JUDICIAL REVIEW COMMISSION
ON FOREIGN ASSET CONTROL
PUBLIC HEARINGS ON THE
FOREIGN NARCOTICS KINGPIN DESIGNATION ACT

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MEMBERS OF THE COMMISSION:

I wish to thank the Commission for the opportunity to address the evils that are embodied in the Foreign Narcotics Kingpin Designation Act. They are many.

This statute presents one of the most horrific attacks upon private ownership of property in American history. In attitude and philosophy it combines elements of nineteenth century Know-Nothings with its attack on "foreigners" and McCarthyism of the 1950's with its black lists. Both of those movements were dark chapters in our nation's history. There is every reason to believe that this Act will create a new chapter just as black.

To call the designations in this Act a "Black List" is not hyperbole. While the list is published, it is created in back rooms in secret, without well-defined standards, using an unknown combination of facts, rumors, suspicions, or speculation, keeping secret both the grounds for including someone and the sanctions to be imposed. Instead of lists of Communist sympathizers, we have a list of drug kingpins and yet another list of those who assist or do business with those in the first list. The opportunity for untold mischief is enormous. Indeed, it is impossible to imagine such a scheme at work that would not injure many innocent people and cause great injustice and oppression.

When the law enforcement arms of our government act against people or property, they should act in the light of day where the press and public can observe. Their actions must be accountable to an independent judiciary. And above all, they must be required to establish with competent evidence in adversary hearings that their action is justified by clearly defined elements of proof. All of these hallmarks which protect a free society from tyranny are absent in this Act.

The primary weapon afforded law enforcement agencies in this Act is the "blocking" of private property. Make no mistake here, "blocking" is a synonym for seizure. It is a "taking" within the meaning of the Due Process Clause. Even the Conference Report on p. 43 refers to "those whose assets are blocked or seized...," implying that the two terms are synonymous. In forfeiture, however, the seizure is the precursor for a forfeiture proceeding which, at the property owner's option, is a judicial action before an Article III court. Here the seizure, a.k.a. the block, is an end to itself and may be maintained indefinitely - even for years - without judicial intervention.

It is strikingly ironic that the Conference Report assures us that the information used by the Secretary of the Treasury in compelling the second-tier list (those who assist the king pins materially) would be "material, factual and verifiable, and able to withstand scrutiny in a United States Federal Court." (Conf. Report at 46). If the drafters of the Act were so confident of the high reliability of those deliberations, why does the Act not require the evidence to be taken *before* a court before a name can be placed on the second-tier list, or at least provide for judicial review so a person or business added to the list could challenge it in court?

Not only will the second-tier list be used oppressively and unjustly because there is no accountability and the criteria is so broad and imprecise, it will also undoubtedly be used by law enforcement as a tool to coerce and blackmail (of course, when the government does it, it's not blackmail). The threat to add a person or business to the list, along with the absence of a meaningful mechanism to challenge, will result in people saying things the government wants to hear, truthful of not. It will result in people capitulating to government demands no matter how unreasonable or unjust because no means is provided to resist. The government's use today of money laundering statutes is a case in point. Money laundering laws are so broad in definition, they are actually money-spending offenses. Because the sentencing guidelines include such longer sentences for money laundering offenses, they are often used as leverage to pressure people to enter guilty pleas (e.g., plead guilty now to the underlying offense or we will obtain a superseding indictment adding money laundering charges with greater penalties). The threat of "The List" would be even more powerful because the Executive branch can invoke it without competent evidence and without means of review. It is a cardinal lesson of history that where unbridled, unchecked power exists, it will be abused.

It may be argued that a challenge under the Due Process Clause itself is sufficient protection, but it clearly is not. Federal courts are most reluctant to devise procedures where Congress provides none. Many constitutional scholars thought that forfeiting the property of a completely innocent person because of non-consented, unknown acts of a co-owner could not pass Constitutional muster, but by a 5-4 vote in *Michigan v. Bennis*, the Supreme Court permitted it in the absence of a statutory innocent owner provision. The Constitution is not meant to be used as a substitute for sound law-making.

The second-tier list should be repealed altogether. It is too broad in its language. Any innocent business (a grocer, a car dealer, a boat dealer, a banker) who unknowingly deals with a business owned by a "kingpin" could be caught up in a net with no way out. It is simply too fraught with opportunities for abuse. If not repealed, a means of challenging a listing in court *before the fact* should be afforded. The Rules of Evidence should apply, and the government's burden should be at least clear and convincing evidence. The trial should be before a jury upon demand.

The criminal penalties should also be repealed. The mens rea requirement is at lease in part unconstitutional. To "willfully neglect" to comply with an order is an oxymoron. Further, to make the minimum penalty 30 years if a defendant is an "agent of any entity" versus 10 years for someone not an agent is arbitrary and possibly a denial of equal protection. The use of a supposedly civil penalty of $1,000,000 is in reality punitive and should only be imposed as a fine in a judicial proceeding

One of the most pernicious strategies used by the government today is to use the civil forfeiture statutes (or a criminal forfeiture restraining order) to seize or gain control of all of a person's substantial assets, then after crippling the person financially, to bring a criminal indictment. In such cases a person is stripped of the resources with which to defend the charges even if innocent. This Act will be used as just such a devise. By "blocking" a person's assets and affording no means of challenging the seizure, the person would have no means funding a defense if indicted.

The civil and criminal forfeiture statutes are quite adequate for he government to attack the property of a drug king pin in the United States if the government has competent evidence. If it does not, this act should not fill the gap.