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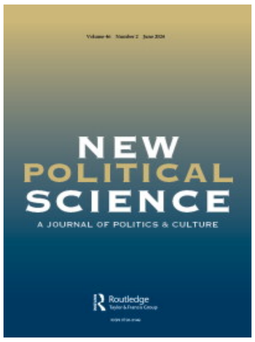

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OFAC, Famine, and the Sanctioning of Afghanistan: A Catastrophic Policy Success

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ABSTRACT

On August 15, 2021, American military forces withdrew from Kabul, and the sanctioning of Afghanistan began. Marred by the usual problems—ineffective, counterproductive, unwieldy—these sanctions revealed three additional puzzles. First, although grounded in targeted sanctions, they transformed into de facto comprehensive sanctions. Secondly, that transformation was instantaneous and unprompted. Thirdly, a near-famine followed within weeks. I make nested analytical, functional, and explanatory arguments. The analytical argument is that targeted sanctions are best understood not as tools of international coercion but primarily as domestic regulations. The functional argument is that the Office of Foreign Asset Control (OFAC) uses tactical and strategic ambiguity to maximize its regulatory reach over financial intuitions, humanitarian aid organizations, and money transfer organizations. The explanatory argument returns to the puzzles. I argue that, without any signal from OFAC, which was the signal, and reflecting OFAC's regulatory domination, when the Taliban took Kabul, the international financial community, humanitarian aid organizations, and remittance providers all dissociated from Afghanistan with immediate effect and particularly acute consequences on food entitlements.

KEYWORDS

Sanctions; Afghanistan; famine; regulations; remittances

Introduction

August 15, 2021, the day the American-led military war in Afghanistan ended, was the first day of the de facto comprehensive sanctioning of the country. In many regards, the sanctions are typically ineffective, counterproductive, and unwieldy. However, the sanctions are also problematic in terms of more nuanced analyses. For instance, some argue that sanction failure is a misleading metric because sanctions should work at the "threat stage."[1] But, curiously enough, there was no threat stage. Others argue that sanctions signal to future targets that the sanctioner will

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[1]Dean Lacy and Emerson M. S. Niou, "A Theory of Economic Sanctions and Issue Linkage: The Roles of Preferences, Information, and Threats," *The Journal of Politics* 66, no. 1 (2004): 25–42.

"carry through."[2] However, the evidence strongly suggests that the sanctions ramp-up was as disorderly as the military wind-down. From the perspective of international relations (IR), where sanctions are conceptualized as a "tool of great power diplomacy"[3] and as a means of "applying pain" against adversaries, none of this makes sense.[4] If anything, the sanctions appear to be what Daniel Drezner calls a "catastrophic policy failure."[5]

But Afghanistan is also uniquely puzzling, and it is those puzzles on which I will focus. First, the *transformation* puzzle: though rooted in "smart" sanctions, the sanctions transformed into de facto comprehensive sanctions of Afghanistan, indeed, this despite the Executive's repeated insistence that it did not recognize the Taliban as head of state and statements by the Office of Foreign Asset Control (OFAC)—the office in charge of administering the Treasury's economic sanctions—that Afghanistan was expressly not subject to comprehensive sanctions. Secondly, the *immediacy* puzzle: the transformation was immediate, occurring without signal or direction by OFAC, the Executive, or any other relevant party. Thirdly, the *famine* puzzle: an acute spike in food shortages followed within weeks of the sanctions, and the country was on the brink of general famine until early 2022. On August 15, 2021, the "golden age"[6] of smart sanctions took a markedly banal turn: automated, thoughtless, obscured by clichés, self-harming for the sanctioner, and catastrophic for the people who had nothing to do with the Taliban.

I make nested analytical, functional, and explanatory arguments. The analytical argument is that scholars are better served by understanding sanctions through the analytical prism of domestic regulations, as opposed to IR. To develop this argument, I reconsider US unilateral sanctions focusing on OFAC's sanctions powers in the post-September 11, 2001 period. The core contention is simple: OFAC's sanctions powers are based fundamentally on domestic regulatory powers and, as such, target US persons, not foreign adversaries. I argue that significant analytical gains follow from ignoring the rhetoric—including OFAC's own—of international coercion and focusing instead on its regulatory practices.

The functional argument regards the development and refinement of OFAC's regulatory practices and their relation to the expression of sanctions power. I argue that through trial and error, OFAC honed its means (fines) and ends, ultimately discovering that its goal was not punishing non-compliance but maximizing active compliance behavior (private financial self-surveillance). Central to these developments was realizing the utility of tactical and strategic ambiguity in the service of disciplinary power. Ambiguity—intentional imprecision in promulgated aims, scope, application, and enforcement—is a sanction power bug in the IR analysis. I argue that it is an essential feature of effective domestic regulation. As part of this argument, I account for OFAC's regulatory capture of humanitarian aid and much of the global remittance market,

[2]Timothy M. Peterson, "Sending a Message: The Reputation Effect of US Sanction Threat Behavior," *International Studies Quarterly* 57, no. 4 (2013): 672–82.
[3]Daniel Drezner, "How Not to Sanction," *International Affairs* 98, no. 5 (2022): 1533.
[4]Richard Nephew, *The Art of Sanctions: A View from the Field* (New York, NY: Columbia University Press, 2018), 3.
[5]Drezner, "How Not to Sanction."
[6]Daniel Drezner, "Targeted Sanctions in a World of Global Finance," *International Interactions* 41, no. 4 (2015): 755.

and hence the major pillars (along with the state's economy) of the contemporary political economy of food entitlements.

The explanatory argument returns to Afghanistan and the *transformation*, *immediacy*, and *famine* puzzles. I argue that on August 15, the Taliban takeover of Kabul transformed smart sanctions into de facto comprehensive sanctions, sparking general and global de-risking, where in the absence of clear signals—which was the signal—US persons and their affiliates immediately dissociated from Afghanistan. Because OFAC had already captured the three pillars of the political economy of famine, the already precarious food situation jolted towards a full-fledged famine. As part of this argument, I also consider why it was a *near* famine.

My arguments contrast with much of the sanctions scholarship but do not necessarily disagree. To take just one counterpoint that I have already flagged, Drezner has recently discussed what he calls "catastrophic sanctions failures," understood as "a lose-lose outcome in which the targeted actor made no observable concessions and the negative policy externalities of the sanctions for both the sender and the target were considerable."[7] Analyzed as a "tool of statecraft," the Afghan sanctions look like a quintessential policy failure. However, when analyzed as domestic policies, the sanctions against the Taliban appear as a catastrophic policy *success*: a near-perfect manifestation of the global disciplinary power that OFAC has been working toward for twenty years. That is an analytical counterpoint, not a criticism. Indeed, these analyses are surely compatible: a complete account of sanctions failure in terms of international coercion requires understanding how they succeed in terms of domestic regulations.

The article is organized as follows. Part II develops the analytical and functional arguments. Part III develops the explanatory arguments. Part IV concludes the article.

OFAC's Sanctions Power

The sanctioning of Iraq in the 1990s closed out an era of sanctions.[8] The Iraq sanctions were exercises in extremes: extremely costly, extremely burdensome administratively, diplomatically, and militarily, and extremely harmful to the Iraqi population.[9] Though atypical in the breadth and depth of application, the organizational principle behind the Iraq sanctions was typical of the twentieth century sanctions. The logic was inter-state rivalry, the driving principle was the blockade, and the aim was to steer the actions of enemy states. Initially, those problems were not particularly troublesome for US policymakers, but after a decade, the sanctions became politically untenable, partly because of the human toll.

[7]Drezner, "How Not to Sanction," 1534.

[8]On the history of sanctions see Nicholas Mulder, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (New Haven, CT: Yale University Press, 2022); on the sanctioning of Iraq see Joy Gordon, *Invisible War: The United States and the Iraq Sanctions* (Cambridge, MA: Harvard University Press, 2012).

[9]Gordon, *Invisible War*, Chapter 2. The legal basis for the sanctions is the United Nations Security Council, "Resolution 661" (1990). For a review of the consequences, see Gordon, *Invisible War*, Chapter 5. See also Tim Dyson and Valeria Cetorelli, "Changing Views on Child Mortality and Economic Sanctions in Iraq: A History of Lies, Damned Lies and Statistics," *British Medical Journal: Global Health*, no. 2 (2017); Michael Spagat, "Estimating the Human Costs of War: The Sample Survey Approach," in *The Oxford Handbook of the Economics of Peace and Conflict*, ed. Michelle R. Garfinkel and Stergios Skaperdas (Oxford, UK: Oxford University Press, 2012), 318–40.

Starting towards the end of the Iraq sanctions and decisively in the years following, sanctions changed. The first change was a shift towards targeted or "smart" sanctions aiming to reduce the harms suffered by the general population while isolating individuals or groups, ostensibly in response to the calamity of the Iraq sanctions. Whether smart sanctions were ever all that smart is debatable.[10] However, the new framing allowed sanction promoters a reprieve from post-Iraq criticisms, enabling policymakers to assume the mantel of humanitarianism themselves.[11]

Secondly, the Treasury transformed how sanctions worked following September 11, 2001.[12] Discussions of smart sanctions sometimes obscure these changes, but they are arguably more important. To understand the shift, it helps to step back. Twentieth century Executive-led sanctions targeted states. In the post-War decades, OFAC slowly took on a supplemental role in targeting the US-based financial assets of foreign adversaries.[13] In time, OFAC's remit expanded beyond states to cartels, terrorist organizations, and associated individuals. OFAC's powers were—and still are—entirely domestic, and its foremost tool was the threat of fines and, more rarely, criminal punishment. OFAC would place entities or individuals on its Specially Designated Nationals and Blocked Persons List (SDN), and US financial institutions would, in principle, comply by freezing funds or ceasing to do business with that person. Those sanctions seemed effective and sometimes were. However, it was also clear that OFAC's regulatory practices were poorly crafted and implemented, partly because of the agency's focus on coercing foreign adversaries, not on the finetuning of domestic regulations.[14] This is not to say that OFAC excelled in that task. Bluster aside, it was evident that avoiding sanctions penalties was not particularly challenging for sophisticated cartels, while successfully prosecuting banks and financial institutions proved difficult. Worse, although smaller firms were simply coerced into submitting to OFAC, major firms often challenged OFAC in court, sometimes resulting in the curtailment of OFAC's powers.[15] Whatever the reason, the insufficiencies of both approaches to sanctions were made evident by 9/11: alQaeda was immune to traditional sanctions, and the Treasury's previous efforts targeted at Bin Laden had failed.[16] Twentieth century sanctions were inapt responses to non-state actors. A new approach was needed.

Although the details (discussed below) are important, the elemental innovation at the core of OFAC's twenty-first century powers was to merge the Executive's plenary

[10]Daniel Drezner, "Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice," *International Studies Review* 13 (2011): 96–108; Joy Gordon, "Smart Sanctions Revisited," *Ethics & International Affairs* 25, no. 3 (2011): 315–35.

[11]Drezner, "Targeted Sanctions in a World of Global Finance." See also Sylvanus Kwaku Afesorgbor, "Sanctioned to Starve? The Impact of Economic Sanctions on Food Security in Targeted States," in *Research Handbook on Economic Sanctions*, ed. Peter A. G. van Bergeijk (Cheltenham, UK: Edward Elgar Publishing, 2021).

[12]"The Treasury 2021 Sanctions Review" (The Department of the Treasury, October 2021), 1; Juan C. Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (New York, NY: PublicAffairs, 2013). Preble and Early have also mapped OFAC's recent history. Although my account highlights different elements, I am indebted to their excellent survey, see Bryan R. Early and Keith A. Preble, "Going Fishing versus Hunting Whales: Explaining Changes in How the US Enforces Economic Sanctions," *Security Studies* 29, no. 2 (2020): 231–67.

[13]Zarate, *Treasury's War*, 25–26.

[14]Peter L. Fitzgerald, "'If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This': Blacklisting and Due Process in U.S. Economic Sanctions Programs," *Hastings Law Journal* 51, no. 1 (1999).

[15]Fitzgerald.

[16]"The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Report)," November 22, 2004, 185.

power over foreign affairs with the Treasury's domestic regulatory powers to bypass many of the legal, procedural, and ultimately constitutional constraints that had hindered OFAC before 2001.[17] To that end, and following the Treasury's guidance, on September 23, 2001, President Bush signed Executive Order 13224 (EO 13224).[18] Later bolstered by elements of the Patriot Act and various other amendments, EO 13224 is the foundation of what one insider described as a "new form of financial warfare."[19] Garbed in the rhetoric of humanitarian smart sanctions and the war on terror, and empowered by its new legal infrastructure, OFAC-administered sanctions soon became the go-to tool of US foreign policy.

Most fundamentally, E0 13224 changed the target of sanctions. No longer was the target of US unilateral sanctions foreign adversaries; it was "US persons."[20] Foreign adversaries are named—placed on the SDN list—and ostensibly, those adversaries are the "target." However, as a matter of regulatory focus, practice, and fact, the operative target was US persons, and whatever happens to the designee is described in EO 13224 as "other effects."[21] The target change was subtle (it mirrored OFAC's previous efforts against cartels and used much of the same language), but the principle behind the change was profound. Where blockades like those against Iraq coercively curtailed economic associations with states, and where OFAC's secondary sanctions had also focused on coercing foreign persons, the new principle animating OFAC's legal powers is to disregard direct effects on foreign adversaries (designees) and target US persons. US persons (individuals, corporations, foundations, and the like) would be penalized for not dissociating from individuals and entities on the SDN list. That, in effect, is the static definition of compliance: compliance means dissociation of US persons and designees, and non-compliance tracks their association. That static definition occludes more than it reveals, and to see why, we need to attend first to OFAC's understanding of "person."

EO 13224 deployed an unconventional operative definition of "person." Unlike the conventional understanding of natural or corporate persons, OFAC treats "persons" as hubs connected to "nexuses" (OFAC's favored term) of plausible associations. Regarding designees, OFAC lists individuals and entities by name. But functionally, OFAC conflates that person or entity and any associated "partnership, association, corporation, or other organization, group, or subgroup."[22] The ambiguity around "partnership," "association," and "other organization, group, or subgroup" is key. OFAC neither distinguishes essential from mundane associates (from bankers to drivers, so to speak) nor between evident and presumptive associates. That ambiguity allows OFAC to project its regulatory reach beyond its formal domestic to include designees'

[17]For a first-person account of these developments, see Zarate, *Treasury's War*. For a fascinating account of the case law, see Nina J Crimm, "High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy," *William and Mary Law Review* 45, no. 4 (2004): 1341–452.
[18]"Executive Order 13224" (U.S. Department of State, Bureau of Counterterrorism), accessed October 1, 2022, https://www.state.gov/executive-order-13224/.
[19]Zarate, *Treasury's War*, 29. For a recent account of the relevant laws, see Early and Preble, "Going Fishing versus Hunting Whales."
[20]"EO 13224."
[21]Ibid.
[22]Ibid.

networks of associates. The resulting imprecision provides OFAC significant leeway in deciding where association ends and dissociation begins, a line that OFAC is cautious about leaving undefined.

Regarding US persons, the same ambiguity is in play. For private individuals, OFAC assumes that they have limited control over associates and are a nexus of one. However, corporate persons are different. Legally constituted and contractually enmeshed to business associations, contractors, and subsidiaries (and by way of subsidiaries, the whole value chain), the ambiguity quickly encompasses nexuses of association as hard to pin down as those that constitute persons on the SDN list. So, twenty-first century sanctions aim to dissociate the nexuses of US persons from persons on the SDN list. However, the inherent ambiguity of the definition of "persons" means dissociation and association—compliance and non-compliance—is, strictly speaking, impossible. Consequently, for firms, compliance is ultimately a question of risk (more on risk in a moment). While, for OFAC, sanctions become a question of tactics and strategies for modulate firms' risk calculus.

Ambiguous association is OFAC's gateway to deputizing US persons and foreign firms to surveil their financial dealings, not despite but *because* of their domestic jurisdiction.[23] Regulatory due diligence combined with ambiguity around the nature of association means that the effective requirement for proactive financial self-surveillance cascades through the system and is soon taken on by second-country persons incentivized to regulate themselves as though they were subject to OFAC's domestic remit.[24] Today, many major foreign financial institutions voluntarily submit to OFAC regulations, auditing their business to ensure compliance, proactively reporting compliance issues, and often paying fines to OFAC despite being outside OFAC's jurisdiction. The combination of US persons and proactively subordinated foreign financial institutions means that OFAC functionally regulates global capitalism.[25] At its core, OFAC's sanctions power is premised upon the strategic wager that US persons will remain preeminent in the global political economy. That tells us about the nature of the "other effects" of being put on the SDN list: it amounts to ostracism from the formal global economic system. Where twentieth century sanctions were premised upon US military hegemony, twenty-first century sanctions are premised upon the predominance of US persons in global finance.

So far, I have established a set of static analytical points regarding the regulatory foundations of OFAC's sanction powers. It is equally important to consider how this system developed and transformed over time functionally, abandoning some practices while optimizing and redirecting others, to which I now turn.

Initially, OFAC's tactical ambiguity could be deployed precisely and may have been devised with such precision in mind. For example, in 2002, Citibank realized it might

[23]"Deputizing" in Jennifer Harris and Robert Kahn's term, "Understanding and Improving U.S. Financial Sanctions," in *The Oxford Handbook of U.S. National Security*, ed. Derek S. Reveron (Oxford, UK: Oxford University Press, 2017), 231.
[24]See Grégoire Mallard and Jin Sun, "Viral Governance: How Unilateral U.S. Sanctions Changed the Rules of Financial Capitalism," *American Journal of Sociology* 128, no. 1 (2022): 144–88; Bryan R. Early and Timothy M. Peterson, "The Enforcement of U.S. Economic Sanctions and Global De-Risking Behavior," *Journal of Conflict Resolution*, Online first 2023, 1–28.
[25]Mallard and Sun, "Viral Governance."

not be allowed to work with the Saudi Government based on evidence linking high-level Saudi officials to various groups in Palestine.[26] So, Citibank went to the Treasury to ask permission. Insider reports show how Citibank actively tried to get clarity from the Treasury about where the government stood, but the Treasury maintained an active ambiguity.[27] Iterations of this game resulted in Citibank cutting off some accounts but not others while maintaining dialogue in the hope of deducing Treasury's whims and avoiding fines. Citibank never got absolute clarity but did get enough information to attenuate risk. And risk mitigation, not strict compliance, was the aim.[28] For its part, OFAC could monitor and delimit which entities Citibank did business with only intermittent need to correct its practices.

OFAC still intermittently provides private guidance to privileged players in the international financial system; however, early on, it realized that its goal was generalized compliance among *all* actors, which makes bespoke steering impossible. The deference exhibited by Citibank was prized, but the attention granted was not scalable. Moreover, the rapid increase in OFAC sanctions under the Bush administration and the growing breadth of OFAC's reach beyond the big banks meant that precise steering was no longer operationally possible. Instead, OFAC's entire regulatory apparatus would have to rest on fines with targeted and tactical steering reserved for when the fining strategy proved insufficient.

The development of OFAC's sanctions power since 2001 can be understood as a learning process in the tactics and strategies of effective regulatory practices.[29] Above, I tracked in static terms how EO 13224 reconfigured the sanctions weapon in principle—changing the very target of sanctions while simultaneously uncoupling domestic regulatory enforcement from burdensome legal procedures. However, the initial post-September 11 practice showed few signs of radical changes in OFAC's strategy and carried forward the previous practice of punishing non-compliance. In this period, OFAC seems to have understood its goal as strict dissociation of US persons and designees; it understood its purpose as coercing foreign adversaries. The strategy remained partly punitive (fines) and partly disciplinary, which then meant "naming and shaming" understood in the sense of publicly shaming firms that were associated with known terrorists. In the early 2000s, as noted, the fines levied increased due to a growing political reliance on OFAC, its increasing operational sophistication, and its expanding regulatory reach. As the goal was to punish non-compliance, the high number of fines demonstrated success.

Those same successes slowly came to look like failings. The problem is a typical regulatory problem rooted in the economic dynamics of proportionality and predictability.[30] Non-compliance becomes profitable when compliance is poorly enforced and/or fines are smaller than likely profit. When that happens, fines are not deterrents but taxes.[31] The problem with OFAC's initial post-September 11 fining strategy was

[26]Zarate, *Treasury's War*, 86.
[27]Ibid., 86–90.
[28]Ibid., 8.
[29]For an analysis of OFAC's changing fining strategy see Early and Preble, "Going Fishing versus Hunting Whales."
[30]Early and Preble make this same argument.
[31]For the classic economic analysis of this effect, see Uri Gneezy and Aldo Rustichini, "A Fine Is a Price," *The Journal of Legal Studies* 29, no. 1 (2000): 1–17.

their *certainty*—predictably poor enforcement of predictably low fines—allowing banks to feign compliance, absorb intermittent fines, and profit otherwise. From that perspective, what looked like an operational success—the large numbers of small fines for non-compliance—was almost certainly a functional failure, increasing non-compliant practices overall. The problem is so predictable that it is something of a puzzle as to how this came about. One plausible explanation is that OFAC may have overestimated the effects of "naming and shaming." Following September 11, and under the auspices of the war on terror, OFAC seemed convinced that the reputational costs of being associated with terrorists were real and high. However, those reputational costs proved to be low. Publicized non-compliance—stated in EO 13224 as a means to steer behavior—proved an easily managed public relations issue.

The contradictions inherent to OFAC's early fining practices may have compelled it to rethink its goals. Whatever the reason, OFAC realized it has to focus on maximizing active compliance behavior—financial self-surveillance—rather than simply punishing non-compliance in general. Abandoning discipline understood as naming and shaming; discipline as *active private financial self-surveillance* became the goal. That shift had the added and necessary benefit of offloading enforcement costs to US persons and thus reducing the pressure on its limited investigative resources. In sum, the practical realization of the principle implied in EO 13224—shifting not just in principle but operationally to targeting US persons—triggered a strategic shift in focus from coercing foreign adversaries to what financial regulations scholars call the "conduct regulation" of US firms.[32]

OFAC's power falls apart if businesses treat financial surveillance as empty administrative hurdles, signaling full compliance while implementing superficial surveillance measures. *Active* compliance means proactive financial surveillance that can identify the persons sending and receiving money with a degree of certainty, appropriate due diligence, and, for the major financial institutions, ever-expanding and technologically innovative verification and validation systems. These measures minimally include adherence to industry practices like know-your-customer (KYC) measures and, reflecting the logic of "nexuses of association," increasingly know-your-customer's-customer measures. OFAC keenly avoids surveillance stagnation or simple deference to industry norms, rarely dictating financial surveillance standards, and instead promotes interfirm compliance program competition and innovation. OFAC has been successful in this regard. Domestic and foreign banks now institute robust compliance measures, proactively investigate potential compliance risks, and avoid doing business with agents who invite unknown compliance risks while rapidly dissociating from entities when new risks are discovered, including from ex-post reviews informed by new OFAC signals or technologically capacities—all reported to OFAC regularly.

To realize these new disciplinary goals, OFAC had to modify its fining tactics and strategies. With broad legislative support, OFAC shifted from high-quantity, low-impact fines to low-quantity, high-impact disciplinary measures targeting the most prominent

[32]Iain MacNeil, "Enforcement and Sanctioning," in *The Oxford Handbook of Financial Regulations* (Oxford, UK: Oxford University Press, 2015), 281. This literature never mentions Michel Foucault, but the parallels to his critique of disciplinary power are evident. See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York, NY: Vintage Books, 1977). See also Philip Pettit's notion of "domination without interference," Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, UK: Oxford University Press, 1997), 63–64.

players.[33] Specifically, high impact meant not simply disproportionality but fines that would put the viability of the business at risk. That new strategically severe approach to enforcement and fines transformed compliance from a quasi-tax to a condition of doing business.[34] An example of this approach was a settlement in 2020 with the French bank BNP Paribas. Paribas was accused of compliance violations, and despite real political leverage (the French presidency was actively involved in defending the bank), Paribas "settled its *potential* liability for *apparent* violations of US sanctions … for a combined US$8.9 billion"[35] with Justice alongside a separate US$900 million settlement with OFAC.[36] Equally importantly for OFAC, Paribas moved its compliance office from Paris to New York and submitted its entire global operation to direct OFAC oversight.[37] Early and Preble note the "enormous amount of discretion the agency has in determining the size of the penalties that sanctions violators face."[38] The "discretionary" part is surely as significant for the operational success of this new approach to sanctions insofar as it incentivizes potential violators to settle out of court, thereby allowing OFAC to both avoid the pre-September 11 legal impediments that had constrained it while also avoiding the possibility of large firms successfully defending their cases in court and the subsequent precedents which could have curtailed OFAC's power.

Enormous financial penalties are imperfect and, misused, invite long-term strategic threats to OFAC's sanctions power in the form of exit. Having shifted from the goal of strict dissociation to active compliance self-surveillance, OFAC necessarily had to accommodate firm profitability. The reason is that if firms perceive compliance risks as impossible to hedge or potential fines are so large as to threaten their very existence, then the rational decision is to cease pertinent operations. Ceasing operations means that deputized surveillance, of course, halts. So, existential fines may serve as a powerful disciplinary signal to third-party firms, but they did so at the risk of normalizing deterrence instead of discipline.

To thread the needle between the problems of high-quantity/low-quality fines (increased non-compliance and inactive or inadequate surveillance) and low-quantity/high-quality fining strategies (perfect compliance, deterrence, no surveillance), OFAC settled on two techniques. One technique allows for practiced ambiguity by firms

[33]For example, The International Emergency Economic Powers Enhancement Act (IEEPEA) in 2007. For an excellent review of these legislative developments, see Early and Preble, "Going Fishing versus Hunting Whales"; Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare*. See also Early and Peterson, "The Enforcement of U.S. Economic Sanctions and Global De-Risking Behavior."

[34]Early and Preble, "Going Fishing versus Hunting Whales"; Jesse Van Genugten, "Conscripting the Global Banking Sector: Assessing the Importance and Impact of Private Policing in the Enforcement of U.S. Economic Sanctions," *Berkeley Business Law Journal* 18, no. 1 (2021): 136–64.

[35]"Office of Public Affairs | BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions | United States Department of Justice," August 29, 2014, https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial [emphasis added]; U.S. Department of Justice, "Paribas Plea Agreement," June 27, 2014, https://www.justice.gov/sites/default/files/opa/legacy/2014/06/30/plea-agreement.pdf.

[36]Department of the Treasury, "Paribas/Treasury Settlement Agreement," June 30, 2014, https://ofac.treasury.gov/media/13521/download?inline.See also Tom Ruys and Cedric Ryngaert, "Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions," *British Yearbook of International Law*, 2020, 17.

[37]Pierre-Hugues Verdier, "'A Hidden War': Sanctions Evasion," in *Global Banks on Trial: U.S. Prosecutions and the Remaking of International Finance*, ed. Pierre-Hugues Verdier (Oxford, UK: Oxford University Press, 2020), 137.

[38]Early and Preble, "Going Fishing versus Hunting Whales," 254.

doing the work of self-surveillance. The ambiguity of nexuses and enforcement means that OFAC has considerable leeway in deciding on compliance veracity. As noted, within that principle is a paradox: in the absence of constraints on degrees of separation, every US person can be linked to a designee. Abstractly speaking, perfect compliance as dissociation is impossible. That abstraction becomes concrete every time financial entities devise the nature and scope of their compliance measures. Looking the other way (inactive self-surveillance) is insufficient as it would draw the attention of OFAC. Looking too closely is both expensive and, at the extreme, always reveals non-compliance. Therefore, financial entities must navigate between measures strict enough to placate OFAC but not so strict as to eliminate profitability. That abstract paradox is practically manifest in another puzzle, and it is there that the paradox resolves. Because the entire surveillant apparatus is privately run and operated, day-to-day compliance risks are functionally self-authored. OFAC only knows what the firms report, and what they report is conditioned by decisions regarding the technical operations of their compliance programs. Risk is two-faced, one looking inwards towards operational decisions and profitability, the other signaling genuflection to OFAC and its operational needs. The paradox is assuaged partly by allowing a measure of ambiguity by firms in their practices of self-surveillance and related reporting requirements. As such, both OFAC and US firms can step back from the problem of radical dissociation—mutual self-harm—and muddle through.

Another technique separates the fine signal and substance by threatening enormous fines but imposing lower penalties on the condition that the target implements robust financial surveillance systems. For example, on April 29, 2021, OFAC settled with MoneyGram, a major American money transfer organization, for potential sanctions violations. Consider only the fine (I will consider other aspects momentarily). OFAC threatened a US$302 million fine but settled with MoneyGram on a US$34,328.78 fine. What did the 99.99% reduction in the fine get OFAC? The answer is more robust compliance measures supported by lines of communication to upper management directly responsible for oversight. MoneyGram hired 128 compliance officers and created an executive-level position of Chief Compliance Officer, among other stipulations.[39] OFAC, in other words, will forego punitive fines to ensure firm-level profitability if the firm commits to robust financial self-surveillance measures.

OFAC's strategies and tactics require it to monopolize operative sanction signaling. By operative signaling, I mean to distinguish the public statements of the Executive, Judiciary, and Treasury—the rhetoric, public justifications, and proclamations of virtuous and humanitarian intent—from the signals to be adhered to by US persons as a regulatory matter. On those grounds, OFAC is a vigilant guardian of its standing. Consider again the MoneyGram example mentioned above. The case is peculiar. MoneyGram was accused of compliance violation for facilitating money transfers from prisoners in the US in a way that may have involved Syrian entities on the SDN list. What is peculiar is that MoneyGram was acting *at the behest of the Department of Justice*. MoneyGram took Justice's urgings as implying that compliance concerns were

[39]"OFAC Enters Into US$34,328.78 Settlement with MoneyGram Payment Systems, Inc. for Apparent Violations of Multiple Sanctions Programs" (Department of the Treasury, April 29, 2021).

moot.[40] In a notable example of OFAC's concerted strategic and tactical calculations, OFAC found that although the transactions "would likely have been eligible for a license," and despite MoneyGram enabling the transfers at the behest of the Judiciary, the company was nevertheless non-compliant. MoneyGram's error was in deferring to the wrong authority. The Department of Justice and the Executive may sit at the sanctions table with the Treasury, but operative sanction signaling is the Treasury's domain, and it is very keen to ensure that firms ignore all other signals—including its extra-regulatory public pronouncements—and diligently attend to OFAC regulations and related clarificatory frequently asked questions (FAQs) published on its website.

Beyond Banks and Financial Systems

Banking systems are inherently regulatable because banks are creatures of law established in domestic jurisdictions. The developments in OFAC's regulatory means and ends discussed above regarded how best to regulate those kinds of creatures; engagement is the status quo, and exit is an extreme option. But from the outset, OFAC knew that however effective their new regulatory powers were, they could not address the very target that the overhaul to OFAC's sanctions power was ostensibly meant to address: Hawala. As the 9/11 Commission Report drove that home, terrorist financial networks had already shifted to informal networks inherently beyond OFAC's regulatory reach.[41]

Hawala is a global financial system with deep roots in the Middle East. Hawala is often described as a nefarious, trust-based, and informal financial system. This description is analytically unhelpful on all counts. Criminals and terrorists use the Hawala system to transfer money, but they use the formal system for that, too. Trust is crucial to Hawala, but it is similarly crucial to the "formal" system. "Informal" is even less helpful, as it is, in fact, a sophisticated global exchange system.[42] A more analytically significant description of Hawala would be that it is a highly sophisticated global financial system with one peculiar attribute: it is immune to OFAC's financial regulatory control. To see why, we need to consider how the Hawala network functions. In the Hawala system, money moves domestically between the sender and the Hawaladar on one side, and the Hawaladar and the receiver on the other—however, only the value, not the money, moves across national boundaries. Instead, a balance sheet is kept—apparently, without records—as a measure of liabilities. As such, only information moves horizontally across borders between Hawaladars. The only time capital moves internationally is to intermittently settle accounts between Hawaladars. Because the sending of Hawala functions through communication, because the settling of accounts is transferred as pools of aggregated transactions, and because the initial currency deposit to the Hawaladars is (notoriously) not registered in any transaction ledger,

[40]"OFAC Enters Into $34,328.78 Settlement with MoneyGram Payment Systems, Inc. for Apparent Violations of Multiple Sanctions Programs."

[41]"9/11 Commission Report," 185, n. 79.

[42]For an excellent discussion of Hawala in Afghanistan see Haroun Rahimi, *Reform and Regulation of Economic Institutions in Afghanistan* (London, UK: Routledge, 2023).

Hawala is all but invisible to the formal financial system and therefor unregulatable. That, in effect, is what is meant by "informal": beyond OFAC's regulatory reach.[43]

So, as Zarate notes, Hawala "needed to be regulated and brought into a framework wherein its transactions could be monitored."[44] OFAC responded to the Hawala challenge in two ways. First, it continued to expand its regulatory scope to include even the smallest domestic money transfer organizations (MTOs). Hawaladars generally avoid major financial institutions but rely on brick-and-mortar transfer circuits (MTOs and small banks), and OFAC slowly pulled those hubs into its grasp. Second, it championed a global initiative to promote and incentivize remitters to shift from the informal to the formal market. Part of the Treasury's strategy was to force this distinction by illegalizing untraceable "informal" transfers. However, in many regards, OFAC had taken on a Sisyphean task. Whatever Hawala's cultural and operational particularities, its prevalence as a means of value transfer is partly due to its comparative efficiency. In that regard, OFAC is fighting itself as the compliance measures it demands of the formal banking system impose costs passed down to users, further disincentivizing the shift from Hawala. For instance—and looking ahead to the descriptive argument—the US and Afghanistan spent more than a decade modernizing the Afghan banking system and training Hawaladars on its use.[45] However, to little effect, and by 2020, only US$800,000,000 in remittances could be tracked through formal channels in Afghanistan.[46]

Where OFAC faced significant impediments in expanding its regulatory reach over the "informal" remittance system, its grasp over IOs, NGOs, and humanitarian aid organizations expanded steadily and with relative ease. From the outset, it was clear the EO 13224 and related legislation afforded vast powers over charities, with Islamic charities established in the US sharply curtailing their operations.[47] However, the more general implications of OFAC regulations for IOs and NGOs more broadly remained unclear throughout the 2000s. However, by the late 2000s, IO lawyers began to consider if their operations were subject to OFAC regulations and, if so, whether they were compliant.[48] OFAC had never signaled as much. But no matter, the answer to the former was "absolutely." OFAC's sanctions powers may focus on major financial institutions, but EO 13224 and all subsequent legislation target US persons in general. The answer to the latter was, of course, ambiguous, and no clear answers were on offer. Instead, one exasperated IO representative noted that their lawyers wrestled with "vaguely defined laws, a lengthening list of ever-evolving and almost Orwellian vetting requirements, and a stubborn reluctance by policy-makers in Washington to issue clear guidance."[49] Unlike financial institutions, IOs and much more so NGOs have few means to absorb financial risk, no direct connections to the Treasury to glean more precise signals (like Citibank, for example), and—because of the nature of

[43]Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare*, 95.
[44]Ibid., 95.
[45]Rahimi, *Reform and Regulation of Economic Institutions in Afghanistan*, Chapter 3.
[46]The World Bank, "World Bank Open Data" (The World Bank), accessed March 24, 2023, https://data.worldbank.org.
[47]Crimm, "High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy."
[48]Ken Menkhaus, "No Access: Critical Bottlenecks in the 2011 Somali Famine," *Global Food Security* 1 (2012): 32.
[49]Sarah Margon, "Unintended Roadblocks: How US Terrorism Restrictions Make It Harder to Save Lives" (Washington, DC: Center for American Progress, 2011); quotation found in Menkhaus, "No Access," 38.

international aid—no means to ensure compliance. Just the opposite, because IOs and NGOs relied on local subcontractors operating in unsafe regions, it had to be assumed that compliance—dissociation from entities associated in some way with designees—was impossible. Where banks see few opportunities in troubled states, and thus few benefits in running OFAC compliance risks, engaging in such states is the purpose of many IOs. There was no obvious way to keep the nexuses of the IO's activities separate from those of designees.

OFAC and the Political Economy of Famine: A Somali Interlude

Before moving to the explanatory argument, let me briefly establish the link between sanctions and the political economy of food—first, theory, then empirics. Since Amartya Sen's studies, we have known that famines are not primarily outputs of weather patterns, population levels, or food availability; famines are questions of politics, power, and policy.[50] To Sen's argument, Alex de Waal has appended a critique of what he calls the "humanitarian international"—that is, the collage of state-led, IO, and NGO-led humanitarian aid which, since the 1980s has developed into a crucial, effective, and somewhat reliable institutionalized countermeasure against famine, despite evident shortcomings and recurrent scandal.[51] To those two pillars, remittances are emerging as a third pillar in the contemporary transnational food entitlement map.[52] The implications for the arguments are evident: theoretically, OFAC's sanctions power includes power over the modern political economy of famine.

Evidence of the theoretical conjunction of sanctions powers and food entitlements can be seen in the case of the sanctioning of Somalia in 2011. In 2008 Al Shabaab was put on the SDN list.[53] Beyond the immediate halt in operations by US government agencies such as US Aid, the general implications were unclear. However, by 2010, the NGOs and IOs that had avoided compliance issues began to take notice and, in turn, progressively slowed operations in Somalia.[54] By 2011, the problem was unavoidable, and external assistance quickly dried up. The reason was apparent, partly because of an earlier scandal at the World Food Program (WFP) regarding internal

[50]Amartya Sen, "Starvation and Exchange Entitlements: A General Approach and Its Application to the Great Bengal Famine," *Cambridge Journal of Economics* 1, no. 1 (1977): 33–59; Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford, UK: Clarendon Press, 1981). Sen's arguments have been criticized and expanded, but the core analytical principle holds. See Olivier Rubin, "The Entitlement Approach: A Case for Framework Development Rather than Demolition: A Comment on 'Entitlement Failure and Deprivation: A Critique of Sen's Famine Philosophy,'" *The Journal of Development Studies* 45, no. 4 (2009): 621–40; Olivier Rubin, "Famine Ethics," *Food Ethics* 4 (2019): 123–38; Alex de Waal, *Mass Starvation: The History and Future of Famine* (Cambridge UK: Polity, 2018).

[51]De Waal, *Mass Starvation*, Chapter 7.

[52]J. Matthew Hoye, "Famine, Remittances, and Global Justice," *World Development Perspectives* 27 (2022).

[53]U.S. Department of the Treasury, "Treasury Targets Somali Terrorists (Press Release)," November 20, 2008, HP-1283, https://home.treasury.gov/news/press-releases/hp1283.

[54]The foremost account of these developments is Daniel Maxwell and Merry Fitzpatrick, "The 2011 Somalia Famine: Context, Causes, and Complications," *Global Food Security* 1 (2012): 5–12. In the background was Holder v. Humanitarian Law Project, No. 08-1498; 09-89 (Supreme Court of the United States 2010). As Maxwell and Fitzpatrick note:

> In June 2010, the US Supreme Court ruled that the provision of any material support to a terrorist organization could result in legal action against any US citizen involved. Although this particular case (Holder vs. Humanitarian Law Project) did not involve Somalia, no humanitarian agency working in Somalia failed to take notice (9).

corruption and payoffs to local warlords and partly because of a simultaneous food emergency and a spike in violence by Al Shabaab, that convenient disconnect of OFAC's presumptive reach and IO and NGO operations became untenable.[55] The reason was that humanitarian aid was, at the time, dependent on local sub-contractors to deliver food. However, as the WFP knew, verifying that a local subcontractor was not connected with Al-Shabaab was impossible. That, combined with Al-Shabaab's about-face from enabler to an adversary of aid organizations—Al-Shabaab's leaders appear to have feared that all aid organizations were potential fronts for Western powers—meant food aid was effectively stopped right when it was needed most.[56] In light of the significant uncertainties and high likelihood of probable association, Somalia was treated as a compliance risk, sparking de-risking maneuvers by all except the most flagrant risk-taking enterprises.

To be clear, neither OFAC nor any other relevant actor declared stewardship over the political economy of food to be the goal. Instead, there were two signals. One was the effectively misleading public pronouncements, the other the operative regulatory provisions. For instance, the US secured an amendment to UN sanctions resolutions, which opened a sixteen-month window for specified UN agencies to act. But by the nature of OFAC's powers, the signal meant something else: all *other* aid was non-compliant. Yes, OFAC pronounced otherwise, but with OFAC, the regulation is the signal, not the public pronouncements, non-binding memos, and private promises of non-enforcement to IOs.[57] Understandably, IO lawyers treated the public pronouncements as immaterial and existing regulations as operative.

For the same reasons that humanitarian aid organizations halted operations, so did the banks and MTOs.[58] Partly because of state collapse and an absence of internal regulation, the Somali remittances, Telcom, and MTO economy flourished in the post-Siad Barre years.[59] However, by 2011, those unregulated firms became subject to regulations—unbeknownst to them, perhaps—by proxy of the major international financial firms that the small MTOs utilized for facilitating transactions (for reasons discussed above). Following the upheavals of 2011, financial institutions, and MTOs all recognized an evident increase in regulatory concern by OFAC and a drastic decrease in reliable information on the ground. In turn, every actor subject to OFAC penalties "de-risked" by maximally dissociating from Somalia, including banks providing backend services facilitating transfers to Somali MTOs. As the financial system seized, remittances stopped flowing. One Somali-American remitter described the sanctions as a "blockade."[60] In time, the Somali diaspora succeeded in getting money through, figuring

[55]Menkhaus, "No Access"; see also Maxwell and Fitzpatrick, "The 2011 Somalia Famine"; Manuel Orozco and Julia Yansura, "Keeping the Lifeline Open: Remittances and Markets in Somalia" (Oxfam International, 2013), http://hdl.handle.net/2307/3019; Hoye, "Famine, Remittances, and Global Justice"; Daniel Maxwell and R Majid, *Famine in Somalia: Competing Imperatives, Collective Failures, 2011–12*, 2016, chap. 3. Jeffrey Gettleman and Neil MacFarquhar, "Somalia Food Aid Bypasses Needy, U.N. Study Says," *New York Times*, March 9, 2010.

[56]Menkhaus, "No Access."

[57]Ibid.

[58]Laura Hammond et al., "Cash and Compassion: The Role of the Somali Diaspora in Relief, Development and Peace-Building" (United Nations Development Programme, 2011).

[59]Peter T. Leeson, "Better off Stateless: Somalia Before and After Government Collapse," *Journal of Comparative Economics* 35 (2007): 689–710.

[60]Hammond et al., "Cash and Compassion: The Role of the Somali Diaspora in Relief, Development and Peace-Building."

out how to transfer money without going through Al Shabaab or the major banks (and almost certainly making more use of Hawala), allowing partial relief for some.[61]

Afghanistan

I turn now to Afghanistan and the explanatory argument. The Trump administration signed the Doha Agreement with the Taliban to end the war on February 29, 2020.[62] The agreement stipulated that coalition forces would withdraw within 14 months (May 2021) and that the US would undertake an internal analysis of its sanctions list with the aim of removing Taliban members by August 27, 2020, preceded by efforts to have the international community remove the Taliban from their sanctions lists by May 29, 2020. Doha further stipulated that the Taliban would not harbor members of alQaeda.[63] Upon taking office, President Biden initiated a reassessment of Afghanistan policy, including the Doha agreement. Public reports at the time indicated that the military preferred to remain, which President Biden reportedly rejected, reaffirming the plan for withdrawal. There were few signs leading up to the withdrawal that Doha would not be honored, although intermittent gestures towards alQaeda regrouping were made. What equivocation there was related to the final date, which under Biden was unilaterally changed to August 31, then unilaterally changed by the Taliban to August 15.

August 15, 2021, was a unique moment in the history of sanctions defined, to recall, by three related puzzles: the *transformation* from smart to de facto comprehensive sanction, the *instantaneous* nature of that transformation, and the *near-famine* that followed almost immediately. Before I consider each, I must first address "over-compliance," a prominent explanation for the catastrophic consequences that have followed the sanctioning of Afghanistan.

"Overcompliance" is both analytically and descriptively misleading. For one, "over-compliance" implies compliance was a real possibility. Hence, the "over" compliance error is due to a misunderstanding of the pertinent regulations by the entity gauging compliance risks. It follows that firms have somehow erred and that unexpected (and, it is implied, unintended) spillover effects are partly their fault. That critique treats sanctions *as a tool of statecraft,* assuming states use targeted sanctions to achieve delineated goals against foreign adversaries. Hence, "over-compliance" is seen as a bug in the system, perhaps one resolved by more precise language on the sanctioner's part.[64]

From the regulatory perspective, "over-compliance" is a misnomer, as what is described is simply normal compliance.[65] The sanctions apparatus is designed to incentivize financial entities to be vigilant that their nexuses of associations are

[61]Maxwell and Majid, *Famine in Somalia*, 68.
[62]"Joint Declaration between the Islamic Republic of Afghanistan and the United States of America for Bringing Peace to Afghanistan," February 29, 2020, https://www.state.gov/wp-content/uploads/2020/02/02.29.20-US-Afghanistan-Joint-Declaration.pdf.
[63]"Doha Agreement," pts. 1, d-e.
[64]Paul L. Lee, "Compliance Lessons from OFAC Case Studies - Part I," *Banking Law Journal* 131, no. 8 (2014): 657–87; Paul L. Lee, "Compliance Lessons from OFAC Case Studies - Part II," *Banking Law Journal* 131, no. 9 (2014): 717–66; Drezner, "How Not to Sanction."
[65]For a similar discussion, see Early and Peterson, "The Enforcement of U.S. Economic Sanctions and Global De-Risking Behavior."

dissociated from those of persons on the SDN list to an extent agreeable to OFAC. OFAC, as we have seen, is cautious, wherever possible, *not* to clarify what compliance entails precisely so that US persons and their affiliates are actively vigilant.[66] What follows is a rational calculation that typically results in a firm's extra-cautious demeanor. Those risk calculations are conditioned by two decades of sedimented disciplinary norms, whereby rhetoric is discounted, and published regulations are taken as signals. Where uncertainty about OFAC's view prevails—regarding legal, enforcement, future, jurisdictional, compliance, and reputational considerations[67]—then the system is constructed to incentivize thorough and immediate dissociation. A more appropriate term than "over-compliance" would be a "de-risking run." Unlike runs on the bank, where a cascade of customers withdraw their money because of emergent concerns over the bank's solvency, de-risking runs describe a cascade of financial de-risking responding to a sudden shift in available information or typical practices, where OFAC has taken no measures to amend existing regulations.[68] It is an acute but otherwise normal expression of a deeply entrenched practice of ambiguous penalties and concerted risk avoidance. "Overcompliance" is a feature, not a bug.

Back to the puzzles. The answer to the *transformation* and *instantaneous* puzzles, whereby targeted sanctions transform into de facto comprehensive sanctions from one day to the next, are at hand, and both are resolved through the same regulatory analysis. Without access to internal accounts of the period leading up to August 15, it is impossible to know what assumptions were held and plans were made. In hindsight, the sanctions ramp-up appears to have been as unthoughtful, hasty, and poorly organized as the ramp-down by military and civilian forces. However, on the regulatory analysis, neither ex-ante internal debates nor ex-post justifications are particularly significant. What we know is that there was no signal, no comprehensive sanctions starting pistol. On the regulatory approach, what matters is the absence of any positive signal: the Doha agreement's stipulations that the US would delist the Taliban were ignored. That was the signal. OFAC's sanctions power is disciplinary, whereby US persons and their nexuses make risk calculations about degrees of association based on OFAC's past enforcement norms and present whims. Thus, without any changes to the regulatory facts on the ground, when the Taliban became Afghanistan's sovereign, the targeted sanctions against individual Taliban members transformed into de facto comprehensive sanctions, putting the entire state outside of the global financial system.

It is descriptively true that Afghanistan was not comprehensively sanctioned formally. The Biden administration repeatedly proclaimed that they did not recognize the Taliban as sovereign, and OFAC stipulated in a FAQ (later) that it was not comprehensively sanctioning Afghanistan. It is also true that the operative sanctions are smart sanctions targeting individual Taliban members. Yet those descriptive truths are analytically misleading. As argued above, those kinds of signals are moot. What mattered on August 15 was that

[66]Verdier.

[67]This Verdier's list, see Verdier, "'A Hidden War': Sanctions Evasion."

[68]For examples of de-risking runs, see the Somalia and Afghanistan cases discussed in this article. These arguments are broadly supported by a wealth of interview evidence collected by Mallard and Sun, "Viral Governance." See also Early and Peterson, "The Enforcement of U.S. Economic Sanctions and Global De-Risking Behavior"; Verdier, "Sanctions Overcompliance."

in the absence of decisive signals to the contrary (delisting the Taliban), the global economic community acted on the political fact that the Taliban were sovereign and the regulatory fact that the sovereign was on the SDN list. Indeed, the fraught politics around whether the Taliban should be "recognized" overlooks a striking feature of contemporary sanctions politics. Namely, because of the nature of OFAC's disciplinary powers, the decision on recognition of sovereignty is not made by other sovereigns but, in the first instance, by their "deputies": financial firms, IOs, MTOs, and NGOs. Public declarations of non-recognition by Western leaders are immaterial to understanding the sanctions against Afghanistan. The effective truth of the matter is regulatory, a conclusion near-universally arrived at on August 15 when the Taliban took Kabul. At that moment, the targeted sanctions instantaneously transformed into comprehensive sanctions.

The solution to the *famine* puzzle follows from the same set of arguments and, as a historical event, can be tracked with some precision. The economic ramifications of the sanctions were felt at once. Afghanistan had suffered crop failures due to poor rainfall in the previous years. In mid-2011, the Integrated Food Security Phase Classification (IPC) initiative reported that eleven million Afghans were "experiencing high levels of acute food insecurity," with a slight improvement projected for the coming fall.[69] On August 15, the political economy of Afghanistan lurched towards famine. Afghanistan was cut off from the global financial system, international aid was stopped, and the remittance market seized. The humanitarian catastrophe followed swiftly. On August 24, the WFP reported that one-third of the Afghan population faced food insecurity but that operations were partially intact.[70] It would not last. By September, a UNICEF director noted that the humanitarian aid upon which ten million children depend stopped and that "At least one million children will suffer from severe acute malnutrition this year and could die without treatment."[71] On October 25, the IPC reported that nineteen million Afghans were in a state of "high levels of acute food insecurity" due to a "combination of drought, conflict and economic collapse."[72] The IPC projected that by November 2021, 8.7 million Afghans would be on the brink of famine and some fourteen million in acute food shortage.[73] By January 2022, the WFP, in a rare rebuke of its donors—reminiscent of the pushback against the sanctioning of Iraq in the 1990s—concluded a report with a personal reflection by a spokesperson: "There are some people who just need to tell you what they are going through. They also need to let the world know that the economic sanctions are destroying them."[74] In early February 2022, a representative for UNICEF voiced another

[69]"Afghanistan: Acute Food Insecurity Situation September - October 2021 and Projection for November 2021 - March 2022," accessed January 10, 2024, https://www.ipcinfo.org/ipc-country-analysis/details-map/en/c/1155210/?iso3=AFG.

[70]Imran-Ullah Kahn, "WFP Calls for Urgent Aid as Millions of Afghans Face Starvation," *Al Jazeera*, August 24, 2021, https://www.aljazeera.com/news/2021/8/24/wfp-food-aid-afghanistan-starvation-taliban.

[71]Marc Santora, Nick Cumming-Bruce, and Christina Goldbaum, "A Million Afghan Children Could Die in 'Most Perilous Hour,' U.N. Warns," *The New York Times*, September 13, 2021, https://www.nytimes.com/2021/09/13/world/asia/afghanistan-united-nations-crisis.html.

[72]"Afghanistan: Acute Food Insecurity Situation September - October 2021 and Projection for November 2021 - March 2022."

[73]Ibid.

[74]Peyvand Khorsandi, "'Our Presence Is Hope': US$2.6bn Needed as Winter Spells Hunger for Afghanistan" (World Food Programme, January 25, 2022), https://www.wfp.org/stories/our-presence-hope-call-funds-winter-spells-hunger-afghanistan-0.

rare rebuke, noting that 97% of the Afghan population was under the poverty line, that pneumonia had drastically increased, and that some Afghans had been reduced to eating dung.[75] He then pointed at the global sanctions regime: "The situation here is critical, but it could be resolved if international financial institutions and the World Bank release money into Afghanistan to allow the economy to function again."[76] By March, half of the population faced drastic food shortages, with small amounts of international relief finally getting through with some success.[77]

Perhaps caught off-guard by August 15 and the de-risking run that followed, OFAC adjusted the sanction regime, sometimes secretly, often with great public pomp, but, for reasons discussed above, rarely to any effect. On August 25, OFAC gave a secret license and private reassurance to Western Union and MoneyGram to allow "humanitarian activity to continue."[78] It is unclear how persuasive the Treasury was. Secret licenses and promises of non-prosecution are poor guidelines by design, especially for targets repeatedly fined by OFAC. As noted, only four months prior, OFAC settled with MoneyGram for misunderstanding the US unilateral sanctions signaling hierarchy. The system is optimized to maximize timidity on the part of the sanctioned to the extent that not just permission is required but tested permission. Hence, it was not until one week later—presumably, after MoneyGram and Western Union lawyers had time to assess the secret license and engage in conversation with OFAC—that some formal remittances started flowing, although how much is unknown. Even if OFAC desired that remittances flow freely, remittances were staunched by OFAC's stipulations against charitable donations (Western Union cannot distinguish between charity and remittances).[79]

On September 24, 2021, OFAC released General License (GL) 14 and 15, allowing humanitarian aid to a select group of named IOs. However, it was unclear what constituted humanitarian aid, and it appears IOs and NGOs remained in a holding pattern. Caution was in order, as two months later, GL 19 clarified that OFAC did *not* authorize the transfer of any funds "other than for the purpose of effecting the payment of taxes, fees, or import duties, or the purchase or receipt of permits, licenses, or public utility services"[80] among other issues. GL 19 allowed humanitarian aid under the condition that money did not reach agents other than those precisely related to the humanitarian endeavor and that fees could be paid to the government but not to persons on the SDN list. That reads like permission, but it is not. The idea of nexuses of associations and the disciplinary grounding of that idea bolstered by two decades of

[75]Sophie Gorman, "Soaring Pneumonia and Starvation Is Killing Thousands of Children in Afghanistan," *France 24*, February 2, 2022, https://www.france24.com/en/asia-pacific/20220202-soaring-pneumonia-and-starvation-is-killing-thousands-of-children-in-afghanistan.

[76]Ibid.

[77]"Afghanistan: Acute Food Insecurity Situation for March - May 2022 and Projection for June - November 2022".

[78]https://www.reuters.com/world/asia-pacific/exclusive-us-treasury-issued-new-license-ease-flow-aid-afghanistan-2021-09-01/. On remittances and humanitarian aid, see J. Matthew Hoye, "Global Justice and the Remittances Challenge: On Political Ontology and Agency," *Constellations* 28, no. 2 (2021): 234–51. See also, Grégoire Mallard, Farzan Sabet, and Jin Sun, "The Humanitarian Gap in the Global Sanctions Regime: Assessing Causes, Effects, and Solutions," *Global Governance: A Review of Multilateralism and International Organizations* 26, no. 1 (2020): 139.

[79]https://www.reuters.com/world/asia-pacific/exclusive-western-union-resuming-services-afghanistan-senior-exec-2021-09-02/. And they have good reason to be very weary, see: https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20190607_33 .

[80]OFAC, "General License 19," December 22, 2021, https://home.treasury.gov/system/files/126/ct_gl19.pdf.

tactical and strategic enforcement—all compounded by the radical uncertainty of the post-August 15 situation and the fact that Haqqani and Taliban members hold positions within related Afghan institutions—made compliance extremely challenging for even the most sophisticated IO. Thus, though publicly allowing humanitarian aid, GL 19 clarified that most aid could not flow. For that reason, the practical consequences were meager. Strikingly, on December 22, 2021, OFAC published FAQ 951, which declared that the sanctions against Afghanistan *were not* comprehensive sanctions, changing very little, but indicating that it was aware that the *effects* of the sanctions were akin to those of comprehensive sanctions regimes.[81]

OFAC confirmed as much on February 2, 2022, when it updated the FAQ page relating to GLs 14 and 19. The FAQ entailed notes of clarification—six months after the start of the de facto comprehensive sanctions against Afghanistan—that IOs are allowed to, among other things, sign memoranda of understanding with the Taliban to deliver food, coordinate with the Taliban regarding the distribution of humanitarian aid, attend meetings with donors, and share descriptions of projects. The note further stated that IOs could pay taxes and other fees to the Taliban or Haqqani Network to the extent that they are authorized under GL 14 and 19.[82] GL 14, 16, and 19 and related FAQs continue a longstanding OFAC practice of strategic and incremental permissiveness and have greatly hindered humanitarian aid efforts, irrespective of whether or not OFAC officials intended such caution. GL 20, issued on February 25, 2022, and related FAQs were important amendments and clarifications to the sanction regime, allowing for small-scale commercial trade of goods and services related to humanitarian needs and more robust engagements with various facets of the Afghan government. Following GL 19 and 20, the food emergency has since progressively improved.

(Near) Famine

Afghanistan was not pushed to a full-scale famine, and considering the explanation above, that needs to be explained, too. There are viable explanations. First, as noted, it appears that beyond the softening of the sanctions—the GLs, especially GL 20—did, in time, allow for an increase in the flow of remittance and humanitarian aid. Secondly, and arguably more importantly, despite significant efforts to limit the Hawala system, it remained intact, if not expanded, in response to the decades of tumult in Afghanistan. Indeed, the majority of economic activity in Afghanistan is facilitated in some way through Hawala.[83] Culture, an aversion to the formal banking system promoted by the US and successive Afghan, and post-August 15, the impossibility of using the formal system and, importantly, conjoined with a deep aversion to the Taliban who control the Afghan Central, combined to make Hawala more established and more legitimate in the eyes of its users than the

[81]"951," US Department of the Treasury, March 17, 2023, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/951.
[82]"U.S. Department of the Treasury, Frequently Asked Questions, #958," February 2, 2022, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/958.
[83]Rahimi, *Reform and Regulation of Economic Institutions in Afghanistan*.

formal system.[84] It is the formal system that is not trusted, is rife with corruption, and which facilitates the actions of predatory states, both domestic and foreign.

The persistence and robustness of the Hawala system had three direct implications for the political economy of famine. Regarding remittances, they could, more or less, continue to flow once the initial jolt had been absorbed and understood. What that means is impossible to know with any certainty. Formal remittances topped out at 4% of GDP before the sanctions, dropping to 2% following the sanctions and slowly returning as the GLs came online.[85] What is unknown is the magnitude of the informal remittances, but it is presumably far higher than formal flows. Regarding the political economy, more generally, it sustained a massive shock, but the Hawala system was at least partially available to facilitate domestic and regional trade. Notably, humanitarian aid agencies pivoted similarly and somewhat ironically started transferring funds through Hawala to support vital employees (teachers, doctors) to avoid the Afghan central bank while transferring funds to vital employees (such as teachers and healthcare professionals). As Erica Moret wrote in January 2022 in a report for the Norwegian Refugee Council:

> At the current time, hawala is increasingly the sole transfer mechanism with sufficient liquidity capacity and access to physical cash to respond to the programmatic and operational needs of the different humanitarian organisations operating in Afghanistan.[86]

Hawala alone stood as a counter-network bracing Afghanistan as the formal economic system ground to a halt, helping to ward off a full-scale famine.

Conclusion

I have made nested analytical, functional, and explanatory arguments. The analytical argument is that however counterintuitive the analytical prism of domestic regulations seems, it is comparatively better for understanding sanctions—explaining more, in more detail—than the IR approach. At its core, the argument is that rhetoric aside, post-September 11 sanctions powers are domestic regulations. The functional argument deepens the analytical argument by tracing the strategic and tactical development of OFAC's regulatory powers, and therein its treatment of nexuses of associations, the international expression of domestic regulatory powers, the maximization of privatized financial surveillance, the use of fines as a disciplinary measure, and its encompassing of remittances and humanitarian aid. The explanatory argument explains what happened on August 15. The puzzles were that the smart sanctions (i) instantaneously (ii) transformed into comprehensive sanctions and that a (iii) near-famine followed quickly after that. I argued that the domestic regulation analytical framework provides a powerful explanation for all three puzzles: without any clear signals from OFAC otherwise—which was the signal—on August 15, the world's financial, money transfer, and humanitarian aid communities recognized the Taliban as

[84]Haroun Rahimi, "How to Create Better Hawala Regulations: A Case Study of Hawala Regulations in Afghanistan," *Crime, Law and Social Change* 76, no. 2 (September 2021): 131–48.
[85]World Bank, "World Bank Data (Personal Remittances, Received (% of GDP) - Afghanistan)," August 28, 2023, https://data.worldbank.org/indicator/BX.TRF.PWKR.DT.GD.ZS?locations=AF.
[86]Erica Moret, "Life and Death: NGO Access to Financial Services in Afghanistan" (Norwegian Refugee Council, 2022), 26.

sovereign and thus assumed that the targeted person was now the Afghan state. Hence, in the face of unknown risks, the world's economic and humanitarian community immediately dissociated from Afghanistan. The near-famine followed because the twenty-first century political economy of food—domestic political economy, humanitarian aid, and remittances—is subject to OFAC's regulatory reach.

From the perspective of IR, the sanctioning of Afghanistan appears to be a "catastrophic policy failure."[87] That is descriptively true but analytically misleading. I have argued instead for taking a regulatory analytical perspective. From that perspective, the sanctions against Afghanistan embody the ideal of maximal domination secured through strategic and tactical regulatory ambiguity in the service of privatized global financial surveillance that OFAC has been working toward for twenty years. These analytical perspectives are not antithetic; they are synthetic. A full analysis of the failures of OFAC's sanctions against the Taliban as a tool of statecraft needs to give account to the fact that the weapon is optimized for effective domestic regulation, not the coercion of foreign adversaries. But the point stands: the sanctioning of Afghanistan and the near famine that followed was not a catastrophic policy failure; it was a catastrophic policy success.

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[87]Drezner, "How Not to Sanction."