DUE PROCESS BOUNDARIES OF U.S. ECONOMIC SANCTIONS

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Unilateral economic sanctions have become an essential tool in modern foreign policy playbooks. This development was massively emphasized following the 2022 invasion of Ukraine and is particularly prominent in the United States' international strategy. U.S. sanctions hold a unique level of influence over international affairs due to the near-hegemonic reach of the American economy combined with the high functional capabilities of the country's relevant administrative bodies, chiefly the Office of Foreign Assets Control (OFAC). However, the sheer scope of the OFAC sanctions program—which in many areas tends to lack transparency—may give rise to human rights concerns, domestic legal inconsistencies, and direct policy blowback.

This paper examines substantive and procedural safeguards in place against the imposition and maintenance of sanctions designations on both domestic and foreign entities. The paper specifically addresses the functional disparity between procedural avenues to recourse offered to sanctioned parties based on their status as U.S. persons or foreign parties. It seeks to define how domestic law, including the Fifth Amendment, offers judicially protected standards of procedure to sanctioned parties. Ultimately, the paper argues that the Constitution's due process requirements offer U.S. entities balanced procedural rights in consideration of national security interests inherent to OFAC's sanctions program. Additionally, it argues that courts are willing to consider, but have yet to functionally extend, similar procedural standards to foreign parties lacking Fifth Amendment protections as grounded in § 706(2)(D) of the Administrative Procedure Act (APA) and relevant law regulating OFAC's administrative procedures for sanctions designation removal.

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Introduction

Economic sanctions are some of the most useful and relied-upon tools in modern foreign policy. Both multilateral and unilateral sanctions are flexible, utilitarian methods of exerting influence on international actors ranging from states to businesses and specific individuals.[1] Though sanctions are generally, but not exclusively, more effective at achieving tailored policy goals when instituted multilaterally, unilateral sanctions have risen to the forefront of international political playbooks, especially in countries like the United States that wield economic weight on hegemonic scales.[2]

Several practical factors feed into the growing prominence of economic sanctions as a catch-all tool for international maneuvering. For countries warming up to their utility, unilateral sanctions are seen as a necessary means of circumventing vexing multilateral roadblocks—such as veto powers or political resistance to coalition-building—while maintaining national security interests and policing bad actors without use or threat of force.[3] Furthermore, overly generalized sanctions have historically yielded adverse, unintended effects on large swathes of innocent and often vulnerable populations, sometimes resulting in serious blowback on the sanctioning state.[4] Crafting and maintaining finely targeted sanctions based on an entity-level designation system, which mitigates this risk, demands a tailored, technocratic approach and large-scale resource expenditure.[5] Given that state-level administrative bodies, as opposed to multilateral organizations, are most naturally equipped to

1. David S. Cohen & Zachary K. Goldman, *Like It or Not, Unilateral Sanctions Are Here To Stay*, 113 Am. J. Int'l L. Unbound 146, 146 (2019); Jonathan Masters, *What Are Economic Sanctions?*, Council on Foreign Rels. (Aug. 12, 2019), https://www.cfr.org/backgrounder/what-are-economic-sanctions#chapter-title-0-5 [https://perma.cc/4NXH-YHFD].

2. *Id.*

3. 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/6NAE-REQA]; Cohen & Goldman, *supra* note 1, at 146.

4. Unilateral sanctions risk economic fallout on innocent populations both at home and abroad. Richard N. Haass, *Economic Sanctions: Too Much of a Bad Thing*, Brookings (June 1, 1998), https://www.brookings.edu/articles/economic-sanctions-too-much-of-a-bad-thing/ [https://perma.cc/X9QS-CVEQ]. Unilateral sanctions also entail disproportionately long-lasting and severe economic impacts on innocent populations in developing countries. *See* Aidan Cover, *Sanctions and Consequences: Third-State Impacts and the Development of International Law in the Shadow of Unilateral Sanctions on Russia*, 100 U. of Detroit Mercy L. Rev. 441, 446–49 (2023).

5. The Clinton administration provided proof of concept for entity-based targeted sanctions in 1995 with its narcotics trafficking program. Though the U.S. likely would have been unable to implement such a program, which was considered both novel and

meet these demands, unilateral sanctions are argued to maximize the impact of and minimize fallout from implemented sanctions.[6]

Unilateral sanctions are particularly attractive to American policymakers because they channel the asymmetrical economic influence of the United States.[7] The unique status of sanctions in the U.S. policy arsenal is comparatively apparent; the Department of Treasury's Office of Foreign Assets Control (OFAC) maintains more sanctions designations than the EU, U.K., and United Nations combined.[8] The U.S. sanctions program far surpasses the size of China's upstart program as administered by its Ministry of Foreign Affairs and is second in size only to the Russian program, which mainly targets domestic parties allegedly connected to violent extremism rather than foreign entities.[9] Therefore, not only does the U.S.'s unilateral regime far outstrip its peers in terms of comprehensiveness, it also outpaces them in terms of international impact.[10]

The growing global reliance on unilaterally administered sanctions became further exaggerated in response to the 2022 Russian invasion of Ukraine; a coalition of states implemented coordinated, comprehensive sanctions to punish, alienate, and undermine the domestic security and political interests of the Russian regime.[11] According to experts, as long as states like the U.S. retain outsized economic leverage, this conflict

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niche, if it had been required to garner multilateral support. *See* Cohen & Goldman, *supra* note 1, at 148–49.

6. *Id*. at 146, 148; Cover, *supra* note 4, at 450.

7. Cohen & Goldman, *supra* note 1, at 146, 148; Cover, *supra* note 4, at 443.

8. C4ADS, Analytics, SANCTIONS EXPLORER, https://sanctionsexplorer.org/analytics [https://perma.cc/GMX9-JE25] (last visited Dec. 21, 2022).

9. In 2021, the U.S. maintained fewer sanctions total than Russia, and that trend seems to continue into 2022 even after the invasion of Ukraine. However, Russia primarily administers economic sanctions against domestic entities as opposed to foreign individuals and states, which are the nearly exclusive focus of U.S programs. *Compare* Charles Lichfield et al., *Global Sanctions Dashboard: Sanctioning Soars Across the Board*, ATL. COUNCIL (Sept. 8, 2022), https://www.atlanticcouncil.org/blogs/econographics/global-sanctions-dashboard-sanctioning-soars-across-the-board/ [https://perma.cc/DRF5-5JWG], *with* Michael Albanese & Castellum.AI, *Global Sanctions Dashboard: January*, ATL. COUNCIL (Feb. 12, 2021), https://www.atlanticcouncil.org/blogs/econographics/global-sanctions-dashboard/ [https://perma.cc/ZAK8-TH5B].

10. Albanese & Castellum.AI, *supra* note 9.

11. *No Safe Haven: Launching the US-Europe Coalition on Russia Sanctions*, COMM'N ON SEC. & COOP. IN EUR. (Dec. 13, 2022), https://www.csce.gov/international-impact/events/no-safe-haven-launching-us-europe-coalition-russia-sanctions [https://perma.cc/ZYS2-2WBH]; *Fact Sheet: Joined by Allies and Partners, the United States Imposes Devastating Costs on Russia*, WHITE HOUSE (Feb. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/24/fact-sheet-joined-by-allies-and-partners-the-united-states-imposes-devastating-costs-on-russia/ [https://perma.cc/7EL6-ZH7N]; *see also* REBECCA M. NELSON, CONG. RSCH. SERV., IF12092, RUSSIA'S WAR ON UKRAINE: THE ECONOMIC IMPACT OF SANCTIONS 1 (2022).

and other acute sources of international turmoil including the U.S.-China trade rivalry[12] will motivate further proliferation of unilateral economic sanctions in years to come.[13] With the reach of economically damaging sanctions growing ever-wider, it is imperative that their legal boundaries be explored, understood, and enforced.

Nowhere is this task more important than in the U.S., which imposes sanctions that leverage the near-hegemonic influence of its economy. Furthermore, when comparing the frequency of sanctions removal between some of the biggest international players, the U.S. proves more hesitant than other states and international organizations to remove sanctions designations once implemented.[14] This is an alarming trend, especially considering the comparative length of the designation lists OFAC maintains.[15] The magnitude and unilateral nature of OFAC's sanctions program are not, on their own, dispositive of whether the program is a threat to the wellbeing of the international community.[16] However, its general lack of transparency and consistency compared against sanctions programs of allied nations, combined with past inconsistencies with international law, give rise to concerns as to whether the regime may violate human rights in certain instances by applying sanctions arbitrarily and without genuine recourse.[17]

Though OFAC is bound by administrative procedures requiring it to review designations upon request by sanctioned parties, it exercises broad levels of discretion throughout this process.[18] In addition, the procedural nature of present legal checks on the U.S.'s sanctions authority creates a unique barrier to recourse for foreign parties. In the last few decades, due process claims grounded in the Fifth Amendment

12. *See generally US-China Relations in the Biden Era: A Timeline*, China Briefing (Dec. 16, 2022) https://www.china-briefing.com/news/us-china-relations-in-the-biden-era-a-timeline/ [https://perma.cc/JD93-UVC8].

13. Charles Lichfield et al., *Global Sanctions Dashboard: What's Coming in 2023?,* Atl. Council (Nov. 17, 2022), https://www.atlanticcouncil.org/blogs/econographics/global-sanctions-dashboard-whats-coming-in-2023/ [https://perma.cc/N77F-YG4X]; *see also* Cohen & Goldman, *supra* note 1, at 148, 150–51.

14. *See* Julia Friedlander et al., *Global Sanctions Dashboard: 5th Edition*, Atl. Council (June 9, 2021), https://www.atlanticcouncil.org/blogs/econographics/global-sanctions-dashboard-may/ [https://perma.cc/E59Z-XSKE].

15. *See* Albanese & Castellum.AI, *supra* note 9; C4ADS, *supra* note 8 (tracking new OFAC designations, modifications, and delistings as they are published).

16. Peter Piatetsky & Julian Vasilkoski, Atl. Council, When Sanctions Violate Human Rights 7 (June 2021), https://www.atlanticcouncil.org/wp-content/uploads/2021/06/GeoEcon-Sanctions-report-v4.pdf [https://perma.cc/KW8Y-MWCS].

17. *Id.* at 7–8, 11.

18. *Id.* at 11. *See generally* Christopher A. Casey et al., Cong. Rsch. Serv., R45618, The International Emergency Economic Powers Act: Origins, Evolution, and Use (2020).

have proven a valuable inroad in challenging sanctions designations for U.S. companies, citizens, and residents.[19] However, without a sufficient connection to the U.S., foreign parties cannot avail themselves of constitutional due process rights.[20] Thus, the unparalleled international scope of U.S. sanctions necessarily raises the question of whether current substantive and procedural safeguards sufficiently protect against mistaken or unjustified maintenance of economic sanctions imposed on foreign parties, which constitute the overwhelming majority of OFAC's sanctions designation lists.[21]

This Note endeavors to find a solution to the domestic jurisprudential lacuna surrounding challenges to OFAC sanctions made by foreign entities. First, it assesses the role that economic sanctions play in modern U.S. foreign policy and studies sanctions data to illustrate the ethical, legal, and functional implications sanctions overreach may have on key facets of the international system. Second, it explores the legal authorities and organizational structure behind the U.S.'s economic sanctions initiatives to build a foundation upon which to analyze existing legal and administrative options for recourse to and/or removal of sanctions designations. Third, it assesses the boundaries of current procedural requirements as required by law and as interpreted in jurisprudence.

This Note makes two principal claims. First, the Constitution's due process requirements, although less rigorous in the context of U.S. sanctions programs than in run-of-the-mill administrative law, are ultimately sufficient for courts to review and balance Fifth Amendment guarantees in consideration of important national security interests. Second, although procedural protections for foreign entities without access to constitutional due process rights are held to much more nebulous standards than those of their Fifth Amendment-grounded counterparts, courts have indicated a willingness to consider whether similar procedural standards are required by law pursuant to Administrative Procedure Act (APA) section 706 review.

I.
THE U.S. SANCTIONS REGIME

A. Economic Sanctions: The Swiss Army Knife of Foreign Policy

Economic sanctions are coercive measures imposed by governments or international organizations to cut specific individuals and

19. See cases cited under *infra* note 76 and accompanying text.

20. *See* Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1070 (9th Cir. 1995).

21. *Infra* notes 75–77 and accompanying text.

entities off from domestic markets and financial resources.[22] They are flexible tools in that they can address both acute crises and long-term goals across many foreign policy interests.[23] Sanctions have evolved over time to target dangerous industries and individual actors with precision while minimizing negative, unwarranted impacts on the international economy and vulnerable innocents whenever feasible.[24]

Sanctions can sever targeted parties' access to financial assets and restrict their ability to transact with or through businesses of the sanctioning state.[25] These functions are intended to suppress sanctioned parties' political capital in dealing with other international actors and limit their ability to take actions that interfere with foreign policy, national security, and economic objectives.[26] Alternatively, or perhaps cotemporally, sanctions may be designed to name and shame actors into compliance with international norms rather than prevent actions by cutting off access to required resources.[27] On a much broader scale, even narrowly-tailored sanctions like OFAC's designation system[28] are meant to universally disincentivize certain behavior on the international stage by setting an example for other actors that may threaten foreign policy objectives down the road.[29] Arms and drug trafficking, human rights

22. Masters, *supra* note 1.

23. *See* Cohen & Goldman, *supra* note 1, at 146–47, 151.

24. *See id.* at 148 (the Clinton narcotics trafficking sanctions are one of the earliest examples of unilateral, "targeted" sanctions that impose economic restrictions on specific individuals and entities rather than imposing jurisdiction-wide effects). *See also* Cover, *supra* note 4, at 447–48, 451 (discussing the issues of overcompliance, caused by businesses fearing the complexity and severity of sanctions regimes, and the inadequacies of licenses and "comfort letters").

25. *See* Masters, *supra* note 1. *See also* CASEY ET AL., *supra* note 18, at 18–19 (describing the Carter administration's Iran sanctions regime, which blocked all property interests held by the Iranian government; the transfer of all goods, money, or credit to Iran by anyone under U.S. jurisdiction; and all imports from Iran to the U.S.).

26. *See* Masters, *supra* note 1; Cohen & Goldman, *supra* note 1, at 146–47. *See also* Exec. Order No. 13,581, 76 Fed. Reg. 44757 (July 4, 2011) (describing sanctions for transnational criminal organizations that "constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States").

27. Masters, *supra* note 1; Cohen & Goldman, *supra* note 1, at 148; Haass, *supra* note 4.

28. Masters, *supra* note 1; OFF. OF FOREIGN ASSETS CONTROL (OFAC), *Specially Designated Nationals List – Data Formats & Data Schemas*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-data-formats-data-schemas [https://perma.cc/Y7K8-K4SC] (last visited Dec. 20, 2022).

29. *See* Masters, *supra* note 1 (describing sanctions as used for the general purpose of deterring violations of international norms); Haass, *supra* note 4.

violations, armed conflict, and diplomatic issues are often policed in part by means of sanctions regimes both multilateral and unilateral.[30]

1. The Role of Sanctions in U.S. Policy

In the U.S. context, sanctions can include comprehensive trade embargoes, restrictions on certain exports or imports, denial of foreign financial aid, blocking of assets within U.S. jurisdiction, and the prohibition of transactions involving U.S. citizens, businesses, or property thereof.[31] However, the paradigmatic application of unilateral U.S. economic sanctions concerns the comprehensive "blacklisting" of individuals or organizations, thereby blocking assets and prohibiting transactions with entities under U.S. jurisdiction.

B. Administrative Structure of U.S. Economic Sanctions

1. Statutory Sources of Authority

a) Trading with the Enemy Act (TWEA)

The Trading with the Enemy Act (TWEA) of 1917 originally granted the executive branch sweeping power to regulate international commerce during times of war.[32] Though this original act has been mostly repealed, its basic structure—making sanctions powers temporally contingent on an emergency in international affairs—remains the central model for today's legal authority for U.S. sanctions.[33] As part of a general political push to rein in executive discretion after the Vietnam War, the TWEA was amended by the National Emergencies Act (NEA) of 1976 and the International Emergency Economic Powers Act (IEEPA) of 1977.[34]

The amendments terminated all ongoing emergencies declared pursuant to the TWEA (except for those invoking section 5(b)) and put in place procedural safeguards regarding the declaration of new empowering states of emergency.[35] The TWEA regime was criticized for its lack

30. Masters, *supra* note 1; Cohen & Goldman, *supra* note 1, at 148. *See also* Haass, *supra* note 4.

31. Masters, *supra* note 1. Note that export controls are generally excluded from discussions of economic sanctions, but sanctions themselves can still limit exports and imports. *C.f.* Exec. Order No. 14,068, 87 Fed. Reg. 14381 (Mar. 11, 2022) (prohibiting certain exports to Russia); Exec. Order No. 12,211, 45 Fed. Reg. 26685 (Apr. 17, 1980) (prohibiting imports into the U.S. from Iran).

32. CASEY ET AL., *supra* note 18, at 3.

33. *Id.* at Summary.

34. *Id.* at 6–10. *See also* National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 § 101; International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 § 101(b).

35. CASEY ET AL., *supra* note 18, at 8.

of nuance and overly broad grant of presidential authority.[36] Though the IEEPA and NEA have been an improvement upon these issues, critics still cite these critiques as problems with the current system.[37]

The TWEA survives today insofar as emergencies declared under section 5(b) were grandfathered into the IEEPA-NEA regime. At the time of writing, Cuba is the only country that remains subject to TWEA sanctions.[38] Though North Korea was removed from the provisions of the TWEA in 2008, it remains sanctioned under IEEPA authority.[39] In addition, the TWEA would, theoretically, provide authority for the regulation of trade in the event of any future declaration of war by the United States.

b) The NEA-IEEPA Framework

The IEEPA and NEA work in tandem, acting as amendments to the previous TWEA system of authority. The NEA places three checks on the executive's authority to declare national emergencies pursuant to the Act.[40] First, it requires the President to immediately transmit to Congress a notification of the declaration of any national emergency.[41]

36. *Id.* at 7–8 (these congressional criticisms are documented in a 1977 House of Representatives report on a proposed bill to revise the TWEA).

37. Though the IEEPA is more commonly cited as a source of criticism, its authority is predicated on the declaration of a national emergency under the NEA, which also lacks firm limitations. *See* Elizabeth Goitein & Andrew Boyle, *Limiting This Governmental Emergency Power Could Curb Presidential Overreach*, BRENNAN CTR. FOR JUST. (Mar. 5, 2020) https://www.brennancenter.org/our-work/analysis-opinion/limiting-governmental-emergency-power-could-curb-presidential-overreach [https://perma.cc/6JFJ-N5MY]; Andrew Boyle, *Checking the President's Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers Act*, BRENNAN CTR. FOR JUST. (June 10, 2021) https://www.brennancenter.org/our-work/policy-solutions/checking-presidents-sanctions-powers [https://perma.cc/2QZ6-2VEJ]. The NEA lacks clear temporal and geographic limits, which has allowed some emergencies to encompass a global scope and others to persist quasi-permanently. For instance, the very first emergency declared under the NEA by the Carter administration has been renewed by successive administrations. *See also* CASEY ET AL., *supra* note 18, at 18–19. That emergency persists as of this writing. *Notice on the Continuation of the National Emergency With Respect to Iran*, WHITE HOUSE (Nov. 8, 2022).

38. STUART DAVIS & IMMANUEL NESS, SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY 132 (2022); OFAC, *Cuba Sanctions*, U.S. DEP'T OF TREASURY, https://ofac.treasury.gov/sanctions-programs-and-country-information/cuba-sanctions [https://perma.cc/R3JH-5AUX] (last visited Oct. 12, 2023).

39. Proclamation No. 8271, 73 Fed. Reg. 36785 (June 26, 2008). OFAC, *North Korea Sanctions Program,* U.S DEP'T OF TREASURY (Nov. 2, 2016), https://ofac.treasury.gov/sanctions-programs-and-country-information/north-korea-sanctions [https://perma.cc/T3P8-7QGH] (last visited Oct. 12, 2023).

40. CASEY ET AL., *supra* note 18, at 8.

41. 50 U.S.C § 1621(a).

Second, it mandates a biannual Congressional review to consider a vote on whether each ongoing emergency shall be terminated by the legislature.[42] Finally, upon review, it provides Congress with the authority required to terminate any national emergency via joint resolution.[43]

The IEEPA can be invoked alongside the NEA in declaring a national emergency, and it provides the operating regulatory authority for modern U.S. sanctions.[44] In addition to the above procedural checks instituted by the NEA, the IEEPA carries additional congressional reporting requirements. This includes a six-month interval at which the President must report on any actions taken under the act's authority. In addition, if notice stating the continuance of the underlying emergency is not both transmitted to Congress and published in the Federal Register at each of these biannual intervals, the emergency will automatically be terminated.[45] This NEA-IEEPA framework is the vessel of legal authority that ultimately empowers executive direction of administrative agencies in creating, implementing, and maintaining unilateral economic sanctions.

2. Administrative Life Cycle of Economic Sanctions

a) Executive Order

The sanctioning process typically begins with consultations among administration and agency representatives within the National Security Council that culminate in the issuance of an empowering executive order (EO) declaring a national emergency pursuant to the NEA and IEEPA and outlining directives for agency action in creating a new sanctions program.[46] This provides policy-based guiderails for the actual implementation of sanctions measures. For instance, EO 14046 established the Ethiopia-Related Sanctions Program.[47] An EO can be broken up into three main action items. First, it institutes a national emergency under the NEA.[48] Second, it explains the general purpose, in terms of international policy goals, of the desired sanctions.[49] Finally, it orders the Secretary of the Treasury to institute a sanctions program based on several guidelines, including what kinds of entities to target under the program.[50]

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42. 50 U.S.C § 1622(b).
43. 50 U.S.C § 1622(c).
44. CASEY ET AL., *supra* note 18, at Summary, 10–11.
45. *Id.*
46. *See* O'Toole & Sultoon, *supra* note 3.
47. Exec. Order No. 14,046, 86 Fed. Reg. 52389 (Sept. 21, 2021).
48. *Id.* at ¶ 2.
49. *Id.* at ¶ 3.
50. *Id.* at §§ 1–12.

b) Congressional Action

Congress can also play a limited role in defining when and how to apply sanctions. It can enact legislation to authorize (or potentially require) the President to direct the administration to address a specific foreign policy, national security, or economic concern by means of sanctions.[51] Legislation can also be used to direct adjustments or expansions of existing sanctions efforts.[52] Congressional influence on sanctions programs is folded into certain programs alongside executive orders from which the programs originate; such is the case with the Global Magnitsky Sanctions (GLOMAG) program targeting human rights abusers.[53]

However, even if a given sanctions program is instigated by a congressional enactment of authority, its implementation is still designed to take the path of least resistance. In practice, this means relying on the proven national emergency and international emergency frameworks as laid out below that culminate in implementation and maintenance by OFAC.[54] The GLOMAG program illustrates this point in action. A Trump administration executive order, EO 13818, provides directions for the implementation process pursuant to and colored by the authority granted to the administration under the 2016 Global Magnitsky Act.[55] In the executive order, the Act is cited alongside the NEA and IEEPA as a parallel grant of legal authority to implement the relevant sanctions program designating international human rights abusers.[56]

c) Roles of Other Administrative Agencies

Though OFAC manages sanctions once in place, other agencies with necessary expertise and authorities play vital, upstream roles in design of the program, implementation oversight, and relevant licensing

51. Masters, *supra* note 1.

52. OFAC's Counter Narcotics Trafficking Sanctions traces its legal authority from both executive orders and later-in-time legislation that affects the program's direction. OFAC, U.S. Dep't of Treasury, Narcotics Sanctions Program (July 18, 2014) https://ofac.treasury.gov/media/6776/download?inline [https://perma.cc/JH5Y-DDJR].

53. Exec. Order No. 13,818, 82 Fed. Reg. 60839 (Dec. 20, 2017) (citing the Global Magnitsky Human Rights Accountability Act, which outlines Congress's vision for the GLOMAG sanctions regime that was ultimately implemented by the President through this executive order (*see* The Global Magnitsky Human Rights Accountability Act of 2016, Pub. L. No. 114-328, 130 Stat. 2000)).

54. Dianne E. Rennack & Rebecca M. Nelson, Cong. Rsch. Serv., IF11730, Economic Sanctions: Overview for the 117th Congress (2021).

55. Exec. Order No. 13,818, 82 Fed. Reg. 60839 (Dec. 20, 2017); The Global Magnitsky Human Rights Accountability Act of 2016, Pub. L. No. 114-328, 130 Stat. 2000.

56. Exec. Order No. 13,818, 82 Fed. Reg. 60839 (Dec. 20, 2017).

and listing procedures.[57] For instance, the Secretary of State retains control over designations of foreign terrorist organizations and state sponsors of terrorism, decisions that carry both broader diplomatic impacts and direct sanctioning effects under current OFAC regimes.[58] Particularly when national security is concerned, other agencies involved in defense and intelligence often play a role in investigations, monitoring, and list additions and removals.[59] For example, EO 13848, implementing the Foreign Interference in a United States Election Sanctions (Elections Interference) program, calls on the Director of National Intelligence and other relevant executive agencies to assess and report on foreign entities that should be targeted under the new program for the purpose of informing official OFAC designations.[60]

d) OFAC Listing and Enforcement

OFAC maintains and enforces U.S. economic sanctions. Beyond administration of comprehensive, country-based sanctions regimes, OFAC maintains a blacklist of individuals, vessels, businesses, and organizations.[61] These entities are collectively known as specially designated nationals, or SDNs. The assets of SDNs are blocked, and U.S. residents and businesses are generally prohibited from doing business with them. Other lists, collectively referred to as non-SDN lists, are also maintained by OFAC.[62] Entities designated by OFAC on non-SDN lists are subject to sanctions on a spectrum on intensities. A non-SDN designation often earns sanctions that fall short of full asset blocking on par with SDNs.

e) Delisting Opportunities

There are two ways for a sanctioned entity to get delisted if OFAC does not do so of its own volition. One can file a petition for removal from OFAC's SDN or non-SDN lists, which triggers an administrative

57. *See* O'Toole & Sultoon, *supra* note 3; Masters, *supra* note 1.

58. Masters, *supra* note 1.

59. OFAC, *Filing a Petition for Removal from an OFAC List*, U.S. DEP'T OF TREASURY https://ofac.treasury.gov/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list [https://perma.cc/V3DP-EWVT] (last visited Dec. 20, 2022).

60. Exec. Order No. 13,848, 83 Fed. Reg. 46843 (Sep. 12, 2018).

61. Masters, *supra* note 1; OFAC, *Specially Designated Nationals List – Data Formats & Data Schemas*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-data-formats-data-schemas [https://perma.cc/Y7K8-K4SC] (last visited Dec. 20, 2022).

62. OFAC, *Consolidated Sanctions List (Non-SDN Lists),* U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/consolidated-sanctions-list-non-sdn-lists [https://perma.cc/63YW-W3BK] (last visited Dec. 20, 2022).

review of a past designation.[63] If that fails, the sanctioned entity could seek injunctive relief from an Article III court.[64] If the claim succeeds, the court could compel OFAC to delist the winning party or set aside the original agency action designating the relevant party under a sanctions program. The issue of designation removal could be brought into court either by claiming OFAC violated a designee's Fifth Amendment due process rights or by seeking judicial review of OFAC's decision per the APA.

Though decisions made by OFAC regarding entity designation are subject to judicial review, decision-making in the administration of IEEPA or Congressional sanctions programs often necessitates reliance on classified information.[65] The use of classified information in administrative determinations is governed by 50 U.S.C. § 1702(c), which permits submission of such information to the reviewing court ex parte and in camera.[66] This serves as a caveat to otherwise constitutionally-required due process (and any process otherwise legally required), limiting the extent of available notice and therefore parties' abilities to advocate for themselves during both administrative and judicial review of an OFAC designation.

C. Power Asymmetry in OFAC's Sanctions Administration

1. The Information Disparity Dilemma

Judicial review of administrative actions undertaken on national security grounds is often profoundly affected by the issue of asymmetrical access to information. Decisions regarding international economic sanctions designations are often made based at least partially on classified information that agencies are under no obligation to fully disclose.[67]

Courts only require the government to mitigate the information disparity dilemma raised by the use of classified information on case-by-case bases to protect constitutional due process rights as required

63. OFAC, *supra* note 59.

64. *See, e.g.*, 5 U.S.C. § 706(2); Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 976 (9th Cir. 2012) (considering the option of setting aside an agency action on the grounds that it was arbitrary and capricious).

65. CASEY ET AL., *supra* note 18, at 37–39 (providing an overview of cases that consider the effects of classified information on due process rights in suits contesting sanctions designation procedures); *see also* Masters, *supra* note 1 (discussing the involvement of national security interests and the intelligence community in the sanctions designation and enforcement process).

66. 50 U.S.C. § 1702(c) (2001).

67. Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003) (*Holy Land II*) (rejecting plaintiff's argument that they are entitled to a disclosure of the classified evidence to be presented *ex parte* and *in camera* to the reviewing court).

under a situational application of the *Mathews v. Eldridge* balancing test.[68] The test considers three factors: the weight of the private interest affected by the contested government action, the risk of erroneous deprivation of that interest and mitigating value additional procedural safeguards would provide, and the weight of the government's interest that would be affected by additional procedures. OFAC sanctions designations result in the blacklisting of entities from the U.S. economy, and thus implicate a very serious private interest. However, because national security is such an important government interest, the value of additional procedural safeguards are often far outweighed by the sensitivity of relevant classified information. Moreover, judicial efforts to balance constitutional due process rights, or procedural standards otherwise required by law, are steeped in norms of significant deference to the executive and individual agency discretion.

On this matter, the IEEPA expressly grants OFAC authority to rely on classified information and to make said information available "to the reviewing court *ex parte* and *in camera*."[69] In these hearings, a court meets privately with only one party in a given case to review relevant classified information without the risk of civilian plaintiffs accessing sensitive evidence.[70] Under these circumstances, the court would meet directly with OFAC but would not allow representation of a plaintiff seeking relief. Generally speaking, ex parte hearings are considered to detract from typical notions of due process,[71] but in the circumstances addressed by the above measure of the IEEPA, courts understand these hearings to be necessary caveats to the baseline standard of constitutional due process.

Though OFAC shares some information with removal applicants and plaintiffs,[72] it is under no obligation to provide plaintiffs with any of the classified information it may present to a reviewing court in hearings at which plaintiffs are not necessarily present or represented. Courts only require that OFAC "expeditiously" declassify and/or summarize classified information necessary to inform a designee of the

68. *Al Haramain Islamic Found.*, 686 F.3d at 979 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

69. 50 U.S.C. § 1702(c).

70. *Ex parte proceeding*, BLACK'S LAW DICTIONARY (11th ed. 2019); *In camera proceeding*, BLACK'S LAW DICTIONARY (11th ed. 2019).

71. *See* United States v. Rosen, 447 F. Supp. 2d 538, 545 (E.D. Va. 2006) (stating that hearings in camera and ex parte are "unaided by the adversarial process"). *See also* H. COMMITTEE ON ETHICS, *Off-the-Record Ex Parte Communications*, https://ethics.house.gov/casework/record-ex-parte-communications [https://perma.cc/9E7G-TRHD] (last visited Dec. 17, 2022).

72. PIATETSKY & VASILKOSKI, *supra* note 16, at 11–13.

agency's reasoning on a case-by-case basis in light of any national security interests in play.[73] This leaves both citizens and foreign plaintiffs "stumbl[ing] towards a moving target,"[74] as they are comparatively less equipped to argue their case in consideration of all relevant facts and cannot respond to evidence as it is presented to a reviewing court. Functionally, this provides parties seeking recourse against harms imposed by national security measures with fewer procedural safeguards.[75]

However, a reviewing court may still find, on a case-by-case basis, that OFAC's refusal to share information or sufficiently communicate with a sanctioned party violates Fifth Amendment due process rights or legally required process as framed under the APA.[76] For instance, in light of balanced due process requirements, despite OFAC's ability to rely on classified information in its decision-making, it is still required to provide an adequate statement of reasons for blocking assets in a timely manner.[77] Sufficient notice pursuant to the Fifth Amendment is not met even if a plaintiff correctly infers the reasons for which it has been listed by OFAC; the agency itself must provide some form of written reasoning.[78] Per *KindHearts I*, "[c]onstitutionally sufficient notice should give the party an understanding of the allegations against it so that it has the opportunity to make a meaningful response."[79] However, courts may still find lower standards for constitutional notice on an *ad hoc* basis in light of a *Mathews* balancing test that considers highly-prioritized national security interests.[80]

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73. *Al Haramain Islamic Found.*, 686 F.3d at 984 (quoting KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 710 F.Supp.2d 637, 657–60 (2010) (*KindHearts II*)); 50 U.S.C. § 1702(c).

74. Zevallos v. Obama, 793 F.3d 106, 118 (D.C. Cir. 2015).

75. *See, e.g.,* Bazzi v. Gacki, 468 F. Supp. 3d 70, 78–79 (D.D.C. 2020) (explaining that when government interests are high, as they are when the protection of classified information is implicated, the due process protections required are necessarily diminished under the balancing standard) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

76. *Compare Bazzi*, 468 F. Supp. 3d at 82 (stating "[plaintiff] may have a viable claim under the APA to enforce a statute or regulation that requires notice," but that such a claim was not viable in the case at bar because the plaintiff had failed to identify a statutory or regulatory obligation to provide the requested process), *with* Rakhimov v. Gacki, No. CV 19-2554 (JEB), 2020 WL 1911561, at *6–7 (D.D.C. Apr. 20, 2020) (acknowledging that, as Rakhimov alleges, OFAC may be obliged to provide a certain level of reasoning behind the challenged designation, but that in the case at bar, the plaintiff was "provided with sufficient information regarding the 'basis' for his designation such that he may meaningfully participate in the reconsideration process").

77. *Al Haramain Islamic Found.*, 686 F.3d at 986.

78. *Id.*

79. *KindHearts I*, 647 F. Supp. 2d at 901.

80. *Bazzi*, 468 F. Supp. 3d at 79.

2. Homefield Advantage: OFAC Sanctions

As established, OFAC's sanctions programs serve primarily to impose international sanctions on foreign entities. Notably, sanctions jurisprudence tends to focus on U.S. parties and constitutional due process claims to a disproportionate extent considering their underwhelming representation on OFAC's designation lists.[81] Of course, there may be functional reasons influencing these representational discrepancies. For example, domestic parties have easier access to U.S. courts and OFAC itself and are usually better equipped with the resources required to navigate them. However, this trend is particularly concerning in light of the actual makeup of OFAC sanctions lists and the rates at which designees achieve removal. The following empirical observations illustrate the issue of representational discrepancy between U.S. and foreign entities on OFAC's sanctions designations lists. They were reached through statistical analysis of OFAC's publicly available records as compiled and provided by the Center for Advanced Defense Studies (C4ADS).[82]

Of the over 20,000 entities listed since 1994,[83] only 158 total entities[84] have been registered in or are connected to physical addresses

81. *Compare Al Haramain Islamic Found.*, 686 F.3d at 970 (dealing with an Oregon-based organization), *and Holy Land II*, 333 F.3d 156, 160 (D.C. Cir. 2003) (dealing with another U.S.-based organization), *with* Fulmen Co. v. OFAC, 547 F. Supp. 3d 13, 22 (D.D.C. 2020) (dealing with an entity with "no property or presence in the United States"), *Rakhimov*, 2020 WL 1911561, at *5 (dealing with a foreign individual), *and Bazzi*, 468 F. Supp. 3d at 73 (dealing with "a Belgian citizen with no connections to the United States"). *See also infra* notes 83–85 and accompanying text (describing the disproportionate representation between U.S. parties and foreign parties designated by OFAC pursuant to its sanctions programs). Though less than 1% of designated parties have readily available constitutional anchors for due process claims under the Fifth Amendment, it is comparatively much more common to see cases that deal with U.S. persons and organizations than foreign parties. *See infra* note 87 (calculating the "1%" figure).

82. The raw data on historic and present OFAC sanctions, provided on Nov. 30, 2022, was provided courtesy of Patrick Baine, Director of Data and Technology at C4ADS. This data is part of the basis for the publicly available Sanctions Explorer tool developed and administered by C4ADS, a nonprofit organization that provides research on global security issues. The organization persistently updates sanctions data published by the U.S., U.K., E.U., and U.N. as it goes live. Though the basic data used to calculate these statistical observations is publicly available and constantly updated on the Sanctions Explorer website, C4ADS provided a snapshot of the data in a format more conducive to statistical analysis for the purpose of this academic project. Many thanks for their support. *See* C4ADS, *About*, SANCTIONS EXPLORER, https://sanctionsexplorer.org/about [https://perma.cc/LQ8Q-DSHK] (last visited Dec. 17, 2022).

83. OFAC only maintains electronic records of sanctions lists going forward from 1994. *Id.*

84. Entities, as applicable here, includes individuals, organizations, aircraft, and vessels, each of which are categorized as such under OFAC designation lists. *See* OFAC,

in the United States according to OFAC's publicly available records.[85] This statistic includes even entities that have ultimately been removed from sanctions lists but were historically designated at some time. Perhaps even more notable, only nine of the 9,700 individuals sanctioned by OFAC during this period are recorded as holding U.S. citizenship.[86] Given that each of these U.S. citizens is attached to a U.S. address, this means that less than 1% of parties subject to OFAC's economic sanctions have a readily available constitutional anchor for due process claims in U.S. courts.[87]

Though the above conclusion leaves a much smaller sample size for additional comparisons,[88] the available evidence demonstrates the rates at which U.S. and foreign entities achieve removal and how long they tend to remain listed. U.S. entities tend to spend far less time on OFAC's sanctions lists, on average, than foreign designees.[89] However, entities with U.S. addresses or citizenship tend to achieve removal at

Sanctions List Search, U.S. DEP'T OF TREASURY, https://sanctionssearch.ofac.treas.gov/ [https://perma.cc/6PB8-4PJ7] (last visited Dec. 17, 2022).

85. This observation was made by counting each instance of a previously or currently sanctioned entity with a registered physical address in the United States. *See* C4ADS, *supra* note 82 and accompanying text (attributing the data used in this analysis).

86. As above, this observation was made by counting each instance of a previously or currently sanctioned entity on record as holding U.S. citizenship. Note, however, as is the case with the designation of Anwar Al-Aulaqi, a U.S. citizen killed in 2011 in Yemen by U.S. drone strike, OFAC has no set removal procedures for designations on individuals that are no longer living. *See* PIATETSKY & VASILKOSKI, *supra* note 16, at 11 (stating that "OFAC does not proactively delist dead designees"); *Anwar al-Awlaki Fast Facts*, CNN (Mar 1, 2017), https://www.cnn.com/2013/08/23/world/meast/anwar-al-awlaki-fast-facts/index.html [https://perma.cc/LQP9-B6ZJ] (reporting al-Aulaqi's death in 2011); C4ADS, *supra* note 82 (proving al-Aulaqi's designation persists even after his death).

87. Entities have "readily apparent" Fifth Amendment due process claims if they are physically located in the United States or possessing citizenship or permanent residency status. This methodology does not account for nonphysical property interests such as the bank account at issue in *NCORI* or instances of non-recorded physical presence sufficient to establish due process rights. Nat'l Council of Resistance of Iran v. U.S. Dep't of State, 251 F.3d 192, 201 (D.C. Cir. 2001) (establishing sufficient presence within the U.S. for plaintiff to be entitled to due process).

88. Only 45 of the 158 historically designated U.S. entities as described above have had their designation removed. *See supra* note 85 and accompanying text. *See also* C4ADS, *supra* note 82 and accompanying text (attributing the data used in this analysis).

89. This measurement compares the average number of days spent by formerly designated foreign entities on OFAC sanctions lists against average days spent sanctioned by formerly designated U.S. entities. As of Nov. 30, 2022, removed U.S. entities were only designated for an average of around 5,300 days, whereas the average for foreign entities is above 16,200. *See* C4ADS, *supra* note 82 and accompanying text (attributing the data used in this analysis); *see also supra* note 85 (describing how "U.S. entities" are identified in this analysis).

similar rates to foreign entities,[90] implying that although they may be able to navigate the removal process more smoothly, and therefore faster, than foreign parties, there does not seem to be significant evidence of discrimination against foreign parties in terms of OFAC's final decisions on removal petitions.[91]

Ultimately, these statistics[92] illustrate reasons for concern regarding procedural protections provided to foreign designees under OFAC sanctions program: these entities are overrepresented in the population of entities designated by the second largest and most powerful unilateral sanctions program in the world.[93] Even though OFAC is objectively the most transparent administrator of international economic sanctions, there is room for improvement.[94]

Therefore, any shortcomings of the program's accountability standards would have a disproportionate impact on foreign parties, who already receive fewer nominal procedural standards under domestic U.S. law. In addition, foreign parties tend to be underrepresented in sanctions jurisprudence,[95] which, regardless of whether there is a functional explanation for this trend, means that procedures provided to foreign parties by OFAC face comparatively less frequent judicial scrutiny than those provided to parties presumably protected by the Fifth Amendment. In addition, foreign parties that eventually establish grounds for removal tend to spend more time subject to sanctions and the severe economic fallout they entail. Therefore, foreign parties are subjected to greater overall financial detriment than U.S. parties before succeeding in petitioning OFAC for removal of their designations.

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90. U.S. entities represent around 0.87% of all historical removals, whereas they make up around 0.77% of total sanctions designations. Note, however, that comparative population sizes detract from the statistical significance of this observation. *See* C4ADS, *supra* note 82 and accompanying text (attributing the data used in this analysis). *See also supra* note 85 (describing how "U.S. entities" are identified in this analysis).

91. *Compare supra* note 82 (explaining method of data procurement and source and its temporal limitations), *with supra* note 83 (elaborating on the temporal limitations of the data analyzed), *supra* note 84 (explaining what constitutes an "entity" in the relevant OFAC data), and *supra* note 85 (explaining how listed entities with connections to U.S. addresses were tallied), and accompanying text (describing the similar removal rates between U.S. entities and foreign entities recorded in the C4ADS compilation of public OFAC data, caveated by the issue of working with a comparatively small sample size of designated U.S. entities).

92. *See* C4ADS, Analytics, SANCTIONS EXPLORER, https://sanctionsexplorer.org/analytics [https://perma.cc/GMX9-JE25] (last visited Dec. 21, 2022); *supra* notes 9–10 and accompanying text.

93. Cohen & Goldman, *supra* note 1, at 146, 148; Cover, *supra* note 4, at 443 (describing the asymmetrical influence of U.S. unilateral sanctions).

94. PIATETSKY & VASILKOSKI, *supra* note 16, at 11.

95. *See supra* note 81 (outlining key jurisprudence and identifying whether the plaintiffs were U.S. persons or foreign entities).

3. Unwarranted Outcomes: Fallout of Economic Sanctions

The U.S. chooses to rely on economic sanctions because they leverage the sheer magnitude of its influence over the global economy and are ultimately an efficient and minimally invasive method of influencing foreign actors' behavior.[96] Though sanctions are generally favored as an alternative means of coercion as opposed to direct force or messy diplomatic intervention, they still have their drawbacks when used as a stick in foreign policy.[97] Sanctions, since their inception, have increased in precision and sophistication through methods such as intelligence-dependent, entity-specific designations. Still, even modern sanctions are often criticized for cutting off disadvantaged swathes of the global population from economic resources they may rely on for survival.[98] Humanitarian crises are often exacerbated by sanctions that limit a country's (or a key employer's) access to capital.[99]

To some critics, certain applications of sanctions can themselves constitute a violation of human rights.[100] For instance, general procedural requirements guaranteed by the Universal Declaration of Human Rights. Articles 8 and 10[101] are reflected in the recommended delisting standards of the Financial Action Task Force (FATF),[102] an international organization of which the U.S. is a member.[103] Though the unilateral nature or size of a given program are not determinative of human rights infringements, these factors raise the stakes of the issue due to their potential for widespread impact and a lack of international accountability.[104] OFAC's sanctions are generally seen as more robust in terms of reasoning, procedure, and opportunities for removal than more worrisome programs in states like Russia, Pakistan, and Turkey. However, the U.S. is still criticized for the unparalleled scope of other forms of sanctioning,

96. Masters, *supra* note 1; Cohen & Goldman, *supra* note 1, at 146, 148; Cover, *supra* note 4, at 443.

97. *See generally* Haass, *supra* note 4.

98. *Id.*; Cohen & Goldman, *supra* note 1, at 151; *see also supra* note 4.

99. Cover, *supra* note 4, at 442, 446-47 (describing sanctions' humanitarian impacts and explaining how they necessarily entail fallout when they impact important businesses in vulnerable regions).

100. PIATETSKY & VASILKOSKI, *supra* note 16, at 7–8.

101. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 8, 10 (Dec. 10, 1948); *see also* PIATETSKY & VASILKOSKI, *supra* note 16, at 7–8.

102. PIATETSKY & VASILKOSKI, *supra* note 16, at 7. *See generally* FIN. ACTION TASK FORCE, THE FATF RECOMMENDATIONS (Feb. 2023).

103. FIN. ACTION TASK FORCE, *United States*, FATF, https://www.fatf-gafi.org/en/countries/detail/United-States.html [https://perma.cc/33K9-G7V6].

104. PIATETSKY & VASILKOSKI, *supra* note 16, at 7–8.

such as export controls and sweeping sanctions that limit dealings with entire industrial sectors.[105]

Sanctions also risk retaliatory measures from targets, as can be seen in the ongoing trade conflict with China.[106] The PRC has instituted its Anti-Foreign Sanctions Law to try and limit the impact of key foreign sanctions on domestic industries.[107] Furthermore, it has recently threatened retaliation against indirect fallout from ongoing Russia sanctions in response to its invasion of Ukraine.[108] Beyond retaliatory measures, unilateral sanctions also cause some direct harm to the sanctioning state. They effectively cede power in the form of business opportunities arising from foreign shores.[109] Therefore, no matter how they are applied or how retaliation may be diplomatically avoided, unilateral sanctions ultimately detract a measure of economic power of the United States itself by limiting economic transactions in which U.S. individuals would otherwise engage or indirectly benefit from.

II.
Drawing the Line: Administrative and Legal Recourse to Sanctions

A. Removal Petition: The Standard Administrative Procedure

1. 31 C.F.R. § 501.807

OFAC's delisting (i.e., sanctions designation removal) procedures are codified in 31 C.F.R. § 501.807.[110] Per this regulation, a listed entity may seek rescission of an OFAC designation by way of either administrative reconsideration of the original decision or by asserting that circumstances resulting in the original designation no longer apply.[111] Either argumentative stance relies on an internal review of facts by OFAC.

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105. *Id.* at 13.

106. *See generally US-China Relations in the Biden Era*, *supra* note 12.

107. Hung Tran, *China's Anti-foreign Sanctions Law: Companies in the Crosshairs*, Atl. Council (June 28, 2021), https://www.atlanticcouncil.org/commentary/blog-post/chinas-anti-foreign-sanctions-law-companies-in-the-crosshairs/ [https://perma.cc/4UHQ-5EEJ].

108. The Anti-Foreign Sanctions Law includes provisions that protect Chinese entities from negative effects of sanctions imposed by third countries, not just sanctions imposed directly onto Chinese entities. *Id*. *See also* China protests US sanctioning of firms dealing with Russia, AP (Apr. 15, 2023), https://apnews.com/article/china-russia-us-ukraine-sanctions-59fa76b79b69b7489039b4d0ee5dd14b [https://perma.cc/K7UK-3LEK] (describing criticisms of the extraterritorial effects of U.S. Russia sanctions on Chinese entities).

109. Haass, *supra* note 4.

110. OFAC, *supra* note 59.

111. 31 C.F.R. § 501.807(a) (2019).

A party filing a petition for removal can provide arguments or evidence that may establish that insufficient evidence existed for the original designation or that circumstances have sufficiently changed to make the continuation of the designation unwarranted. They may also propose remedial steps such as corporate reorganization (often seeking to undermine a majority ownership stake by a blocked individual in practice),[112] resignation of certain persons from a blocked company or organization, or similar steps that may negate the original basis for the relevant sanctions.[113]

Negotiations with OFAC can culminate in formal agreements containing certain terms upon which a designee's delisting is contingent. Such was the case in 2018 with several Russian entities connected with Oleg Deripaska, a Russian oligarch targeted pursuant to OFAC's Ukraine-/Russia-Related Sanctions Program.[114] Three entities, En+, Rusal, and ESE, negotiated for the removal of SDN designations previously put in place due to their being controlled, directly or indirectly, by Deripaska. The agreement reached between the three petitioners and OFAC included reorganization requirements, such as the resignation of board members and the significant reduction of Deripaska's ownership stake and voting power, and significant auditing and reporting requirements. Ultimately, OFAC reserved the right to relist any of the relevant entities if the "change in circumstances" represented by the terms were to backslide.[115]

2. Functional Rundown of the Removal Petition Procedure

OFAC's § 501.807 procedure for delisting is, in practice, available to any blocked person or majority owner of a blocked entity on behalf of that entity.[116] Though § 501.807 only explicitly references removal procedures in respect to the SDN and Blocked Persons Lists, the same procedures presumably apply to persons seeking removal from non-SDN lists as well. A FAQ posted one day prior to the release of EO 14032, establishing the non-SDN Chinese Military-Industrial Complex

112. Letter from Andrea M. Gacki, Director, OFAC, to Sen. Mitch McConnell 2–4 (Dec. 19, 2018), https://home.treasury.gov/system/files/126/20181219_notification_removal.pdf [https://perma.cc/Y8XX-8DUK].
113. 31 C.F.R. § 501.807(a).
114. *See* Kenneth P. Vogel, *Treasury Dept. Lifts Sanctions on Russian Oligarch's Companies,* N.Y. TIMES (Jan. 27, 2019), https://www.nytimes.com/2019/01/27/us/politics/trump-russia-sanctions-deripaska.html [https://perma.cc/3MNH-3WSC].
115. Letter from Andrea M. Gacki to Sen. Mitch McConnell, *supra* note 112, at 1.
116. *Id.*

("NS-CMIC") List,[117] provides interpretive guidance for persons or other entities seeking delisting.[118] This implies that the clarifying FAQ entry was intended for reference by individuals sanctioned under the NS-CMIS regime. Furthermore, its phrasing as a general statement regarding § 501.807 implies this interpretation applies to all entitles listed on non-SDN lists maintained by OFAC.

In light of the information disparity dilemma, it is important for a party seeking removal to be in command of all information they have at their disposal so that they may preempt reasons for certain agency actions in the event that a provided explanation is unclear or delayed.[119] Given that OFAC may rely on classified information[120] and is under no obligation to share even summarized, declassified reasonings behind designations, a petitioner needs to be able to infer problem areas based on active sanctions programs, entity organization, and transaction history.[121] Jurisprudence and certain OFAC resources provide some guidance as to the limitations of certain arguments and evidence in the removal petition process.[122] Petitioners should take this information into account while focusing efforts on OFAC's administrative procedures, as the odds display that a removal request is the best chance a blocked party has at a delisting.[123]

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117. *See* Exec. Order No. 14,032, 86 Fed. Reg. 30145 (June 3, 2021) (establishing the non-SDN Chinese Military-Industrial Complex Companies List); OFAC, *Chinese Military Companies Sanctions*, U.S. DEP'T OF TREASURY https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/chinese-military-companies-sanctions [https://perma.cc/98KV-2K8R] (last visited Dec. 7, 2022).

118. *See* OFAC, *FAQ,* U.S. DEP'T OF TREASURY, at 879 (June 2, 2021), https://home.treasury.gov/policy-issues/financial-sanctions/faqs/897 [https://perma.cc/SSF8-ET4S].

119. Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 985 (9th Cir. 2012) (explaining that plaintiff was able to infer some missing reasonings behind OFAC's requests and designations but noting that correct inferences do not meet the needs of due process if no reason was provided by the agency in the first place).

120. CASEY ET AL., *supra* note 18, at 37–39; Masters, *supra* note 1; 50 U.S.C. § 1702(c) (2001).

121. *See Al Haramain Islamic Found.*, 686 F.3d at 985; Rakhimov v. Gacki, No. CV19-2554 (JEB), 2020 WL 1911561, at *7 (D.D.C. Apr. 20, 2020).

122. *See generally supra* notes 59, 81 (respectively, describing OFAC removal procedures and listing key designation removal jurisprudence).

123. There has never been a case in which a court has provided injunctive relief leading to the immediate removal of an OFAC designation, but, since 1994, over 5,000 previously sanctioned entities have, at some point, had their designation removed under typical administrative procedures. Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, 857 F.3d 913, 918–19 (D.C. Cir. 2017). *See generally supra* note 81 (listing core jurisprudence on OFAC designation removal). None of these cases resulted in injunctive relief even if requested. For instance, the plaintiff in *Zevallos v. Obama* explicitly requested an injunction to "force Treasury to act on his long-pending delisting request," which was denied. 793 F.3d 106, 116 (D.C. Cir. 2015).

OFAC can request elaboration on arguments and evidence provided in a removal request, and the agency retains full discretion over whether any face-to-face meetings and/or negotiations will be conducted with the petitioner prior to reaching a final determination in its review.[124] Subsequently, the sanctioned party must be prepared to respond to requests for elaboration and potential terms of removal.[125] Negotiation with OFAC's reviewing authorities should be considered and, if amenable, presented to OFAC as proposed remedial steps pursuant to § 501.807. These may include corporate reorganization in consideration of the 50% rule,[126] sale of a blocked vessel, or resignation of certain persons from a blocked organization.[127] Requests for removal are also subject to consultation by other U.S. agencies "as warranted," according to OFAC.[128]

3. Removal Petitions as a Detriment to Due Process

Opportunities to reapply for removal directly through OFAC are technically endless.[129] Petitioners that are denied removal are allowed to reapply through the same process an unlimited number of times, but OFAC instructs petitioners that they should only do so if changed circumstances arise or if novel arguments and evidence are provided in the request.[130] This presents an issue for sanctioned parties: the fear of an endless cycle of failed removal petitions or negotiations and the compounding financial impacts of being kept in limbo.[131]

In the eyes of the courts, a plaintiff seeking removal through the basic administrative procedure "should not 'confuse a single failure with a final defeat.'"[132] This presents several practical legal obstacles, especially regarding claims of insufficient procedure. Such an open-ended

124. 31 C.F.R. § 501.807(c) (2019).
125. 31 C.F.R. § 501.807(b) (2019).
126. Letter from Andrea M. Gacki to Sen. Mitch McConnell, *supra* note 112, at 1.
127. *Id.* at 1–5*;* 31 C.F.R. § 501.807(a) (2019).
128. OFAC, *supra* note 59.
129. *Id.*
130. *Id*; Rakhimov v. Gacki, No. CV 19-2554 (JEB), 2020 WL 1911561, at *6 (D.D.C. Apr. 20, 2020).
131. *Compare Rakhimov*, 2020 WL 1911561, at *6 (implying that APA reviews may not be fruitful as long as OFAC's administrative removal procedures remain available), *with* Rebecca M. Nelson, Cong. Rsch. Serv., IF12092, Russia's War on Ukraine: The Economic Impact of Sanctions (May 3, 2022) (demonstrating the severe impacts of OFAC's Russia sanctions regime in just the short term; longer).
132. *Rakhimov*, 2020 WL 1911561, at *1 (quoting *Crawford v. Barr*, No. 17-798, 2019 WL 6525652 at *1 (D.D.C. Dec. 4, 2019) (quoting F. Scott Fitzgerald, Tender is the Night 157 (Wordsworth ed. 1995))) (arguing that even under full due process standards, OFAC's removal procedures are sufficient to protect plaintiff's opportunity to be heard).

removal timeline makes it difficult to discern, as a practitioner or interested party, when it might be time to move on from filing further removal petitions and instead begin investing in a legal claim.[133] Furthermore, the simple fact that filing a petition for removal *always* remains an option means that a reviewing court will *never* be the forum of last instance for any particular claim. This disincentivizes courts from granting injunctive relief, as a blocked party could always reapply through OFAC and potentially achieve the same effects.[134]

B. Making a Claim in an Article III Court

1. Constitutional Rights

a) U.S. Entities

A U.S. citizen, noncitizen resident, domestically registered entity, or any other party with a "substantial connection" to the U.S. listed by OFAC retains full entitlement to Fifth Amendment due process rights.[135] These rights, at a basic level, require that a party receive notice and an opportunity to be heard before the government can deprive it of property rights.[136] In practice, these guarantees are protected via procedural standards.

However, such standards are regularly tempered by the need to protect sensitive national security interests or for other functional purposes.[137] When it arises, this issue is resolved through a flexible balancing test used to determine exactly what procedural protections a given situation demands.[138] For example, the Seventh Circuit has

133. Note that claims in Article III courts entail additional expenditure of both effort and monetary resources compared to removal petitions under OFAC's administrative procedures. This may partially explain the disproportionate level of representation between U.S. and foreign plaintiffs in sanctions cases dealing with due process. *See generally supra* notes 81–85 and accompanying text (noting the disproportionate frequency with which foreign entities appear as plaintiffs in key designation challenges in U.S. courts compared to U.S. persons, which represent a vanishingly small portion of total entities designated by OFAC).

134. *See supra* note 129 and accompanying text.

135. *Rakhimov*, 2020 WL 1911561, at *4–5 (holding that though a substantial connection would entitle plaintiff to due process, there was no sufficient connection present in the case at bar).

136. Zevallos v. Obama, 793 F.3d 106, 116 (D.C. Cir. 2015).

137. *See Holy Land II*, 333 F.3d 156, 164 (D.C. Cir. 2003) (citing *Morrissey v. Brewer,* 408 U.S. 471, 481) (arguing that the executive branch has a "compelling interest in withholding national security information from unauthorized persons"); Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 984 (9th Cir. 2012) (establishing that due process requirements are interpreted and applied on a case-by-case basis in light of the need to protect classified information).

138. Nat'l Council of Resistance of Iran v. U.S. Dep't of State, 251 F.3d 192, 208–09 (D.C. Cir. 2001) (applying the Mathews test in a similar context).

found that pre-deprivation notice is not generally required before OFAC sanctions go into effect, as there is a general need for administrative speed in protecting national security interests, especially considering the risk of asset flight and record destruction.[139] Furthermore, as established, though administrative reliance on classified information when making decisions depriving parties of life, liberty, or property is presumptively unconstitutional in *most* circumstances,[140] national security concerns can override that presumption subject to *Mathews* balancing.[141]

b) Foreign Entities

Courts have made clear that foreign parties can avail themselves of Due Process Clause protections to challenge the exercise of personal jurisdiction over them.[142] However, there has been no test articulated as to what constitutes sufficient contact with the United States to allow foreign, nonresident nationals or foreign businesses and originations to avail themselves of these rights.[143] The only clear precedent in dealing with a foreign entity that is not physically present, registered, or engaged in the stream of commerce in a forum holds that courts must employ a minimum contact analysis.[144] Through a minimum contacts analysis, courts have also established that merely being sanctioned by the U.S. does *not* establish a connection for the purpose of extending the Fifth Amendment's due process protections.[145] Still, a non-resident entity with insufficient contacts to invoke the Due Process Clause has one final means of recourse in Article III courts: judicial review under the APA.[146]

139. Glob. Relief Found. v. O'Neill, 207 F. Supp. 2d 779, 803–04 (N.D. Ill. 2002); *Holy Land II*, 333 F.3d at 163–64.

140. Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1070 (9th Cir. 1995).

141. *Al Haramain Islamic Found.*, 686 F.3d at 981.

142. *See* Rakhimov v. Gacki, No. CV 19-2554 (JEB), 2020 WL 1911561, at *4–5 (D.D.C. Apr. 20, 2020) (citing People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999)); *see also* Fulmen Co. v. OFAC, 547 F. Supp. 3d 13, 22 (D.D.C. 2020) ("Because Fulmen's own pleadings demonstrate no property or presence in the United States, it cannot establish the 'substantial connection' necessary to entitle it to Fifth Amendment protections as a non-resident alien.").

143. *Rakhimov*, 2020 WL 1911561, at *4–5 (explaining that no test has been articulated to apply when this issue arises).

144. Nat'l Council of Resistance of Iran v. U.S. Dep't of State, 251 F.3d 192, 208–09 (D.C. Cir. 2001) (applying the *Mathews* test and proposing an oversimplified version of notice that would have met the requirements of due process and did not seem to threaten foreign policy objectives at issue).

145. People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999).

146. *Al Haramain Islamic Found.*, 686 F.3d at 976.

2. Evaluating Fifth Amendment Due Process Rights: Mathews Balancing

Process due to plaintiffs challenging OFAC designations and their effects is determined via the application of the classic *Mathews* three-factor balancing test, which pitches relevant interests on each side of the case against one another.[147] The unique circumstances of international economic sanctions and their policy justifications present a challenge for plaintiffs facing such a due process standard: government interests in protecting national security and foreign policy are weighed with a heavy finger on the *Mathews* scale.[148] It is possible, as exemplified by *Al Haramain*, to overcome the high-order priority of national security interests. However, in that case it took a combination of significant issues in OFAC's provision of notice to the plaintiff to constitute a due process violation, including a failure to explain reasons behind OFAC's investigation and requests for evidence and a seven-month wait before the plaintiff was ever given a reason for their designation.[149]

3. Judicial Review under the APA

Rationality review under APA section 706 has a brighter history compared to due process challenges for the purposes of seeking removal from sanctions lists. Though OFAC frequently relies on classified information, that information is still subject to review and consideration by an Article III court per the IEEPA.[150] A reviewing court may be afforded classified information relied upon by an agency in making a disputed decision, provided the information is submitted to the court ex parte and in camera.[151]

Unlike in due process review, judicial review of OFAC determinations pursuant to the APA *has* resulted in some substantive, if limited, remedies for plaintiffs.[152] Still, these are rare circumstances and have yet to ultimately result in an outright order for removal from OFAC's

147. *Id.* at 979.
148. *Id.* at 986.
149. *Id.*
150. 50 U.S.C. § 1702(c); 5 U.S.C. § 706(1).
151. 50 U.S.C. § 1702(c); 5 U.S.C. § 706(1); *see also supra* notes 70–71 (respectively, describing the use of ex parte and in camera proceedings to deal with classified information and defining these types of proceedings).
152. Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, 857 F.3d 913, 928–29 (D.C. Cir. 2017) (holding OFAC determinations regarding enforcement actions on certain shipments plaintiff had "knowledge or reason to know" would be re-exported to Iran were arbitrary and capricious per APA § 706(2)(A) and that the relevant, non-severable penalty imposed by the agency needed to be recalculated).

SDN or non-SDN lists.[153] Furthermore, in camera, ex parte hearings deny advocacy opportunities on behalf of the plaintiff, as plaintiffs are not empowered to fully prepare arguments in light of all relevant facts and evidence.[154]

III.
Assessing Due Process and APA Requirements Under Judicial Review

A. Fifth Amendment Due Process Claim

Courts view the level of procedure required by due process to be flexible on a case-by-case basis.[155] A plaintiff must argue that the life, liberty, and/or property interests they have been deprived as a result of a U.S. sanctions designation are substantial enough to outweigh the relevant foreign policy and/or national security interests that are at stake from OFAC's perspective.[156] Though courts acknowledge that sanctions designees are subject to drastic deprivations of property and liberty by blocking all business conducted in the U.S. and subjecting even unwitting violators to penalties,[157] they also afford the executive with significant deference because of the high-order interests the government has in pursing national security objectives.[158] Navigating such a balancing act is a difficult task, but it is possible to reach favorable outcomes for plaintiffs.

A reviewing court will almost always find that a plaintiff's due process rights are procedurally afforded to the degree demanded by the Fifth Amendment due to the limitless availability of the removal petition process through OFAC.[159] However, if the government fails to provide

153. Even in *Al Haramain,* where the court found a clear due process violation, the court ultimately concluded that the violation was harmless, as OFAC would have reached the same decision based on the evidence in its administrative record regardless of whether the plaintiff was fully equipped to rebut its designation with sufficient notice and reasoning. *Al Haramain Islamic Found.*, 686 F.3d at 988.

154. *Compare* United States v. Rosen, 447 F. Supp. 2d 538, 545 (E.D. Va. 2006) (stating that hearings *in camera* and *ex parte* are "unaided by the adversarial process"), *with* Zevallos v. Obama, 793 F.3d 106, 117–18 (D.C. Cir. 2015) (holding that Zevallos was not left to "stumble towards a moving target," which would have worsened the severity of due process deprivations).

155. *Zevallos*, 793 F.3d at 116 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

156. Nat'l Council of Resistance of Iran v. U.S. Dep't of State, 251 F.3d 192, 205 (D.C. Cir. 2001).

157. *Al Haramain Islamic Found.*, 686 F.3d at 980.

158. *See supra* note 137 and accompanying text; Bazzi v. Gacki, 468 F. Supp. 3d 70, 79 (D.D.C. 2022).

159. Rakhimov v. Gacki, No. CV 19-2554 (JEB), 2020 WL 1911561, at *1 (D.D.C. Apr. 20, 2020). (stating that an initial failure to achieve removal through petition under

a designated party with sufficiently informative and timely notice, even highly-weighted national security interests can be overcome in favor of protecting due process requirements. For instance, though OFAC is not required to provide pre-deprivation notice, the *Al Haramain* court skirted the issue by instead holding that OFAC provided the plaintiff, a U.S. organization, inadequate notice and, subsequently, no meaningful opportunity to be heard as required under due process.[160] In effect, though the designee was not entitled to be notified *before* sanctions had gone into place because of the urgency and speed the protection of national security interests requires,[161] the organization was still entitled to an explanation *after* it was sanctioned that would sufficiently equip it to understand and ultimately argue against OFAC's position on the matter.

Courts treat *Al Haramain's* approach to characterizing notice in the context of sanctions investigations and designations as the floor for what process is required pursuant to the Fifth Amendment (and possibly even under other relevant legal guidelines).[162] As framed in *Zevallos v. Obama*, courts seem to mandate that designees be provided with notice sufficient to inform a certain minimum level of understanding as the rationale behind OFAC's decision to impose sanctions on them so as to prevent plaintiffs from "stumbl[ing] towards a moving target" as they exercise their opportunity to be heard via the administrative removal procedure.[163] This concern is outlined in the ad hoc assessments of due process requirements in a number of other cases.[164] Notice is clearly insufficient if, when the case comes before a reviewing court, the plaintiff is *still* not given an adequate explanation as to why they have been targeted and, therefore, cannot truly be expected to represent their case effectively and "be heard" pursuant to the Fifth Amendment.[165]

B. APA Section 706 Review

Both domestic and foreign entities are entitled to APA review of any agency action that exercises personal jurisdiction over them,

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OFAC administrative procedures does not mean that avenue has been exhausted, given that designees can always try again).

160. *Al Haramain Islamic Found.,* 686 F.3d at 985.

161. *Id.* at 985–986.

162. Zevallos v. Obama, 793 F.3d 106, 117 (D.C. Cir. 2015) (citing *Al Haramain Islamic Found.*, 686 F.3d at 985); *Rakhimov*, 2020 WL 1911561, at *6–7.

163. *Zevallos*, 793 F.3d at 118.

164. *See, e.g., id.* at 116; *Al Haramain Islamic Found.*, 686 F.3d at 985–86 (citing United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010); Gilbert v. Homar, 520 U.S. 924, 930 (1997)).

165. *See supra* notes 67–68.

regardless of whether the relevant entity is entitled to constitutional procedure.[166] In addition, APA review has a brighter history compared to due process challenges in terms of seeking actual remedies against challenged sanctions designations.[167] As a result, due process claims tend to accompany APA-based review of decisions, as it provides a greater number of potential routes to relief.[168]

1. Arguing Agency Action was "Unreasonably Delayed"

APA section 706(1) provides grounds for courts to compel OFAC to remove an entity's sanctions designations; it allows an Article III court to "compel agency action unlawfully withheld or unreasonably delayed."[169] This form of relief was considered in a few cases such as *Zevallos* and the more recent *Pejcic v. Gacki*.[170] Under this approach, rather than arguing that the court must set aside a specific agency action, the plaintiff must challenge OFAC's *failure* to take some action.[171] In the context of designation removal, claims must challenge OFAC's failure to issue a decision on an administrative removal petition.

However, such a claim requires an almost inconceivable circumstance to be met when the case goes before a court. By the time these claims progress to the point of a true legal challenge, OFAC will generally issue some sort of decision on the matter to render the claim moot and therefore immune to judicial review.[172] This was the outcome in *Pejcic v. Gacki*.[173] Unless OFAC mistakenly allows a case to reach a courtroom without reaching some sort of decision on the removal petition at issue, a section 706(1) claim will not be available. Furthermore, a period of several years between the filing of a petition for removal and an ultimate decision is not sufficient to constitute an "unreasonable delay"—rather, only a combination of a delayed decisions and further delayed or otherwise insufficient reasoning for that decision (the grounds

166. *See generally* Fulmen Co. v. OFAC, 547 F. Supp. 3d 13, 23 (D.D.C. 2020).
167. Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, 857 F.3d 913, 928–29 (D.C. Cir. 2017)
168. See generally *Al Haramain Islamic Found.*, 686 F.3d at 976; *Zevallos*, 793 F.3d at 112; *Fulmen*, 547 F. Supp. 3d at 16; *KindHearts II*, 710 F.Supp.2d 637, 637 (2010); Rakhimov v. Gacki, No. CV 19-2554 (JEB), 2020 WL 1911561, at *1 (D.D.C. Apr. 20, 2020), each of which featured dual due process and APA claims, regardless of whether the plaintiff was ultimately protected by the Fifth Amendment.
169. 5 U.S.C. § 706(1).
170. *Compare Zevallos*, 793 F.3d at 118 *with* Pejcic v. Gacki, No. 19-CV-02437 (APM), 2021 WL 1209299, at *4 (D.D.C. Mar. 30, 2021).
171. 5 U.S.C. § 706(1) ("compel agency action . . . unreasonably delayed").
172. Zevallos v. Obama, 10 F. Supp. 3d 111, 123 (D.D.C. 2014).
173. *Pejcic*, 2021 WL 1209299 at *4.

for a finding of due process violations in *Al Haramain*)[174] may constitute an adequate application of section 706(1) in dealing with OFAC sanctions.[175] Thus, both the Fifth Amendment's due process clause and the APA's "unreasonable delay" provide a similar level of protection against an agency's failure to abide by acceptable procedures.

2. Arguing Agency Action was Arbitrary and Capricious

A more typical and more jurisprudentially settled argument made pursuant to an APA claim is based on APA section 706(2)(A), wherein a reviewing court evaluates whether the contested agency action was unlawful on grounds that it was made arbitrarily or capriciously.[176] If this determination is made in the affirmative, section 706(2) empowers the reviewing court to set aside the action and remand it for administrative reconsideration.[177] If this outcome was reached after a review, the court could set aside the original sanctions designation. Therefore, this course of action is generally used to challenge the basis for an original OFAC decision to list the relevant entity.

Arbitrary and capricious review requires courts to consider OFAC's proposed justification and substantive evidence for a challenged designation.[178] Courts do not conduct their own factfinding to review agency decisions; reviews are confined to administrative records.[179] Although OFAC is empowered to rely upon classified information, courts are authorized to review that classified evidence ex parte and in camera.[180]

Despite the checks these procedures provide against overregulation, courts give significant deference to the executive branch, especially in matters involving foreign policy and national security. Courts will not substitute their own judgment for agency discretion, and, upon review, OFAC is only required to "articulate a . . . rational connection between the facts found and the choice made" that is not so implausible that it cannot be attributed to simple administrative discretion.[181] This is a high standard for setting aside an agency action, especially when

174. Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 965 (9th Cir. 2012).
175. *See Zevallos,* 10 F. Supp. 3d at 123.
176. 5 U.S.C. § 706(2)(A).
177. 5 U.S.C. § 706(2); *Al Haramain Islamic Found.*, 686 F.3d at 992.
178. *Al Haramain Islamic Found.*, 686 F.3d at 970.
179. Holy Land Found. for Relief and Dev. v. Ashcroft (*Holy Land I*), 219 F.Supp.2d 57, 65–66 (2002).
180. *See also supra* notes 70–71 (respectively, describing the use of ex parte and in camera proceedings to deal with classified information and defining these types of proceedings).
181. Zevallos v. Obama, 10 F. Supp. 3d 111, 112 (D.D.C. 2014); (citing Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

litigating with asymmetrical access to information and, as a foreign party, in an inconvenient forum. Still, arbitrary and capricious claims are not without hope for plaintiffs; *Epsilon Elecs., Inc.* is a fairly recent example of the federal D.C. Court of Appeals setting aside several OFAC enforcement actions on section 706(2)(A) grounds.[182] This resulted in the recalculation of the original penalty based on reconsideration of some, but not all, instances of sanctions violations. But, given that the case concerned a non-severable enforcement action against sanctions violations and did not challenge an entity's baseline designation, there still is no precedent for a sanctions designation being set aside under arbitrary and capricious review.[183]

3. Arguing Inadequate "Procedure Required by Law"

Finally, courts signal willingness to at least consider whether, regardless of a plaintiff's entitlement to full constitutional process rights, APA section 706(2)(D) as read in combination with 31 C.F.R. § 501.807,[184] the legal authority behind OFAC's administrative removal procedure, provides a level of legally protected procedural rights comparable to those required by due process.[185] The plaintiff in *Rakhimov v. Gacki* laid out this argument in 2020, claiming that section 501.807(a) clearly presumed that a petitioner has been provided sufficient reasoning behind a designation to be able to effectively rebut the "basis . . . for the designation" or "assert that the circumstances resulting in the designation no longer apply."[186] Rakhimov argued that this regulation indicated a presumption that a designee has received "sufficient notice" that adequately explains the reasoning behind a designation and puts the designee in a position to offer relevant rebuttal evidence through the removal petition procedure.[187]

Though the court did not rule on the validity of this interpretation, it entertained it on a nearly identical basis as it had addressed the sufficiency of notice under due process requirements in similar cases.[188]

182. 50 U.S.C. § 1702(c); 5 U.S.C. § 706(1); Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, 857 F.3d 913, 928–29 (D.C. Cir. 2017).

183. *Cf. Epsilon Elecs., Inc.*, 857 F.3d 913 at 932.

184. 31 C.F.R. § 501.807(a) (2019) ("[A] person owning a majority interest in a blocked vessel may submit arguments or evidence that the person believes establishes that insufficient basis exists for the designation.").

185. 5 U.S.C. § 706(2)(D) ("without observance of procedure required by law").

186. Rakhimov v. Gacki, No. CV 19-2554 (JEB), 2020 WL 1911561, at *6–7 (D.D.C. Apr. 20, 2020).

187. *Id.*

188. *Compare id.* at *7, *with* Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 984 (9th Cir. 2012) (quoting *KindHearts II*, 710 F. Supp. 2d 637, 657–60 (2010)); 50 U.S.C. § 1702(c).

The court concluded that Rakhimov's claim of insufficient notice was invalid, as OFAC *did* provide sufficient information as to the basis for the contested designation for the purposes of arguing against it.[189] Though not an explicit invocation of the constitutional standard, this construction is analogous to both one court's desire to avoid forcing a plaintiff to "stumble towards a moving target" and the ultimate grounds for ruling OFAC had violated due process in *Al Haramain* and *KindHearts I*.[190] Therefore, in future cases, section 706(2)(D) as grounded in section 501.807 *may* provide grounds for a reviewing court to establish and enforce procedural safeguards on the same level as required under constitutional due process.

C. Barriers to Remedy

One would be remiss to overlook the fact that even if a due process violation is found in a given case or if APA review resulted in a finding of procedural insufficiency, a plaintiff seeking removal must then prove sufficient harm resulting from that violation to receive a desired injunctive remedy. *Al Haramain* is instructive on this point. Despite due process violations stemming from clearly inadequate notice of reason for the deprivation of protected interests, the violation was found to be harmless, and therefore the court did not order the removal of the plaintiff's designation.[191] This seems to demonstrate a significant flaw in any potential claim that seeks the ultimate removal of OFAC sanctions.

Conclusion

Due process is a historically tricky issue when national security is concerned, and the severity of policy measures taken pursuant to national security interests tends to raise the stakes in interpreting and applying procedural checks on government power. In assessing unilateral economic sanctions, U.S. programs are of particular concern when it comes to global impact and potential human rights infractions.[192] However, the country's domestic legal system is equipped to adequately balance the life, liberty, and property interests of sanctioned parties against genuine national security and foreign policy interests.

Courts employ a standardized system of review that ultimately adapts to case-by-case scenarios to achieve balanced outcomes. In addition,

189. *Rakhimov*, 2020 WL 1911561, at *7.
190. Zevallos v. Obama, 793 F.3d 106, 118 (D.C. Cir. 2015).
191. *See supra* note 153.
192. *See* Piatetsky & Vasilkoski, *supra* note 16, at 11–14; *see also* Cohen & Goldman, *supra* note 1, at 146, 148; Cover, *supra* note 4, at 443 (describing the asymmetrical influence of U.S. unilateral sanctions).

despite there being a disproportionate level of foreign party representation in sanctions jurisprudence, current precedent indicates a comparable level of procedural standards in place for both entities that can avail themselves of due process rights and foreign entities that can only rely on the administrative removal procedure and APA review. Courts focus on the same central issue in evaluating both notice standards pursuant to constitutional due process rights and APA section 706 claims regarding "unreasonable delay" and failure to observe "procedure required by law": whether or not plaintiffs were provided with information on why they were listed by OFAC sufficient to allow them to rebut the underlying basis for a contested designation.[193] In addition, the removal petition procedure is open to any and all sanctioned parties on an equal and unlimited basis, and courts interpret this procedural provision as an adequate opportunity to be heard even under the nominally higher standards required by the Fifth Amendment.[194] Ultimately, even as the U.S. continues to expand its unilateral sanctions programs, its legal procedural requirements do not substantively discriminate between foreign and domestic parties designated under OFAC programs.

193. *Rakhimov,* 2020 WL 1911561, at *7; *Zevallos*, 793 F.3d, at 117.

194. OFAC, *supra* note 59; *Rakhimov*, 2020 WL 1911561, at *6 (demonstrating that OFAC's provision of administrative recourse to sanctions designations weigh against setting aside the agency's decisions under the APA even after failing to achieve removal trough the administrative procedures, as an initial failure does not amount to the total exhaustion of that avenue of recourse).