111.

On November 15, 2021, having reviewed OFAC's reasons for refusing to delist Luka Karadzic, his counsel sought judicial review of OFAC's decision by filing a complaint in U.S. District Court. ECF 1. On January 24, 2022, defendants moved for summary judgment. ECF 7.

STANDARD OF REVIEW

Because this is a claim seeking review of agency action under the Administrative Procedure Act, the District Court acts, in effect, as an appellate tribunal. It decides, by way of summary judgment proceedings, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review. *Zevallos v. Obama,* 10 F. Supp. 3d 111, 117 (D.D.C. 2014), *aff'd*, 793 F.3d 106 (D.C. Cir. 2015).

The standard of review of agency action under the Administrative Procedure Act is whether the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Zevallos* 10 F. Supp. 3d at 117. While "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The agency must have examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs Ass'n of the US, Inc. v State Farm Mutual Auto Ins. Co,* 463 US 29, 43 (1983).

The agency's actions must be based on substantial evidence, which is more than a scintilla, but less than a preponderance of the evidence. *Zevallos,* 10 F. Supp. 3d at fn. 8

ARGUMENT

I. OFAC used the wrong legal standard when concluding that Luka Karadzic's public statements critical of the judicial process in his brother's case "actively obstructed" the Dayton Peace Accords in Bosnia and Herzegovina

To maintain the sanctions against Luka Karadzic, OFAC must defend its decision that Luka "actively obstructed, or pose[s] a significant risk of actively obstructing . . . the Dayton Accords . . ." E.O. 13304.

While OFAC's decisions are entitled to a significant degree of deference, that deference is not unlimited. "One thing no agency can do is apply the wrong law to citizens who come before it." *PAM Squared at Texarkana LLC v Azar*, 436 F.Supp.3d 52, 54 (D.D.C. 2020), quoting Gorsuch, J in *Caring Hearts Pers. Home Servs. v. Burwell*, 824 F.3d 968, 970 (10th Cir. 2016). That is what OFAC has done here.

When President Bush signed E.O. 13304 in 2003, it had been well-established for more than 60 years that public criticism of courts and judicial decisions did not constitute interference in the administration of justice in the absence of a "clear and present danger".

In a series of cases beginning with *Bridges* v. *California,* 314 U. S. 252 (1941), the United States Supreme Court overturned convictions for interfering with the administration of justice based solely on public comments disparaging our courts.

In *Bridges*, there were two sets of defendants. The *Los Angeles Times* defendants had been charged with interfering with the administration of justice by publishing editorials critical of a judge were he to grant probation to union officials awaiting

sentencing before him. The union leader defendant was charged with interference with the administration of justice by publishing a telegram in which he called a judicial decision "outrageous" and predicted it would lead to a labor strike.

In reversing the convictions, the Supreme Court held that public statements critical of the judicial system or judges cannot be punished unless they present a "clear and present danger". This required that the substantive evil arising from the statements be extremely serious, and the degree of imminence extremely high. *Bridges*, at 263.

Bridges was followed six years later by *Pennekamp* v. *Florida*, 328 U. S. 331, 349-50 (1946). There, defendants from the *Miami Herald* were convicted for publishing editorials and a cartoon that colorfully criticized a judge's recent sentences as unduly lenient. The Supreme Court once again held that public statements critical of judges could not constitute interference with the administration of justice unless they presented a "clear and present danger". The convictions were reversed.

A year later, in *Craig* v. *Harney* 331 U. S. 367, 378 (1947), the Supreme Court reversed yet another conviction for interference with the administration of justice based on critical reporting and editorials concerning the decisions taken by a judge in a recent case. The Court again found that the public statements had not posed a "clear and present danger".

While the interference with the administration of justice in these cases were brought under the rubric of contempt of court, the Supreme Court has applied the principle that criticism of the authorities cannot be punished absent a "clear and present danger" to other forms of obstruction, including encounters with police officers. *City of Houston v Hill*, 482 U.S 451, 461 (1987).

Therefore, Luka Karadzic's criticism of the international court that tried and convicted his brother could not constitute active obstruction or interference with the Dayton Accords unless his public statements created a clear and present danger.

Although the rationale of *Bridges* and its progeny is rooted in the First Amendment to the U.S. Constitution, Luka Karadzic does not advance a First Amendment claim. He recognizes that as a citizen of Serbia whose only connection with the United States is these unwelcome sanctions, he possesses no U.S. constitutional rights. *Agency for International Development v Alliance for Open Society International*, 591 U.S.__, 140 S. Ct. 2082 (2020). As this Court has stated, "foreign nationals do not suddenly acquire constitutional rights whenever the United States sanctions them." *Bazzi v Gacki,* 468 F.Supp.3d. 70, 77 (D.D.C. 2020).

Luka Karadzic's contention is that the term "obstruct" in E.O. 13304, when based solely on public statements, requires that those statements present a clear and present danger to the implementation of the Dayton Accords.

Many parameters of our laws in the United States incorporate principles of the U.S. constitution in their definition. An abortion is not murder because of the constitutional right of privacy. *Roe v Wade*, 410 U.S. 113, 153 (1973). No one would contend that the term "murder", were it to appear in an Executive Order triggering sanctions against foreign nationals, would include abortion.

Likewise, a corporate campaign contribution is not illegal because of the First Amendment. *Citizens United v Federal Election Comm'n*, 558 U.S. 310 (2010). No one would contend that corporate campaign contributions made in a foreign country to a

candidate in their own country's elections would by itself meet the definition of "corruption" in E.O. 13818. ("Global Magnitsky Sanctions")

Similarly, while the First Amendment has influenced the parameters of what constitutes "obstruction", possession of First Amendment rights is not a prerequisite to understanding and applying that term in E.O. 13304 as excluding public statements critical of judicial proceedings that do not present a clear and present danger.

There is no jurisprudential support for the existence of two concepts of the term "obstruction"—one for U.S. citizens and one for non-U.S. citizens. Indeed, the use of the phrase "**active** obstruction" in E.O. 13304, if anything, confirms the view that the executive order was not designed to encompass speech that did not constitute a clear and present danger. Article II(3)(h) of the Constitution of Bosnia and Herzegovina, like the First Amendment to the U.S. Constitution, expressly guarantees the right to freedom of expression.[2] "Obstruction" of the Dayton Accords cannot, therefore, have a different meaning than it does in the United States.

The common understanding of the concept of obstruction also has limitations rooted in other provisions in the Bill of Rights. A person who invokes their Fifth Amendment right against self-incrimination would not be guilty of obstruction in the United States. Likewise, OFAC could not legitimately contend that a Bosnian who refused to answer questions to the authorities in his own country on self-incrimination grounds "obstructed" the Dayton Accords solely by that act. Such conduct does not come

[2] An English translation of the Constitution of Bosnia and Herzegovina can be found on the OHR website: http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pdf

within the legal concept of obstruction, regardless of whether the person has rights under the United States Constitution.

The U.S. Supreme Court's recent decision in *Agency for International Development v Alliance for Open Society International*, 591 U.S.__, 140 S. Ct. 2082 (2020) does not compel a different conclusion. There, foreign organizations that did not adopt a policy against prostitution and sex trafficking were prohibited from receiving federal HIV/AIDS funds, even though such a condition could not be applied to domestic organizations because it would violate the First Amendment to the U.S. Constitution. The Court found that this condition could be enforced against foreign organizations, who did not possess First Amendment rights.

Here, Luka Karadzic, unlike the foreign organizations in *Agency for International Development v Alliance for Open Society International*, does not contend that the use of his public statements to maintain the sanctions against him violates his First Amendment rights. Rather, he contends that his conduct does not come within the terms of the Executive Order that governs the imposition of sanctions.

The letter that President Bush sent to Congress at the time he transmitted E.O. 13304 supports Luka Karadzic's contention that the concept of obstruction President Bush had in mind when he promulgated E.O. 13304 did not include mere speech. In that letter, President Bush described the rationale for the order as:

> These additional steps respond to the continuing actions of ethnic extremists in Bosnia, Kosovo, Macedonia, southern Serbia, and elsewhere in the Western Balkans who engage in acts of violence, sometimes targeting international personnel, or otherwise obstruct efforts to build peace and stability. The Executive Order underscores the support of the United States for the International Criminal Tribunal for the former Yugoslavia by sanctioning those individuals indicted by the Tribunal and those who aid and abet their efforts to escape justice. United States Congressional Serial Set, 108th Congress,

House Document 108-78, p. 2.

The "obstruction" of efforts to build peace and stability was referenced in connection with ethnic extremists who engage in acts of violence and those who aid and abet the efforts of individuals indicted by the ICTY to evade justice. While adding Luka Karadzic to the SDN list in 2003 for helping his brother evade justice fell within the conduct sought to be addressed by E.O. 13304, continuing to sanction him in 2021 for criticism of his brother's judicial proceedings falls far outside the conduct described in the letter and E.O. 13304.

This is not an effort to "map" First Amendment concerns into OFAC's designation decisions, as defendants' claim. ECF 7-1, p. 22. As an administrative agency, OFAC is obligated to make its designation decisions within the terms of the Executive Order. The term "active obstruction" does not encompass mere public criticism of judicial institutions or their decisions.

Olenga v Gacki, 507 F.Supp.3d 260 (D.D.C. 2020), cited by defendants, does not support the proposition that the clear and present danger requirement is inapplicable to OFAC decisions. First, Olenga was designated for actions that undermine democratic processes or institutions, not obstruction. Second, OFAC did not refuse to delist Olenga based on speech alone. The administrative record included information that Olenga, a militia leader, had deployed teams to disrupt demonstrations around the country, gave orders to Republican Guard members who arrested and assaulted protestors, and supported offensive violent action against Western diplomats. Third, the issue presented here was never raised or decided in that case.

Pejcic v Gacki, No. 19-cv- 2437 (AHM), 2021WL 120299, (D.D.C. March 30,

2021) also does not support the defendants' argument against a clear and present danger standard. As in *Olenga*, the Court never considered that issue. In any event, the administrative record in that case contained information that Pejcic was a former police commander and leader of an association of former soldiers whose promotion of alternative narratives risked a "resurgence" of unrest.

The defendants' policy arguments against requiring OFAC to interpret "obstruction" according to the meaning given to it by the U.S. Supreme Court, ECF 7-1, pp. 23-24, are overblown. Individuals and entities who engage in "disinformation campaigns designed to subvert U.S. democratic processes" can be found to present a clear and present danger to U.S. interests. The words of foreign leaders who "denounce pro-democracy protests" can also be found present a clear and present danger due to their positions within their government structure. This is particularly true in the context of OFAC's low burden of proof and high deference given to its decisions by the courts.

Therefore, to conclude that Luka Karadzic's public statements critical of the judicial proceedings in his brother's case constituted "obstruction", it must have been shown that those statements presented a clear and present danger to the implementation of the Dayton Accords. The administrative record in this case is devoid of information to support such a conclusion. OFAC never even considered the clear and present danger test to Luka Karadzic's statements.

In *Epsilon Electronics Inc. v U.S. Dep't of Treasury*, 857 F.3d 913, 927-29 (D.C. Cir. 2017), the D.C. Circuit reversed the part of OFAC's findings that *Epsilon* knew the final five shipments were destined to Iran. It found that OFAC failed to offer a sufficient explanation for its decision to not credit email evidence that cast doubt on Epsilon's

knowledge. The Court held that while it was required to give heightened deference to OFAC's decision, where an agency failed to to offer a sufficient explanation for its decision, that decision would be reversed.

In this case, OFAC used the wrong concept of "obstruction". It never considered or explained how Luka's public statements presented a clear and present danger to the Dayton Accords. Therefore, its decision to deny his request for delisting must be reversed.

II. Even absent a clear and present danger requirement, OFAC's refusal to delist Luka Karadzic was arbitrary and capricious

Even if this Court were to find that the clear and present danger requirement did not apply, OFAC's finding that Luka Karadzic's presence at the demonstrations and public statements actively obstructed or posed a significant risk of obstructing the Dayton Accords was arbitrary and capricious on the facts.

If criticism of the international criminal justice system constitutes "obstruction" and undermines the rule of law, then what to make of Secretary of State Mike Pompeo's widely reported statements that the International Criminal Court is a "kangaroo court"[3] or OFAC's own sanctions against the International Criminal Court for investigating US personnel? 85 Fed. Reg. 61816 (October 1, 2020).

In the United States, seeing quotes from family members criticizing our justice system and law enforcement is common. For example, when George Floyd's brother testified before Congress, he described his brother's death as a "a "modern-day lynching

[3] https://www.reuters.com/article/us-warcrimes-afghanistan-trump-pompeo/pompeo-on-icc-u-s-wont-be-threatened-by-kangaroo-court-idUSKBN23I2AJ

in broad daylight". He added that "he often wondered whether police might kill him next."[4]

Jussie Smollett's brother recently claimed that his brother's case was "politically motivated".[5] The brother of Ghislaine Maxwell stated that her trial "was not a fair trial".[6] Siblings of other, less well-known defendants, also openly criticize law enforcement and the justice system in the United States: "My brother was being profiled and was wrongfully arrested because of blatant racism and lazy detective work;"[7] and "Officers lied under oath" and "fabricated evidence, police statements and paid witnesses to testify against an innocent man."[8]

There is nothing inherent in public statements criticizing the justice system that would lead to the conclusion that such statements obstruct that system, or any of the laws that underpin it. The conclusion that Luka Karadzic's similar statements actively obstructed the Dayton Accords was both arbitrary and capricious.

This is particularly true when the statements at issue come from a relative of the defendant and are identified as such. Someone complaining about the treatment of their brother has a bias that is apparent to the reader. This further diminishes the likelihood that the statements would somehow obstruct the authorities or the peace process.

The three statements attributed to Luka Karadzic in the administrative record over a ten-year period do not support OFAC's conclusion that Luka Karadzic "maintains a

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[4] https://www.nbcnews.com/politics/congress/george-floyd-s-brother-set-testify-house-police-brutality-hearing-n1229046
[5] https://www.wate.com/news/jussie-smolletts-brother-says-the-actor-is-innocent/
[6] https://inews.co.uk/news/world/ghislaine-maxwell-brothers-family-insist-innocent-wrongly-portrayed-trial-1377188
[7] https://campaigns.organizefor.org/petitions/freemichaelduvall-my-brother-is-innocent
[8] https://www.change.org/p/join-over-500-influential-voices-as-we-help-save-billie-allen-an-innocent-man-on-federal-death-row

position of prominence in Bosnia and Herzegovina on the matter of his brother's time in hiding, arrest, trial, and conviction." A.R. 013. A simple Google search on the topic of Radovan Karadzic's conviction would reveal that Luka's statements comprise a tiny fraction of the public comments on the case. It would also reveal how interest in the case has waned since 2019, making the likelihood of Luka posing a "significant risk of obstructing the Dayton Accords" an even more untenable conclusion.

OFAC's conclusion that Luka Karadzic's comments obstructed the Dayton Accords relied on the High Representative's emphasis on respect for ICTY verdicts. A.R. 012. However, the High Representative removed all sanctions against Luka Karadzic in 2011. He has not seen fit to re-impose them. Nor has he imposed sanctions against the many prominent public figures from all ethnic groups in Bosnia who have railed against the ICTY whenever it convicts a member of their group. This includes the Prime Minister of Croatia who labelled an ICTY verdict a "moral injustice" on the very same day the High Representative made his statement.[9]

If the very official charged with implementing the Dayton Accords has not seen fit to sanction Luka Karadzic's statements as obstructing or potentially obstructing those accords, OFAC's decision to do so can only be seen as arbitrary and capricious.

The central question in the arbitrary and capricious analysis is whether substantial evidence supported the agency's determination. *Epsilon Electronics Inc. v U.S. Dep't of Treasury*, 857 F.3d 913, 925 (D.C. Cir. 2017). There is no substantial evidence in the administrative record of this case to support a finding that Luka Karadzic's presence at a demonstration and public statements critical of the judicial process that led to his

[9] https://balkaninsight.com/2017/11/29/croatia-rejects-party-of-bosnian-croats-verdict-11-29-2017/

brother's conviction actively obstructed or posed a threat of actively obstructing the Dayton Accords.

Therefore, even absent a clear and present danger requirement, OFAC's refusal to delist Luka Karadzic based on his appearance at a demonstration and public criticism of the judicial institution that convicted his brother was arbitrary and capricious. It should be reversed.

III. OFAC violated its own regulations when continuing the sanctions based solely on decades old conduct

Defendants contend that the delisting request could be denied on the alternative ground that Luka Karadzic helped his brother evade arrest until 2008. ECF 7-1, pp. 26-27. Should the Court find that the decision to deny delisting based on Luka Karadzic's statements in support of his brother was erroneous, it must go on to consider whether OFAC would be justified in retaining Luka Karadzic on the SDN list based solely on his conduct more than 14 years ago.

E.O. 13304 speaks in the past tense when authorizing sanctions on persons determined "to **have** actively obstructed, or pose a significant risk of actively obstructing . . . the Dayton Accords . . ." (emphasis added). In *Olenga v Gacki*, 507 F.Supp.3d 260, 281-82 (D.D.C. 2020), the District Court judge found that similar language authorized OFAC to sanction someone based on past conduct.

However, OFAC's own regulations, entitled "Procedures governing delisting from the Specially Designated Nationals and Blocked Persons List" provides, in pertinent part, that:

> A person may seek administrative reconsideration of his, her or its designation or that of a vessel as blocked, **or assert that the circumstances resulting in the**

> **designation no longer apply**, and thus seek to have the designation rescinded pursuant to the following administrative procedures: (emphasis added)
>
> 31 CFR 501.807.

Even if Luka Karadzic had assisted his brother in avoiding arrest, OFAC must nevertheless justify how the circumstances resulting in his SDN designation, which was issued in 2003 to aid in the apprehension of Radovan Karadzic, continued to apply more than a decade after Radovan's arrest and years after his conviction.

The *Olenga* court recognised that the regulations "seem to contemplate that a change in circumstances is grounds for the withdrawal of a designation." *Olenga*, at 282.

This is consistent with the very nature and goals of economic sanctions which OFAC has stated "is not to punish, but to bring about a positive change in behavior." Resource Center, U.S. Dep't of Treasury, Office of Foreign Assets Control, Filing a Petition for Removal from an OFAC List (last updated May 2, 2017). Delisting procedures for United Nations sanctions likewise require a determination that the individual continues to meet the criteria for listing.[10]

It is well established that agencies must abide by their own rules and regulations. *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954), even where those regulations provide more rights than the agency was required to provide. *Service v. Dulles*, 354 U.S. 363, 388 (1959). When federal agencies set rules for themselves, even gratuitous procedural rules that limit otherwise discretionary actions, they must adhere to them. *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003), applying the "Accardi doctrine".

[10] https://www.un.org/securitycouncil/ombudsperson/approach-and-standard

The concept that the sanctions should be removed when the circumstances resulting from the designation no longer apply was not only codified by the Treasury Department when promulgating 31 CFR 501.807, but was originally suggested by President Bush himself in E.O. 13304 when he said:

> The Secretary of the Treasury, in consultation with the Secretary of State, is authorized to determine, subsequent to the issuance of this order, that circumstances no longer warrant inclusion of a person in the Annex to this order and that such person is therefore no longer covered within the scope of the sanctions set forth herein. Such a determination shall become effective upon publication in the Federal Register." E.O. 13304, sec. 4

OFAC has not shown how Luka Karadzic's assistance to his brother up to 2008 continues to warrant his inclusion in the sanctions list 13 years after Radovan Karadzic had been captured.

Past conduct may well lead to a conclusion that the circumstances resulting in a designation continue to apply. A person's retirement, or moving on to other pursuits, does not *per se* prevent OFAC from concluding that the circumstances resulting in a designation continue to apply. For example, the past conduct may have been so egregious or of such a duration to lead one to believe that a person would violate the sanctions again if removed from the list.

That is not the case here. OFAC made no effort to establish that Luka Karadzic's assistance to his brother in evading arrest, by itself, shows that the designation should continue 13 years after Radovan was apprehended and while he is serving a sentence of life imprisonment.

Pejcic v Gacki, No. 19-cv-2437 (APM), 2021 WL 1209299 (D.D.C. March 30, 2021), is distinguishable. There, the Court followed the reasoning of *Olenga* that sanctions may be based on past conduct, but never found that Pejcic's conduct in helping

Radovan Karadzic evade arrest was, alone, sufficient to sustain OFAC's decision. Instead, it relied on Pejcic's recent conduct to conclude that the decision was not arbitrary or capricious. *Pejcic*, at pp. 14-16.

The Court found that OFAC's reliance on Pejcic's recent activities as a leader of a Bosnian veterans' organisation that promoted an alternative narrative of the war that undermined the international community's work to advance the rule of law demonstrated that the continuation of sanctions was not arbitrary or capricious. *Pejcic*, at p. 16. Unlike Pejcic, Luka Karadzic, a pensioner who is not even a resident of Bosnia, held no such position. His sporadic statements critical of the ICTY's conviction of his brother, coinciding with seminal events in the case, cannot be said to have had or be likely to have a similar impact on the Dayton Accords.

Likewise, *Olenga,* relied upon by the defendants, is distinguishable from Luka Karadzic's case because the past conduct occasioning the sanctions in that case took place a mere three years before OFAC's decision. Here, the past conduct took place at least 13 years before the decision. The rationale for basing continued sanctions on past conduct occurring within the past three years is far greater than that in this case involving past conduct more than a decade old. This is particularly true where the nature of the conduct could not be expected to recur since Radovan Karadzic is now serving a sentence of life imprisonment.

Therefore, to the extent that OFAC's decision rests solely on Luka Karadzic's 13-year-old conduct in assisting his brother to evade arrest, it was arbitrary and capricious.

CONCLUSION

The Court is respectfully requested to reverse OFAC's decision denying Luka Karadzic's delisting application. It should remand the matter to OFAC to issue a decision consistent with the Court's opinion. *Cargo v. U.S. Postal Serv*., 674 F.3d 852, 861 (D.C. Cir. 2012). Because OFAC has already taken two years and nine months to decide this case, and routinely takes two years or more to make decisions, the Court is respectfully requested to order OFAC to issue its decision on remand within 60 days. See *Genus Lifesciences Inc v Azar*, No. 1-20-cv-00211 (TNM)(Memorandum and Order, January 27, 2021) at p. 9.

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Respectfully submitted,

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