POLICY REPORT

BRENNAN CENTER FOR JUSTICE

Checking the President's Sanctions Powers

A Proposal to Reform the International Emergency Economic Powers Act

By Andrew Boyle PUBLISHED JUNE 10, 2021

Brennan Center for Justice at New York University School of Law

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Introduction

There are more than 120 statutory powers that the president can invoke when declaring a national emergency, but the vast majority of the emergencies declared since the National Emergencies Act (NEA) was enacted in 1976 rely on just one of these.[1] That power is the International Emergency Economic Powers Act (IEEPA), which has been the sole or primary statutory authority invoked in 65 of the 71 emergency declarations made during this period.

IEEPA, which became law in 1977, gives the president sweeping powers to impose economic sanctions on persons and entities upon determining that there exists an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." Over the years, it has been invoked to deal with the proliferation of chemical and biological weapons and weapons of mass destruction, hostile foreign governments, terrorism, transnational crime, cyberattacks, human rights abuses, corruption, interference in U.S. elections, potential intrusions into U.S. communications technology, and perceived threats from the International Criminal Court.[2]

IEEPA's use has been expansive geographically as well as thematically. Sanctions have been levied against numerous countries, from Iran and North Korea to Belarus and Côte d'Ivoire. Indeed, IEEPA has been used against persons engaged in certain activities no matter where they might be in the world — and also against groups and persons within the United States. The government's compendium identifying sanctioned persons and entities, a majority of which are sanctioned under IEEPA, runs to more than 1,400 three-column pages.[3]

The imposition of sanctions under IEEPA has been called a "financial death sentence."[4] In most cases, anyone who falls within the legal jurisdiction of the United States is barred from transacting with persons or entities designated as targets of sanctions, and any property of a target that comes within U.S. jurisdiction must be frozen. Put simply, with the stroke of a pen, the president can freeze all of a person's U.S.-based assets and make it illegal for anyone in the United States (and many outside the country) to conduct any financial transaction with them. If the target is an American citizen or resident, the practical effect is that no one can give them a job, rent them an apartment, or even sell them groceries without the government's permission.

Americans caught up in IEEPA sanctions have found themselves trapped in a Kafkaesque nightmare that bears little resemblance to the due process that the Constitution supposedly guarantees them. By its own rules, the government is not required to give the target any information about its decision, let alone access to the underlying evidence. Targets may challenge the designation, but the government does not have to provide a hearing, and there is no deadline for resolving a challenge. When targets are able to bring litigation (the sanctions can complicate paying attorneys), courts base their decision solely on the record the government has assembled — which may include almost any kind of material, including hearsay — and they must give "extreme deference" to the government's decision to designate.

As with other powers that presidents can invoke under the NEA, Congress intended for IEEPA to be used sparingly and in extraordinary circumstances. However, national emergencies of all kinds are easy for presidents to declare — and, because of a ruling by the U.S. Supreme Court a few years after the NEA's passage, they are extremely difficult for Congress to terminate. The result is that presidents' use of IEEPA is virtually unchecked except in the rare instance of a successful court challenge.

Despite IEEPA's requirement that a president must declare a national emergency that presents an "unusual and extraordinary threat" before imposing sanctions, the law is used today as a routine foreign policy tool. There has been an average of 1.5 IEEPA emergencies declared each year, with 11 such emergencies declared during the Trump administration alone. Each order may result in the targeting of tens, hundreds, or even thousands of persons or entities. Moreover, IEEPA sanctions often stay in place for years or even decades, with little congressional oversight and no clear metrics to assess their success or failure.

Concerns about IEEPA's broad powers and the lack of substantial checks on presidents' use of them are not new. In 1987 a commentator wrote about IEEPA's flaws: "The criteria for invoking it are vague, Congress has very little to say about its use, and there is no effective way to terminate a use that becomes inappropriate as time passes."[5] But a combination of factors has given a new urgency to the need to reexamine and reform IEEPA. Prominent among them is that President Donald Trump used, and threatened to use, IEEPA's powers in unprecedented and troubling ways, underscoring the dangers of delegating such potent powers with so few limits on discretion or institutional checks.

This report proceeds as follows. Part I provides background on how IEEPA came into law. Part II describes how various aspects of sanctions under IEEPA work in practice. Part III lays out some concerns regarding how the government has used, does use, and could use IEEPA. Part IV provides an overview of some of the proposed legislative reforms to IEEPA to date, and in Part V we propose a slate of reforms that would limit IEEPA's potential for abuse while giving the government sufficient latitude to sanction those who threaten U.S. interests.

Origins and Legislative History of IEEPA

IEEPA's origins lie in the Trading with the Enemy Act of 1917 (TWEA). Passed in the same year that Congress declared war against Germany in World War I, TWEA gave the president power during wartime to prevent trade and financial transactions with enemy states and their allies and to freeze their assets in the United States. Subsequent amendments broadened the president's powers under TWEA. Most significantly, a 1933 amendment expanded the law's applicability beyond wartime to include "any other period of national emergency declared by the President."[6]

In the atmosphere of distrust of executive power that followed the Nixon presidency, Congress passed the National Emergencies Act of 1976. Although that law terminated almost all exercises of emergency authority then in effect, it explicitly exempted TWEA Section 5(b), the precursor to IEEPA, due to the complex and multiple ways in which the government was using those powers.[7] Instead, the NEA ordered that the relevant House and Senate committees "make a complete study and investigation concerning that provision of law" and report on recommended revisions within 270 days.[8]

Congress's study revealed that "the 'emergency' authorities provided in [TWEA's] section 5(b) have in effect become routine authorities used to conduct the day-to-day business of the Government."[9] Writing several years later, Supreme Court Associate Justice Blackmun had occasion to summarize the abuses of TWEA that led Congress to undertake its reform:

> The historical record shows that, once a President had declared the existence of a national emergency, he was slow to terminate it even after the circumstances or tensions that had led to the declaration could no longer be said to pose a threat of emergency proportion to the Nation. Because of this pattern of behavior, TWEA emergency authority operated as a one-way ratchet to enhance greatly the President's discretionary authority over foreign policy. . . .
>
> There was widespread feeling that this broad grant of emergency powers conflicted with the intent of the TWEA, which sought to empower a President to respond to situations that presented an imminent threat requiring immediate response. The expert witnesses who testified before the House Subcommittee expressed a general consensus that § 5(b) of the TWEA inappropriately had been used as a flexible instrument of foreign policy in nonemergency situations.[10]

As a result of its review, Congress limited TWEA to wartime use and created IEEPA — enacted on December 28, 1977 — for peacetime use of most of Section 5(b)'s powers in cases of national emergency.[11] While the substantive powers set forth in the two laws are similar, Congress included in IEEPA significant procedural checks that were not present in TWEA.

Most notably, lawmakers subjected the use of presidential powers under IEEPA to the procedural requirements of the recently passed National Emergencies Act. Accordingly, IEEPA orders — like all national emergency declarations — must be published in the Federal Register and transmitted to Congress, and they are subject to regular reporting requirements. (Congress also placed additional reporting requirements and procedures on IEEPA orders beyond those provided by the NEA.)[12] The orders expire after one year unless renewed by the president.[13] Most important, under the original terms of the NEA, Congress had the power to terminate IEEPA orders with a concurrent resolution, better known as a "legislative veto": a law passed with a simple majority that takes effect without the president's signature.[14]

Lawmakers rejected a proposal to place firm limits on the duration of a national emergency invoking IEEPA out of concern for ensuring that the authorities were "sufficiently broad and flexible to enable the President to respond as appropriate and necessary to unforeseen contingencies."[15] Nevertheless, the report of the House Committee on International Relations concerning IEEPA stated that committee members intended for the law to be used for emergencies that

> are by their nature rare and brief, and are not to be equated with normal ongoing problems. A national emergency should be declared and emergency authorities employed only with respect to a specific set of circumstances which constitute a real emergency, and for no other purpose. The emergency should be terminated in a timely manner when the factual state of emergency is over and not continued in effect for use in other circumstances. A state of national emergency should not be a normal state of affairs.[16]

Congress has amended IEEPA a number of times since its passage.[17] But perhaps the biggest effect on IEEPA (and all emergency powers) has come not from Congress but from a 1983 Supreme Court case, *Immigration and Naturalization Service v. Chadha*, which held that legislative vetoes are unconstitutional.[18] This neutered the NEA's primary check against presidential abuse of emergency powers. After *Chadha*, Congress replaced the NEA's concurrent resolution provision with a joint resolution provision.[19] A joint resolution, like any other legislation, must be presented to the president and, if vetoed, requires a two-thirds vote in each chamber for an override. This makes it extremely difficult for Congress to stop a presidential abuse of any emergency power.

How IEEPA Sanctions Are Implemented

A detailed breakdown of IEEPA's provisions is provided in the annex to this report. Generally, IEEPA gives the president expansive powers to freeze assets of targets held by U.S. persons and companies, block transactions that would benefit targets, prohibit imports and exports by and to targets, or otherwise "regulate" a wide array of financial transactions. IEEPA also contains four exceptions to its powers: it does not confer authority to block personal communications, humanitarian donations (although this exception may be waived by the president), the transmission or receipt of "information and informational materials," or expenditures relating to travel.

Although the prohibitions under different sanctions programs can vary significantly depending on their particular implementing regulations and licenses, a general understanding of the sanctions mechanisms and processes is essential to considering effective and workable reforms.

Who Imposes and Implements Sanctions

An IEEPA sanctions program generally is created when the president issues an executive order that declares a national emergency under the NEA, invokes IEEPA, and specifies the "unusual and extraordinary threat" the sanctions are intended to address. Congress has also passed laws that direct the president to use IEEPA's authorities to address certain concerns, such as human rights abuses.[20]

For any given IEEPA sanctions program, the executive order establishes the outer bounds of what is permissible, often specifying categories of individuals or entities to be sanctioned (e.g., "foreign persons attempting to interfere with a U.S. election"). Further refinement is generally left to regulations promulgated by the Treasury Department's Office of Foreign Assets Control (OFAC), which administers IEEPA sanctions as well as sanctions programs that rely on other authorities.[21] An executive order establishing a sanctions program may specify initial targets or may leave it entirely to OFAC to designate targets at a later time (the latter approach is called a "naked" executive order).

Who — and What — May Be Subject to Sanctions

For many Americans, the term "foreign sanctions" likely brings to mind the imposition of financial penalties on hostile foreign leaders, governments, or nations, such as officials working with Kim Jong Un in North Korea or Vladimir Putin in Russia. But IEEPA places no limits on who may be sanctioned, as long as the purpose is to address a threat that originates "in substantial part" from overseas. Sanctions may target foreign nationals with no ties to any government and may even target American citizens based in the United States.

Sanctions programs roughly fall into two categories: "country-based" programs and "activity-based" ones. Some country-based programs are comprehensive, covering essentially all transactions with the country and its nationals (e.g., Iran and North Korea). Others are more limited and prohibit only certain types of transactions with the target country or with certain persons in the government of that country (e.g., Libya and Venezuela).[22]

Activity-based programs, on the other hand, address particular actions, and the targets can be anywhere in the world. Some examples of activity-based programs are sanctions against alleged narcotics traffickers, transnational criminal organizations, and persons interfering with U.S. elections.[23] Programs may also authorize the sanctioning of people or entities who provide aid or support to those already sanctioned, even if they are not themselves engaged in the offending activity, or family members of those sanctioned.[24]

Over time, the reach of IEEPA orders has expanded in various ways. For several years after its enactment, presidents used IEEPA only against foreign governments or countries (including "nationals thereof"). President Bill Clinton was the first to use IEEPA to target nonstate individuals and entities — specifically, terrorists who threatened to disrupt the Mideast peace process and international narcotics traffickers — rather than hostile foreign regimes.[25] Since that time, activity-based programs have become unexceptional.[26]

When targeting nonstate actors, presidents originally limited their focus to foreign groups or persons.[27] In 2001, however, President George W. Bush invoked IEEPA in Executive Order 13219, targeting persons threatening stabilization measures in the Balkans, which permitted the targeting of nonstate persons or entities but did not

specify that they must be foreign.[28] Since then, several other executive orders invoking IEEPA have similarly failed to limit their scope to foreign persons, although actual designation of U.S. citizens remains a relatively rare occurrence.[29]

Who Must Adhere to Sanctions

The method of applying pressure to the targets of sanctions is by prohibiting U.S. corporate and real persons from transacting with them and, in some cases, by intimidating foreign persons from transacting with the targets. While the targets suffer the effects of designation, it is the would-be transactors who are placed in legal and financial jeopardy if they transgress the sanctions.

To begin, sanctions must be adhered to by all "U.S. persons," defined by OFAC to include "all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, [and] all U.S incorporated entities and their foreign branches."[30] Many foreign entities are also barred from transacting with targets. If foreign companies have sufficient "contacts" with the United States, or if they conduct their transactions in U.S. dollars (as many do), OFAC may determine that they are subject to U.S. jurisdiction for purposes of sanctions. In fact, OFAC has gone so far as to claim jurisdiction over a Taiwanese company that transferred oil to an Iranian company, simply because that Taiwanese company had previously filed for bankruptcy in U.S. court.[31]

The power of IEEPA sanctions is further increased by the imposition or threat of "secondary sanctions." Secondary sanctions may be placed, under certain programs, on non-U.S. persons — those who fall outside U.S. jurisdiction and cannot legally be required to adhere to sanctions — suspected of transacting with sanctioned or sanctionable entities (for example, purchasing oil from Iran or selling luxury goods to North Korea).[32] The United States has also prosecuted foreign persons for inducing U.S. persons to transact with sanctioned individuals or entities.[33]

The Effect of Sanctions

Experts have referred to IEEPA sanctions as a "financial death sentence." Given the broad powers of the law, combined with OFAC's even more expansive interpretations, the risk-averse behavior of financial institutions, and the centrality of the United States to the global economy, the term is no overstatement.

Once an entity is sanctioned, U.S. persons and others under U.S. jurisdiction are generally prohibited from doing business with that entity, and any property of the target that comes into the possession of a U.S. person — for instance, an account at a U.S. bank — must be frozen.[34] Blocking orders typically target "all property and interest in property" of the target.[35] OFAC has defined *interest* broadly as "any interest whatsoever, direct or indirect."[36] OFAC has further defined *property* and *property interest* to refer to a long list of legally enforceable rights such as currency, negotiable instruments, "evidences of title," "contracts of any nature whatsoever," and any interest in "tangible or intangible" property, whether "present, future or contingent."[37]

When the government announces a particular target of sanctions (which it does by adding the target to the publicly available Specially Designated Nationals and Blocked Persons List, publishing its designation in the Federal Register, and notifying entities that have requested such notifications), U.S. financial institutions, businesses, banks, and so forth must immediately determine whether they hold any property belonging to that person or entity and freeze it. Similarly, when a U.S. bank receives a request to transmit funds to or from a sanctioned entity, it is obligated to either freeze the transaction, which prevents the sender and recipient from accessing the funds, or deny the request without holding the funds. After blocking or rejecting a transaction, it must file a report with OFAC within 10 days.[38]

In large part, the power of U.S. sanctions derives from the centrality of the United States to the international banking system, a fact OFAC acknowledged in a 2019 report: "Sanctions are also magnified by the central role of the U.S. dollar in the international financial system, as . . . funds transfers that neither originate from nor are destined for the United States can nevertheless pass through or otherwise touch a U.S. financial institution, which reacts by blocking the transaction."[39]

The financial sector has proved to be quite risk averse when it comes to sanctions compliance. Indeed, the desire to avoid fines or reputational harms will often lead U.S. institutions to over-comply with sanctions, inhibiting even transactions that might be exempt (for instance, the provision of goods under humanitarian allowances). Moreover, even if a transaction is processed through banks entirely outside U.S. jurisdiction, those banks have a strong incentive to comply with U.S. sanctions, as failure to comply could lead to reputational harms or the U.S. government depriving them of access to the U.S. banking system.[40]

Designation and Delisting

"Designation" under a sanctions regime — the process by which a person or entity is made subject to sanctions — is neither a criminal nor a civil enforcement proceeding.

As one practitioner described it, it is "an extra-judicial process for violation of a U.S. policy."[41]

As a threshold matter, the government need not designate someone before taking action against that person. Due to an amendment made by the USA Patriot Act, the government may block property or transactions pending the results of an investigation into whether someone should be designated. There is no time limit on concluding such investigation, so a "blocked pending investigation" status can place targets in an indefinite financial limbo.

In the process of making a designation decision, OFAC compiles an evidentiary package containing information about the target and writes a formal memorandum supporting the designation. The evidentiary package can include information from U.S. government agencies and foreign governments as well as open-source information.[42] Designation files may rely on evidence that would not ordinarily be admissible in court, such as newspaper articles and hearsay.[43] This evidence is then reviewed by OFAC to determine whether it provides a "reasonable basis to determine that the target meets the criteria for designation" — i.e., the criteria specified in the executive order.[44] OFAC must also consult with other government agencies that have relevant expertise.[45]

In litigation, at least some plaintiffs have been able to obtain some information about the reasons for their designation.[46] However, neither IEEPA nor its implementing regulations require the agency to provide the target any notice or explanation at all, let alone access to the record on which the decision was based.

OFAC has the authority to delist targets, either on its own initiative or if the target raises a challenge. A designated entity may file a petition with OFAC. The petition may assert that an insufficient basis exists for the designation or "propose remedial steps on the person's part, such as corporate reorganization, resignation of persons from positions in a blocked entity, or similar steps, which the person believes would negate the basis for designation."[47] The sanctioned entity may also request a meeting but is not entitled to one.[48]

OFAC acts as the decision-making body and will provide a written decision.[49] There is no time limit for a decision on a petition to delist. After receiving such a petition, OFAC "typically endeavors" to respond within 90 days, but that response, and subsequent ones, may consist of just questionnaires requesting additional information.[50] There are no standards OFAC is required to apply in evaluating the petition.

A designated person, whether in the United States or abroad, may also seek relief in federal court.[51] As a "final agency action," a designation under IEEPA may be challenged under the Administrative Procedure Act (APA). OFAC's determination that a person meets the criteria for designation is afforded "extreme deference" under the APA's "arbitrary and capricious" and "unsupported by substantial evidence" standards of review.[52] The court bases its decision entirely on the administrative record compiled by the government, and plaintiffs are often unable to see much of the evidence in the record because it is classified. The court may also review allegations that the government's actions violate IEEPA (or other statutes) or the Constitution.[53]

Delisting occurs much less frequently than designation, resulting in an ever-increasing roster of targets. While IEEPA-specific data is unavailable, in 2019 there were 334 individuals, 372 entities, 73 vessels, and 6 aircraft sanctioned under a variety of sanctions programs. During that same year, 29 individuals, 62 entities, 9 vessels, and 1 aircraft were delisted.[54] According to one report, the Treasury Department imposed sanctions on approximately 2,800 targets under President Trump, and it sanctioned more alleged terrorists in 2018 than in any of the previous 15 years.[55]

Licenses

Once OFAC sets up a sanctions program or freezes the property or transactions of an entity, it can selectively permit exceptions through a process called licensing.[56] OFAC issues two types of license. "General licenses," which are self-executing, authorize categories of otherwise-prohibited activity for any person or entity that meets their terms.[57] For instance, in Executive Order 13685, President Obama imposed sanctions prohibiting transactions with Crimea after Russia forcibly occupied it. OFAC subsequently issued General License 9, which permitted the export to Crimea of various internet-based messaging services.[58] General licenses may also be incorporated into the regulations for individual sanctions programs. For instance, many sanctions programs contain within their regulations a general license allowing the provision of certain types of legal services.[59]

On the other hand, OFAC issues "specific licenses," which apply only to the recipient and are particularized to their circumstances, on a case-by-case basis; those seeking such licenses must apply for them.[60] Specific licenses are not made public, but examples occasionally surface through Freedom of Information Act (FOIA) requests or statements by licensees. For instance, the company 3M once received a specific license so it could sell a window-coating product to be used in a United Nations building in Sudan.[61] There is no deadline for OFAC to rule on specific license requests and no regulatory criteria for evaluating them. Although a denial constitutes a final agency action and can therefore be challenged in court under the APA, any such challenge is likely to be futile given the purely discretionary nature of licensing and the APA's deferential standard of review.[62]

Guidance

In light of the complexity of sanctions programs and the high cost of running afoul of them, OFAC takes various steps to provide clarity about how the regimes operate. First, it publishes answers (currently more than 800) to "Frequently Asked Questions" about various sanctions programs.[63]

Second, OFAC periodically issues guidance regarding compliance with various sanctions regimes. For instance, it has issued guidance regarding the provision of humanitarian aid by nonprofit organizations that attempts to clarify what actions may run afoul of existing sanctions.[64] Suggestions for best practices are sometimes included in these guidelines, and although they are not mandatory, they can have a coercive effect. Banks and other institutions may require clients to adhere to the guidance in order to work with them.[65]

Third, OFAC occasionally issues "interpretative letters" or "comfort letters." These constitute nonbinding, situation-specific advice to interested parties on whether OFAC will interpret certain activities as authorized or unauthorized by a sanctions program. At least some of these letters are published on OFAC's website in redacted form.[66]

Unlike regulations, FAQ responses and guidance documents are not binding on the agency, and adherence to them cannot serve as a legal defense in a civil enforcement action. However, compliance with informal guidance can make enforcement action less likely or reduce any penalties.[67] Entities subject to IEEPA are thus incentivized to treat restrictions set forth in these documents as binding, while they rely on the permissions set forth in these documents (but not enshrined in regulations) at their own risk.

Enforcement

IEEPA has a strict liability regime when it comes to civil enforcement. No intent to violate the law is necessary, and there are no de minimis exceptions for low-value transactions.[68] Civil penalties may be levied not only for a violation of sanctions but also for a failure to comply with administrative requirements imposed by a particular sanctions regime (such as record-keeping requirements).[69] However, OFAC has enforcement discretion as to what actions it will seek to penalize.

OFAC can issue administrative subpoenas when investigating a suspected violation. Ordinarily, when OFAC determines that an individual or entity has violated sanctions, it will issue a pre-penalty notice and provide an opportunity for a written response.[70] The director of OFAC ultimately decides whether a fine should be imposed and how much it should be, applying a set of factors that OFAC has specified. The maximum fine per violation is the greater of $311,562 or twice the value of the illegal transaction.[71]

OFAC has published a list of factors it considers in levying penalties. These include the willfulness of the violation, the harm to the sanctions program's objectives, the characteristics of the violator (e.g., how sophisticated the entity is, or whether it has any prior history of violating sanctions), how robust the entity's compliance program is, and the entity's cooperation with OFAC (most significantly, whether the company self-reported the violation).[72]

The imposition of a fine is a final agency action that can be challenged in court under the APA. The court applies the APA's deferential standard of review; it does not undertake its own fact-finding but relies on the administrative record as presented by the agency.[73]

In addition to civil penalties, it is a felony to willfully transact with a designated person or entity. Penalties can include fines of up to $1 million and prison terms of up to 20 years per violation.[74] OFAC refers suspected criminal violations to the Department of Justice for prosecution.

Trends and Concerns

Since its first use in 1979, IEEPA has been heavily relied on by every administration. It underlies dozens of sanctions programs that have wide, bipartisan support from Congress. Moreover, although nothing in IEEPA prevents it from being used against targets within the United States, the vast majority of designations have been of noncitizens abroad.

Nonetheless, certain aspects of the law — and certain uses of its powers — have raised concerns. The law's potential for abuse is significant and has been limited not by any safeguards within the law but by self-restraint on the part of those wielding it. We already have seen hints of how IEEPA can be abused when self-restraint yields to other considerations.

Use of IEEPA in Nonemergency Situations

An emergency, as ordinarily defined, is "an unforeseen combination of circumstances or the resulting state that calls for immediate action."[75] Notably, IEEPA requires more than just an emergency to invoke its powers: its use is authorized only for emergencies involving an "unusual and extraordinary threat."[76] And yet, although Congress intended IEEPA to be used rarely, for brief periods, and only in situations of extraordinary national emergency, it has become a routinely invoked foreign policy tool.

Obama administration officials acknowledged as much in 2015. When an IEEPA-based national emergency declaration concerning Venezuela caused some alarm, a deputy national security adviser hastened to reassure the public that there was, in fact, no threat to the United States: "This is language we use in executive orders around the world. . . . So the United States does not believe that Venezuela poses some threat to our national security. We, frankly, just have a framework for how we formalize these executive orders."[77] Ironically, this is exactly the problem that IEEPA was meant to solve. When Congress was considering reforms of the TWEA, a number of witnesses testified that it had been used "as an instrument of foreign policy in non-emergency situations."[78]

This is not to say that IEEPA is used for unimportant matters. It may well be appropriate to impose sanctions on targets in Belarus because of threats to its democratic processes (as in Executive Order 13405) or on targets in Somalia because of conflict there (as in Executive Order 13536). But these cannot fairly be described as emergencies that threaten the United States. Moreover, some of the IEEPA-based national emergencies are not tied to any particular precipitating event but rather to a background set of conditions that did not arise quickly and do not seem likely to disappear anytime soon, such as proliferation of weapons of mass destruction or narcotics trafficking.[79]

According to the Congressional Research Service, "Each year since 1990, Presidents have issued roughly 4.5 executive orders citing IEEPA and declared 1.5 new national emergencies citing IEEPA."[80] Once established, emergencies invoking IEEPA are routinely renewed, lasting nearly a decade on average, a figure that is increasing.[81] The longest-running emergency invoking IEEPA, concerning Iran, has been in place since 1979 (it is also the longest-running declared national emergency generally).[82]

Routine use of IEEPA in nonemergency situations not only normalizes such use but also threatens to lower the threshold for invoking a national emergency to access other emergency powers. This was made starkly evident in the debate over President Trump's invocation of national emergency powers to fund the construction of a border wall. When critics of the move argued that conditions at the border did not warrant a national emergency declaration under the NEA, the president's supporters and others observed that national emergencies — mostly relying on IEEPA — had been invoked dozens of times for circumstances that were not particularly threatening to U.S. interests.[83]

Use of IEEPA as a Stand-In for Lapsed Legislation

On occasion, presidents have used IEEPA to give themselves powers contained in statutes that Congress had allowed to lapse. This is, in effect, the use of emergency powers to supplant the role of the legislature. On six separate occasions, presidents have invoked IEEPA to continue powers under the Export Administration Act of 1979 (EAA), which gave the president the ability to control exports for national security or foreign policy reasons.[84] Such uses included a seven-year stretch from 1994 to 2001.

The relevant national emergency declarations made clear the president's intention to extend these legislative powers, stating almost identically in each declaration: "Notwithstanding the expiration of the Export Administration Act of 1979 . . . the provisions of that Act, the provisions for administration of that Act and delegations of authority set forth in [related orders] shall, to the extent

permitted by law, be incorporated in this Order and shall continue in full force and effect."[85] In addition, almost all the declarations stated the president's "intention to terminate th[e] order upon the enactment into law of a bill reauthorizing the authorities contained in the Export Administration Act."[86]

The Export Controls Act of 2018 made the powers of the EAA permanent.[87] But the last of the national emergencies declared to continue the powers of the EAA through IEEPA, Executive Order 13222, continues to be renewed every year in order to keep preexisting sanctions in place.[88]

Courts have upheld this use of IEEPA under challenge. Some have read into IEEPA's history, along with Congress's repeated acquiescence to the use of IEEPA to fill in for the EAA, a sort of gloss that permits it to be used in this way.[89] However, some courts have found that where the EAA's powers exceed those of IEEPA, the powers in effect are those limited to IEEPA; others have limited the IEEPA powers that may be used to fill in for the EAA to those that existed in 1977, when IEEPA was passed.[90]

Use of IEEPA Sanctions Against U.S. Targets

The vast majority of targets sanctioned under IEEPA are foreign. However, nothing in IEEPA precludes the designation of people and entities inside the United States, including U.S. citizens. Indeed, dozens of U.S. citizens and entities are currently sanctioned under IEEPA. (Some of these U.S. citizens are dual nationals, whom OFAC considers "foreign persons" in at least some circumstances.)[91]

In some executive orders creating sanctions programs, presidents have specified that the targets must be foreign. For example, the 1994 national emergency declaration concerning proliferation of weapons of mass destruction authorizes sanctions only against "foreign persons."[92] Moreover, while many orders authorizing country-based sanctions do not contain a foreign person limitation, such a limitation is often inherent in the nature of the sanctions. In recent years, however, few of the activity-based sanctions orders have included such a restriction. Thus, for example, Executive Order 13694, which authorizes the blocking of property to address malicious cyber activity, is not limited to foreign persons.[93]

The Effect of Sanctions on Designated U.S. Persons

After the 9/11 attacks, the George W. Bush administration sanctioned a number of Muslim Americans and U.S.-based Muslim charities under Executive Order 13224, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism." The order authorized sanctions against suspected foreign terrorists, as well as any persons or entities — including any U.S. persons — who are "owned or controlled by, or [who] act for or on behalf of" designated terrorists or terrorist groups; who "assist in, sponsor, or provide financial, material, or technological support for . . . or other services to or in support of" them; or who are "otherwise associated with" them.[94]

The numerous sanctions placed on U.S. persons and entities after 9/11 may have been the result of a top-down process that placed quotas on designations to the detriment of fairness and accuracy. The 9/11 Commission observed:

> The goal set at the policy levels of the White House and Treasury was to conduct a public and aggressive series of designations to show the world community and our allies that the United States was serious about pursuing the financial targets. It entailed a major designation every four weeks, accompanied by derivative designations throughout the month. As a result, Treasury officials acknowledged that some of the evidentiary foundations for the early designations were quite weak. One participant (and an advocate of the designation process generally) stated that "we were so forward leaning we almost fell on our face."[95]

Given the centrality of the U.S. banking system, IEEPA sanctions can have devastating effects on foreign targets. But the impact on U.S. persons who are designated can be even more drastic, as they are less likely to have access to resources that fall outside U.S. jurisdiction. Indeed, when designated under IEEPA, an American citizen or legal permanent resident is effectively unable to hold a job or pay rent without OFAC's permission.

After 9/11, naturalized U.S. citizen Garad Jama was designated for nine months. During the initial months of that period, in addition to the stigma he suffered, he was unable to obtain employment, and he received no responses when he sought to obtain relief from OFAC. This changed only after he filed suit and OFAC granted him a limited license. OFAC ultimately de-listed him for lack of evidence.[96]

U.S. organizations that are designated are often forced out of existence.[97] Unable to pay rent or other bills or to access bank accounts, they can quickly go bankrupt. Nine U.S.-based charities were designated after 9/11 when the government concluded that their charitable contributions benefited terrorist groups operating in the relevant regions.[98] Most of them were forced to shut down without the government ever having to prove any criminal charges against them in court.

Constitutional Concerns Regarding U.S. Designees

Litigants have raised a number of constitutional claims in relation to IEEPA designations, most of which have not been successful. Many of the relevant cases concern designations pursuant to terrorism sanctions, an area in which courts are maximally deferential and give great weight to the government's interests in the applicable balancing tests. In certain cases, Fourth and Fifth Amendment claims have been fruitful, but these decisions have come in lower courts, not the U.S. Supreme Court, and so their holdings do not apply nationally.

Fourth Amendment: Unreasonable Seizure

For a seizure under the Fourth Amendment to be considered "reasonable," the government ordinarily must obtain a warrant from a neutral magistrate that is supported by probable cause of criminal activity. The freezing of assets under IEEPA occurs without a warrant. Two questions therefore arise: First, is the freezing of assets a "seizure" under the Fourth Amendment? And second, if it is, is there an exception such that the seizure is constitutionally "reasonable" even in the absence of a warrant?

Courts are divided on whether freezing assets under IEEPA constitutes a Fourth Amendment seizure. The primary fault line is whether the government must take ownership of the assets in order to "seize" them. Some courts have held that no seizure occurs under IEEPA because the frozen assets do not vest in the government.[99] Other courts, however, have pointed out that the legal standard for seizure is not one of vesting but of "interference with the target's possessory interest" and that the freezing of assets meets this test.[100] Mirroring the latter view, the 9/11 Commission staff noted that while an IEEPA freeze does not technically divest title, "when a freeze separates the owner from his or her money for dozens of years . . . that is a distinction without a difference."[101]

If the freezing of assets is a seizure under the Fourth Amendment, the question then becomes whether the government must obtain a warrant supported by probable cause. Courts that have upheld the warrant requirement have rejected government arguments that IEEPA asset freezes should be subject to special needs, exigency, or "general reasonableness" exceptions.[102] Other courts, while still finding the warrant requirement applicable, have indicated that some flexibility in its application could be permissible.[103]

Still other courts, however, have held that a warrant is not required even if the asset freeze is a seizure. They have ruled that the Fourth Amendment's reasonableness requirement is satisfied, at least when dealing with foreign entities, by the existence of substantial evidence to support designation.[104] Moreover, in *United States v. Holy Land Foundation for Relief and Development*, a district court found that warrantless searches of the target's property were permissible within the Fourth Amendment because, as a "Specially Designated Global Terrorist," the organization was placed in a group of entities that was "closely regulated."[105]

The government has argued that a warrant requirement is impracticable for a variety of reasons, including that the government does not know the location of a target's assets before a blocking order is sent out, that it would be too cumbersome to update warrants as the government learns of additional assets, and that the timing of blocking orders must be coordinated with other governments.[106] However, the court in *Al Haramain Islamic Foundation v. U.S. Department of Treasury* rejected these arguments, noting that the number of targets who have sufficient connections to the United States to make a Fourth Amendment claim will be small, limiting any administrative burden.[107] The court also suggested approaches that could respect the need for a warrant while addressing the government's stated concerns. For instance, in situations of potential asset flight, assets could be frozen initially pursuant to an emergency exception to the warrant requirement; alternatively, a warrant could be issued that leaves the specific nature of the assets to be filled in after identification by financial institutions.[108]

Fifth Amendment: Insufficient Due Process

The Fifth Amendment requires that the government provide due process when depriving persons of "life, liberty, or property." Normally such process consists of notice and, as the Supreme Court stated in *Matthews v. Eldridge*, "the opportunity to be heard at a meaningful time and in a meaningful manner."[109] However, the Court has also held that "due process is flexible and calls for such procedural protections as the particular situation demands."[110] Thus, the Supreme Court has allowed the notice and hearing to take place after the deprivation, rather than before, where pre-deprivation procedures would frustrate a valid governmental interest.[111]

With IEEPA, courts generally have held that no pre-deprivation notice and hearing are necessary, due to concerns about asset flight.[112] They have found due process to be satisfied by a post-deprivation administrative process that includes the opportunity to make written submissions to OFAC.[113] However, such process must be timely (in that OFAC must respond to submissions and provide a determination within a reasonable time), and OFAC must provide the person or entity with sufficient notice of the underlying basis for the designation.[114]

Some courts have found due process violations where OFAC was dilatory in the post-deprivation administrative process.[115] In *KindHearts for Charitable Humanitarian Development, Inc., v. Geithner*, the district court found the plaintiff's due process rights violated where OFAC did not

promptly provide the plaintiff with the unclassified administrative record on which it had been designated, noting that without such a record, KindHearts was unable to raise an effective administrative challenge.[116] The court also held that OFAC's failure to respond to the plaintiff's letter questioning the blocking of its property for more than a year, after which it provided only a cursory letter with no explanation of its reasoning, violated due process because it did not provide a "meaningful opportunity to be heard."[117]

In *Al Haramain*, the court found that the notice OFAC provided to the sanctioned organization was insufficient and thus violated due process. OFAC provided no information to Al Haramain Islamic Foundation for seven months after its designation, and within four years provided only one document that indicated some of the bases on which it had been designated. The court held that, while the adequacy of notice must be decided on a case-by-case basis, the government must give plaintiffs sufficient access to the administrative record. With respect to classified information, this could be accomplished through the use of unclassified summaries or by providing access to an attorney for the plaintiff who has the requisite security clearance. As with the warrant requirement, the government argued that such a process would be unworkably burdensome, but once again the court noted that only a small percentage of targets would be able to bring constitutional due process claims.[118]

The rulings in *KindHearts* and *Al Haramain* remain good law. However, they apply only within the jurisdictions of those courts — the Northern District of Ohio and the Ninth Circuit, respectively — and given the fact-specific nature of due process inquiries, the government would likely argue that their precedential value is limited.

Moreover, the regulations concerning the administrative process for challenging an OFAC designation do not reflect the holdings of those cases. Remarkably, the regulations to this day include no requirement that OFAC provide any notice to designated U.S. persons of the reasons for their designation. As for hearings, the regulations permit a person or entity to seek delisting through the filing of a written petition. On its website, OFAC states that while its timing for responding to each petition is unique, it aims to provide some kind of response (which can simply be a request for further information) within 90 days. It provides no guidelines on the timing for an ultimate decision. The target seeking delisting may request a meeting, but granting any such request is up to OFAC's discretion.[119] In other words, the regulations do little more than acknowledge a target's ability to ask in writing for a designation to be reversed.

The due process concerns are even greater when the government invokes IEEPA's powers while an investigation is pending — i.e., before OFAC has reached even the minimal threshold of a "reasonable basis" for designation. This authority to block pending investigation (BPI) was added to IEEPA by the USA Patriot Act in the immediate aftermath of 9/11.[120] Congress did not provide any standard the government must meet to implement BPI, although OFAC has asserted in litigation that it "must be pursuing an investigation based upon a reasonable basis to suspect that the individual or entity meets the E.O. [executive order] criteria."[121] The 9/11 Commission staff described freezes during the pendency of an investigation in these terms: "The government is able to . . . shut down U.S. entities without developing even the administrative record necessary for a designation. Such action requires only the signature of a midlevel government official."[122]

The BPI provision was used against four U.S. charities after 9/11: Al Haramain Islamic Foundation, KindHearts for Charitable Humanitarian Development, the Global Relief Foundation, and the Benevolence International Foundation. At the time, the Treasury's general counsel wrote to other Treasury officials: "Common fairness and principles of equity counsel that we impose a reasonable end date on the duration of such orders."[123] The same Treasury memorandum offered a six-month limit on such asset freezes for discussion purposes. However, that suggestion was never implemented.

BPI can prevent a target from challenging its designation in court because it may not be considered a reviewable final agency action under the Administrative Procedure Act (although targets may still be able to bring other claims, including constitutional ones). That was the case in *KindHearts*, where the charity had its funds blocked pending investigation but was informed that it had been "provisionally designated" and that full designation was forthcoming. When KindHearts sought to challenge its "provisional and prospective final" designation, the court held it could not consider the claim because there had been no final agency action.[124]

In short, as noted by 9/11 Commission co-chair Lee Hamilton, "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."[125]

Narrow Interpretation of the Informational Materials Exemption

A pair of amendments made to IEEPA in 1988 and 1994 created an exemption that sought to protect speech and related activities from sanctions. The impetus for the

amendments was the government's seizure of books and magazines that were being shipped from countries sanctioned under IEEPA, convincing Congress that greater First Amendment protections were needed.[126]

The 1988 amendment was introduced by Rep. Howard Berman (D-CA), who explained the reasoning behind the amendment as follows: "The fact that we disapprove of the government of a particular country ought not to inhibit our dialog with the people who suffer under those governments. . . . We are strongest and most influential when we embody the freedoms to which others aspire."[127] The Berman Amendment carved out from IEEPA the president's "authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials."[128]

Despite its broad language, the Treasury Department interpreted this exemption narrowly. OFAC, in its regulations, claimed the right to prohibit transactions related to "informational materials not fully created and in existence at the date of the transaction" (for example, unedited video footage), as well as those involving "the substantive or artistic alteration or enhancement of informational materials." It also excluded "intangible items, such as telecommunications transmissions" from the definition of "informational materials."[129]

These narrow interpretations, and some court cases upholding them, prompted Congress to amend IEEPA again in 1994 with the Free Trade in Ideas Act (FTIA).[130] The express goal of the 1994 amendment was to counter the Treasury Department's restrictive reading of the Berman Amendment.[131] The FTIA thus clarified that the informational exemption applied not only to "informational materials" but also to "information," including intangible information; it stated that the exemption applied "regardless of format or medium of transmission"; and it made clear that the list of exempted media (to which the FTIA added new examples) was only illustrative, prefacing that list with the words "including but not limited to."[132] The conference report also stated that the Berman Amendment "established that no embargo may prohibit or restrict directly or indirectly the import or export of information that is protected under the First Amendment."[133]

Despite the passage of the FTIA, the government has continued to interpret the informational materials exemption narrowly. In regulations and litigation, it has taken the view that the exemption does not protect items that are not fully complete on transmission or activities that are tailored to a particular audience, such as editing publications, sending legal briefs, or giving a speech and answering audience questions. The government has further contended that sanctions may be used to render a video-sharing mobile application unworkable without violating the amendment. It has even promulgated guidance claiming that some artwork may be subject to sanctions, despite the fact that artwork is explicitly protected in the exemption.[134]

Humanitarian Impact of Sanctions

Country-based sanctions programs, as well as activity-based ones that sweep broadly or target entities with political power, can have a dire humanitarian impact on populations that bear no blame for the conduct occasioning the sanctions and have no ability to effect changes that might lift the sanctions.[135] Moreover, even as these populations suffer, the actual targets — officials or other actors who are able to put in place the desired changes — are often insulated from the sanctions' full effects because they hold positions of relative power or privilege. A recent NGO report pointed to "overwhelming agreement in the academic literature" that the toughest U.S. sanctions regimes "degrade public health, and cause tens of thousands of deaths per year" while at the same time "almost always fail[ing] to achieve their goals, particularly when the aim is regime change or significant behavioral changes pertaining to what states consider their fundamental interests."[136] Sanctions have been shown to have severe health impacts, from malnutrition to infant mortality to the undermining of responses to flu outbreaks.[137]

IEEPA contains an exemption for "donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering." However, the statute allows the president to waive this exemption upon determining that it would impair the government's ability to deal with the precipitating emergency. Although the waiver provision was meant to be invoked sparingly, it has become routine. The provision was never waived until 1995, and then not again until 2001.[138] However, since that time, the vast majority of national emergency declarations invoking IEEPA have waived this provision.

In cases where the humanitarian exemption is waived, the government will sometimes issue licenses or regulations that permit various humanitarian measures.[139] Even when the humanitarian exemption is not waived, a license is often still required to provide many goods and services needed for humanitarian purposes, as the exemption applies only to donations — not sales — and only to certain categories of items.[140] Licenses to provide humanitarian aid, when they are granted, can sometimes take months or years to obtain.

The regulations for some sanctions regimes address humanitarian assistance by altering the normal strict liability scheme for civil penalties. For instance, under

Executive Order 12947, charitable contributions made without knowledge or reason to know that the donation or contribution was for the benefit of a specially designated terrorist do not incur penalties.[141]

In addition, at least partly out of humanitarian concerns, Congress has restricted the use of sanctions to prohibit exports of agricultural and medical goods. In the Trade Sanctions Reform and Export Enhancement Act of 2000, Congress prohibited unilateral sanctions that restrict export of agricultural or medical goods unless the president submits a report to Congress explaining the need for the sanctions and Congress enacts a joint resolution approving them. (Situations involving hostilities, war, and controlled exports are exempted from the congressional prohibition.)[142]

These measures are not a complete solution to the problem, however. As one report noted, "Even when one can potentially operate within the letter of the law, the sanctions regime is of such complexity, and the potential consequences of running afoul of U.S. law so dire, that there is a chilling effect on many businesses."[143] This tendency on the part of financial institutions toward overcompliance (or "de-risking," as it is sometimes called) may effectively prohibit humanitarian work regardless of any exemption or license.[144]

For instance, a recent U.S. Government Accountability Office report regarding Venezuela sanctions found that all nine of the U.S. Agency for International Development implementing partners in that country, which were permitted to deliver aid to alleviate the humanitarian effects of the sanctions, nevertheless had banks close their accounts or reject transactions.[145] In North Korea, where humanitarian waivers are in place for some activities, banks' overcompliance has led in some instances to NGOs having to physically carry cash into the country to fund their work.[146] A recent report by a UN special rapporteur found that even the World Health Organization had difficulty delivering aid in countries under sanction because it could not obtain transportation for the goods. The rapporteur found that unilateral sanctions were having an adverse effect on a wide range of human rights "of all population groups in targeted states."[147]

The government has argued that humanitarian assistance must be controlled, as it may be difficult in some settings to ensure that it will not fall into the hands of the sanctioned persons or entities. It has further argued that even if sanctioned entities use the humanitarian assistance to benefit innocent populations — for example, if Hamas were to use humanitarian donations to build hospitals or water treatment systems in the Gaza Strip — that could allow the sanctioned entity to curry local support, undermining a goal of sanctions.

The argument raises both empirical and values-based questions. The government generally is not called upon, either by law or by congressional overseers, to justify IEEPA sanctions regimes with evidence that the sanctions are achieving their goals. It is thus difficult to evaluate the claim that expanding the amount of allowable humanitarian assistance would undermine the sanctions. If that were demonstrated, however, the moral question would remain as to whether the benefits to U.S. interests would outweigh the human costs.

Exercise of Licensing Discretion

The question of whether to issue specific licenses for certain actors to engage in otherwise sanctionable conduct is almost entirely within the discretion of OFAC, which states that "many" of its licensing decisions "are guided by U.S. foreign policy and national security concerns."[148] Although general licenses that OFAC issues are made publicly available, specific licenses are not. In response to a reporter's inquiry regarding a specific license that OFAC had issued, a Treasury Department spokesperson stated: "Treasury does not generally comment on or provide details on license applications or specific licenses that have been issued as the information contained within these licensing applications and determinations may be protected by the Privacy Act, the Trade Secrets Act, or other regulations governing OFAC's licensing authorities."[149]

Obtaining a specific license can be a significant benefit for a business, not only because the license allows the business to engage in otherwise sanctionable conduct but also because the sanctions program likely eliminates a significant portion of the competition. It is not difficult to imagine how the licensing process could be abused to confer a hefty business advantage on individuals who have some connection or influence with relevant government officials. The lack of transparency as to the specific licenses that OFAC grants exacerbates this potential for abuse.

One instance of a specific license that was issued under troubling circumstances involves Syria's broadly sanctioned oil market. As described by *Politico* in April 2020, "a little-known firm helmed by politically connected former military and diplomatic officials," which was created one month before the Trump administration enacted additional sanctions on the Syrian oil sector, received a license to refine and export oil from the country's northeast.[150] It later emerged, in part through a congressional hearing, that the founders of the company were donors to various Republican politicians, including President Trump, and that the Trump administration had pushed for Kurdish authorities to reach a deal with the company.[151]

Similarly, in the Trump administration's final weeks, OFAC granted an Israeli businessman and a number of associated companies a license to engage in certain busi-

ness transactions despite having been sanctioned for corruption and human rights abuses. Those employed to advocate for the license included one of Trump's impeachment attorneys, Alan Dershowitz. Civil society advocates and lawmakers raised concerns regarding the justification for the license, the speed with which it was issued, and the process used. The Biden administration revoked the license, stating that it was "inconsistent" with U.S. foreign policy interests.[152]

These concerns are not limited to the Trump years. In 2010, OFAC provided the *New York Times* with some information about specific licenses after the newspaper filed a FOIA request and commenced litigation. As described by the *Times*, "The process took three years, and the government heavily redacted many documents, saying they contained trade secrets and personal information."[153]

The *Times* found that OFAC had issued almost 10,000 licenses in the previous decade and observed that it would be difficult to justify some of them as serving U.S. foreign policy goals. It also noted that some licensing decisions appeared to have been influenced by political pressure. In one instance, the government was preparing to deny a license to a Hawaiian company until a U.S. senator from the state intervened. The person seeking the license made his first-ever contribution of $2,000 to the senator shortly before the senator and his aide reached out to OFAC regarding the license. Although an official at the State Department recommended denying the license, emails from OFAC noting the senator's interest convinced the State Department that the items in question qualified for a "medical and humanitarian exception." Two months after the license was issued, the individual made another $2,000 contribution to the senator.[154]

This was not the only instance of politicians' involvement in licensing decisions. The *Times* noted that politicians had written in favor of a number of the licenses on which it had obtained information.[155] A former OFAC sanctions adviser admitted that in deciding to allow Mars, Inc. to sell Wrigley's chewing gum in sanctioned countries, "we were probably rolled on that issue by outside forces."[156]

Lack of Congressional Checks, Oversight, and Transparency

Termination of National Emergencies

As originally passed, the NEA allowed Congress to terminate a national emergency by passing a concurrent resolution, which would go into effect without the president's signature. After the Supreme Court's decision in *Chadha* disabled that provision, Congress replaced it with a joint resolution provision. Such resolutions must be presented to the president for signature or veto.

This change has greatly weakened Congress's role as a check against presidential overreach. Congress's inability to terminate emergency declarations that bipartisan majorities in both chambers oppose was demonstrated when President Trump declared a national emergency in order to fund the construction of a border wall. Congress twice voted to terminate the national emergency. Both times however, President Trump vetoed the measures, and Congress was unable to muster the two-thirds supermajority in each house required to override the veto.[157]

Reporting and Oversight

For each new sanctions program under IEEPA, the president must transmit to Congress an initial report that explains the necessity and appropriateness of the sanctions, proposed actions, and the countries that will be the subject of those actions. Following this initial report, the NEA requires the president, every six months thereafter, to transmit to Congress a report on emergency-related expenditures made during that period. Also every six months, IEEPA requires the president to submit a report on the actions taken under that particular sanctions program since the last report.[158] These reports are intended to "give Congress standards by which to evaluate the necessity of continuing the emergency under the National Emergencies Act."[159]

This reporting, which presidents have delegated to the secretary of the Treasury, has become cursory and pro forma, and it is insufficient to hold the executive accountable with respect to whether sanctions are achieving their stated goals.[160] For instance, one recent IEEPA report consisted of just three sentences specifying the total number of actions taken in regard to licenses (such as grants, denials, or clarifications) under the program during the six-month reporting period, the total number and dollar amount of transactions blocked, and OFAC outreach efforts.[161] A recent NEA report was similarly brief, consisting of two sentences providing a total figure of costs associated with the program during the reporting period and characterizing the types of costs.[162] Reports like these do not inform Congress as to whether the sanctions are achieving their goals. Moreover, it appears that these reports have not been made publicly available since the early 2000s, so interested persons must obtain them through FOIA.

IEEPA also requires the president "in every possible instance" to consult with Congress before using the statute and to "consult regularly with Congress" while the powers are being used.[163] In reality, however, these consultations do not occur in any formalized manner. Congressional committees do sometimes hold hearings regarding sanctions programs, and on occasion they even express concern that such authorities are being abused.[164] In one

rare instance in 2009, Congress required OFAC to submit a report on the effectiveness of a particular program.[165] And in 2017 a committee held a hearing on "Evaluating the Effectiveness of U.S. Sanctions Programs."[166] But such oversight initiatives are neither regular nor comprehensive.

Notice and Comment on Regulations

When the government develops regulations implementing sanctions programs under IEEPA, there is typically no opportunity for stakeholders to weigh in. This is because the government takes the view that, despite their often significant effects on U.S. persons, entities, and commerce, sanctions programs "involve a foreign affairs function" and therefore are "exempt from the requirements under the Administrative Procedure Act (5 U.S.C. 553) for notice of proposed rulemaking, opportunity for public comment, and delay in effective date."[167]

President Trump's Novel Uses of IEEPA

President Trump used IEEPA extensively. Sanctions designations soared during his administration, and all but 2 of the 13 national emergencies he declared relied primarily or exclusively on IEEPA.[168] The Trump administration sanctioned more targets in each of its four years than any previous administration in any given year. In all, it nearly doubled the total number of targets from President Obama's first term.[169]

Moreover, President Trump used, and threatened to use, IEEPA in unconventional and unprecedented ways. For instance, he levied IEEPA sanctions in an attempt to intimidate international civil servants of the International Criminal Court (ICC) who were investigating alleged U.S. and Israeli war crimes.[170] Although the United States has never recognized the ICC's jurisdiction over U.S. citizens, and although previous administrations were sometimes critical of the ICC, Trump's action took matters to an entirely new level. The United States had previously used sanctions to punish war criminals, not those who prosecute them. (The Biden administration terminated the ICC sanctions.)[171]

Trump also used IEEPA to target the mobile messaging and video applications TikTok and WeChat, as well as their parent companies, raising significant First Amendment concerns. In litigation, courts have held that the sanctions on TikTok and WeChat violate IEEPA's informational materials exemption and the First Amendment, respectively.[172] Judges have been unpersuaded by the government's claims that national security concerns justify banning the apps. Observers have posited that national security was a pretext, and that the real reasons for the sanctions included the administration's hostility toward China in general and Trump's unhappiness with certain anti-Trump content hosted by these apps in particular.[173]

Trump also frequently threatened IEEPA sanctions that would have been unprecedented in their scope or application. In August 2019, in the midst of a trade war with China, Trump claimed authority to order all U.S. companies to stop doing business there.[174] When questioned on this authority, he tweeted, "Try looking at the Emergency Economic Powers Act of 1977. Case closed!" He also threatened to use IEEPA to impose tariffs on goods imported from Mexico unless that country took steps to reduce the number of immigrants arriving at the southern U.S. border.[175] And he warned of sanctions against Iraq if it expelled U.S. troops following the U.S. assassination of Iranian general Qasem Soleimani.[176] Even though Trump did not act on these threats, his disregard of the norms that have governed past uses of IEEPA increases the likelihood that future presidents will also seek to use the law in novel and expansive ways.

Reform Efforts and Proposals to Date

A handful of bills to reform aspects of IEEPA have been introduced to date, but none would address the full array of problems with the legislation.

For example, the Article One Act, introduced by Sen. Mike Lee (R-UT) shortly after President Trump declared a national emergency to secure funds for a border wall, would reform the National Emergencies Act by requiring congressional approval of national emergency declarations within 30 days of issuance.[177] As amended in the Senate Homeland Security and Government Affairs Committee, however, the bill exempted almost all declarations that rely on IEEPA (although it made explicit that IEEPA cannot be used to impose tariffs).[178] According to the committee's report, IEEPA orders were exempted from congressional approval to "preserve the President's flexibility in deploying economic sanctions on foreign entities and individuals."[179] Unsaid in the report, but no doubt relevant to the committee's decision, was that the bill would have forced Congress to vote dozens of times each year on IEEPA declarations. Most members of Congress would not relish that prospect or consider it necessary, given that Congress has largely approved of presidents' uses of IEEPA to date. Lee reintroduced this bill in 2021 in its original, unamended form.[180]

Rep. Ilhan Omar's (D-MN) Congressional Oversight of Sanctions Act (COSA) would enhance congressional power to terminate national emergencies, strengthen humanitarian exemptions, and require additional transparency regarding the goals the sanctions are intended to achieve and the progress toward them.[181] However, the congressional approval scheme it envisions would be even more burdensome than the one established in the Article One Act, as it would require Congress to vote on individual IEEPA sanctions regimes every six months. In addition, it lacks due process protections for U.S. persons and would benefit from greater humanitarian protections.

Rep. Christopher Smith's (R-NJ) Humanitarian Assistance Facilitation Act of 2013[182] would improve access to humanitarian goods and boost monitoring of the humanitarian impact of sanctions. It would not address other concerns with IEEPA, though, such as the lack of of due process or the high bar for Congress to terminate sanctions.

Experts have also proposed reforms. Peter Harrell, an official in the Obama administration who now serves on President Biden's National Security Council, proposed several reforms to IEEPA while at the Center for a New American Security. These included requiring more robust reporting to Congress and releasing those reports publicly, subjecting sanctions rules and regulations to notice and comment, and requiring Congress to approve actions taken pursuant to IEEPA that have an economic impact in excess of $1 billion or $2 billion.[183]

A Legislative Reform Proposal

To address some of the issues discussed thus far, Congress should enact the changes to IEEPA described below. The primary aims of these reforms are to bolster Congress's role as a check against possible abuse, to protect the constitutional rights of Americans who are designated, to mitigate humanitarian harms, and to bring transparency and oversight to sanctions regimes.

The purpose of these proposals is not to prevent IEEPA's use in nonemergency situations. Although such a change might be desirable, Congress has long accepted presidents' use of IEEPA to achieve significant foreign policy goals in nonemergency situations, clouding the prospects for narrowing IEEPA's use in that respect. Moreover, if the current language of IEEPA is not sufficient to limit the law's use to urgent threats, it is not clear what language would accomplish that goal, short of delineating precise criteria for the imposition of sanctions — a move that would meet resistance in Congress.

The reforms below strike a realistic and workable balance by significantly limiting IEEPA's potential for abuse while responding to the legitimate needs and concerns of both the executive and legislative branches. Thus, for instance, a warrant would be required to freeze Americans' assets, but the courts could apply flexibility in permitting a temporary freeze pending issuance of the warrant to minimize the chance of asset flight. Similarly, Congress would be required to approve presidential renewals of sanctions regimes, but the regimes would be voted on as a package, thus lessening the burden on Congress.

Remove IEEPA from Under the National Emergencies Act of 1976

The suggestion that IEEPA should be removed from the NEA framework might seem counterintuitive if the goal is to strengthen control and oversight over IEEPA. This recommendation, however, is aimed not at enhancing checks on IEEPA but rather at preventing nonemergency IEEPA usage from lowering the bar to deploy other emergency powers.

Because IEEPA is by far the most frequently used of the executive emergency powers, and because Congress has largely acquiesced to presidents' use of IEEPA to impose sanctions in a variety of circumstances, the effect of including IEEPA as an emergency power under the NEA is to normalize the use of emergency powers in nonemergency situations. Removing IEEPA from the ambit of the NEA would thus help preserve more stringent standards for use of the remaining emergency powers.

Under this proposal, although a declaration of national emergency would no longer be required to invoke IEEPA, the other procedural requirements of the NEA — such as publication of the IEEPA order in the Federal Register, the requirement of yearly renewal, and semiannual reporting obligations — would be imported into IEEPA itself. Moreover, the "unusual and extraordinary threat" requirement, which is unique to IEEPA, would be retained. Although the government has often honored this requirement in the breach, removing it could create the impression that Congress intends to make the standard even lower than the one that has evolved in practice.

Require Congressional Approval for Invocations and Renewals

Invocations

The U.S. Supreme Court's holding that legislative vetoes are unconstitutional, and Congress's replacement of the NEA's concurrent-resolution provision for termination of emergencies with a joint-resolution mechanism, has made it exceedingly difficult for Congress to terminate a national emergency. In effect, Congress must muster a veto-proof supermajority. In addition, allowing presidents to use IEEPA's powers without congressional action may incentivize legislative inaction. Lawmakers can criticize abuses without having to risk accountability for their own votes.

The solution, as has been proposed in bills to reform to the NEA itself, is to flip the effect of Congress doing nothing. Currently, congressional inaction results in the national emergency — and the use of IEEPA — continuing. Under the proposed reform, if Congress does not affirmatively approve the use of IEEPA within 90 days, the authority would terminate. This period is longer than the 30 days allotted in NEA reform legislation, the idea being that because IEEPA declarations are relatively common, a short approval period could create numerous "fire drills" that would be difficult for Congress to manage.

A resolution to approve would be privileged and fast-tracked. Any member could force a vote on the resolution, and it would not be subject to a filibuster in the Senate. This would prevent party leaders from blocking a floor vote

and would ensure that the sanctions program is approved if a simple majority of each chamber votes for it. A failure to approve the declaration, either because no joint resolution was offered or because Congress voted against it, would serve as a bar to the president issuing another IEEPA order for substantially the same circumstances.

Renewals

In addition to approving a president's invocation of IEEPA within 90 days, Congress should be required to renew its approval on a yearly basis. However, unlike the initial approval vote, which would be done individually for each IEEPA program, the renewal vote would consider all extant IEEPA programs as a package, thus reducing the strain on Congress's time and resources.

These approval votes would be privileged and subject to expedited procedures. Filibusters would be prohibited, and amendments would be considered germane only if they removed particular sanctions programs from the blanket approval. Any member of Congress could force a vote on an amendment to the sanctions approval.

This arrangement strikes a sensible balance: while Congress could in theory terminate the full package of IEEPA sanctions through inaction, that would be highly unlikely; nonrenewal of a particular sanctions program, on the other hand, would require a majority vote (but not a veto-proof supermajority).

Strengthen IEEPA's Foreign Focus

The prerequisite of a threat that has its source "in whole or substantial part outside the United States" should be amended to read "in whole or *primary* part outside the United States." In today's globalized world, any domestic threat significant enough to warrant IEEPA sanctions — such as a major crime syndicate or terrorist organization — is likely to have some international component. Thus, the current standard does little to constrain IEEPA's use. To date, presidents have used IEEPA to target threats that are largely foreign in origin, and so the proposed amendment would not require a change in current practice. Rather, it is a prophylactic measure to prevent any drift in the direction of using IEEPA as a tool to address domestic threats.

Address Issues Regarding Specific Licenses

Lack of Transparency

OFAC's decision-making on requests for specific licenses is a black box, enabling political favoritism and other problematic practices. A threshold problem is that there are no public regulatory standards governing the decision to grant or deny a request. Congress should require OFAC to develop specific, transparent standards and criteria for granting licenses, to be set forth within the regulations of each sanctions program. These criteria could be tailored to reflect each program's goals.

Another problem is that OFAC does not make information regarding specific license applications or grants publicly available. Instead, every six months, the secretary of the Treasury reports to Congress an aggregate number of actions taken on licenses for each sanctions program during that period. Even these reports, however, are not (at least since the early 2000s) freely available online.

OFAC should be required to make public on its website as much information as possible about specific licenses. At a minimum, this should include the number of specific licenses applied for and granted under each of the sanctions programs. Where possible, it should also include the licenses themselves, redacted as necessary to protect legitimate privacy interests, trade secrets, or safety concerns. In addition, the Treasury should provide (under the necessary confidentiality strictures) unredacted copies of all licenses, as well as underlying materials, to the congressional committees with relevant oversight responsibilities.

Delays

Currently there is no limit on the time OFAC may take to rule on specific license applications. There should be a 60-day limit within which OFAC must issue a decision on a specific license request, unless OFAC and the applicant agree to an extended timeline. The ability to negotiate an extension will help mitigate the risk that OFAC will simply deny licenses rather than comply with the deadline. To further dissuade the agency from defaulting to denial, the law should clarify that a denial of a license application is a final agency action for purposes of APA review, and Congress should appropriate sufficient resources to enable OFAC to respond in a timely manner to license requests.

Legal Representation

It is a clear conflict of interest for OFAC to have discretion over whether targets of sanctions may use their frozen funds to hire legal representation to challenge those sanctions. Although OFAC has issued general licenses to permit legal work under some sanctions regimes (usually allowing payment only from unblocked funds), such measures should be expanded to apply to all sanctions programs, eliminate specific license requirements, and permit the use of blocked funds.

Currently general and specific licenses allowing legal representation include reporting requirements to guard

against targets overpaying their attorneys as a way to free up funds. Similar reporting should be required for the expanded license proposed here. An additional option would be for OFAC to establish a transparent and standardized process for setting reasonable fees, similar to the process by which attorneys' fees are set under fee-shifting litigation regimes.

Protect the Rights of U.S. Persons

It is highly questionable whether Americans and other persons in the United States should be subject to IEEPA's powers in their current form. IEEPA in theory allows the government to prohibit anyone inside the United States (and many outside the United States) from transacting with a designated person. Absent a license, which IEEPA does not require OFAC to grant, a designated person living in the United States would not be able to work, pay for shelter, or even buy food, and these restrictions could remain in place indefinitely. The target would quite literally lack the means to live.

This is arguably a far more severe penalty than a finite term in prison, and yet the president can impose it with the stroke of a pen. Although this authority is supposed to be used only in the face of an "unusual or extraordinary threat," the president is never required to prove that such a threat exists. If any judicial review occurs, the court accepts that anyone who meets the criteria laid out in the executive order — whatever those criteria might be — may lawfully be sanctioned; it asks only whether the determination that the target meets the criteria meets the APA's deferential standard. This is an incredibly low bar for such a draconian penalty.

Congress should consider restricting the use of IEEPA against U.S. persons (including real persons as well as corporations, organizations, or property that is at least 50 percent owned and controlled by U.S. persons) to cases involving criminal conduct. In other words, the powers of IEEPA should be available only when the target of sanctions has been convicted of a crime based on the activities that trigger the sanctions authority. (Assets could be attached pending criminal proceedings to prevent asset flight.) This would impose a burden of proof and a set of procedural protections that are far better suited to the magnitude of the penalty that IEEPA sanctions represent.

Short of this solution, there are steps Congress can and should take to bolster constitutional protections for U.S. persons who are designated under IEEPA. Some of these measures follow directly from the rulings of lower courts in response to Fourth and Fifth Amendment challenges.

Access to Necessities

There is no set of circumstances under which the government should be able to render U.S. persons homeless and deny them adequate means for subsistence through an executive order. Under current law, targets may apply for licenses that allow them to work and pay rent, but Americans in some cases have spent agonizing months — and have had to file lawsuits — before the government even responded to their license requests. IEEPA should be amended to require the government, when designating a real U.S. person (as opposed to a corporate entity), to simultaneously issue a license that ensures the target has sufficient means and legal permissions to access the necessities of life. The specifics of that license could vary depending on the target (for instance, a target might not be authorized to work in certain sectors), but the law should clearly state that no designation may go into effect if not accompanied by such a license.

Warrant Requirement for Seizures

To ensure that IEEPA's implementation complies with the Fourth Amendment, IEEPA should be amended to explicitly acknowledge that the freezing of assets constitutes a seizure and to require OFAC (or any other government office implementing IEEPA sanctions) to obtain a warrant when the assets in question belong to any person or entity entitled to the protections of the Fourth Amendment.

Asset flight is a legitimate concern; sanctions cannot be as effective if targets can simply move assets before they are frozen. However, the court in *Al Haramain* suggested solutions that would enable the government to secure the assets for a brief period while applying for a warrant. If a court then denied the application, any temporarily frozen assets would immediately be unfrozen.

These approaches would be most likely to pass constitutional muster if the period of temporary seizure were minimal.[184] Accordingly, OFAC should amend its regulations to require financial institutions, after freezing the designee's assets, to report to OFAC within 24 hours, rather than the current 10 days, for the small portion of cases in which the designated person or entity can claim Fourth Amendment protections. Once any property has been identified, OFAC can apply for warrants in the relevant federal districts.

Due Process for Designations

To address Fifth Amendment due process concerns, Congress should require OFAC to adhere to the following procedures when designating U.S. persons for sanctions. Targets should receive contemporaneous notice that they have been designated. Within a reasonable period, not to exceed one week, they should be provided the record on

which the decision to designate was based. The record should include an unclassified summary or redacted version of any classified evidence, and the law should specify that these unclassified substitutes must give the target substantially the same ability to respond as the evidence itself.

Targets could then submit documentary evidence in their defense, and they would be entitled to an in-person administrative hearing within 90 days of receiving the administrative record, unless the parties agreed to extend that period. OFAC would then be required to issue a ruling within 90 days of the hearing. If OFAC failed to adhere to any of these deadlines, the target would be considered to have exhausted administrative remedies for purposes of seeking judicial review.[185]

Judicial Review

IEEPA should be amended so that U.S. real persons, as well as U.S. legal persons (such as corporations or organizations) that are at least 50 percent owned and controlled by U.S. persons, can obtain meaningful judicial review of their designation and other adverse actions under the statute. Currently judicial review is available through the APA, but it is limited to the evidence in the administrative record and employs the APA's deferential standard. Congress should create an alternative judicial review mechanism for U.S. persons under which the government must prove by a preponderance of the evidence, on de novo review that allows both parties to submit new evidence, that a target meets the criteria for designation set forth in the relevant executive order (or, in an enforcement proceeding, that a person or entity has violated IEEPA sanctions). The administrative record should be admissible in these proceedings; however, courts should consider hearsay, authenticity, and similar objections when determining how much weight to give the record evidence.

Classified evidence should be handled using procedures similar to those in the Classified Information Procedures Act (CIPA), which governs the use of such information in criminal cases involving espionage charges and other sensitive national security matters. CIPA contemplates various mechanisms — including the appointment of cleared counsel to represent the nongovernment party, the use of unclassified summaries or factual admissions, and the issuance of protective orders — to ensure that classified information is protected while giving the accused a fair opportunity to mount a defense. Prevailing plaintiffs should be entitled to injunctive relief, attorney's fees, and actual damages, which would serve as a deterrent to abuse of the designations process.

Enhance Protections for Provision of Humanitarian Aid

The humanitarian exemption within IEEPA should be enhanced and expanded. It should allow the provision of goods and services — both donations and sales — for health care, water, sanitation, nutritional support, agricultural and food security, civilian energy infrastructure, primary and secondary education, basic shelter, and any other humanitarian needs identified by the secretary of the Treasury. Those who support the delivery of such items should also be covered by the exemption.

The criteria for waiving the humanitarian exemption should be amended along the lines proposed by the Charity and Security Network, an organization that provides resources for nonprofits involved in humanitarian and similar work overseas. In particular, when waiving the exemption on the ground that it would impair the government's ability to address the threat in question, the president should also have to issue a determination — and to provide Congress with the factual basis for this determination — that the humanitarian aid would not reach the intended civilian populations. The exemption should specify that waivers must be temporary and last no longer than necessary, and that the president must submit periodic reports to Congress demonstrating the continued necessity of the waiver.[186]

For individuals and entities wanting to provide humanitarian assistance but who are unsure if the provision of particular products or services is permissible, OFAC should establish an inquiry process with a mandated response time of no more than 30 days. OFAC should also provide comfort letters to financial institutions so that they will facilitate the necessary transactions related to humanitarian goods and services.

Finally, individuals and entities providing humanitarian items and services related to them should be protected by a good-faith belief standard rather than be subject to strict liability. More specifically, a reasonable, good-faith belief that the entity was facilitating the provision of humanitarian goods in accordance with the law should constitute an affirmative defense against any criminal or civil enforcement action.

Remove Certain IEEPA Powers

Using IEEPA Powers Pending Investigation

The ability to use IEEPA's powers during the pendency of an investigation should be eliminated. The deployment of IEEPA's expansive powers even before the government

has determined that a target meets the minimal threshold for designation is uncalled for and dangerous, particularly when there is no time limit on the investigative period.

Imposing Tariffs

As proposed in bills such as the Article One Act (as reported out of the Senate Homeland Security and Governmental Affairs Committee), IEEPA should be amended to make clear that it cannot be used to impose tariffs. It is not entirely clear that IEEPA confers this power presently, but the issue arose after President Trump threatened tariffs on goods coming from Mexico if he was not satisfied with the actions that country was taking to reduce the flow of persons across the U.S.–Mexico border.

Replacing Expired or Rejected Legislation

On several occasions, presidents have used IEEPA to supplant export-control legislation that has expired. Allowing presidents to use IEEPA in this way is highly problematic. When Congress declines to renew a particular authority, its will must be respected, not evaded through the deployment of emergency powers. Using IEEPA in this manner not only constitutes a usurpation of legislative authority but also creates perverse incentives for Congress, absolving lawmakers of having to debate and vote on the policies in question. Accordingly, IEEPA should not be available as a stand-in for expiring legislation or to implement measures that Congress has expressly rejected.

Targeting Certain Multilateral Organizations

Although international organizations make easy political targets, none had ever been the target of sanctions prior to President Trump's executive order concerning the ICC. Although reasonable people can disagree about aspects of the work of the United Nations and international organizations that are either part of or affiliated with the UN, a president should not have nearly unlimited discretion to impose a "financial death sentence" on them. For that reason, IEEPA should be amended to exclude the possibility of sanctioning the UN, its subsidiaries, or its affiliates.[187] There would be no prohibition on sanctioning employees of these organizations for actions that are not part of their professional functions. Limiting the exclusion to these clearly defined organizations will ensure that the exemption is kept to a core group of reputable bodies, and including such an exemption would help the United States build trust among its allies.

Clarify the Informational Materials Exemption

The informational materials exemption, often referred to as the Berman Amendment, continues to be a point of contention. OFAC and the Department of Justice have adopted a cramped view of what it protects. The exemption should explicitly state that it protects all transfers of information, including materials not fully formed on transmission, and that the only types of information *not* protected are those explicitly excluded within the language of the exemption. Moreover, the exemption should be clarified to make explicit that sanctioning social media or other communications platforms constitutes indirect regulation of information and therefore triggers the exemption.

Enhance Oversight and Transparency

Additional oversight and transparency of IEEPA-based sanctions are necessary to ensure that IEEPA's powers are used appropriately and effectively.

Reporting Requirements

To facilitate oversight, new reporting requirements should be added. For sanctions meant to change future behavior (as opposed to punishing past actions), the government, in its initial report to Congress, should be required to state the specific goals that the sanctions are intended to achieve and the criteria that a sanctioned entity must meet to have sanctions removed. Within 30 days, the government should be required to file a supplemental report setting forth the estimated costs to the U.S. economy and the expected humanitarian impact of the sanctions. The government also should be required to report, on a yearly basis, the actual impact on the U.S. economy, any humanitarian impact, and the extent to which the identified goals have been achieved.

Notice-and-Comment Procedures

IEEPA regulations currently are exempted from the notice-and-comment requirements of the Administrative Procedure Act, on the ground that they pertain to a foreign affairs function. Given the significant impact of IEEPA sanctions on U.S. entities' economic activities, however, this exemption should not be available. Requiring notice and comment would allow stakeholders to raise concerns that OFAC and other agencies may not have considered.

Conclusion

IEEPA was based on good intentions to curb abuses of emergency economic powers, and it represented an improvement over what came before. But the more than four decades following its enactment have been marked by unforeseen shifts in the legal landscape and unintended executive and congressional practices. These developments have exposed flaws that are ripe for correction, particularly after the stress test of the Trump years.

The proposals contained in this report would bolster checks and balances within the statute, ensuring that IEEPA remains a flexible tool for presidents to use against global challenges, but one that is sufficiently constrained to reduce opportunities for abuse.

Appendix

IEEPA's Provisions (as Amended)

Criteria to Invoke (50 U.S.C. § 1701)

To use IEEPA's powers, the president must first declare a national emergency with respect to an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." These terms are not further defined. The president may then use IEEPA's powers "to deal with" that emergency.

Powers (50 U.S.C. § 1702(a))

The president has three sets of powers under IEEPA. The first set relates to currency exchanges. Specifically, the president has the power to investigate, regulate, or prohibit:

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or national thereof,

(iii) the importing or exporting of currencies or securities . . .

This set of powers is rarely used today, as the government generally relies instead on similar authorities contained in the USA Patriot Act or achieves the same result through blocking actions under the second set of powers.

The second set of powers is the most frequently used. This paragraph gives the president broad authority to freeze assets and block financial transactions, allowing the president to

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

Particularly notable is the president's ability to block assets even while an investigation against a person or entity is pending — that is, before the government has reached any conclusion of wrongdoing.

Third, in circumstances where "the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals," the president may not only freeze but also vest (i.e., take ownership of) property owned by foreign persons, entities, or countries.

The president is additionally allowed to require reports or records concerning covered transactions.

Exemptions from IEEPA Powers (50 U.S.C. § 1702(b))

IEEPA exempts four categories of items from sanctions.

First, from the outset, IEEPA exempted exchanges of "any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value."

Second, also as originally passed, IEEPA includes a "humanitarian" exemption, which covers "donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering." However, this exemption can be waived when the president "determines that such donations (A) would seriously impair his ability to deal with [the emergency], (B) are in response to coercion against the proposed

recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances."

Third, Congress added in 1988, and then expanded and clarified in 1994, an exemption for the import or export of "any information or informational materials."[188] This exemption applies whether the transmission is "commercial or otherwise, regardless of format or medium of transmission," and whether the sanction affects such activity directly or indirectly. The exception to this exemption, also contained within IEEPA, is certain types of information the export of which is controlled on national security grounds (for instance, information related to the building of nuclear weapons).

Fourth, IEEPA exempts from sanction "any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages."

Secret Evidence in Judicial Review (50 U.S.C. § 1702(c))

Added by the 2001 USA Patriot Act,[189] this section provides that in any judicial review of the government's actions, the government may present any classified evidence "ex parte and in camera." Thus, the person challenging the sanctions would not be able to see or respond to such evidence.

Congressional Consultation and Reports (50 U.S.C. § 1703)

IEEPA requires the president "in every possible instance" to consult with Congress before exercising IEEPA's powers and to "consult regularly" with Congress while exercising them. It does not specify particular committees or individuals in Congress that must be consulted. When using IEEPA, the president must "immediately transmit to the Congress a report specifying":

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;

(3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

(4) why the President believes such actions are necessary to deal with those circumstances; and

(5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

This report must be supplemented at least every six months with additional reports describing the actions taken pursuant to IEEPA and any changes to the information previously provided to Congress.[190]

Regulations (50 U.S.C. § 1704)

IEEPA empowers the president or the president's designee to issue regulations to implement the statute's powers.

Penalties (50 U.S.C. § 1705)

It is unlawful to "violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition" issued pursuant to IEEPA. For civil penalties, there is strict liability, meaning that even unintentional viola-

tions may be punished and that there is no de minimis exception for cases in which the monetary value of the transgression is slight.[191] Civil penalties can range up to $311,562 or twice the amount of the illegal transactions, whichever is greater, per violation.[192] Criminal penalties are available for "willful" transgressions; they can include fines of up to $1 million and prison terms of up to 20 years.

Consequences of Termination of IEEPA Emergency (50 U.S.C. § 1706)

Under this section, powers that the government is exercising to prohibit transactions regarding property on the date of a termination of a national emergency remain in force if the president determines that continuing them "is necessary on account of claims involving such country or its nationals." However, IEEPA states that such powers may not continue to be exercised if the national emergency is terminated by concurrent resolution and "if the Congress specifies in such concurrent resolution that such authorities may not continue to be exercised."[193]

Economic Embargo (50 U.S.C. § 1707)

This section states that "it is the policy of the United States" that, "as appropriate," the president should seek a multinational embargo and seizure of all foreign financial assets of any foreign country when the U.S. Armed Forces engage in hostilities against that state. It also requires the president to report on steps taken under this provision.

Sanctions for Espionage in Cyberspace (50 U.S.C. § 1708)

This section was added in 2014.[194] It permits the president to impose sanctions on foreign persons whom the president determines engaged in or assisted with economic or industrial espionage of U.S. persons in cyberspace. Sanctions under this provision may not prohibit the importation of goods to the United States.

Endnotes

1 See Brennan Center for Justice, "A Guide to Emergency Powers and Their Use," December 5, 2018, last updated April 24, 2020, https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use.

2 See Brennan Center for Justice, "Declared National Emergencies Under the National Emergencies Act," last updated April 22, 2021, https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act.

3 Office of Foreign Assets Control, "Specially Designated Nationals and Blocked Persons List," March 10, 2021, https://www.treasury.gov/ofac/downloads/sdnlist.pdf.

4 Spencer S. Hsu, "Chinese Bank Involved in Probe on North Korean Sanctions and Money Laundering Faces Financial 'Death Penalty,'" *Washington Post*, June 24, 2019, https://www.washingtonpost.com/local/legal-issues/chinese-bank-involved-in-probe-on-north-korean-sanctions-and-money-laundering-faces-financial-death-penalty/2019/06/22/0ccef3ba-81be-11e9-bce7-40b4105f7ca0_story.html.

5 Barry E. Carter, "International Economic Sanctions: Improving the Haphazard U.S. Legal Regime," *California Law Review* 75, no. 4 (July 1987): 1234, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2598&context=facpub.

6 Benjamin A. Coates, "The Secret Life of Statutes: A Century of the Trading with the Enemy Act," *Modern American History* 1, no. 2 (2018): 161; and Christopher R. Casey et al., *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, CRS report no. R45618 (Washington, DC: Congressional Research Service, 2020), 5, https://fas.org/sgp/crs/natsec/R45618.pdf.

7 50 U.S.C. § 1651(a)(1); and 123 Cong. Rec. H2217 (daily ed. Mar. 16, 1977) (excepted Section 5(b) of TWEA "because of that section's importance to the day-to-day functioning of the Government.").

8 50 U.S.C. § 1651(b); and *Revision of Trading with the Enemy Act: Markup Before the H. Comm. on Int'l. Rel.*, 95th Cong. 1 (1977) (statement of Clement J. Zablocki, chairman, Committee on International Relations).

9 123 Cong. Rec. H235-H236 (daily ed. Jan. 10, 1977) (statement of Jonathan B. Bingham, chairman, Subcommittee on International Economic Policy and Trade).

10 Regan v. Wald, 468 U.S. 222, 245-246 (1984) (internal citations omitted) (J. Blackmun dissenting).

11 International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701-08 (1977).

12 50 U.S.C. § 1703.

13 50 U.S.C. §§ 1621, 1622(d), 1641.

14 50 U.S.C. § 1622.

15 H. Comm. on Int'l. Rel., Trading with the Enemy Act Reform Legislation, H.R. Rep. No. 95-459, at 10 (1977).

16 H.R. Rep. No. 95-459, at 10.

17 Casey et al., *The International Emergency Economic Powers Act*, 11-12.

18 Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

19 50 U.S.C. § 1622.

20 See, e.g., Caesar Syria Civilian Protection Act of 2019, Pub. L. No. 116-92, § 7412, 133 Stat. 1197, 2291 (2019); Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44; and Global Magnitsky Human Rights Accountability Act of 2017, Pub. L. No. 114-328, §§ 1261-63, 130 Stat. 2533 (2017).

21 U.S. Department of the Treasury, "Statement of R. Richard Newcomb, director of the Office of Foreign Assets Control," press release, May 10, 2001, https://www.treasury.gov/press-center/press-releases/Pages/po370.aspx.

22 See, e.g., Exec. Order No. 13692, 80 Fed. Reg. 12747 (Mar. 8, 2015) (Venezuela); and Exec. Order No. 13566, 76 Fed. Reg. 11315 (Feb. 25, 2011) (Libya).

23 Exec. Order No. 12978, 60 Fed. Reg. 54579 (Oct. 24, 1995); Exec. Order No. 13581, 76 Fed. Reg. 44757 (July 24, 2011); and Exec. Order No. 13848, 83 Fed. Reg. 46843 (Sept. 12, 2018).

24 See, e.g., Exec. Order No. 14014, 86 Fed. Reg. 9429 (Feb. 10, 2021) ("to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of any person whose property and interests in property are blocked pursuant to this order").

25 See Laura K. Donohue, "Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime," *Wake Forest Law Review* 43, no. 3 (2008): 648, http://www.wakeforestlawreview.com/wp-content/uploads/2014/10/Donohue_LawReview_9.08.pdf.

26 See, e.g., Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001); Exec. Order No. 13581; and Exec. Order No. 13694, 80 Fed. Reg. 18077 (Apr. 1, 2015).

27 See, e.g., Exec. Order No. 12938, 59 Fed. Reg. 59099 (Nov. 14, 1994); Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 25, 1995); and Exec. Order No. 12978.

28 Exec. Order No. 13224.

29 See, e.g., Exec. Order No. 13396, 71 Fed. Reg. 7389 (Feb. 7, 2006); and Exec. Order No. 13694.

30 U.S. Department of the Treasury, "Financial Sanctions: Frequently Asked Questions," accessed March 16, 2021, 11, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx; Thomas B. McVey, *U.S. Sanctions Laws: Dangers Ahead for Foreign Companies*, Williams Mullen, February 21, 2019, 4, https://www.williamsmullen.com/sites/default/files/files/U_S_%20Sanctions%20Laws%20Dangers%20Ahead%20for%20Foreign%20Companies_3_2019.pdf; William B. Hoffman, "How to Approach a New Office of Foreign Assets Control Sanctions Program," *Stetson Law Review* 37, no. 4 (1999): 1414, https://www.stetson.edu/law/lawreview/media/how-to-approach-a-new-office-of-foreign-assets-control-sanctions-program.pdf; and 31 C.F.R. 594.315 (2003).

31 McVey, *U.S. Sanctions Laws*, 4-5.

32 See John J. Forrer, *Secondary Economic Sanctions: Effective Policy or Risky Business?*, Atlantic Council, May 2018, https://www.atlanticcouncil.org/wp-content/uploads/2018/05/Secondary_Sanctions_WEB.pdf; and Vital Interests (blog), "The Impact of Sanctions," interview of Daniel Drezner, moderated by John Berger, Center on National Security at Fordham Law, April 23, 2020, https://www.centeronnationalsecurity.org/vital-interests-issue-28-daniel-drezner.

33 United States v. Tajideen, 319 F.Supp.3d 445 (D.D.C. Aug. 10, 2018).

34 *Anti-Money Laundering: Blocking Terrorist Financing and Its Impact on Lawful Charities*, hearing before the *H. Subcomm. on Oversight and Investigations of the H. Comm*. on Fin. Serv., 111th Cong. 5 (2010) (statement of Daniel L. Glaser, deputy assistant secretary of terrorist financing and financial crimes, Department of the Treasury).

35 See, e.g., Iranian Transactions and Sanctions Regulations, 31 C.F.R. § 560.211(a) (2016).

36 See, e.g., 31 C.F.R. § 535.312 (1979).

37 See, e.g., 31 C.F.R. § 535.311; and 31 C.F.R. § 549.308 (2010).

38 Barry E. Carter and Ryan Farha, "Overview and Operation of U.S.

Financial Sanctions, Including Example of Iran," *Georgetown Journal of International Law* 44 (2013): 908, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2267&context=fac-pub; see also, e.g., 31 C.F.R. 501.603, 501.604 (1997); and Treasury, "Financial Sanctions: Frequently Asked Questions," 32, 49.

39 Office of Foreign Assets Control, U.S. Department of the Treasury, *Terrorist Assets Report: Twenty-Eighth Annual Report to the Congress on Assets in the United States Relating to Terrorist Countries and Organizations Engaged in International Terrorism*, 2019, 7, https://home.treasury.gov/system/files/126/tar2019_0.pdf.

40 See Vital Interests, "The Impact of Sanctions"; Adam M. Smith, "Dissecting the Executive Order on International Criminal Court Sanctions," *Just Security*, June 15, 2020, https://www.justsecurity.org/70779/dissecting-the-executive-order-on-intl-criminal-court-sanctions-scope-effectiveness-and-tradeoffs/; and Carter and Farha, "Overview and Operation of U.S. Financial Sanctions."

41 McVey, *U.S. Sanctions Laws*, 7.

42 See *Anti-Money Laundering,* 4-5 (statement of Daniel L. Glaser); and CarrieLyn Donigan Guymon, "The Best Tool for the Job: The U.S. Campaign to Freeze Assets of Proliferators and Their Supporters," *Virginia Journal of International Law* 49, no. 4 (2009): 858.

43 John Roth et al., *Monograph on Terrorism Financing: Staff Report to the Commission*, National Commission on Terrorist Attacks upon the United States, 2004, 107, https://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf; and Kadi v. Geithner, 42 F. Supp. 3d 1, 12 (D.D.C. 2012) ("Courts, including the D.C. Circuit, have held that hearsay evidence can be considered as part of the administrative record.").

44 *Anti-Money Laundering*, 4-5 (statement of Daniel L. Glaser); U.S. Department of the Treasury, "Protecting Charitable Giving: Frequently Asked Questions," June 4, 2010, 5, https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/Treasury%20Charity%20FAQs%206-4-2010%20FINAL.pdf; and KindHearts for Charitable Human Development, Inc., v. Geithner, 647 F. Supp. 2d 857, 890 (N.D. Ohio 2009).

45 Guymon, "The Best Tool for the Job," 858. Among other things, OFAC must ensure that the designation of a target comports with other governmental interests. *Anti-Money Laundering*, 5 (statement of Daniel L. Glaser); *Anti-Money Laundering: Blocking Terrorist Financing and Its Impact on Lawful Charities: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Serv.*, 111th Cong. 5 (2010) (live testimony of Daniel L. Glaser, deputy assistant secretary of terrorist financing and financial crimes, Department of the Treasury), https://www.govinfo.gov/content/pkg/CHRG-111hhrg58051/html/CHRG-111hhrg58051.htm ("Once a decision is made to proceed along the lines of targeted financial sanctions, there is a well-established process that includes, in particular, the Treasury Department, the Justice Department, and the State Department. The collection—the assembly of the administrative record is reviewed by lawyers from all three of those departments.").

46 *KindHearts*, 647 F.Supp. 2d at 857, 868-69.

47 31 C.F.R. § 501.807.

48 31 C.F.R. § 501.807.

49 31 C.F.R. § 501.807; and Treasury, "Protecting Charitable Giving: Frequently Asked Questions," 4, 5.

50 U.S. Department of the Treasury, "Filing a Petition for Removal from an OFAC List," accessed March 17, 2021, https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list.

51 Treasury, "Protecting Charitable Donations: Frequently Asked Questions," 4.

52 See *Kadi*, 42 F. Supp. 3d at 10-11; and 5 U.S.C. § 706(2)(A)&(E). "Substantial evidence" is a low standard, requiring less than a preponderance of evidence. See Florida Gas Transmission Co. v. FERC, 604 F.3d 636, 645 (D.C. Cir 2010) (Substantial evidence "requires more than a scintilla, but can be satisfied by something less than a preponderance.").

53 See 5 U.S.C. § 706(2)(B)&(C).

54 Johnpatrick Imperiale, *Sanctions by the Numbers: U.S. Sanctions Designations and Delistings, 2009–2019*, Center for a New American Security, February 27, 2020, https://www.cnas.org/publications/reports/sanctions-by-the-numbers.

55 James Politi, "Trump Administration Leans on Sanctions to Shape Foreign Policy," *Financial Times*, January 29, 2020, https://www.ft.com/content/a85a4246-169a-11ea-b869-0971bffac109.

56 *Anti-Money Laundering*, 6 (statement of Daniel L. Glaser); and 31 C.F.R. § 501.801. If, however, legislation requiring the use of IEEPA authorities restricts certain transactions, OFAC may not be empowered to license them. Treasury, "Financial Sanctions: Frequently Asked Questions," 7.

57 Treasury, "Protecting Charitable Donations: Frequently Asked Questions," 4.

58 John E. Smith, "Executive Order 13685, General License No. 9: Exportation of Certain Services and Software Incident to Internet-Based Communications Authorized," Office of Foreign Assets Control, May 22, 2015, https://home.treasury.gov/system/files/126/ukraine_gl_9.pdf.

59 See, e.g., Syrian Sanctions Regulations, 31 C.F.R. § 542.507 (2005). Relatedly, OFAC can also establish "white channels," methods of conducting activity that would otherwise be sanctionable but are permitted subject to additional reporting and oversight requirements. For instance, in 2019, OFAC announced the establishment of such a channel to allow U.S. persons to engage in certain humanitarian exports to Iran under enhanced due-diligence requirements. SmarTrade (blog), "OFAC Announces New Method for Permissible Humanitarian Trade with Iran," Thompson Hine LLP, October 28, 2019, https://www.lexology.com/library/detail.aspx?g=a362ce83-830c-4378-b20c-03d118a9d815; see also Office of Foreign Assets Control, "Financial Channels to Facilitate Humanitarian Trade with Iran and Related Due Diligence and Reporting Expectations," October 25, 2019, https://home.treasury.gov/system/files/126/iran_humanitarian_20191025.pdf.

60 Treasury, "Protecting Charitable Donations: Frequently Asked Questions," 4.

61 See Jo Becker, "Licenses Granted to U.S. Companies Run the Gamut," *New York Times*, last updated December 24, 2010, https://archive.nytimes.com/www.nytimes.com/interactive/2010/12/24/world/24-sanctions.html.

62 See, e.g., Okko Business PE v. Lew, 133 F.Supp.3d 17 (D.D.C. 2015).

63 Treasury, "Financial Sanctions: Frequently Asked Questions."

64 Office of Foreign Assets Control, "Guidance Related to the Provision of Humanitarian Assistance by Not-for-Profit Non-Governmental Organizations," U.S. Department of the Treasury, October 17, 2014, https://home.treasury.gov/system/files/126/ngo_humanitarian.pdf.

65 Kay Guinane, Vanessa Dick, and Amanda Adams, *Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve*, OMB Watch and Grantmakers Without Borders, July 2008, 42, https://charityandsecurity.org/system/files/Collateral%20Damage.pdf.

66 U.S. Department of the Treasury, "Interpretative Rulings on OFAC Policy," accessed March 18, 2021, https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/iran-sanctions/interpretative-rulings-on-ofac-policy. OFAC also sometimes issues statements assuring certain non-U.S. entities that they will not come under sanction for engaging with sanctioned entities under certain specific circumstances. For instance, when a bank was designated and the government of

Honduras then seized the bank in order to liquidate it, OFAC issued a statement assuring non-U.S. institutions that might need to take actions to liquidate the bank that they would not be sanctioned. Office of Foreign Assets Control, "Statement on Proposed Liquidation of Banco Continental," U.S. Department of the Treasury, October 11, 2015, https://home.treasury.gov/system/files/126/banco_continental_10112015.pdf.

67 U.S. Department of the Treasury, "Risk Matrix for the Charitable Sector," accessed March 17, 2021, 4n3, https://home.treasury.gov/system/files/126/charity_risk_matrix.pdf.

68 Smith, "Dissecting the Executive Order." However, some implementing regulations for sanctions programs do incorporate a de minimis standard. See, e.g., 31 C.F.R. 560.205(b)(2).

69 31 C.F.R. § 501 app. A.

70 See, e.g., 31 C.F.R. § 575.702(a) (2010); and 31 C.F.R. § 501 app. A.

71 Clancy v. Office of Foreign Assets Control of the U.S. Department of the Treasury, No. 05-C-580, 2007 WL 1051767, at *4 (E.D. Wis. 2007); 50 U.S.C. § 1705(b). The amount specified in the statute is $250,000, but the amount is periodically adjusted for inflation. See Inflation Adjustment of Civil Monetary Penalties, 86 Fed. Reg. 14,534 (Mar. 17, 2021), https://home.treasury.gov/system/files/126/fr2021_05506.pdf.

72 31 C.F.R. § 501 app. A.

73 Donohue, "Constitutional and Legal Challenges," 685.

74 50 U.S.C. § 1705(c); and Treasury, "Protecting Charitable Donations: Frequently Asked Questions," 12 (criminal penalties require a showing of "willful" violations).

75 *Merriam-Webster*, s.v. "emergency (*n.*)," accessed March 18, 2021, https://www.merriam-webster.com/dictionary/emergency.

76 50 U.S.C. § 1701.

77 Gregory Korte, "White House: States of Emergency Are Just Formalities," *USA Today*, April 9, 2015, https://www.usatoday.com/story/news/politics/2015/04/09/pro-forma-states-of-national-emergency/25479553/.

78 Frederic Block, "Civil Liberties During National Emergencies: The Interaction Between the Three Branches of Government in Coping with Past and Current Threats to National Security," *New York University Review of Law & Social Change* 29, no. 3 (2005): 463, https://socialchangenyu.com/review/civil-liberties-during-national-emergencies-the-interactions-between-the-three-branches-of-government-in-coping-with-past-and-current-threats-to-the-nations-security/.

79 These examples conjure an exchange during hearings on reforming TWEA, in which Rep. Bingham asked an executive branch official what national emergency justified the ongoing use of TWEA's powers. The official's reply was that it was the "threat of Communist aggression." Bingham responded: "Are you serious? . . . The threat of Communist aggression, if you will, or the threat of Communist competition which we face in the world . . . is a permanent situation. It is not an emergency unless you are going to define the situation that exists in the world today as a permanent emergency." *Emergency Controls on International Economic Transactions*, hearings before the Subcomm. on Int'l. Econ. Policy and Trade of the H. Comm. on Int'l. Rel., 95th Cong. 110, 113-14 (1977) (statements of Julius L. Katz, assistant secretary for economic and business affairs, Department of State, and Jonathan B. Bingham, chairman, Subcommittee on International Economic Policy and Trade), https://babel.hathitrust.org/cgi/pt?id=pur1.32754061304717&view=1up&seq=1.

80 Casey et al., *The International Emergency Economic Powers Act*, 18.

81 Casey et al., *The International Emergency Economic Powers Act*, 18-19.

82 Brennan Center for Justice, "Declared National Emergencies Under the National Emergencies Act," last updated March 10, 2021, https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act; and Casey et al., *The International Emergency Economic Powers Act*, 18.

83 See, e.g., Edward Helmore, "Stephen Miller: 'Trump Will Protect His National Emergency Declaration,'" *The Guardian*, February 17, 2019, https://www.theguardian.com/us-news/2019/feb/17/trump-national-emergency-declaration-stephen-miller; Charles Lane, "How Is Everyone Coping with the National Emergency? No, Not That One," *Washington Post*, January 14, 2019, https://www.washingtonpost.com/opinions/how-is-everyone-coping-with-the-national-emergency-no-not-that-one/2019/01/14/96522fc2-1818-11e9-9ebf-c5fed1b7a081_story.html; Madison Gesiotto, "Republican Senators Who Voted Against Trump Have No Excuses," *The Hill*, March 18, 2019, https://thehill.com/opinion/white-house/434556-republican-senators-who-voted-against-trump-have-no-excuses; and Rich Lowry, "Don't Declare a National Emergency for the Wall," *Politico Magazine*, January 9, 2019, https://www.politico.com/magazine/story/2019/01/09/dont-declare-a-national-emergency-for-the-wall-223911/.

84 Exec. Order No. 12444, 48 Fed. Reg. 48215 (Oct. 14, 1983); Exec. Order No. 12470, 3 C.F.R., 1984 Comp., 168 (Mar. 30, 1984); Exec. Order No. 12730, 3 C.F.R., 1990 Comp., 305 (Sept. 30, 1990); Exec. Order No. 12923, 59 Fed. Reg. 34551 (July 5, 1994); Exec. Order No. 12924, 59 Fed. Reg. 43437 (Aug. 19, 1994); and Exec. Order No. 13222, 66 Fed. Reg. 44025 (Aug. 17, 2001).

85 See, e.g., Exec. Order No. 12444.

86 The exceptions were Exec. Orders No. 12924 and No. 13222.

87 Pub. L. No. 115-232, § 1766, 132 Stat. 1636, 2232. This act repealed the Export Administration Act of 1979. Ian F. Fergusson and Paul K. Kerr, *The U.S. Export Control System and the Export Control Reform Initiative*, CRS report no. R41916 (Washington, DC: Congressional Research Service, 2020), 2, https://fas.org/sgp/crs/natsec/R41916.pdf.

88 See, e.g., Continuation of National Emergency With Respect to Export Control Regulations, 85 Fed. Reg. 49939 (Aug. 14, 2020).

89 Owens v. Republic of Sudan, 374 F. Supp. 2d 1, 22 (D.D.C. 2005); United States v. Mechanic, 809 F.2d 1111, 1112-13 (5th Cir. 1987); and Wisconsin Project on Nuclear Arms Control v. U.S. Department of Commerce, 317 F.3d 275, 278-82 (DC Cir 2003).

90 United States v. Quinn, 401 F. Supp. 2d 80, 93-96 (D.D.C. 2005); and Micei International v. Department of Commerce, 613 F.3d 1147, 1153-54 (D.C. Cir. 2010).

91 See, e.g., 31 CFR 536.304.

92 Exec. Order No. 12938.

93 Exec. Order No. 13694.

94 Exec. Order No. 13224; see also 31 C.F.R. § 594.316; and Treasury, "Protecting Charitable Donations: Frequently Asked Questions," 3.

95 Roth et al., *Monograph on Terrorism Financing*, 79.

96 See generally Jake Tapper, "A Post-9/11 American Nightmare," *Salon*, September 5, 2002, https://www.salon.com/2002/09/05/jama/.

97 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," *Harvard Journal on Legislation* 48, no. 1 (2011): 101, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1710534 ("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.").

98 These organizations were the Holy Land Foundation for Relief and Development, Global Relief Foundation, Benevolence International Foundation, Al Haramain Islamic Foundation — Oregon, Islamic African Relief Agency — USA (aka Islamic American Relief Agency),

Goodwill Charitable Organizations, Tamils Rehabilitation Organization, Tamil Foundation, and KindHearts for Charitable Humanitarian Development (dissolved as part of a settlement).

99 Islamic American Relief Agency v. Unidentified Federal Bureau of Investigation Agents, 394 F. Supp. 2d 34, 48 (D.D.C. 2005); *KindHearts*, 647 F. Supp. 2d at 871 (collecting cases); and *Kadi*, 42 F. Supp. 3d at 37 (collecting cases).

100 *KindHearts*, 647 F. Supp. 2d at 871.

101 Roth et al., *Monograph on Terrorist Financing*, 51.

102 *KindHearts*, 647 F. Supp. 2d at 871 (citing cases); and Al Haramain Islamic Foundation, Inc., v. U.S. Department of the Treasury, 686 F.3d 965, 990-95 (9th Cir. 2012).

103 *Al Haramain*, 686 F.3d at 993.

104 *Kadi*, 42 F. Supp. 3d at 36-38; see also United States v. El Mezain, 664 F.3d 467, 539-45 (5th Cir. 2011) (where plaintiff did not challenge seizure under IEEPA, no warrant needed to move seized property under Fourth Amendment).

105 United States v. Holy Land Foundation for Relief and Development, No. 3:04-CR-240-G, 2007 WL 1285751 (N.D. Tex. 2007).

106 See *Al Haramain*, 686 F.3d at 993.

107 *Al Haramain*, 686 F.3d at 993.

108 *Al Haramain*, 686 F.3d at 993.

109 Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

110 Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

111 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974).

112 See, e.g., *Islamic American Relief Agency*, 394 F. Supp. 2d at 49-50; and Zevallos v. Obama, 10 F. Supp. 3d 111, 127-28 (D.D.C. 2014).

113 See, e.g., *Kadi*, 42 F.Supp.3d at 29; *Zevallos*, 10 F.Supp. 3d at 129.

114 *KindHearts*, 647 F. Supp. 2d at 904-06.

115 See *Zevallos*, 10 F. Supp. 3d at 130 (citing cases).

116 *KindHearts*, 647 F. Supp. 857 at 905; cf. Global Relief Foundation, Inc., v. O'Neill, 207 F. Supp. 2d 779, 804 (N.D. Ill. 2002) (no due process violation where plaintiff was not given access to basis for designation but failed to use available administrative processes).

117 *KindHearts*, 647 F. Supp. 2d at 899-908.

118 *Al Haramain*, 686 F.3d at 980-89.

119 See Treasury, "Filing a Petition for Removal from an OFAC List."

120 USA PATRIOT Act § 106.

121 *KindHearts*, 647 F. Supp. 2d at 890.

122 Roth et al., *Monograph on Terrorist Financing*, 51. The 9/11 Commission staff said that "serious consideration should be given to placing a strict and short limit on the duration of such temporary blocking." Roth et al., *Monograph on Terrorist Financing*, 112.

123 Roth et al., *Monograph on Terrorist Financing*, 105 (quoting Treasury memorandum).

124 See *KindHearts*, 647 F. Supp. 2d at 885-86.

125 *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); see also Roth et al., *Monograph on Terrorist Financing*, 8.

126 Tracy J. Chin, "An Unfree Trade in Ideas: How OFAC's Regulations Restrain First Amendment Rights," *New York University Law Review* 83, no. 6 (2008): 1891, https://www.nyulawreview.org/issues/volume-83-number-6/an-unfree-trade-in-ideas-how-ofacs-regulations-restrain-first-amendment-rights/.

127 138 Cong. Rec. E1856-E1857 (daily ed. June 16, 1992).

128 Pub. L. No. 100-418 § 2502, 102 Stat. at 1371-72.

129 See, e.g., Foreign Assets Control Regulations and Cuban Assets Control Regulations, 54 Fed. Reg. 5229 (Feb. 2, 1989); see also Chin, "An Unfree Trade in Ideas," 1891-93.

130 See generally Andrew Franklin, "Material Support: Terrorist Television in the United States," *John Marshall Law Review* 47, no. 4 (2014): 1544-46, https://repository.law.uic.edu/cgi/viewcontent.cgi?article=2093&context=lawreview.

131 H.R. Rep. No. 103-482, at 483 (1994) (Conf. Rep.).

132 Pub. L. No. 103-236, § 525, 108 Stat at 474.

133 H.R. Rep. No. 103-482, at 239.

134 See, e.g., 31 C.F.R. § 560.210(c); United States v. Amirnazmi, 645 F.3d 564 (3rd Cir. 2011); TikTok v. Trump, No. 1:20-cv-02658, 2020 WL 5763634 (D.D.C. 2020); Office of Foreign Assets Control, "Advisory and Guidance on Potential Sanctions Risks Arising from Dealings in High Value Artwork," U.S. Department of the Treasury, October 30, 2020, 1, https://home.treasury.gov/system/files/126/ofac_art_advisory_10302020.pdf ("What is commonly described as the 'Berman Amendment' to the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA) does not categorically exempt all dealings in artwork from OFAC regulation and enforcement.").

135 Richard Hanania, *Ineffective, Immoral, Politically Convenient: America's Overreliance on Economic Sanctions and What to Do About It*, Policy Analysis no. 884, Cato Institute, February 18, 2020, 4, https://www.cato.org/policy-analysis/ineffective-immoral-politically-convenient-americas-overreliance-economic-sanctions ("Thus, aside from those narrowly targeted at the financial interests of individuals, economic sanctions practically always cause hardship to innocent third parties."). More targeted sanctions, such as those that single out individual corrupt officials or human rights offenders, are far less likely to create the same kind of collateral damage.

136 Hanania, *Ineffective, Immoral, Politically Convenient*, 1; see also Erica Borghard, "Reality Check #2: Economic Sanctions Should Not Always Be the Go-To Foreign Policy Tool," Atlantic Council, February 22, 2021, https://www.atlanticcouncil.org/content-series/reality-check/reality-check-2-economic-sanctions-should-not-always-be-the-go-to-foreign-policy-tool/.

137 Hanania, *Ineffective, Immoral, Politically Convenient*, 6.

138 Exec. Order No. 12947; and Exec. Order No. 13219, 3 C.F.R., 2001 Comp., 778-82 (June 26, 2001).

139 See, e.g., Andrea Gacki, "General License No. 8A: Authorizing Certain Humanitarian Trade Transactions Involving the Central Bank of Iran or the National Iranian Oil Company," Office of Foreign Assets Control, U.S. Department of the Treasury, October 26, 2020, https://home.treasury.gov/system/files/126/iran_gl8a.pdf; 31 C.F.R. § 510.512 (2018, am. 2020); and 31 C.F.R. § 542.516.

140 Because the language of the exemption portrays food, clothing, and medicine as examples rather than a comprehensive list, there can be debate about the extent of the items that may fall within this exemption. See Peter L. Fitzgerald, "'If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This': Blacklisting and Due Process in U.S. Economic Sanctions Programs," *Hastings Law Journal* 51, no. 1 (1999): 154-56, https://repository.uchastings.edu/hastings_law_journal/vol51/iss1/3/.

141 31 C.F.R. § 595.408(b) (2020).

142 Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 7202 (2000); and 22 U.S.C. § 7202; see also Dianne E. Rennack, *Economic Sanctions: Legislation in the 106th Congress*, CRS report no. RL30384 (Washington, DC: Congressional Research Service, 2000), 10-13, http://webcache.googleusercontent.com/search?q=cache:McOPJgUs7VQJ:research.policyarchive.org/975.pdf+&cd=11&hl=en&ct=clnk&gl=us.

143 Hanania, *Ineffective, Immoral, Politically Convenient*, 4.

144 Jacob D. Kurtzer, *Denial, Delay, Diversion: Tackling Access Challenges in an Evolving Humanitarian Landscape*, Center for

Strategic & International Studies, September 2019, 21-22, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/Kurtzer_DenialDelayDiversion_WEB_FINAL.pdf.

145 U.S. Government Accountability Office, *Venezuela: Additional Tracking Could Aid Treasury's Efforts to Mitigate Any Adverse Impacts U.S. Sanctions Might Have on Humanitarian Assistance*, GAO-21-239, report to congressional requesters, 28, February 2021, https://www.gao.gov/assets/720/712232.pdf.

146 Edward White, "Aid Groups Forced to Borrow Money from North Korea," *Financial Times*, August 3, 2020, https://www.ft.com/content/057ec3d5-77ba-4db3-a1cc-1b2e60617094.

147 Alena Douhan (UN special rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights), *Report on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights in the Coronavirus Disease Pandemic*, United Nations Doc. A/75/209, 21, 23, July 21, 2020, https://www.undocs.org/en/A/75/209; see also Tara Sepehri Far, *"Maximum Pressure": US Economic Sanctions Harm Iranians' Right to Health*, Human Rights Watch, October 29, 2019, https://www.hrw.org/report/2019/10/29/maximum-pressure/us-economic-sanctions-harm-iranians-right-health.

148 U.S. Department of the Treasury, "OFAC Licenses: Frequently Asked Questions," question 78, accessed March 18, 2021, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1506.

149 Lara Seligman and Ben Lefebvre, "Little-Known U.S. Firm Secures Deal for Syrian Oil," *Politico*, updated August 8, 2020, https://www.politico.com/news/2020/08/03/delta-crescent-energy-syrian-oil-391033.

150 Seligman and Lefebvre, "Little-Known U.S. Firm Secures Deal"; and Amberin Zaman, "US Oil Company Signs Deal with Syrian Kurds," *Al-Monitor*, accessed March 18, 2021, https://www.al-monitor.com/pulse/originals/2020/07/us-oil-company-deal-syria-kurds-kobani-turkey-russia-sdc-sdf.html.

151 Matthew Petti, "Trump Administration Helped GOP Donors Get Syria Oil Deal," Responsible Statecraft, December 9, 2020, https://responsiblestatecraft.org/2020/12/09/trump-administration-helped-gop-donors-get-syria-oil-deal/.

152 See Andrew Boyle, "Ripe for Reform: The Opaque World of Specific Licenses to Do Business Under Sanctions," Just Security, February 12, 2021, https://www.justsecurity.org/74679/ripe-for-reform-the-opaque-world-of-specific-licenses-to-do-business-under-sanctions/; and U.S. Department of State, "Revocation of License for Dan Gertler," press release, March 8, 2021, https://www.state.gov/revocation-of-license-granted-for-dan-gertler/.

153 Jo Becker, "U.S. Approved Business with Blacklisted Nations," *New York Times*, December 23, 2010, https://www.nytimes.com/2010/12/24/world/24sanctions.html.

154 Becker, "U.S. Approved Business with Blacklisted Nations."

155 See Becker, "Licenses Granted to U.S. Companies Run the Gamut" (noting such contacts concerning licenses for companies including American Ingredients Co., Alpha International Trading Co., Computer Sports Medicine, Cooperative Resources International, Hawaii Medical Vitrification, Lasersight, and Sechrist Industries Inc.).

156 Becker, "U.S. Approved Business with Blacklisted Nations."

157 Proclamation No. 9844, "Declaring a National Emergency Concerning the Southern Border of the United States"; and Reuters, "Trump Vetoes Measure to End His Emergency Declaration on Border Wall," October 15, 2019, https://www.reuters.com/article/us-usa-trump-congress-emergency/trump-vetoes-measure-to-end-his-emergency-declaration-on-border-wall-idUSKBN1WV06P.

158 50 U.S.C. §§ 1641(c), 1703(b), (c).

159 123 Cong. Rec. H 6872 (daily ed. July 12, 1977).

160 See Peter E. Harrell, "How to Reform IEEPA," Lawfare (blog), August 28, 2019, https://www.lawfareblog.com/how-reform-ieepa.

161 Steven Mnuchin, U.S. Department of the Treasury, "Periodic Report on the National Emergency with Respect to Transnational Criminal Organizations," June 19, 2020, https://fas.org/irp/agency/treasury/transcrim-202006.pdf.

162 See, e.g., Mnuchin, "Periodic Report on the National Emergency."

163 50 U.S.C. § 1703.

164 See, e.g., *Confronting Threats from China: Assessing Controls on Technology and Investment, and Measures to Combat Opioid Trafficking*, hearing before the S. Comm. on Banking, Housing, and Urban Aff., 116th Cong. (2019), https://www.govinfo.gov/content/pkg/CHRG-116shrg37244/html/CHRG-116shrg37244.htm; and Senate Hearing 115-807, *Assessing the Maximum Pressure and Engagement Policy Toward North Korea*, hearing before the Subcomm. on E. Asia, the Pac., and Int'l. Cybersecurity Policy, 115th Cong. (2017), https://www.govinfo.gov/content/pkg/CHRG-115shrg40415/pdf/CHRG-115shrg40415.pdf.

165 In its report, OFAC admitted that it had difficulty assessing the effectiveness of the United States' sanctions against Sudan, writing that "the most meaningful measure of a sanctions program is whether and to what extent it is exerting pressure on relevant decision makers such that it affects their behavioral calculi. That said, it can be notoriously difficult to measure regime thinking and attribute the impact of sanctions. Even when regime-level behavioral changes do occur, it is difficult to identify the precise role that sanctions might have played in bringing about such changes." The report nevertheless concluded that the sanctions had "applied constructive pressure" that "affected key Sudanese officials' decision-making calculi." U.S. Department of Treasury, Office of Foreign Assets Control, *Effectiveness of U.S. Economic Sanctions with Respect to Sudan*, 7, January 2009, https://reliefweb.int/sites/reliefweb.int/files/resources/9F0F94C530D51DF04925765D00105DB5-Full_Report.pdf.

166 *Evaluating the Effectiveness of US Sanctions Programs*, hearing before the Subcomm. on Monetary Policy and Trade of the S. Comm. on Fin. Serv., 115th Cong. (2017) (statement of Andy Barr, chairman, Subcommittee on Monetary Policy and Trade).

167 31 C.F.R. § 501.804.

168 The exceptions were Proclamation No. 9844, "Declaring a National Emergency Concerning the Southern Border of the United States," and Proclamation No. 9994, "Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak."

169 Imperiale, *Sanctions by the Numbers* (not all designations indicated are under IEEPA); Pranshu Verma, "Trump's Sanctions on International Court May Do Little Beyond Alienating Allies," *New York Times*, October 18, 2020, https://www.nytimes.com/2020/10/18/world/europe/trump-sanctions-international-criminal-court.html (reporting that as of October 2020, the Trump administration had sanctioned more than 3,700 entities, whereas President Obama's administration had sanctioned "slightly over 2,000" during his first term); and Judith Alison Lee et al., *2019 Year-End Sanctions Update*, Gibson, Dunn & Crutcher LLP, January 23, 2020, https://www.gibsondunn.com/2019-year-end-sanctions-update/ ("Sanctions promulgated by the U.S. Department of the Treasury's Office of Foreign Assets Control ('OFAC') have become an increasingly prominent part of U.S. foreign policy under the Trump administration. For the third year in a row, OFAC blacklisted more entities than it had under any previous administration, adding an average of 1,000 names to the Specially Designated Nationals and Blocked Persons ('SDN') List each year — more than twice the annual average increase seen under either President Barack Obama or President George W. Bush.").

170 See BBC, "International Criminal Court Officials Sanctioned by US," September 2, 2020, https://www.bbc.com/news/world-us-canada-54003527.

171 Exec. Order No. 14022, 86 Fed. Reg. 17895 (Apr. 1, 2021).

172 Exec. Order No. 13942, 85 Fed. Reg. 48637 (Aug. 6, 2020); Exec. Order No. 13943, 85 Fed. Reg. 48641 (Aug. 6, 2020); Marland v. Trump, No. 1:20-cv-02658, 2020 WL 6381397 (E.D. Pa. Oct. 30, 2020); TikTok Inc. v. Trump, No. 1:20-cv-02658, 2020 WL 7233557 (D.D.C. Dec. 7, 2020); U.S. WeChat Users Alliance v. Trump, No. 20-cv-05910, 2020 WL 5592848 (N.D. Cal. Sept. 19, 2020).

173 Abram Brown, "Is This the Real Reason Why Trump Wants to Ban TikTok?", *Forbes*, August 1, 2020, https://www.forbes.com/sites/abrambrown/2020/08/01/is-this-the-real-reason-why-trump-wants-to-ban-tiktok/?sh=2f76c54f4aed; and Ana Swanson and David McCabe, "US Judge Temporarily Halts Trump's WeChat Ban," *New York Times*, updated October 5, 2020, https://www.nytimes.com/2020/09/20/business/economy/court-wechat-ban.html.

174 See Covington & Burling LLP, "The President's Authority to Order Companies Out of China," August 28, 2019, https://www.cov.com/-/media/files/corporate/publications/2019/08/the_presidents_authority_to_order_companies_out_of_china.pdf.

175 See Congressional Research Service Insight, *The International Emergency Economic Powers Act (IEEPA) and Tariffs: Historical Background and Key Issues*, CRS report no. IN11129 (Washington, DC: Congressional Research Service, 2019), https://fas.org/sgp/crs/row/IN11129.pdf.

176 BBC, "Trump Threatens Iraq with Sanctions if US Troops Are Expelled," January 6, 2020, https://www.bbc.com/news/world-middle-east-51003159.

177 ARTICLE ONE Act, S. 764, 116th Cong. (2019) (as introduced in Senate), https://www.scribd.com/document/493382879/ARTICLE-ONE-Act#from_embed.

178 ARTICLE ONE Act, S. 764, 116th Cong. (2019) (as reported to Senate), https://www.congress.gov/bill/116th-congress/senate-bill/764/text.

179 S. Rep. No. 116-159 (2019), https://www.congress.gov/congressional-report/116th-congress/senate-report/159/1.

180 Office of Sen. Mike Lee, "Sen. Lee Introduces ARTICLE ONE Act to Reclaim Congressional Power," press release, February 4, 2021, https://www.lee.senate.gov/public/index.cfm/press-releases?ID=EB96D37C-FEB7-4060-8465-2F3885BD8E33.

181 Congressional Oversight of Sanctions Act, H.R. 5879, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/5879/text?r=5&s=1.

182 Humanitarian Assistance Facilitation Act of 2013, H.R. 3526, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/house-bill/3526/text.

183 Harrell, "How to Reform IEEPA."

184 See generally Illinois v. McArthur, 531 U.S. 326 (2001).

185 The same time frames and procedures should apply to any subsequent requests for delisting.

186 See Charity and Security Network, *Proposals for New Congress and Biden–Harris Administration to Support and Facilitate Humanitarian and Peacebuilding Operations Through Nongovernmental Organizations,* 5-6, January 2021, https://charityandsecurity.org/wp-content/uploads/2021/03/CSN-Transition-Memo_V4.pdf.

187 See Bradley T. Smith, "Executive Order 14014 of February 10, 2021 Blocking Property with Respect to the Situation in Burma; General License No. 2," Office of Foreign Assets Control, March 25, 2021 (permitting activities of the "United Nations, including its Programmes, Funds, and Other Entities and Bodies, as well as its Specialized Agencies and Related Organizations"). The relevant organizations covered by these terms should be those included in this UN organigram and any bodies added to it in the future. United Nations Department of Global Communications, "The United Nations System," UN Doc. 19-00073 (2019). https://www.un.org/en/pdfs/un_system_chart.pdf.

188 Omnibus Foreign Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 2501, 102 Stat. 1107, 1113 (1988); and Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 525, 108 Stat 382, 474 (1994).

189 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 106, 115 Stat. 272 (2001).

190 A compilation of some of those reports can be found at Treasury Department and National Emergencies, "Periodic Treasury Department Reports on Various National Emergencies," Federation of American Scientists, accessed March 15, 2021, https://fas.org/irp/agency/treasury/.

191 Roberto J. Gonzalez and Rachel M. Fiorill, eds., *International Comparative Legal Guides: Sanctions 2020* (London, UK: Global Legal Group, 2019), 154-55, https://www.paulweiss.com/media/3979073/iclg_sanctions2020.pdf; and Ori Lev et al., "No Violation Is Too Small and No Connection Is Too Attenuated to Escape US OFAC Scrutiny," Mayer Brown, February 22, 2017, https://www.mayerbrown.com/en/perspectives-events/publications/2017/02/no-violation-is-too-small-and-no-connection-is-too.

192 50 U.S.C. § 1705(b). The amount specified in the statute is $250,000, but the amount is periodically adjusted for inflation. See Inflation Adjustment of Civil Monetary Penalties, 86 Fed. Reg. 14,534 (Mar. 17, 2021), https://home.treasury.gov/system/files/126/fr2021_05506.pdf.

193 The use of "concurrent resolution" is an anachronism from the period before *Chadha*, which held that concurrent resolutions were unconstitutional.

194 Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113–291, § 1637, 128 Stat. 3292, 3644 (2014).

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