William & Mary Bill of Rights Journal

Volume *31 (2022-2023)*
Issue 1

Article 6

10-2022

Balancing Liberty and Security: A Proposal for Amplified Procedural Due Process Protections in the U.S. Sanctions Regime

Allison Lofgren

BALANCING LIBERTY AND SECURITY: A PROPOSAL FOR AMPLIFIED PROCEDURAL DUE PROCESS PROTECTIONS IN THE U.S. SANCTIONS REGIME

Allison Lofgren*

> The use of IEEPA authorities against domestic organizations run by U.S. citizens . . . raises significant civil liberties concerns. IEEPA authorities allow the government to shut down an organization on the basis of classified evidence subject only to deferential after-the-fact judicial review.[1]

---

* Allison Lofgren. JD Candidate 2023, William & Mary Law School, B.S.F.S. 2020, Georgetown University. First, thank you to the staff of *William & Mary Bill of Rights Journal* for their crucial editing work. Thank you also to my family, for their unwavering support, and to my grandfather, for inspiring an enduring interest in foreign affairs and national security. Finally, thank you to Preston for putting up with me during this writing process.

[1] Andrew Boyle, *Checking the President's Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers Act*, BRENNAN CTR. FOR JUST. 14 (June 10, 2021) [hereinafter BRENNAN CENTER REPORT], https://www.brennancenter.org/sites/default/files/2021-06/BCJ-128%20IEEPA%20report.pdf [https://perma.cc/EX2D-85CX] (quoting *The 9/11 Commission Report: Identifying and Preventing Terrorist Financing*: *Hearing Before the H. Comm. on Fin. Servs.*, 108th Cong. 10 (2004) (statement of Lee H. Hamilton, Vice-Chairman, National Commission on Terrorist Attacks upon the United States)).

INTRODUCTION

In September 2001, President Bush issued Executive Order (EO) 13,224 and declared a national emergency in response to the September 11, 2001, terrorist attacks.[2] Citing the "unusual and extraordinary threat to the national security, foreign policy, and economy of the United States," he invoked his authority under the International Emergency Economic Powers Act (IEEPA) to approve the use of financial sanctions to "combat the financing of terrorism."[3] EO 13,224 provides for the designation of "foreign persons" (that is, foreign individuals and entities) as "Specially Designated Global Terrorists" (SDGTs) if they "pose a significant risk of committing" or have committed "acts of terrorism that threaten" U.S. national security.[4] Once designated, all of the designees' "property and interests in property" subject to U.S. jurisdiction are blocked by the Office of Foreign Assets Control (OFAC), which resides within the Department of the Treasury.[5] Because IEEPA—the statutory source of authority for EO 13,224—targets threats that originate in a substantial part from abroad, the thousands of individuals and entities sanctioned by OFAC and designated as SDGTs in the past two decades have largely been foreign.[6] However, Sections (c) and (d) of EO 13,224 do allow the designation of United States persons[7] and the subsequent freezing of their assets under certain circumstances.[8] More

---

[2] Exec. Order No. 13,224, 3 C.F.R. § 13224 (2002).

[3] *Id.*

[4] *Id.* at § 1(b). The Secretary of State is responsible for determining these "foreign persons" in consultation with the Secretary of the Treasury and the Attorney General. *Id.*

[5] *Id.* ("[A]ll property and interests in property of the following persons that are in the United States or that hereafter come within the United States, or that hereafter come within the possession or control of United States persons."). Per OFAC, "SDGT means any person whose property and interests are blocked pursuant to § 594.201(a)." 31 C.F.R. § 594.310 (2013).

[6] *Sanctions List Search*, U.S. DEP'T OF THE TREASURY OFF. OF FOREIGN ASSET CONTROL, https://sanctionssearch.ofac.treas.gov [https://perma.cc/L583-495G] (last visited Oct. 18, 2022).

[7] Exec. Order No. 13,224 defines "United States person" as "any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States." § 3(c). Unlike sections (1)(a)–(b), which specify "foreign persons," section (1)(c) addresses "persons," thus implying the inclusion of non-foreign persons, i.e., U.S. persons. *Id.* at §§ 1(a)–(c). For support of the assertion that EO 13,224 thus applies to U.S. persons, see BRENNAN CENTER REPORT, *supra* note 1, at 12.

[8] *See, e.g.*, Global Relief Found. v. O'Neill, 315 F.3d 748, 753 (7th Cir. 2002) ("GRF

specifically, EO 13,224 authorizes the blocking of (1) assets that are "owned or controlled by, or [are] act[ing] for or on behalf of" a designated individual or entity; (2) assets of persons who are providing assistance, support (whether financial, material, or technological), or services to or in support of acts of terrorism or designees; or (3) are "otherwise associated with certain individuals or entities designated in or under the Order."[9] U.S. persons (a term that also includes foreign persons who are physically located in the United States or who have property subject to U.S. jurisdiction) are entitled to constitutional protections such as due process, including when they are designated and deprived of the right to use their property.[10]

Although designees can contest designations through OFAC's administrative procedures, various typical civil liberties protections have been altered or minimized in this process.[11] As a result, a number of U.S. persons have sued the federal government and argued that OFAC violated their constitutional rights.[12] In a number of cases discussed later in this Note, several federal courts have agreed with such plaintiffs and found that OFAC violated the procedural due process rights of U.S. organizations designated as SDGTs.[13] These decisions have been limited in scope

---

[A U.S. corporation] conducts its operations outside the US; the funds are applied for the benefit of non-citizens and are therefore covered by § 1702(a)(1)(B)."); Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965 (9th Cir. 2012) (holding that AHIF-Oregon, an Oregon non-profit organization was properly designated because a board member—who has control of the company—was designated (Exec. Order No. 13,224 §1(c)), and because AHIF-Oregon was providing support for a designated entity (Exec. Order No. 13,224 § 1(d)(i)); KindHearts for Charitable Humanitarian Dev. v. Geithner, 647 F. Supp. 2d 857 (N.D. Ohio 2009) [hereinafter KindHearts] (holding that because a designated foreign national was the president of the Ohio corporation, he had enough of an "interest" in it to trigger § 1702(a)(1)(B) for the corporation).

[9] Exec. Order No. 13,224 at § 1(c)–(d). In 2007, OFAC later clarified, with a new regulation section, that "otherwise associated with" means, for the purpose of Exec. Order No. 13,224, "to own or control" or "[t]o attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to designees." 31 C.F.R. § 594.316.

[10] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); *see* Exec. Order No. 13,224. In contrast, foreign individuals and entities who have neither presence nor property within the United States generally do not have constitutional rights, therefore they cannot raise due process claims in federal court. *See Al Haramain*, 686 F.3d at 984 ("A foreign entity without property or presence in this country has no constitutional rights, under the Due Process Clause or otherwise.") (quoting Nat'l Council of Resistance of Iran v. U.S. Dep't of State, 251 F.3d 192, 201 (D.C. Cir. 2001)); see *infra* notes 78–79 and accompanying text for an explanation of the nature of the deprivation.

[11] *Infra* Sections II.B–C. These hallmarks of due process include a designee's right to have timely notice, to have an adequate opportunity to be heard, and to view the evidence for a government's designation and subsequent deprivation. *Id.*

[12] BRENNAN CENTER REPORT, *supra* note 1, at 13. Various plaintiffs have invoked the First, Fourth, and Fifth amendments as constitutional bases for their claims. *Id.*

[13] *Infra* Section II.B.

and impact,[14] but they serve as apt examples of serious constitutional concerns present in the designation process.[15] Importantly, a recent review of the U.S. sanctions regime from the Department of the Treasury was devoid of any mention of such constitutional issues,[16] which underscores the need for the government to increase its focus on due process concerns.

This Note will concentrate on procedural due process concerns stemming from the imposition of terrorist financing sanctions, and it will primarily discuss designated U.S. persons.[17] This is a narrow focus, but it can be viewed as a microcosm for due process issues present throughout the broader IEEPA regime. Ultimately, this Note will conclude that OFAC's terrorist financing designation process inadequately protects the procedural due process rights of targets, and it will advocate for the implementation of additional procedural protections that balance undeniable constitutional requirements with the critical concern of national security.[18]

This Note will be organized as follows: Part I will explore the broader background of sanctions, beginning with a short history of emergency powers in the United States, including the Trading with the Enemy Act (TWEA) and IEEPA.[19] Additionally, it will outline the structure of the current U.S. sanctions regime and the process for implementing sanctions under IEEPA (with a particular focus on the role of OFAC in administering and enforcing sanctions).[20] Lastly, Part I will explain the role of each of the three branches of the federal government in the sanctions framework and address a range of key concerns about IEEPA.[21] Part II will (1) briefly discuss due process jurisprudence in the United States; (2) analyze key procedural due process cases in the sanctions realm, with a targeted focus on two issues: the use of classified information in the government's designation decisions and the diminished right to notice and an opportunity to be heard; and (3) discuss the particularly severe impact of designation on individuals.[22] Part III will begin with a discussion of recent criticisms of the U.S. sanctions process and will be followed by a detailed evaluation of the Department of the Treasury's 2021 Sanctions

---

[14] BRENNAN CENTER REPORT, *supra* note 1, at 14 (explaining that these cases are limited in scope and impact because the decisions are binding only in their respective circuits and because they have not prompted any responsive actions from OFAC).

[15] *Id.*

[16] U.S. DEP'T OF THE TREASURY, THE TREASURY 2021 SANCTIONS REVIEW 1 (Oct. 18, 2022). This report was the result of a nine-month investigation into the U.S. sanctions regime. Elizabeth Goitein, *The Biden Administration's Disappointing Sanctions Report: What Should Come Next*, JUST SECURITY (Oct. 29, 2021), https://www.justsecurity.org/78785/the-biden-administrations-disappointing-sanctions-report-what-should-come-next/ [https://perma.cc/4AJ5-A4KV].

[17] *Infra* Section II.B.

[18] *Infra* Section III.C.

[19] *Infra* Section I.A.

[20] *Infra* Sections I.B–C.

[21] *Infra* Sections I.D–E.

[22] *Infra* Part II.

Review.[23] Finally, Part III will recommend amending both OFAC's regulations and IEEPA to provide for more adequate procedural protections during the designation and deprivation process.[24]

I. A PRIMER ON U.S. SANCTIONS

A. The History of the Power to Sanction

The U.S. Constitution does not explicitly grant emergency powers to a particular branch of the federal government.[25] When crises surfaced during the eighteenth and nineteenth centuries, the President would "act without congressional approval" and Congress, which had "claimed primacy over emergency action," would then "ratify the President's actions through legislation or indemnify the President for any civil liability."[26]

A monumental shift in the emergency powers arena occurred in the twentieth century, when Congress began to statutorily authorize "the President to declare an emergency and make use of extraordinary delegated powers."[27] One key statute from 1917—the Trading With the Enemy Act (TWEA)[28]—granted presidents extremely broad authority that included "expansive control over private international economic transactions in times of war."[29] When Congress further expanded TWEA in 1933, it amended Section 5(b) to grant presidents the authority to declare a "period of national emergency" during peacetime.[30] In 1941, with the passage of the Emergency Banking Act, Congress amended TWEA once more to grant presidents the vesting power.[31] In the following decades, particularly during the Cold War, presidents frequently used their considerable authority to declare national emergencies and invoke Section 5(b) of TWEA in pursuit of a variety of objectives.[32] For example, presidents used TWEA to sanction North Korea and China in 1950, and Vietnam, Cuba, and Cambodia in following years; to extend certain export controls after relevant regulations had expired; and to carry out various presidential monetary policy decisions.[33]

---

[23] *Infra* Sections III.A–B.

[24] *Infra* Section III.C.

[25] CHRISTOPHER A. CASEY ET AL., CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 1, 1 (2020) [hereinafter CRS IEEPA REPORT]; U.S. CONST.

[26] CRS IEEPA REPORT, *supra* note 25, at 1.

[27] *Id.*

[28] Trading With the Enemy Act, P.L. 65-91 (Oct. 6, 1917) § 2, 40 Stat. 411 (codified as amended at 50 U.S.C. § 4305 (2018)).

[29] CRS IEEPA REPORT, *supra* note 25, at 3.

[30] Emergency Banking Relief Act, P.L. 73-1 (Mar. 9, 1933), 48 Stat. 1.

[31] CRS IEEPA REPORT, *supra* note 25, at 5.

[32] *Id.* at 6.

[33] *Id.* One such monetary policy decision was made in 1968, when "President Lyndon B.

During this time, the frequent presidential use of TWEA for far-reaching purposes garnered copious criticism and calls for increased Congressional oversight.[34] In the 1970s, after a string of abuses of power triggered a broader Congressional examination of the entire Executive Branch, Congress addressed the criticisms of TWEA in its "reevaluat[ion] [of] delegations of emergency authority to the President."[35] A special investigating committee revealed that at no point in time since TWEA was expanded in 1933 had the United States *not* had a national emergency in effect.[36] Senator Church, one of the committee's cochairs, underscored the significance of this when he questioned "whether it [was] possible for a democratic government such as ours to exist under its present Constitution and system of three separate branches equal in power under a continued state of emergency."[37]

Following the investigation, Congress ultimately took two substantial steps to reform the emergency powers framework: first, it enacted the National Emergencies Act (NEA), which terminated almost all national emergencies and implemented significant constraints on the "manner of declaring and the duration of new states of emergency"; and second, it transformed TWEA in three steps.[38] Step one entailed amending TWEA to eliminate the ability of presidents to invoke the act outside of "times of war."[39] Step two "expanded the Export Administration Act to include powers that previously were authorized by reference to Section 5(b) of TWEA."[40] Finally, in step three, Congress drafted IEEPA to give "the President a new set of authorities for use in time of national emergency which are both more limited in scope than those of [TWEA] section 5(b) and subject to procedural limitations, including those of the [NEA]."[41] One important new limitation imposed by IEEPA concerned the vesting power; under the original form of IEEPA, Presidents could no longer vest frozen assets as they had been able to do under the expanded TWEA.[42]

Today, the vast majority of national emergencies are invoked under IEEPA, which "provides the President [with] broad authority to regulate a variety of economic

---

Johnson explicitly used Truman's 1950 declaration of emergency under Section 5(b) of TWEA to limit direct foreign investment by U.S. companies in an effort to strengthen the balance of payments position of the United States after the devaluation of the pound sterling by the United Kingdom." *Id.*

[34] CRS IEEPA REPORT, *supra* note 25, at 8.

[35] *Id.* at 6–7.

[36] *Id.* at 7.

[37] *Id.* (quoting *Trading with the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency*, committee print, 94th Cong., 2nd sess., Nov. 1976 (Washington, DC: GPO, 1976), p. iii).

[38] CRS IEEPA REPORT, *supra* note 25, at 8–9; *see* National Emergency Act 50 U.S.C. §§ 1601–51 (1976).

[39] CRS IEEPA REPORT, *supra* note 25, at 9.

[40] *Id.*

[41] *Id.* at 9; *see* International Economic Emergency Powers Act, 50 U.S.C. §§ 1701–1708 (2012).

[42] CRS IEEPA REPORT, *supra* note 25, at 11–13.

transactions following a declaration of national emergency" and serves as the centerpiece of the modern U.S. sanctions regime.[43] Since its enactment, IEEPA has been amended eight times.[44] These changes have concomitantly increased presidential emergency powers and weakened the ability of Congress to oversee and limit a president's use of the Act.[45] For example, one amendment replaced the requirement for a concurrent resolution to terminate a national emergency with a requirement for a joint resolution.[46] Although both joint and concurrent resolutions must be approved by the Senate and the House of Representatives, a joint resolution also requires the president's signature.[47] Consequently, this amendment effectively eliminates the power of Congress to terminate—without presidential approval—a national emergency that it believes was wrongly declared by the President.[48]

Several of the other amendments were enacted as a result of the USA PATRIOT Act of 2001, and they altered Section 203 of IEEPA to (1) return the vesting power from TWEA to the President;[49] (2) allow the President to "block assets during the pendency of an investigation";[50] and (3) allow classified information to "be submitted to [a] reviewing court *ex parte* and *in camera*," if the classified information formed the basis of "a determination made under [Section 203]."[51]

The changes IEEPA underwent as a result of the USA PATRIOT Act yield serious due process concerns. Now, a President can go far beyond the already-monumental action of freezing the assets of a sanctioned entity: the President can actually vest them, which effectively means permanently seizing the assets.[52] The

---

[43] *Id.* at 1.

[44] *Id.* at 11. The majority of the amendments "altered civil and criminal penalties for violations of orders issued under the statute." *Id.*

[45] *Id.* at 2.

[46] *Id.* at 11; see *infra* Section I.D, specifically the discussion of Congressional oversight, for a further explanation of this point.

[47] *Congressional Bills, 103rd Congress (1993–1994) to Present*, U.S. GOV'T PUBLISHING OFFICE (Mar. 18, 2021), https://www.govinfo.gov/help/bills [https://perma.cc/4WZ9-6KYC].

[48] If a President vetoes a joint resolution, Congress could still override the veto with a two-thirds vote from each chamber. *The Legislative Process: Presidential Actions (Video)*, LIBR. CONG. (2022), https://www.congress.gov/legislative-process/presidential-action [https://perma.cc/7548-PR6H]. However, this happens very rarely, so an override veto should not be viewed as a substantial remedy that guards Congressional authority in this arena. CRS IEEPA REPORT, *supra* note 25, at 44.

[49] CRS IEEPA REPORT, *supra* note 25, at 13; *see* International Economic Emergency Powers Act, 50 U.S.C. § 1702(a)(1)(C).

[50] CRS IEEPA REPORT, *supra* note 25, at 15; *see* § 1702(a)(1)(B).

[51] CRS IEEPA REPORT, *supra* note 25, at 15; *see* § 1702(c) ("In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in Section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex camera. This subsection does not confer or imply any right to judicial review.").

[52] Uniting and Strengthening America by Providing Appropriate Tools Required to

1933 expansion of TWEA had granted the President this authority, but Congress notably removed the power from the President's toolbox with the 1970s TWEA reforms and the enactment of IEEPA.[53] Another concern stems from the president's new "authority to block pending investigation (BPI)," which has serious due process ramifications because it results in a limited, or even non-existent, administrative record, does not allow the person whose assets were frozen to seek judicial review, and leaves said person in limbo for an undefined period of time, unable to access any of their assets.[54] Third, the *ex-parte*, *in-camera* submission of classified information means that the sanctioned individuals or entities may not be able to view much of, or any, adverse evidence.[55] Therefore, they might not be able to adequately advocate for themselves during an administrative or judicial review.[56]

B. The Current Structure of the U.S. Sanctions Regime

The United States uses two primary types of sanctions: country-based sanctions and targeted sanctions.[57] Country-based sanctions can be comprehensive, such as the current sanctions on Iran, or limited, such as those on Venezuela.[58] Limited sanctions "prohibit only certain types of transactions with the target country or with certain persons in the government of that country."[59] Targeted sanctions, such as those implemented for counterterrorism or counter-narcotics purposes, focus on specific entities and individuals and are not determined geographically.[60] In the years following the September 11 terrorist attacks, the United States' sanctions regime shifted from being primarily composed of country-based sanctions to being largely composed of targeted sanctions, particularly because of an increased focus on counterterrorism efforts that often took the form of sanctioning international terrorism financing.[61]

Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, U.S.C.C.A.N. (115 Stat.) 272 (2001) (codified at 50 U.S.C. § 1702(a)(1)(C)).

[53] CRS IEEPA REPORT, *supra* note 25, at 13.

[54] BRENNAN CENTER REPORT, *supra* note 1, at 14.

[55] *Id.* at 9.

[56] *Infra* Section II.B.2.

[57] *Where is OFAC's Country List? What countries do I need to worry about in terms of U.S. sanctions?*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/where-is-ofacs-country-list-what-countries-do-i-need-to-worry-about-in-terms-of-us-sanctions [https://perma.cc/J3U7-45GG] (last visited Oct. 18, 2022).

[58] BRENNAN CENTER REPORT, *supra* note 1, at 7.

[59] *Id.*

[60] *Id.*

[61] Miriam Berger, *What are Economic Sanctions, and How Did They Become Washington's Foreign Policy Tool of Choice?*, WASH. POST (July 23, 2021, 2:20 PM), https://www.washingtonpost.com/world/2021/04/15/faq-united-states-economic-sanctions/ [https://perma.cc/HZL6-Y4VG].

Although sanctions can be implemented in several ways and under different sources of authority, this Note will focus on sanctions invoked under IEEPA.[62] Implementing sanctions under IEEPA requires several distinct steps. First, the president must explicitly identify an "unusual and extraordinary threat which has in its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[63] Then, the U.S. National Security Council convenes an interagency meeting in which members of the Commerce, Defense, State, and Treasury Departments and members of the Intelligence Community evaluate the situation, discuss options (including sanctions) for addressing the threat, and make recommendations.[64] If sanctions are chosen as the appropriate course of action, OFAC will determine which entities to target, decide on the specifics of the sanctions, and work with the Departments of State and Justice to draft an Executive Order (EO).[65] After approving the specifics of the EO, the President will formally issue it, declare a national emergency under IEEPA on the basis of the stated threat, and pledge to sanction the individual or entity from which the threat stems.[66] Then, the president delegates responsibility back to OFAC, which "administers and enforces economic sanctions and trade sanctions."[67] These EOs often include an Annex with a list of newly designated individuals, entities, or countries that will immediately face sanctions, but such lists are non-exhaustive and can be considered a starting point; if Treasury later determines that additional entities warrant sanctions pursuant to an EO, it can accordingly designate them.[68] After the President delegates authority to OFAC to implement sanctions, the "sanctions are typically written in comprehensive prohibitory language, which is then peeled back by exceptions."[69] These exceptions are called licenses, which ultimately permit the prohibited transactions to occur.[70] OFAC sometimes issues general licenses, which "authoriz[e] the performance of certain categories of transactions."[71] Finally, OFAC allows parties

---

[62] *See* BRENNAN CENTER REPORT, *supra* note 1, at 11.

[63] International Economic Emergency Powers Act (IEEPA), 50 U.S.C. § 1701(a).

[64] Brian O'Toole & Samantha Sultoon, *Sanctions Explained: How a Foreign Policy Problem Becomes a Sanctions Program*, ATL. COUNCIL (Sept. 22, 2019), https://www.atlanticcouncil.org/commentary/feature/sanctions-explained-how-a-foreign-policy-problem-becomes-a-sanctions-program/ [https://perma.cc/T9FZ-FWCU].

[65] *Id.*

[66] Perry Bechky, *Sanctions and the Blurred Boundaries of International Economic Law*, 83 MO. L. REV. 1, 5 (2018).

[67] *Office of Foreign Assets Control—Sanctions Programs and Information*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information [https://perma.cc/K3Z6-NP4N] (last visited Oct. 18, 2022).

[68] Exec. Order No. 13,224 § 1, 3 C.F.R. § 13224 (2002).

[69] Bechky, *supra* note 66, at 7.

[70] *Frequently Asked Questions*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1501 [https://perma.cc/362E-GY4J] (last visited Oct. 18, 2022).

[71] *Id.*

to file written requests for "specific licenses" that allow singular, specific transactions to occur, and it reviews and grants them on a case-by-case basis.[72]

C. OFAC's Role as Enforcer

In furtherance of its enforcement efforts, OFAC maintains and publishes lists of sanctioned individuals, entities, and countries which consequently help individuals and entities who are subject to U.S. jurisdiction ensure that they do not transact with sanctioned parties, which would contravene OFAC regulations and IEEPA.[73] One list is of particular import for this Note; the "Specially Designated Nationals and Blocked Persons List" (SDN List) which includes (1) "individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries" and (2) "individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country specific."[74] Within the SDN List, OFAC further categorizes designees based on the source of authority for their designations.[75] For example, "SDGT" refers to individuals sanctioned pursuant to the U.S. global terrorism sanctions regulations.[76]

Once individuals or entities are designated, "U.S. persons are generally prohibited from dealing with them."[77] A central aspect of sanctioning a person involves the blocking, or freezing, of that person's assets that are in U.S. jurisdiction, which means that the "[t]itle to the blocked property remains with the target but the exercise of powers and privileges normally associated with ownership is prohibited without authorization from OFAC."[78]

---

[72] *Id.*

[73] *Office of Foreign Assets Control—Sanctions Programs and Information*, *supra* note 67.

[74] *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists*, U.S. DEP'T OF THE TREASURY [hereinafter *Specially Designated Nationals and Blocked Persons List*], https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists [https://perma.cc/5NNL-M8GR] (last visited Oct. 18, 2022).

[75] *Program Tag Definitions for OFAC Sanctions Lists*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/program-tag-definitions-for-ofac-sanctions-lists [https://perma.cc/ZLD5-9Q9N] (last visited Oct. 18, 2022).

[76] *Id.*

[77] *Specially Designated Nationals and Blocked Persons List*, *supra* note 74.

[78] *Frequently Asked Questions*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1501 [https://perma.cc/2JFU-RC3C] (last visited Oct. 18, 2022); *id.* ("Blocking immediately imposes an across-the-board prohibition against transfers or dealings of any kind with regard to the property."); *see generally* Andrew Boyle, *Reining in the President's Sanction Powers*, BRENNAN CTR. FOR JUST. (Aug. 4, 2021), https://www.brennancenter.org/our-work/analysis-opinion/reining-presidents-sanctions-powers [https://perma.cc/7W4B-EKES].

Designated persons can file a petition for removal from an OFAC list, which initiates the OFAC administrative review process.[79] OFAC asks that these delisting petitions include contact information, the date of the relevant OFAC listing action, and "a request for the reconsideration of OFAC's determination, including a detailed description of why the listed person should be removed."[80]

Situations that may result in a successful delisting petition 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."[81] After receiving a petition, OFAC might request additional information from the petitioner, but OFAC is not required to respond to petitions with a final determination within any specific time frame.[82] As a result, some designated persons—and persons whose property has been blocked pending investigation—have waited in limbo for years before receiving a final decision.[83]

D. The Roles of Congress and the Judiciary

The process of implementing sanctions largely resides within the Executive Branch, as detailed above, but Congress does play a significant role.[84] Beyond the essential enactment of legislation, such as IEEPA, that allows the Executive Branch to implement sanctions, Congress also has some measure of authority and oversight.[85] However, IEEPA amendments have severely weakened Congress's oversight power.[86] For example, although the President has various reporting and consulting requirements (such as informing Congress immediately after issuing an EO that provides a legal basis for sanctioning an entity) they are largely considered (including by the Congressional Research Service) to be "pro forma."[87] Second, Congress has limited ability to reverse a presidential invocation of IEEPA.[88] The initial draft of the NEA gave Congress the ability to use a "legislative veto," which required a simple majority vote on concurrent resolutions in each chamber, to terminate a national emergency (whether invoked under IEEPA or another authority).[89] However, after

---

[79] *How do I file a request for removal from an OFAC sanctions list?*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list [https://perma.cc/4H2E-Y6KZ] (last visited Oct. 18, 2022).

[80] *Id.* The petitions can also include additional information, including evidence to rebut the designation. *Id.*

[81] *Id.*; *see* 31 C.F.R. § 501.807 for the applicable regulations on delisting.

[82] 31 C.F.R. § 501.807.

[83] *See infra* Sections II.B–C.

[84] CRS IEEPA REPORT, *supra* note 25, at 1.

[85] *Id.*

[86] CRS IEEPA REPORT, *supra* note 25, at ii.

[87] *Id.*

[88] *See supra* Section I.A.

[89] Andrew Boyle, *The President's Extraordinary Sanctions Powers*, BRENNAN CTR. (July 20,

the Supreme Court deemed the use of a legislative veto unconstitutional in 1983, an additional layer of protection was implemented; now, the President must sign off on a joint resolution.[90] Given the fact that the President issued the contested EO that declared the national emergency, it is highly unlikely that the President would do so.[91] During the Trump administration, Congress's limited ability to provide a check on the President in this area was starkly apparent.[92] For example, in response to President Trump's declaration of a national emergency at the Southern border to obtain funds for the construction of a wall, Congress voted twice to terminate the emergency, but President Trump vetoed both bills.[93]

Importantly, the Judicial Branch does not make up for this limited Congressional oversight. U.S. persons whose property is blocked generally don't have substantial judicial recourse because of judicial deference to the political branches on foreign policy and national security questions.[94] Furthermore, because the Administrative Procedure Act (APA) governs judicial review of OFAC designations, a reviewing court must use an elevated standard of review.[95] Specifically, it "may set aside OFAC's designation only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[96] This standard of review creates an additional hurdle for designated persons seeking relief in federal court after exhausting their options in the administrative review process.[97]

E. Key IEEPA Issues

Because this Executive power to declare national emergencies and impose sanctions is broad, flexible, and subject to little Congressional or Judicial oversight, it has prompted a number of significant concerns among policymakers, scholars, and courts.[98] First, some argue that the recent use of IEEPA is inconsistent with the initial Congressional intent.[99] IEEPA was created in response to the overly broad

---

2021), https://www.brennancenter.org/our-work/research-reports/presidents-extraordinary-sanctions-powers [https://perma.cc/284M-TFG3].

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*; *see infra* Section III.B for examples; *see also* Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007) ("We acknowledge that the unclassified evidence is not overwhelming, but we reiterate that our review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential.").

[95] *See, e.g.*, Al Haramain Islamic Found. v. U.S. Dep't of the Treasury, 686 F.3d 965, 976 (9th Cir. 2012).

[96] *Id.*; Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

[97] *Supra* Section I.C.

[98] *See generally* BRENNAN CENTER REPORT, *supra* note 1.

[99] *See supra* Section I.B.

emergency powers that Presidents had been granted (and had frequently used in an excessive scope of situations) under the expanded version of TWEA.[100] Consequently, Congress drafted IEEPA with the intent of ensuring that it would be invoked rarely, and that sanctions would be imposed for relatively short periods of time.[101] Contrary to this intent, presidents have declared states of emergency under IEEPA over sixty-five times since 1977, and some of the resulting sanction regimes have lasted for decades.[102] Second, the frequency and longevity of sanction regimes prompts concerns about the ultimate efficacy of said sanctions.[103] Third, sanctions, particularly very broad ones, prompt humanitarian concerns because of their often outsized impact on vulnerable populations under the control of targeted groups, such as the Taliban.[104] Finally, as previously mentioned, sanctions can yield significant constitutional concerns when, for example, OFAC includes a U.S. person on the SDGT list and blocks all of their property.[105]

In sum, over the past few decades, sanctions have increasingly been used as a tool of foreign policy by American presidents.[106] Simultaneously, support of such actions has generally been growing in the broader foreign policy sphere in Washington, especially during the twenty-first century.[107] When these trends are viewed alongside the current system of minimal Congressional oversight and reluctant judicial intervention, it appears likely that sanctions will continue to be used more

---

[100] *Id.*

[101] CRS IEEPA REPORT, *supra* note 25, at 6 (citing U.S. Congress, House, Subcommittee on International Trade and Commerce of the Committee on International Relations, *Trading with the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in a Time of Declared Emergency*, 94th Cong., 2nd sess. (Comm. Print 1976)).

[102] Boyle, *Reining in the President's Sanction Powers*, *supra* note 78.

[103] Berger, *supra* note 61.

[104] Jacob Kurtzer, *U.S. Sanctions Squeeze Humanitarian Assistance in Afghanistan*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 29, 2021), https://www.csis.org/analysis/us-sanctions-squeeze-humanitarian-assistance-afghanistan [https://perma.cc/AN58-3XHZ]. When the Taliban (which was already listed as an SDGT) became the "de facto government of Afghanistan" in 2021, there was "legal uncertainty about whether sanctions appl[ied] to self-identified members of the Taliban or to the totality of the Afghan government." *Id.* As a result, humanitarian organizations and financial institutions (among others) were uncertain whether they could interact with the Taliban while arranging for aid or banking services to be provided to the Afghan people. *Id.* To address this uncertainty, OFAC issued two general licenses for such activities, but many organizations decided to cease operations involving Afghanistan to avoid the risk of violating sanctions, which illustrate the often-limited practical effect of general licenses intended to mitigate humanitarian ramifications. *Id.*

[105] BRENNAN CENTER REPORT, *supra* note 1, at 13. Constitutional claims have generally been brought as due process claims under the Fifth Amendment (due process) and unreasonable seizure claims under the Fourth Amendment.

[106] *Id.*

[107] Kathy Gilsinan, *A Boom Time for U.S. Sanctions*, ATL. (May 3, 2019), https://www.theatlantic.com/politics/archive/2019/05/why-united-states-uses-sanctions-so-much/588625/ [https://perma.cc/5TDB-BNA4].

regularly, and the primary limitation on the use of IEEPA to implement them seems to effectively be the President's self-restraint. Because of the risk of violating U.S. persons' due process rights, Congress should take measured steps to increase constitutional protections, primarily in the form of increased procedural safeguards during the OFAC designation and freezing process.[108]

II. DUE PROCESS RIGHTS AND VIOLATIONS

A. A Broad Look at Due Process

Under the Fifth Amendment, "no person shall . . . be deprived of life, liberty, or property, without due process of law."[109] Importantly, the Supreme Court has said that "due process is flexible and calls for such procedural protection as the particular situation demands."[110] Various decisions from the Court have interpreted this constitutionally guaranteed due process of law to encompass both procedural and substantive due process, and to require several specific protections.[111] The landmark case of *Mathews v. Eldridge* recognized that "some form of hearing is required before an individual is finally deprived of a property interest" because "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[112] Another critical component of due process is constitutionally sufficient notice.[113]

The Supreme Court in *Mathews* synthesized its prior decisions into a three-part balancing test that assists a court in determining whether the administrative procedures offered by the government entity in its deprivation process are "constitutionally sufficient" protections of due process rights.[114] The '*Mathews* Test' weighs three factors: (1) "the private interest that would be affected by the official action," (2) "the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest."[115] In *Mathews*, the Government's interest was further

---

[108] *Infra* Section III.C.

[109] U.S. CONST. amend. V.

[110] Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see also id.* ("Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.").

[111] *See, e.g.*, *id.*; Mathews v. Eldridge, 424 U.S. 319 (1976).

[112] *Mathews*, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[113] KindHearts, *supra* note 8, at 901 (defining constitutionally sufficient notice as "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action," to "afford them an opportunity to present their objections" and to "convey the required information," and explaining that "[w]hen notice is a person's due, process which is a mere gesture is not due process.") (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950)).

[114] *Mathews*, 424 U.S. 319 at 334.

[115] *Id.* at 334–35.

clarified and determined to "includ[e] the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[116] If a court finds, after using the *Mathews* balancing test, that the administrative procedures did not sufficiently protect the due process rights of the individual or entity in question, then a violation of due process will be deemed to have occurred.[117] However, finding such a violation does not automatically yield a favorable judicial decision because a court may deem the violation "harmless," for example.[118] The following section will critically examine key cases where courts used the *Mathews* Test as a crucial tool in determining what process was due to designees and deciding whether they received such process.[119]

B. Applying Due Process Jurisprudence to Sanctions

In the IEEPA context, where the Government's interest is national security, "courts generally have held that no pre-deprivation notice and hearing are necessary, due to concerns about asset flight."[120] This is a marked departure from the constitutional norm of pre-deprivation process.[121] In evaluating what qualifies as adequate post-deprivation process in IEEPA cases, several courts have held that designated persons are afforded sufficient procedural due process where they are able to, at minimum, write to OFAC after the deprivation and receive a timely response that provides them "with sufficient notice of the underlying basis for the designation."[122]

The following subsections will take a narrow approach to the issue of such due process violations by focusing on those stemming from the imposition of terrorist financing sanctions.[123] The Supreme Court has not spoken on this limited issue, but several federal courts have heard cases brought against OFAC by U.S. persons sanctioned pursuant to EO 13,224 (and its predecessors that also targeted terrorist financing) who argued that their due process rights had been violated by the designation

---

[116] *Id.* at 335.

[117] *Id.*

[118] *See, e.g.*, Al Haramain Islamic Found. Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965, 990 (9th Cir. 2012) ("Even if AHIF-Oregon had enjoyed better access to classified information and constitutionally adequate notice, we are confident that it would not have changed OFAC's ultimate designation determination."). Regardless of this conclusion, it is crucial that the court determined that OFAC's procedures violated constitutional rights. *Id.* Consequently, it does not impinge upon this Note's argument that OFAC procedures are inadequate and must be strengthened to protect due process rights of designees.

[119] For clear support of the propriety of using the *Mathews* test in the national security context specifically, see Hamdi v. Rumsfeld, 542 U.S. 507, 528–29 (2004).

[120] BRENNAN CENTER REPORT, *supra* note 1, at 13.

[121] *Global Relief Found.*, 315 F.3d at 750 (citing Gilbert v. Homar, 520 U.S. 924, 930 (1997); FDIC v. Mallen, 486 U.S. 230, 240 (1988)).

[122] *Global Relief Found.*, 315 F.3d at 750.

[123] *See* Exec. Order No. 12,334.

and deprivation process.[124] In several of these cases, the adjudicating courts determined that due process violations occurred.[125] However, even where due process violations have been found, plaintiffs have received extremely limited relief (or no relief) for various reasons, including the overwhelming importance of the government's national security interest, the "harmless" nature of the violation, or a lack of prejudice.[126] As this Note will discuss, the cumulative impact of these decisions is limited for several reasons: (1) their respective precedents are limited to the 9th Circuit, 7th Circuit, and Northern District of Ohio; and (2) they have not prompted any changes in OFAC regulations, therefore stressing the need for reform.[127]

1. A Key Case: *Al Haramain Islamic Foundation, Inc.*

In *Al Haramain Islamic Foundation, Inc. v. United States Department of the Treasury*,[128] AHIF-Oregon, an Oregon non-profit corporation, was officially designated a "specially designated terrorist" by OFAC, which was acting pursuant to Executive Order 13,224, and the corporation's assets were subsequently blocked by OFAC.[129] Prior to the designation, federal and state officials had obtained a search warrant for the entity's office related to "investigations into possible criminal violations of tax, banking, and money-laundering laws."[130] When the agents executed the search warrant, they found "photographs and other documents related to violence in Chechnya."[131] The following day, February 19, 2004, OFAC announced via press release that it had "blocked AHIF-Oregon's assets pending investigation concerning the potential designation of AHIF-Oregon under EO 13,224," but it did not include a reason for the investigation, nor did it "provide prior notice to AHIF-Oregon before blocking its assets."[132] For several months after the press release, OFAC and AHIF-Oregon exchanged a variety of documents that mostly related to

---

[124] *See, e.g.*, Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965 (9th Cir. 2012); *Global Relief Found.*, 315 F.3d 748; KindHearts, *supra* note 8.

[125] *See Al Haramain*, 686 F.3d 965; *Global Relief Found.*, 315 F.3d 748; KindHearts, *supra* note 8.

[126] *Al Haramain*, 686 F.3d 965; *Global Relief Found.*, 315 F.3d 748; KindHearts, *supra* note 8. For additional context, see Holy Land Foundation v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003); and Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728 (D.C. Cir. 2007).

[127] BRENNAN CENTER REPORT, *supra* note 1, at 14; Claire DeLelle & Nicole Erb, *Key Sanctions Issues in Civil Litigation and Arbitration*, GLOB. INVESTIGATIONS REV. (July 13, 2021), https://globalinvestigationsreview.com/guide/the-guide-sanctions/second-edition/article/key-sanctions-issues-in-civil-litigation-and-arbitration#footnote-110-backlink [https://perma.cc/TB4E-Y3EL].

[128] 686 F.3d at 973.

[129] *Id.* at 970.

[130] *Id.* at 973.

[131] *Id.*

[132] *Id.*

"AHIF-Oregon's possible connections to Chechen terrorism in Russia," including a donation from AHIF-Oregon to AHIF–Saudi Arabia.[133]

Several months later, September 9, 2004, OFAC announced its official designation of AHIF-Oregon via a second press release, which listed, among several other reasons, an allegation that "funds that were donated to [AHIF-Oregon] with the intention of supporting Chechen refugees were diverted to support mujahideen, as well as Chechen leaders affiliated with the al Qaida network."[134] The following week, AHIF-Oregon received a "Blocking Notice" from OFAC that reiterated the designation and informed AHIF-Oregon of its right to request administrative reconsideration under 31 C.F.R. § 501.807.[135] In 2005, AHIF-Oregon accordingly requested administrative reconsideration and submitted additional documents, such as "a detailed explanation concerning certain subjects, including the Chechen donation."[136] Between the submission of those documents in early 2005 and the commencement of the action in August 2007, "AHIF-Oregon repeatedly sought both an explanation for the designation and a final determination of its request for administrative reconsideration," but OFAC did not respond.[137] Because of this, the corporation brought suit in federal court and challenged its designation on both substantive and procedural grounds.[138]

During the ensuing proceedings, AHIF-Oregon made two distinct procedural due process claims by asserting that "OFAC violated its due process rights by (1) "using classified information" in its designation of AHIF-Oregon "without any disclosure of its content," and (2) "failing to provide adequate notice and a meaningful opportunity to respond."[139] In November 2007, while the lawsuit was pending, AHIF-Oregon received a letter from OFAC informing the organization about "OFAC'S provisional intent to 'redesignate them' and offering them a final chance to submit documentation."[140] AHIF-Oregon accordingly submitted further documents, and on February 6, 2008, OFAC informed AHIF-Oregon, again by letter, that it had determined that the corporation "continue[d] to meet the criteria for designation" because of the three reasons it furnished in its original letter: (1) AHIF-Oregon was "owned or controlled by" two designees who were founding members of AHIF-Oregon's board

---

[133] *Id.*

[134] *Id.*

[135] *Id.* at 974. *See* Procedures governing delisting from the Designated Nationals and Blocked Persons List, 31 C.F.R. § 501.807 (1999) ("A person may seek administrative reconsideration of his, her, or its designation . . . 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.").

[136] *Al Haramain*, 686 F.3d at 974.

[137] *Id.* The statutory administrative procedures do require that OFAC review the request and the accompanying information and "provide a written decision to the blocked person." 31 C.F.R. §§ 501.807(b), (d). However, the statute does not specify the time frame within which OFAC must take such actions. *Id.*

[138] *Al Haramain*, 686 F.3d at 970.

[139] *Id.* at 979.

[140] *Id.* at 974.

of directors; [141](2) AHIF-Oregon had "act[ed] for or on behalf of" the two aforementioned designees;[142] and (3) AHIF-Oregon "support[ed] and operat[ed] as a branch office of AHIF, an international charity that employed its branch offices to provide financial, material, and other services and support to al Qaida and other designated persons."[143] OFAC further explained its reasons for the designation in a largely redacted memorandum (issued on February 6, 2008, as well), but "the unredacted conclusions [were] the same as the ones stated in the letter" that had been previously sent to AHIF.[144]

The Court of Appeals first evaluated AHIF-Oregon's substantive challenge to its designation and concluded that "substantial evidence supports two of OFAC's three reasons for redesignating AHIF-Oregon under EO 13,224."[145] Next, the Court of Appeals addressed AHIF-Oregon's procedural due process claims by using the *Mathews* balancing test, and it ultimately determined that OFAC had violated AHIF-Oregon's due process rights.[146] In making this determination, the Court first evaluated the interests of each party and explained that "designation indefinitely renders a domestic organization financially defunct," but "the government's interest in national security cannot be understated."[147] The court acknowledged the difficulty of balancing these interests, and clarified that "[t]he Constitution does require that the government take reasonable measures to ensure basic fairness to the private party and that the government follow procedures reasonably designed to protect against erroneous deprivation of the private party's interests."[148]

In response to AHIF-Oregon's first procedural claim, the Court of Appeals disagreed with the assertion that classified information could never be used in such a process of designation and deprivation, instead stating that it had previously

---

[141] *Id.* at 971, 974. The two founding members in question were Saudi nationals Aqeel Al-Aqil and Soliman Al-Buthe. *Id.* at 971. Al-Aqil resigned from AHIF-Oregon in March 2003, but Al-Buthe remained on the board. *Id.* In June 2004 (after OFAC blocked AHIF-Oregon's assets pending investigation in February 2004), OFAC designated Al-Aqil as a SDGT. *Id.* at 973. In September 2004, when OFAC officially designated AHIF-Oregon, it also designated Al-Buthe, "even though OFAC had not advised Al-Buthe of any investigation of him." *Id.* Importantly, OFAC had not (until February 2008) indicated that the past and present associations of Al-Aqil and Al-Buthe, respectively, comprised a large portion of its reasoning for AHIF-Oregon's designation. *Id.* at 971–74.

[142] *Id.* at 974.

[143] *Id.*

[144] *Id.* at 974–75.

[145] *Id.* at 979. The two supported OFAC reasons include Al-Buthe's continued control over AHIF-Oregon and the fact that, according to OFAC, "AHIF-Oregon supported designated persons and a branch office of AHIF–Saudi Arabia." *Id.* Regarding the remaining reason, the involvement of Al-Aqil in AHIF-Oregon, the court agreed with the district court that "there is no evidence Al-Aqil was involved with AHIF-Oregon after his resignation, or at the time AHIF-Oregon was designated." *Id.*

[146] *Id.* at 980.

[147] *Id.*

[148] *Id.*

determined that "such use is 'presumptively unconstitutional' subject to the government's overcoming the presumption in 'the most extraordinary circumstances.'"[149] The Court elaborated, explaining that "the use of classified information in the fight against terrorism, during a presidentially declared 'national emergency,' qualifies as sufficiently 'extraordinary' to overcome the presumption."[150] Next, it addressed an ancillary argument of AHIF-Oregon, namely that "even if OFAC may use classified information, it must undertake some reasonable measure to mitigate the potential unfairness to AHIF-Oregon," such as offering an unclassified summary or allowing AHIF-Oregon's lawyer to obtain a security clearance and then view the classified information.[151] Here, the court agreed with AHIF-Oregon and said that, where some form of disclosure is possible, such disclosure would clearly be beneficial for both the designated entity and OFAC.[152] Ultimately, the court concluded that "OFAC's failure to pursue potential mitigation violated AHIF-Oregon's due process rights," but it cautioned that this decision was extremely limited and based on very specific facts, including the fact that OFAC could have provided additional unclassified information to AHIF-Oregon without threatening national security, but it failed to do so.[153]

Next, the court addressed AHIF-Oregon's remaining claim, namely "that OFAC violated its due process rights by failing to provide adequate notice and a meaningful opportunity to respond to OFAC's designation and redesignation determinations," specifically in the period between "the freezing of the assets in February 2004 and the redesignation determination in February 2008."[154] Between February 2004 (when OFAC blocked AHIF-Oregon's assets pending investigation) and September 2004, OFAC did not send AHIF-Oregon a statement of reasons; it merely provided a small number of unclassified documents and did not explain their relevance.[155] OFAC argued that the press release in September 2004 constituted sufficient notice, but the court disagreed for two reasons: (1) the press release only mentioned one of the three reasons for designation, and (2) the issuance of the press release "occurred seven months after [OFAC] froze AHIF-Oregon's assets."[156] Next, the court said that it would not have been impracticable for OFAC to provide the reasons for designation to AHIF-Oregon because (1) OFAC clearly had already determined them; (2) OFAC isn't inundated with such requests because "very few of the entities under investigation request a statement of reasons or are even entitled to the protections of the Due Process Clause"; and (3) OFAC had "ample time to provide AHIF-Oregon with, at a minimum, a terse and complete statement of reasons

---

[149] *Id.* at 982 (quoting Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1070 (9th Cir. 1995)).

[150] *Al Haramain*, 686 F.3d at 982.

[151] *Id.*

[152] *Id.* at 983.

[153] *Id.* at 982.

[154] *Id.* at 984–85.

[155] *Id.* at 985.

[156] *Id.* at 986.

for the investigation."[157] Finally, the court rejected OFAC's argument that the "circumstances of the investigation and the documentation that it submitted to AHIF-Oregon" were sufficient for AHIF-Oregon to be able to "guess OFAC's reasons."[158] Ultimately, the Court said that "[i]n the absence of national security concerns, due process requires OFAC to present the entity with, at minimum, a timely statement of reasons for the investigation."[159]

Even though the court determined that OFAC violated AHIF-Oregon's due process rights because it used classified information without implementing feasible mitigation measures and because it provided insufficient notice and opportunity to be heard, the Court found that the violations constituted harmless errors because "better access to classified information and constitutionally adequate notice," in this specific case, "would not have changed OFAC'S designation" because there were adequate substantive reasons for the determination.[160] Consequently, the Court "affirm[ed] the district court's dismissal of the due process claims."[161]

2. The Use of Classified Information in the Designation

According to Section 1702(c) of IEEPA, "[i]n any judicial review of a determination made under this section, if the determination was based on classified information . . . such information may be submitted to the reviewing court *ex parte* and *in camera*."[162] However, the use of classified, undisclosed information in an OFAC designation bears a significant risk of error, which can result in due process violations.[163] The severity of a possible erroneous deprivation is further accentuated by the nature of the classified evidence OFAC can rely on, such as "intelligence data and hearsay declarations."[164]

As the Ninth Circuit explained in *Al Haramain*, such a use is "presumptively unconstitutional," but it can be overcome with an "extraordinary" reason, such as

---

[157] *Id.*

[158] *Id.*

[159] *Id.* at 987. Through its analysis here, the Ninth Circuit implies that these "national security concerns" are *additional*, heightened concerns that, for example, make it impossible to disclose even an unclassified summary. *Id.*

[160] *Id.* at 990.

[161] *Id.* at 1001.

[162] IEEPA, 50 U.S.C. § 1702(c).

[163] *See* Am-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1069 (9th Cir. 1995) ("[T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error."). *See generally* Jonathan W. Ellison, *Trust the Process? Rethinking Procedural Due Process and the President's Emergency Powers in the Digital Economy*, 71 DUKE L.J. 499 (2021).

[164] Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 162 (D.C. Cir. 2003) (stating that under IEEPA, unlike other areas of the law, "it is clear that the government may decide to designate an entity based on a broad range of evidence, including intelligence data and hearsay declarations").

the "use of classified information in the fight against terrorism, during a presidentially declared 'national emergency.'"[165] The Seventh Circuit rejected a similar due process claim which asserted that Section 1702(c) of IEEPA was unconstitutional, and cited the fact that the Supreme Court has allowed *ex-parte* consideration of classified evidence under other circumstances, specifically those in which revealing the unclassified evidence would have had a detrimental impact on national security.[166]

Importantly, as demonstrated in *Al Haramain*, courts can nevertheless find that OFAC's use of classified information without offering feasible mitigation measures violates a designee's procedural due process rights.[167] Possible mitigation measures include providing an unclassified summary of the basis for a designation, or taking a "security-cleared counsel approach," which allows for counsel with the requisite security clearance to view the classified information against their clients.[168] Although these mitigation measures might be helpful in some instances, notable scholars have argued that they do not make up for the significant risk facing the sanctioned individuals and entities.[169] Consequently, these measures may be most effective as part of an approach that incorporates several layers of procedural protections of constitutional rights.

3. Sufficient Notice and Opportunity to Be Heard

U.S. persons are entitled to due process—which, at minimum, includes sufficient notice and opportunity to be heard—but the extent of process that is due depends on the circumstances.[170] Although the question of how much process is due is considered in many areas of the law,[171] it is particularly debated in the national

---

[165] Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965, 982 (9th Cir. 2012) ("In sum, we join all other courts to have addressed the issue in holding that, subject to the limitations discussed below, the government may use classified information, without disclosure, when making designation determinations.").

[166] Global Relief Found., Inc., v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002). For example, courts often consider *ex parte* information in the following circumstances: (1) in criminal cases, where information such as the identity of informants cannot be shared, (2) in "litigation under the Freedom of Information Act—where public disclosure would divulge the very information that the case is about," and (3) in cases involving information that is classified under the Foreign Intelligence Surveillance Act. *Id.* at 750.

[167] *Al Haramain*, 686 F.3d at 982–84.

[168] Ellison, *supra* note 163, at 519. *See generally* David Cole & Stephen I. Vladeck, *Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and 'Cleared Counsel' in the United States, the United Kingdom, and Canada*, *in* REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 161 (Liora Lazarus, Christopher McCrudden & Nigel Bowles eds., 2014).

[169] Ellison, *supra* note 163, at 519.

[170] *Supra* Section II.A.

[171] Roger A. Fairfax & John C. Harrison, *The Fifth Amendment Due Process Clause*,

security context, seemingly because of the widely recognized exception for emergencies that allows typical pre-deprivation hearings to be postponed until after governmental action.[172]

Like the use of classified information, the postponement of hearings increases the risk of erroneous deprivation because designees do not have the opportunity to explain the innocence of their actions (or alert OFAC to a designation mistake), but courts have often found the government's national security interest in avoiding pre-deprivation process overwhelmingly compelling.[173] For example, the government has repeatedly argued—as EO 13,224 does—that notice and a pre-deprivation hearing would have been "an opportunity that would allow any enemy to spirit assets out of the United States," and courts have largely accepted this argument.[174]

Even in the few cases in which courts have found the process provided by OFAC to be constitutionally inadequate, courts have often they have agreed that post-deprivation process is adequate given the circumstances and the aforementioned interests.[175] For example, the court in *Al Haramain* said that "[i]n the absence of national security concerns, due process requires OFAC to present the entity with, at minimum, a timely statement of reasons for the investigation," which it determined OFAC failed to do.[176]

In a similar case, *KindHearts for Charitable Humanitarian Development v. Geithner*, the U.S. District Court for the Northern District of Ohio found that OFAC "failed to afford adequate post-deprivation of due process" to KindHearts, a U.S. corporation whose assets and property were blocked pending investigation by OFAC.[177] The Court applied the *Mathews* balancing test and initially found that OFAC did not provide sufficient notice to KindHearts, which severely impaired KindHearts' ability to rebut the government's designation.[178] The judge stated that "[t]o comply with due process requirements, OFAC should, at the very least, have promptly given KindHearts the unclassified administrative record on which it relied in taking its blocking action."[179] Second, the Court applied another balancing test,

---

NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-v/clauses/633 [https://perma.cc/9KF8-GJ7W] (last visited Oct. 18, 2022).

[172] Global Relief Found., Inc., v. O'Neill, 315 F.3d 748, 750 (7th Cir. 2002) (citing Gilbert v. Homar, 520 U.S. 924, 930 (1997); FDIC v. Mallen, 486 U.S. 230, 240 (1988)).

[173] *Global Relief Found.*, 315 F.3d at 750 ("Risks of error rise when hearings are deferred, but these risks must be balanced against the potential for loss of like if assets should be put to violent use.").

[174] *Id.*; Exec. Order No. 13,224 § 10.

[175] *See, e.g.*, Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965 (2012); KindHearts, *supra* note 8, at 899.

[176] *Al Haramain*, 686 F.3d at 987.

[177] KindHearts, *supra* note 8, at 899.

[178] *Id.* at 904 ("An inability to rebut necessarily enhances, if it does not entirely ensure, the likelihood of erroneous deprivation.").

[179] *Id.* at 904. After KindHearts responded to OFAC's freeze of its assets with a request

a promptness inquiry, and determined that "OFAC ha[d] failed to provide a meaningful hearing, and to do so with sufficient promptness to moderate or avoid the consequences of delay."[180] The Court ultimately determined that KindHeart's due process rights were violated, and KindHearts "eventually reached a settlement with the government," it took over five years for the organization's assets to be unblocked.[181]

As the aforementioned cases demonstrate, some courts have signaled a clear willingness to require more procedure than OFAC currently provides when it designates and blocks a corporation's property pursuant to IEEPA, EO 13,224, and OFAC regulations.[182] This suggested additional process includes, at minimum, adequate notice (which must provide enough information for the designee to be able to prepare a defense to a designation) and an opportunity to be heard (and to receive a response) in a timely manner.[183]

C. The Impact of Designation and Deprivation on Individuals

The majority of court cases concerning due process concerns stemming from OFAC designations have been brought by corporations, but designating individuals yields equally, if not even more severe ramifications.[184] Consequently, this section will discuss the impact of designation on two U.S. persons, Muhammad Salah and Garad Jama.[185] In 1995, Muhammad Salah, a U.S. citizen and Illinois resident, was designated and placed on OFAC's SDN list pursuant to President Clinton's EO

---

for more information about the action, the organization was forced to wait an entire year for a response. Lawyers' Comm. for Civil Rights of the San Francisco Bay Area, *The OFAC List, Due Process Challenges in Designation and Delisting*, CHARITY & SECURITY 1, 2 (July 2014) [hereinafter Lawyers' Comm. for Civil Rights], https://charityandsecurity.org/sites/default/files/-The%20OFAC%20List%2C%20Due%20Process%20Challenges%20July%202014.pdf [https://perma.cc/HTT8-ZEH5].

[180] KindHearts, *supra* note 8, at 907–08.

[181] Lawyers' Comm. for Civil Rights, *supra* note 179, at 2; KindHearts, *supra* note 8, at 906 ("OFAC violated KindHearts' fundamental right to be told on what basis and for what reasons the government deprived it of all access to all its assets and shut down its operations.").

[182] *See supra* Section II.B.3.

[183] BRENNAN CENTER REPORT, *supra* note 1, at 13. Courts haven't specified an appropriate time frame, but it is presumably less than the periods of time for which AHIF-Oregon and KindHearts waited for OFAC responses.

[184] *See supra* Section II.B. For an apt description of the acuteness of the ramifications, see Eric Sandberg-Zakian, *Counterterrorism, the Constitution, and the Civil-Criminal Divide: Evaluating the Designation of U.S. Persons Under the International Emergency Economic Powers Act*, 48 HARV. J. ON LEGIS. 95, 102 (2011) ("The IEEPA designation of an American person thus amounts to total incapacitation, while the designation of an American organization generally amounts to a death sentence.").

[185] Complaint, Salah v. U.S. Dep't of the Treasury, No. 1:12-cv-07067 (N.D. Ill. Sept. 5, 2012) [hereinafter Salah Complaint], https://ccrjustice.org/home/what-wedo/our-cases/salah-v-us-department-treasury; Jake Tapper, *A post-9/11 American nightmare*, SALON (Sept. 5, 2002, 3:18 AM), https://www.salon.com/2002/09/05/jama/ [https://perma.cc/W2JS-HKSU].

12,947, which cited IEEPA as its legal basis to sanction terrorists such as Hamas.[186] Previously, because Salah had sent money to Hamas, he had been found "civilly liable for Hamas' murder of a U.S. citizen," which influenced OFAC's decision to place Salah on the SDN List when the United States sanctioned Hamas.[187] In 2008, Salah was effectively 'acquitted' when the Seventh Circuit reversed the finding of civil liability on the ground that at the time he sent the aid to Hamas, the United States had not yet prohibited doing so.[188] However, OFAC did not remove him from the SDN List until 2012, when he filed a lawsuit challenging his designation.[189] OFAC's initial designation notice (which was bereft of any "factual or legal basis for the decision") was never sent to Salah; he discovered the designation when his wife was unable to withdraw money from her bank account.[190] Once designated, Salah required approval from the Treasury Department before he could perform any economic transaction, including working at a job, buying groceries, paying rent, or seeing a doctor for cancer treatment.[191] Three years after being designated, the Treasury Department issued a limited license that allowed him to obtain a licensed bank account as long as he and his chosen bank submitted frequent reports to OFAC.[192] He then spent two years attempting to open an account at various banks, but each one refused his business because of the extensive licensing and reporting requirements.[193] In 2009, OFAC issued a second license that prohibited him from receiving any payment that "originat[ed] from a source in the United States," which included money from friends and family, and required him to record every single transaction and justify it as "basic maintenance."[194]

Salah subsequently raised a number of constitutional issues in his Complaint, including two significant due process issues: (1) "denial of substantive due process by imposing severe consequences on him for conduct that was lawful when done," and (2) "denial of procedural due process by depriving him of liberty and property without notice and opportunity to respond."[195] Salah initiated this lawsuit in September 2012, and in November 2012, OFAC announced that it was removing him from the SDN List and unblocking his assets.[196]

---

[186] Salah Complaint, *supra* note 185.
[187] Bechky, *supra* note 66, at 31.
[188] *Id.* at 30.
[189] *Id.*
[190] Salah Complaint, *supra* note 185.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] Bechky, *supra* note 66, at 31.
[196] Unblocking of One Specially Designated Terrorist Pursuant to Executive Order 12947, 77 Fed. Reg. 67733, 67733–34 (Nov. 13, 2012). OFAC removed him from the list "before Treasury's answer to the complaint was due." Lawyers' Comm. for Civil Rights, *supra* note 179, at 9.

Garad Jama's experience as a designee serves as another telling example of the dangers of the government foregoing pre-deprivation process because his designation hinged on a clear mistake made by OFAC.[197] Jama, a naturalized U.S. citizen, started a business when he emigrated from Somali, which he named "Aaran Money Wire Service, Inc."[198] Because of the business's name, when he was sanctioned by the government for allegedly being linked with al-Qaida, he "showed up first on a [published] list of [similar businesses] closed by the U.S. government in November" of 2001.[199] As a result, his story was prominently featured in the news, he was inundated with calls from network news organizations, he had his personal assets frozen (in addition to those of his business), and he was prohibited from obtaining another a job.[200] Five months later, he sued the government to release his assets and remove him from the terrorist list; four months after he filed suit—but before any judicial determination was made—the government removed his designation.[201] Jama ultimately obtained some measure of relief because his designation was lifted, but he endured a nine month period during which his reputation was impugned, he could not work, and he could not perform any transactions or utilize his personal assets.[202]

As this section has discussed, the use of the current OFAC designation system has violated a variety of constitutionally guaranteed due process rights and has led to severe ramifications for designated persons and for persons whose assets have been blocked pending investigation. This indicates a clear and pressing need for substantial procedural reform in both the terrorist financing sanctions realm and in the broader sanctions system.

III. CRITIQUES, PROPOSED REFORMS, AND RECOMMENDATIONS

A. Criticisms of the Current Sanctions Regime

Although this Note has focused on due process violations resulting from the implementation of sanctions (and has primarily discussed said issues through a terrorist financing lens), IEEPA, which underpins the current U.S. sanctions regime, has garnered an increasing amount of criticism for a range of other concerns over the past few decades.[203] As a result, a variety of reforms have been proposed by scholars, policymakers, journalists, and government officials.[204] For any proposed

---

[197] Tapper, *supra* note 185.
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*; *see* BRENNAN CENTER REPORT, *supra* note 1, at 12.
[202] Tapper, *supra* note 185.
[203] *See supra* Section I.E.
[204] For example, lawmakers from both parties (including Sen. Mike Lee, Rep. Ilhan Omar,

reform, however, it is essential to keep in mind the critical government interest at stake: national security. Sanctions are imposed under IEEPA, EO 13,224, and OFAC regulations in a wide range of situations, against a variety of individuals, entities, and organizations, and in an increasingly global landscape; this requires a president to be able to act quickly and flexibly.[205] Crucially, the breadth of IEEPA provides the president with such flexibility, but on the other hand, "the breath of the statute means it is ripe for abuse."[206] Consequently, any IEEPA reform must carefully retain the president's ability to agilely respond to national security threats, must limit the possibility of executive abuse of the authority granted under the Act, and must protect the constitutional rights of any potentially impacted U.S. persons.[207] Because this is a difficult balance to strike, "a set of carefully crafted and balanced procedural reforms" would be the most effective tool for achieving this objective without overreaching.[208] However, neither Congress nor Treasury have indicated much of a willingness to tackle concrete procedural due process reforms, even as they have discussed other reforms.[209]

B. Attempted Reform: The Treasury 2021 Sanctions Review

In October 2021, the Department of the Treasury issued a seven-page "2021 Sanctions Review" (The Report), which was the product of a monthslong review that involved discussions between Treasury, "Members of Congress and their staffs, interagency partners, the private sector, foreign governments, nongovernmental organizations, academics, and Treasury's sanctions workforce."[210] According to The Report, Treasury has designated more than 1,600 persons for terrorism-related reasons since 9/11.[211] Additionally, the overall use of sanctions (i.e., not only those implemented to target terrorist financing) has increased by 933% in the past twenty years, which reflects Treasury's mounting propensity to use sanctions as "a tool of first resort to address a range of threats to the national security, foreign policy, and economy of the United States."[212] The Report eschewed a granular approach and did

---

and Rep. Christopher Smith) have proposed reforms, each with a different focus. BRENNAN CENTER REPORT, *supra* note 1, at 19.

[205] Peter E. Harrell, *How to Reform IEEPA*, LAWFARE (Aug. 28, 2019, 11:59 AM), https://www.lawfareblog.com/how-reform-ieepa [https://perma.cc/G2Q8-EMUX].

[206] *Id.*

[207] *Id.* ("IEEPA reforms need to be carefully crafted to balance the nation's legitimate interest in being able to respond to emerging threats quickly, and in unconventional ways, against the need to prevent presidential overreach and ensure adequate checks and balances.").

[208] *Id.*

[209] *See* BRENNAN CENTER REPORT, *supra* note 1, at 19; Goitein, *supra* note 16.

[210] THE TREASURY 2021 SANCTIONS REVIEW, *supra* note 16, at 1.

[211] *Id.* at 1.

[212] *Id.* at 1.

not evaluate the various sanctions programs individually.[213] Instead, it reviewed the sanctions regime on a broader level, and it provided a list of five overarching steps to structurally "modernize" sanctions in order to improve their efficacy.[214] However, The Report failed to mention any efforts to improve safeguards for constitutional rights during the designation process.[215]

C. Procedural Solutions for Due Process

Nevertheless, as this Note has discussed, there is a pressing need for increased constitutional protections during the designation and deprivation process. Although the impacts of their decisions have been limited, several federal courts have decisively found that OFAC has deprived individuals and corporations—including U.S. persons—of typical rights to their property without constitutionally guaranteed due process.[216] Because of the risk of erroneous deprivation and its severe ramifications, OFAC's history of committing due process violations by failing to provide adequate notice, and the absence of required, pre-deprivation judicial process,[217] Treasury should amend its regulations and Congress should amend IEEPA to provide for increased procedural protections. Procedural reforms for due process should be implemented with three main objectives: (1) increasing transparency for designees, (2) promoting accountability by setting deadlines for OFAC, and (3) improving the fairness and availability of review.

1. Increasing Transparency in the Designation Process

Increasing transparency during the designation process is critical because of the concerns discussed in Section II.B. In order to properly respond to OFAC designations—which is a statutorily granted right—the designees must be informed of the basis of the designation, including the purported evidence.[218] However, OFAC's

---

[213] *Id.* at 3.

[214] *Id.* at 4. The 5 steps include: (1) "Adopting a structured policy framework that links sanctions to a clear policy objective," (2) "Incorporating multilateral coordination, where possible," (3) "Calibrating sanctions to mitigate unintended economic, political, and humanitarian impact," (4) "Ensuring sanctions are easily understood, enforceable, and adaptable," and (5) "Investing in modernizing Treasury's sanctions technology, workforce, and infrastructure." *Id.* at 4–6.

[215] Goitein, *supra* note 16. Nothing in The Report even indicates that Treasury considered this significant constitutional issue, and the fact that it purportedly did not review specific designations, or even specific sanctions programs, makes the occurrence of such consideration even less likely. *Id.*

[216] *See supra* Sections II.B–C.

[217] *See id.*

[218] *See* BRENNAN CENTER REPORT, *supra* note 1, at 13–14.

current procedures stymie designee's attempts to respond to OFAC's determinations in three ways: (1) OFAC uses classified information in the designation process without implementing sometimes-feasible mitigation measures, (2) OFAC arguably does not provide truly adequate notice, which would at minimum provide designees with the reasons for their designations, and (3) OFAC procedures allow designees only limited opportunities to be heard and to respond.[219] In many situations, designees are unaware of the basis for the designation, therefore they cannot either explain their activities that may have appeared suspicious to OFAC or discover that OFAC has designated them completely by mistake.[220] These issues have prompted several aforementioned courts to find OFAC's use of classified information, without mitigation measures (if feasible), and its issuance of bare-bones notices to be unconstitutional.[221]

These constitutional deficiencies could potentially be ameliorated with several targeted procedural solutions. First, OFAC should provide designees and persons whose assets are blocked pending investigation with "the record on which the sanctions decision was based,"[222] which should include either a redacted version of classified evidence or an unclassified summary.[223] Because OFAC's decisions often rest on classified information, it should retain the discretion to decide between these two options, but the chosen method should provide enough information for the individual or entity to be able to adequately respond.[224] If neither option is feasible for specific national security reasons, then OFAC should seek to provide designees with access to evidence through another procedure,[225] such as the security-cleared counsel approach.[226] In drafting new regulations or statutory provisions, the government can look to a number of existing procedures in the national security context "that allow access to necessary information while ensuring national security is not compromised."[227] For example, the Classified Information Protection Act (CIPA)

---

[219] *Id.*

[220] *Supra* Sections II.B–C.

[221] *Supra* Section II.B.

[222] Goitein, *supra* note 16; *see* Louise C. Slocum, *OFAC, The Department of State, and the Terrorist Designation Process: A Comparative Analysis of Agency Discretion*, 65 ADMIN. L. REV. 387, 417 (2013).

[223] Goitein, *supra* note 16.

[224] BRENNAN CENTER REPORT, *supra* note 1, at 23.

[225] Lawyers' Comm. for Civil Rights, *supra* note 179, at 16 (arguing that they should be provided "access to classified evidence under procedures established by other laws"). For suggested factors to consider while making this decision, see Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965, 984 (9th Cir. 2012) ("We expect the agency (and, if necessary, the district court) to consider, at minimum, the nature and extent of the classified information, the nature and extent of the threat to national security, and the possible avenues available to allow the designated person to respond more effectively to the charges.").

[226] *See supra* Section II.B.2.

[227] Lawyers' Comm. for Civil Rights, *supra* note 179, at 16.

provides for allowing criminal defendants access to either "classified information under protective orders" or "an unclassified summary of the information."[228] Similarly, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), "parties challenging their designation [as foreign terrorist organizations] must be granted access to unclassified information while classified information is supplied only to the court."[229]

In addition, in order to improve fairness and decrease the administrative burden on the agency, OFAC should provide more upfront guidance that can help individuals and entities avoid conduct that could prompt a blocking or designation order. For example, OFAC could "[p]rovide [more] specific criteria on what activity is proscribed that merits a designation" and could develop and make available its "evidentiary standards for determining designations."[230]

2. Promoting Accountability with OFAC Deadlines

As the law stands today, OFAC is not subject to any concrete deadlines for investigating, providing notice and a record with information about the basis of the designation, responding to requests for administrative consideration, or issuing final determinations about blocking and designation orders.[231] As a result, individuals and entities have been left in limbo for years—unable to access any of their property or interests in property—while OFAC completes investigations and considers designations.[232]

---

[228] *Id.*; Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C.A. app. 3, §§ 1–16). If the government determines that providing specific classified information to a defendant would "cause identifiable damage to the national security," then it can instead provide "a statement admitting relevant facts that the specific classified information would tend to prove" or "a summary of the specific classified information" as long as the court finds that "the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." *Id.* at §§ 6(c)(1)–(2).

[229] Lawyers' Comm. for Civil Rights, *supra* note 179, at 16; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996).

[230] Lawyers' Comm. for Civil Rights, *supra* note 179, at 25. OFAC does publish FAQs that include information about current sanctions and general licenses, further details about overarching regulations, and guidance about what to do at various steps in the administrative process. *OFAC Consolidated Frequently Asked Questions*, OFF. FOREIGN ASSET CONTROL, https://home.treasury.gov/policy-issues/financial-sanctions/frequently-asked-questions/ofac-consolidated-frequently-asked-questions [https://perma.cc/2PZV-C5WH] (last visited Oct. 18, 2022). However, because of the complexity of the sanctions framework and because the applicability and scope of some of the FAQs can be extremely unclear, the FAQs arguably do not always provide adequate guidance. *See Exxon Mobil Challenged a $2 Million OFAC Penalty—and the District Court Agreed*, ARNOLD & PORTER (Jan. 7, 2020), https://www.arnoldporter.com/en/perspectives/advisories/2020/01/exxon-challenged-a-2-million-ofac [https://perma.cc/7M9C-7G6B].

[231] Goitein, *supra* note 16.

[232] *Supra* Sections II.B and II.C.

Implementing concrete deadlines for each step of OFAC's post-blocking and post-deprivation processes would increase accountability for the agency, limit the risk of extended erroneous deprivation, and safeguard OFAC's ability to act quickly to impede terrorist financing and prevent asset flight. First, when OFAC blocks assets pending investigation (BPI), its investigation should be subject to a clear deadline—perhaps ninety days—so that OFAC cannot keep the target's assets "frozen indefinitely."[233] This is particularly important because while a person's assets are BPI, they have no cause of action for judicial recourse.[234] Second, OFAC should be required to provide contemporaneous notice of the designation or BPI, and should have to provide a record containing the basis for the order within one week.[235] Third, OFAC should acknowledge receipt of petitions for review within two weeks,[236] and should respond with its initial request for additional information from the petitioner within ninety days of receiving the petition.[237] Fourth, within ninety days of receiving the basis for the order, the petitioner should be afforded the opportunity for an in-person hearing.[238] Fifth, within ninety days of the hearing, OFAC should be required to make its final determination regarding the designation.[239] Furthermore, future regulations should "[e]stablish deadlines for responding to license requests allows the use of blocked funds for specific purposes."[240]

To facilitate OFAC's ability to meet these deadlines, future regulations should create "an online redress program in which individuals can submit delisting petitions via a website."[241] Currently, requests for removal, which initiate the removal review

---

[233] Lawyers' Comm. for Civil Rights, *supra* note 179, at 19.

[234] BRENNAN CENTER REPORT, *supra* note 1, at 14 ("When *KindHearts* sought to challenge its 'provisional and prospective final' decision, the court held it could not consider the claim because there had been no final agency action.").

[235] Goitein, *supra* note 16; BRENNAN CENTER REPORT, *supra* note 1, at 23; *see* Section III.C.1 for a proposal for the contents of this record.

[236] Per OFAC, petitions for review generally receive acknowledgements of receipt within 7 business days (for emailed petitions) or within 15 business days (for mailed petitions). Filing a Petition for Removal from an OFAC List, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list/ [https://perma.cc/ZME5-HZQJ] (last visited Oct. 18, 2022).

[237] Currently, "OFAC typically endeavors to send the first questionnaire within 90 days from the date the petition is received by OFAC." *Id.*

[238] Goitein, *supra* note 16; BRENNAN CENTER REPORT, *supra* note 1, at 23 (suggesting that this could be subject to extension if agreed to by the parties); *see infra* Section III.C.3 for an explanation of the importance of granting in-person hearings going forward.

[239] Goitein, *supra* note 16; BRENNAN CENTER REPORT, *supra* note 1, at 23.

[240] Lawyers' Comm. for Civil Rights, *supra* note 179, at 25. When an individual or entity's assets are blocked, they generally cannot pay for anything, including legal or medical services, without a specific license from OFAC. 31 C.F.R. §§ 594.506(a), 594.507.

[241] Lawyers' Comm. for Civil Rights, *supra* note 179, at 25.

process, may be submitted to OFAC via postal mail or email.[242] Creating a website could streamline this process and would be in line with Treasury's recent stated objective of "modernizing" the sanctions process.[243] Additionally, OFAC should "[d]esignate an Ombudsperson to oversee the processing of delisting requests,"[244] which could include oversight of the proposed "online redress process." Ideally, this system would simultaneously increase efficiency and fairness in the designation process.

3. Improving the Fairness and Availability of Review

Currently, individuals and entities who are sanctioned by OFAC do not have the opportunity to challenge their designations during in-person hearings, therefore they are limited to the slow exchange of documents with OFAC, which is a process completely devoid of any deadlines for the government.[245] Granting designees the opportunity to be heard in-person would significantly increase the fairness of this process and serve as an important safeguard against erroneous deprivation.[246]

The implementation of the changes suggested in Section III.B would serve the dual purposes of increasing due process protections within the administrative process and facilitating a more robust judicial review.[247] The latter effect would result from the increased requirement for OFAC to include more information about its designation in the record, as well as from the petitioner's improved opportunity to be heard, and to thus rectify any mistakes in the record.[248]

CONCLUSION

In the past two decades since 9/11, Treasury has designated over 1,600 entities and individuals in connection with terrorist financing and has blocked over "$63 million in which there exists an interest of an international terrorist organization or

---

[242] Filing a Petition for Removal from an OFAC List, *supra* note 236.

[243] THE TREASURY 2021 SANCTIONS REVIEW, *supra* note 16, at 2.

[244] Lawyers' Comm. for Civil Rights, *supra* note 179, at 25.

[245] *Supra* Section III.C.2; *see* Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965, 980 (9th Cir. 2012) ("Although an entity can seek administrative reconsideration and limited judicial relief, those remedies take considerable time, as evidenced by OFAC's long administrative delay in this case and the ordinary delays inherent in our judicial system.").

[246] *See* Lawyers' Comm. for Civil Rights, *supra* note 179, at 5 (quoting Anti-Fascist Committee v. McGrath, 341 U.S. 123, 170–72 (1951) (Frankfurter, J., concurring)) ("Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.").

[247] *See supra* Section III.C; Lawyers' Comm. for Civil Rights, *supra* note 179, at 5.

[248] *See id.*

other related designated party."[249] IEEPA, EO 13,224, and related OFAC regulations have facilitated such actions, which have been critical in impeding terrorist financing.[250] However, as these tools continue to be used, it is essential that they remain truly targeted and that they do not violate the constitutional rights of U.S. persons.[251] Striking a balance between protecting national security and safeguarding civil liberties is a difficult endeavor, but the procedural reforms proposed in this Note could move the sanctions regime closer to this desired equilibrium.

---

[249] THE TREASURY 2021 SANCTIONS REVIEW, *supra* note 16; U.S. DEP'T OF THE TREASURY OFF. OF FOREIGN ASSET CONTROL, TERRORIST ASSETS REPORT 2, 3 (2020). This amount does not include assets blocked pending investigation. *Id.* at n. 3.

[250] THE TREASURY 2021 SANCTIONS REVIEW, *supra* note 16.

[251] Lawyers' Comm. for Civil Rights, *supra* note 179, at 24 ("A review of current Treasury regulations would benefit the Department by demonstrating respect for the rule of law in acknowledging the court rulings and increase the credulity and integrity of the terrorist listing process by making it more transparent and accountable.") (quoting Letter from U.S. Congressman Steve Cohen to Treasury Department Secretary Jacob Lew (Aug. 21, 2013)).