

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

FREDERICK BOYLE,

Plaintiff,

-against-

ROBERT W. WERNER, Director, Office of Foreign Assets Control of the United States Department of the Treasury, in his official capacity, JOHN W. SNOW, Secretary, United States Department of the Treasury, in his official capacity, OFFICE OF FOREIGN ASSETS CONTROL, UNITED STATES DEPARTMENT OF THE TREASURY, and ALBERTO R. GONZALES, Attorney General, United States Department of Justice, in his official capacity,

Defendants.

Case No. 05 Civ. 4995 (LTS)

ECF CASE

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Even “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2650 (2004). The government ignores that principle here by asserting an impermissibly broad power to restrict travel by American citizens to Iraq pursuant to economic sanctions established fifteen years ago. Specifically, the Iraqi Sanctions Regulations promulgated by the Office of Foreign Assets Control (“OFAC”) ban travel to Iraq regardless of whether it confers any economic benefit on the Government of Iraq or Iraqi nationals and provide for monetary penalties and exposure to possible criminal prosecution without affording basic guarantees of due process. Further, in this case, OFAC has impermissibly penalized an individual based upon his public opposition to U.S. military action in Iraq rather than his alleged travel to that country.

Plaintiff Reverend Frederick Boyle (“Reverend Boyle”) has sued to enjoin the enforcement of a \$6,700 penalty imposed on him by OFAC pursuant to 31 C.F.R. § 575.207 for alleged travel to Iraq in February and March of 2003. For the reasons set forth below, the Court should deny the government’s motion to dismiss his complaint, or, in the alternative for summary judgment, and should grant Reverend Boyle’s cross-motion for judgment on the pleadings, or, in the alternative, for summary judgment, on his claims that OFAC’s regulations and penalty violate procedural due process (Count One); violate his privilege against self-incrimination (Count Two); exceed statutory authority by imposing a *per se* ban on travel to Iraq (Count Three); violate his rights under the Religious Freedom Restoration Act and Free Exercise Clause of the First Amendment (Counts Six and Seven, respectively); constitute an impermissibly broad delegation of congressional authority (Count Nine); and violate international law (Count Ten). Reverend Boyle’s remaining claims -- that OFAC has impermissibly penalized him based upon his public opposition to U.S. military policy in Iraq in violation of his right to travel (Count Four); right to freedom of speech and expression (Count Five); and right to equal protection of the law (Count 8) -- present genuine issues of material fact. Accordingly, with respect to those counts, the government’s motion to dismiss, or, in the

alternative, for summary judgment should not be granted at this juncture, before any discovery has been conducted.

PROCEDURAL BACKGROUND

On or around June 2, 2003, OFAC issued a Requirement to Furnish Information to Reverend Boyle pursuant to section 501.602 of the Iraqi Sanctions Regulations, asserting that it had received information from press accounts that he had traveled to Iraq during February and March of 2003 without authorization. Administrative Record (“A.R.”) 77. It informed Reverend Boyle that, for violating the regulations, he was subject to criminal sanctions of up to 12 years in prison and \$1 million in fines as well as civil penalties of up to \$275,000 for each violation. A.R. 77; *see* 31 C.F.R. § 575.701.¹ OFAC demanded that Reverend Boyle provide a full written report of his alleged trip to Iraq, including “[a] detailed itemization of all travel-related transactions” and “a copy of any travel-related receipts or records.” A.R. 78. It also informed Reverend Boyle that his failure to respond could result in the imposition of civil penalties, A.R. 78; OFAC’s published guidelines provide that such failure generally results in a \$10,000 penalty, Economic Sanctions Enforcement Guidelines, 68 Fed. Reg. 4422, 4427 (proposed Jan. 29, 2003). Reverend Boyle feared that by responding he risked incriminating himself, although he also understood that by not responding he risked incurring significant monetary penalties. Compl. ¶¶ 23-24. By letter dated October 23, 2003, Reverend Boyle informed OFAC that he was refusing to respond based upon the rights guaranteed to him by the Fifth Amendment to the Constitution of the United States. A.R. 66.

Two months later, OFAC informed Reverend Boyle that his file had been transferred from its Enforcement to its Civil Penalties Division. A.R. 62. Then, on June 22, 2004, OFAC issued a prepenalty notice stating that it intended to impose a \$10,000 civil penalty against him for “exportation of services to Iraq and unauthorized travel-related transactions in Iraq.” A.R. 60. Specifically, OFAC alleged that “[o]n or about February 19, 2003, [Reverend Boyle]

¹ In fact, the maximum civil penalty is currently \$325,000 per violation. 31 C.F.R. § 575.701(a)(1).

departed Amman, Jordan, for Baghdad Iraq. While in Iraq [Reverend Boyle] planned to join a group shielding the Government of Iraq facilities from possible U.S. military action. [Reverend Boyle] also engaged in travel-related transactions, expending currency for the purchase of food, lodging, transportation, and souvenirs. [Reverend Boyle] departed Iraq, returning to Amman, Jordan, on March 11, 2003.” A.R. 60. Reverend Boyle was given 30 days to submit a written response to OFAC’s Director. A.R. 61. That written presentation constituted his only opportunity to be heard before a penalty was imposed.

Reverend Boyle again feared that by responding to OFAC’s allegations he risked incriminating himself and exposing himself to significant criminal penalties. Compl. ¶ 37. He thus requested that OFAC either arrange to provide immunity from criminal prosecution or, alternatively, stay its civil enforcement proceeding until the applicable statute of limitations for criminal prosecution expired. A.R. 52-53. OFAC refused to stay the proceeding or to inquire of the Department of Justice about granting him some form of immunity. Compl. ¶ 36. Reverend Boyle challenged the validity of the Iraqi Sanctions Regulations and, to the extent that he could without risking the waiver of his Fifth Amendment rights, OFAC’s basis for the proposed penalty. A.R. 3-17. On March 14, 2005, OFAC issued a notice imposing a sanction of \$6,700 for “unauthorized travel to Iraq and expenditures therein.” A.R. 1. The penalty was reduced from \$10,000 because it was Reverend Boyle’s “first offense on record at OFAC” and because Reverend Boyle “provided a written response” to the prepenalty notice. A.R. 2. This action followed.

ARGUMENT

I. The Regulations Violate Reverend Boyle’s Right To Due Process.

OFAC informed Reverend Boyle that it intended to impose a monetary penalty against him for traveling to Iraq; Reverend Boyle was given 30 days to submit a written response to its allegations before the penalty was imposed. That is the *only* process that OFAC’s regulations provided to Reverend Boyle. There was no opportunity to inspect the government’s evidence or

to obtain written or deposition discovery; no opportunity to call or cross-examine witnesses or to present evidence at an oral hearing; and no neutral decision-maker. Due process requires more.

Specifically, the Due Process Clause prohibits the government from depriving an individual of property or liberty without prior notice and an opportunity to be heard “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). To determine what process is required in a given situation, courts must balance the significance of the private interest at stake and the extent to which additional procedures would reduce the risk of an erroneous deprivation of that interest against the fiscal and administrative burdens the government would face in providing greater safeguards. *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2646 (2004); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Here, the Constitution requires far greater process to Reverend Boyle than the regulations afforded him. The regulations permit penalties of up to \$325,000, 31 C.F.R. § 575.701; A.R. 60 n.1 -- an enormous penalty that would deprive most individuals, including Reverend Boyle, of their means of existence. *See FDIC v. Mallen*, 486 U.S. 230, 243 (1988) (“We have repeatedly recognized severity of depriving someone of his or her livelihood.”). OFAC eventually fined Reverend Boyle \$6,700, itself a significant sum. A.R. 2. *Herrada v. City of Detroit*, 275 F.3d 553, 556 (6th Cir. 2001) (private interest even in a parking ticket). Also, because Reverend Boyle may be prosecuted criminally for violating OFAC’s regulations, the regulations implicate his liberty interest as well. Furthermore, the quasi-criminal nature of the proceeding jeopardized Reverend Boyle’s honor and reputation. *See, e.g., Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). In short, the private interests at stake are extraordinarily significant.

Given the significant private interests at stake, OFAC’s regulations should have provided, at a minimum: (i) timely and adequate notice; (ii) the opportunity to obtain discovery; (iii) the opportunity to present evidence and appear personally at a hearing; (iv) an unbiased and impartial decision-maker; (v) a decision based solely on the evidence adduced at a hearing, and (vi) an oral or written explanation of the reasons for the agency’s decision and the evidence

relied upon. *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970). The regulations, however, failed to satisfy each of these important requirements of due process.

First, meaningful notice of the factual basis for the government's allegations is a bedrock requirement of due process. *Hamdi*, 124 S. Ct. at 2648-49; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). OFAC, however, never provided Reverend Boyle with the specific information on which it was relying for the threatened sanction. Rather, it was only *after* Reverend Boyle filed this action that OFAC revealed that its allegations were based on statements attributed to Reverend Boyle in several newspapers. A.R. 69, 74-75. Because OFAC never disclosed the statements on which it was relying, Reverend Boyle was denied an effective opportunity to contest OFAC's allegations.

Second, the absence of any opportunity for discovery denied Reverend Boyle the meaningful opportunity to be heard that due process requires. The failure to allow for discovery prevented Reverend Boyle not only from being informed of that on which OFAC was relying so that he could rebut or explain it, but also from developing and asserting affirmative defenses to the agency's charge. Thus, OFAC prevented Reverend Boyle from disputing or explaining the statements attributed to him and from demonstrating that the travel restrictions were being impermissibly imposed upon him for his public opposition to U.S. military action in Iraq. *See infra* Argument IV & V.

The government (Mem. at 16-17) argues that discovery is not necessary, but the robust process provided in the cases it cites underscores precisely why discovery was so crucial here to ensure fairness. In *National Labor Relations Bd. v. Interboro Contractors, Inc.*, 432 F.2d 854 (2d Cir. 1970), a company was denied the opportunity to depose certain witnesses, but still had the opportunity to cross-examine them at an evidentiary hearing. *Id.* at 857. Similarly, in *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28 (7th Cir. 1977), the petitioner was afforded a six-day evidentiary hearing before an Administrative Law Judge during which he had the opportunity to present and cross-examine witnesses, *id.* 31; moreover, in advance of that

hearing the petitioner was provided with all proposed exhibits and a list of all proposed witnesses, *id.* at 33. Reverend Boyle, by contrast, did not receive any of these basic guarantees of due process, including a hearing or opportunity to confront the evidence on which the government was relying. Thus, in contrast to *Interboro Contractors* and *Silverman*, discovery was necessary simply in order to provide Reverend Boyle with a meaningful opportunity to address the government's evidence and to present affirmative defenses.

Third, OFAC denied Reverend Boyle the opportunity to present his case at a hearing. In *Goldberg*, the Supreme Court emphasized the importance of the opportunity to appear personally before, and to be heard orally by, the decisionmaker before depriving an individual of his property. 397 U.S. at 269. It explained that written submissions alone do not satisfy due process because they lack “the flexibility of oral presentations [and] do not permit the [defendant] to mold his argument to the issues the decision maker appears to regard as important.” *Id.* Oral presentations are particularly critical when a defendant challenges a proposed deprivation as resting on incorrect or misleading factual allegations or misapplication of rules or policies to the facts of a particular case. *Id.*

Here, Reverend Boyle was facing a significant monetary penalty and exposure to possible criminal prosecution. Yet, OFAC never afforded him a hearing at any point before penalizing him. Such a hearing was critical because it would have provided Reverend Boyle with a meaningful opportunity to challenge the newspaper articles that were ultimately used to establish violations of the law as well as to demonstrate OFAC's true motive in applying the Iraqi Sanctions Regulations to his case.

In arguing that a written submission was constitutionally adequate, the government (Mem. at 16-18) cites cases where the private interest and need for an oral hearing was far less significant than here. For example, in *Basciano v. Herkimer*, 605 F.2d 605 (2d Cir. 1978), the court found that an evidentiary hearing was not necessary to determine eligibility for accident disability retirement benefits. There, however, the individual was seeking a government benefit,

not facing a monetary penalty or exposure to possible criminal prosecution. Moreover, the agency's determination was based on an expert assessment of medical evidence by three physicians whose "responsibility was to make a medical judgment, not to function as adversaries or advocates." *Id.* at 610. This neutral assessment of an existing medical condition by specialists based upon specified criteria is very different than OFAC's subjective determination, based upon news reports, that Reverend Boyle had violated its regulations. *Cf. Morrissey v. Brewer*, 408 U.S. 471, 473, 485-86 (1972) (hearing required to determine whether individual violated conditions of parole, such as by making unauthorized purchase of car or by giving false statements to police). In *Interboro Institute, Inc. v. Foley*, 985 F.2d 90 (2d Cir. 1993), the court found that no evidentiary hearing was required before a junior college was denied funds from the State's tuition assistance programs because certain students had not met the school's entrance requirements. *Id.* at 93-94. But in *Interboro*, the college's position on the facts had been "exhaustively rehearsed before the relevant decision-makers," *id.* at 93, and "a post-deprivation full evidentiary hearing was available" to it, *id.* at 94. Here there was neither an exhaustive rehearsal of the facts nor an evidentiary hearing before or after the deprivation. Thus, OFAC's failure to provide Reverend Boyle with a hearing undermined his ability to respond effectively to the government's allegations and to present evidence showing why he should not be penalized.²

The government also incorrectly relies on two economic sanctions cases that involved written submissions. In *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), OFAC designated a group as a terrorist organization and accordingly froze the group's assets. *Id.* at 159-60. *Holy Land*, however, involved "ample evidence in a massive administrative record," *id.* at 162, and that record "incontrovertibl[y]" showed that the

² The government (Mem. at 17 n.7) also mistakenly relies on *Mathews*. While the Court determined there that an evidentiary hearing was not constitutionally required before the government terminated Social Security disability benefits, it emphasized the existence of other safeguards, including "the elaborate character of the administrative procedures," 424 U.S. at 339, the agency's reliance on "routine, standard, and unbiased medical reports by physician specialists," *id.* at 344 (internal quotation marks and citation omitted), and the recipient's "full access to all the information relied upon by the . . . agency," *id.* at 345-36. Reverend Boyle was afforded none of those safeguards. Further, the recipient in *Mathews* was still entitled to an evidentiary hearing after the benefits were terminated, *id.* at 339, whereas Reverend Boyle was not provided any post-deprivation process at all.

organization funded a terrorist group, *id.* at 165 -- neither of which is the case here. In addition, *Holy Land* involved concerns about disclosing classified information that are absent from this case. Similarly, in *Global Relief Found Inc. v. O'Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002), the government temporarily froze an organization's assets pending the government's investigation into whether the organization supported terrorism. *Id.* at 786. As in *Holy Land*, summary process was necessary to "maintain[] the status quo" and prevent the unlawful transfer or dissipation of assets. *Id.* at 804. In such "extraordinary situations," the Constitution may tolerate temporary deprivations of property, but only when followed by proper post-deprivation process. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985) ("full adversarial evidentiary hearing" not required based on "government's interest in quickly removing an unsatisfactory employee" where "full post-termination hearing" was provided). Here, there is no emergency but also no post-deprivation process; indeed, Reverend Boyle was forced to file a lawsuit to challenge OFAC's enforcement of the penalty. Meanwhile, interest on that penalty continues to accrue. A.R. 2.

Fourth, the regulations failed to provide a neutral decisionmaker. Instead, Reverend Boyle was subjected to a one-sided proceeding in which OFAC served as investigator, prosecutor, and judge. Due process "demands strict impartiality on the part of those who function in a judicial or quasi-judicial capacity." *Wolkenstein v. Reville*, 694 F.2d 35, 41 (2d Cir. 1982). The government argues that there is generally "a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). However, that presumption does not apply here because the OFAC process is, in effect, one large quasi-criminal investigation and enforcement operation. But the combining of investigative and adjudicatory functions has been upheld in situations where the agency's procedures provided for a separate, genuine adjudication of the factual allegations. *See, e.g., id.* at 40-41, 54-55 (agency determination after contested evidentiary hearing that was bifurcated from investigation); *Cousin*

v. Office of Thrift Supervision, 73 F.3d 1242, 1245, 1249-50 (2d Cir. 1996) (agency review of ALJ’s findings based on evidentiary hearing). Further, “the feasibility of alternative procedures” -- as demonstrated by the ALJ hearing provided under the Cuba regulations, discussed *infra* -- underscores the absence of a neutral decisionmaker in this case. *Wolkenstein*, 694 F.2d at 41.

Fifth, OFAC penalized Reverend Boyle based on evidence which was not adduced at a hearing and which he never had an opportunity to confront. *Goldberg*, 397 U.S. at 271. As noted above, this denied Reverend Boyle a meaningful opportunity to rebut that information. *See, e.g., Mathews*, 424 U.S. at 345-46 (“full access to all information relied upon by the . . . agency” is necessary to ensure meaningful opportunity to challenge accuracy and reliability of its determination); *Greene v. McElroy*, 360 U.S. 474, 496 (1959) (“[T]he evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”).

Sixth, due process requires that the decisionmaker should “state the reasons for his determination and indicate the evidence he relied on.” *Goldberg*, 397 U.S. at 271; *see also Wolff v. McDonnell*, 418 U.S. 539, 564-65 (1974) (convicted prisoners entitled to written decision explaining evidence relied on when disciplinary sanctions imposed). However, OFAC’s written penalty notice never described the specific evidence on which its penalty was based. Rather, it was not until Reverend Boyle filed this action that the government supplied this information to him as part of what it describes as the “administrative record” for this case. OFAC’s regulations and sanction were thus procedurally deficient for this reason as well.

Providing additional procedural safeguards would have reduced the risk of an erroneous deprivation. *See, e.g., Mathews*, 424 U.S. at 245-46 (providing “full access all information relied upon by the . . . agency” reduces risk of error); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring) (“no better instrument has been devised for arriving at the truth” than notice and hearing requirements). As described above, adequate notice, disclosure of the evidence relied upon by the government, the opportunity to obtain

discovery, and the chance to present evidence at an oral hearing before a neutral decisionmaker would all have had significant value. Specifically, those additional safeguards would have provided Reverend Boyle with the opportunity not only to contest or explain the government's factual allegations before an unbiased decisionmaker but also to develop and present affirmative defenses to those allegations, thus ensuring a full and fair resolution. Further, OFAC has established a range of mitigating or aggravating factors that can decrease or increase the penalty when violations are found, including decreasing the proposed penalty by up to 75 percent. Compl. ¶ 33. The absence of a neutral fact-finder presiding over a hearing where evidence and arguments are presented undermined the agency's ability to consider and weigh those equitable factors as well. *Cf. Califano v. Yamasaki*, 442 U.S. 682, 696-97 (1979).³ In sum, a fairer, more thorough, and thus more accurate process could and should have been afforded Reverend Boyle.

Furthermore, affording Reverend Boyle additional procedural safeguards would not have undermined the governmental interests involved, even if any had been asserted, which they have not. The situation did not require "quick action by the [government]." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (internal quotation marks and citation omitted). Indeed, OFAC waited over 15 months after Reverend Boyle's alleged trip to Iraq to issue a prepenalty notice and an additional 7 months to issue a penalty against him. In other proceedings, OFAC has taken almost four years after a prepenalty notice and response to impose a penalty under the same regulations. *OFAC v. Voices in the Wilderness*, 329 F. Supp. 2d 71, 74 (D.D.C. 2004). Thus, OFAC cannot argue that this is an "extraordinary situation[]" where exigent circumstances required it to dispense with meaningful process before depriving Reverend Boyle of his property. *James Daniel Good Real Property*, 510 U.S. at 53.

Moreover, any argument that the meager process provided by the Iraqi Sanctions Regulations is necessitated by the burdens that the government would otherwise face is

³ Here, OFAC reduced Reverend Boyle's penalty from \$10,000 to \$6,700, simply because he submitted a response and because it was his first offense; a more meaningful process might have resulted in a further reduction.

undermined by the comprehensive notice and hearing procedures provided when OFAC accuses one of traveling to Cuba in violation of the Cuban Assets Control Regulations. 31 C.F.R. pt. 515. Those regulations provide prepenalty notice recipients the right not only to respond in writing but also to request a hearing under the Administrative Procedures Act (“APA”) and to obtain discovery. 31 C.F.R. § 515.702(b)(2)(i)-(iii). Cuba sanctions hearings must also be held before an Administrative Law Judge with the power to administer oaths, require the production of documents and records, rule on the admissibility of evidence, authorize depositions, and conduct motion practice. *Id.* § 515.706(b). Moreover, respondents may employ a broad range of discovery mechanisms, including written or oral depositions, written interrogatories, document production, and requests for admissions. *Id.* § 515.710(b).

In sum, the case could not be stronger for greater safeguards than the scant protections OFAC affords to those accused of traveling to Iraq. The private interest at stake is extraordinarily significant; the value of additional safeguards is substantial; and the burdens on the government in providing enhanced protections minimal. OFAC has asserted the power to fine American citizens thousands of dollars for travel abroad and to simultaneously expose them to severe criminal punishment in a one-sided and fundamentally unfair proceeding. The Iraqi Sanctions Regulations thus violate due process, on their face and as applied here.

II. The Regulations Violate The Privilege Against Self-Incrimination.

Reverend Boyle feared that by responding to OFAC’s factual allegations he risked exposing himself to criminal prosecution. He thus properly invoked his Fifth Amendment privilege against self-incrimination and promptly requested that OFAC either stay its enforcement proceeding until after the applicable statute of limitations for criminal prosecution expired or arrange for some form of immunity from criminal prosecution. A.R. 52-53. OFAC refused to do either. The result violated Reverend Boyle’s Fifth Amendment privilege.

An individual may invoke his Fifth Amendment privilege against self-incrimination in a non-criminal proceeding. *See, e.g., Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). While it is not

necessarily unlawful to force an individual to choose between asserting his Fifth Amendment privilege and defending himself in a non-criminal proceeding, *United States v. Kordel*, 397 U.S. 1, 11 (1970), “[t]he Supreme Court has disapproved of procedures which require a party to surrender one constitutional right in order to assert another,” and has made clear that “a party claiming the Fifth Amendment privilege should suffer no penalty for his silence,” *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1088 (5th Cir. 1979) (citing cases). Indeed, the *Kordel* Court suggested that, in some situations, “the appropriate remedy” would be for a court to enter an order postponing the civil proceeding to preserve an individual’s Fifth Amendment privilege. 397 U.S. at 9.

Thus, when a defendant in a civil enforcement action brought by the government faces the dilemma presented to Reverend Boyle, courts must “make special efforts to accommodate” both the privilege against self-incrimination and the government’s interest in proceeding with that action. *United States v. Certain Real Property and Premises Known as: 4003-4005 5th Ave.*, 55 F.3d 78, 83 (2d Cir. 1995) (citation omitted); *see also SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 193-94 (3d Cir. 1994) (“special consideration must be given to the plight of the party asserting the Fifth Amendment” in civil enforcement action by SEC); *Wehling*, 608 F.2d at 1088 (“court should . . . measure[] the relative weights of the parties’ competing interests with a view toward accommodating those interests, if possible”). Moreover, in balancing the respective interests, courts are instructed to remember that the government, the plaintiff in such enforcement actions, also controls the parallel criminal proceedings and possesses the power to grant some form of immunity. *4003-4005 5th Ave.*, 55 F.3d at 83; *Shaffer v. United States*, 528 F.2d 920, 922 (4th Cir. 1975) (relying heavily on government’s power to grant immunity). In addition, courts must “give due consideration to the nature of the proceeding, how and when the privilege was invoked, and the potential for harm or prejudice to opposing parties.” *4003-4005 5th Ave.*, 55 F.3d at 84.

Here, Reverend Boyle reasonably feared that by defending himself against OFAC's factual assertions he risked exposure to criminal prosecution. OFAC specifically warned Reverend Boyle that he could face criminal penalties ranging up to 12 years in prison and \$1 million in fines for violating the regulations. A.R. 77. And, in fact, Reverend Boyle was "subject to criminal prosecution based on *the same* alleged illegal behavior that supports the [civil penalty]." *4003-4005 5th Ave.*, 55 F.3d at 83 (emphasis added). Reverend Boyle timely requested that OFAC accommodate his interests, A.R. 52-53, but OFAC refused either to stay its enforcement proceeding or even to inquire with the Department of Justice about possibly arranging for immunity from criminal prosecution, Compl. ¶ 36 -- something that was certainly within OFAC's power. *Shaffer*, 528 F.2d at 922; *see also United States v. U.S. Currency*, 626 F.2d 11, 16-17 (6th Cir. 1980).

Moreover, in civil enforcement actions brought by government agencies, the responsibility of accommodating an individual's privilege against self-incrimination typically falls to a neutral decision-maker, often to a court. It is not left to the regulatory body responsible for prosecuting the enforcement action. Predictably, then, the request for such accommodation was denied by OFAC here, tellingly, not in a written decision supplying a legal basis for the outcome but instead in a brief telephone call to counsel. *Cf. Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995) ("exhaustive" discussion by ALJ of reasons for denying stay of civil proceeding).

Reverend Boyle was entitled to some form of accommodation or, at the very least, a neutral decision-maker should have ruled on his request. He was forced to choose between giving up his Fifth Amendment rights, even as criminal prosecution was being threatened, and responding vigorously to the allegations in the prepenalty notice. OFAC, on the other hand, lacked any substantial interest in refusing the finite delay sought by Reverend Boyle -- there was no risk of ongoing harm and no reason to believe Reverend Boyle planned to return to Iraq. Indeed, OFAC waited over 15 months after Reverend Boyle's alleged trip to Iraq to issue a

prepenalty notice and an additional 7 months to issue a penalty against him, thus undermining any claim of a need for expeditious enforcement. Moreover, OFAC refused even to inquire about the possibility of granting Reverend Boyle some form of immunity, which would have accommodated both parties' interests by enabling OFAC to proceed with its enforcement action and preserving Reverend Boyle's rights under the Fifth Amendment.

The government's contention (Mem. at 25) that Reverend Boyle was not specifically penalized for invoking his Fifth Amendment privilege but instead for violating the law misses the essential point. By forcing him to assert this constitutional right, OFAC deprived Reverend Boyle of the opportunity to defend himself against or to explain the circumstances of its allegations in a proceeding that lacked a neutral decisionmaker to accommodate that privilege. The result was an unfair and one-sided process; the result was pre-ordained.

III. No Statutory Authority Exists For OFAC's Ban On Travel *Per Se*.

Reverend Boyle has been fined for violating the Iraqi Sanctions Regulations. The regulation at issue provides:

Except as otherwise authorized, *no U.S. person may engage in any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq, or to activities by any U.S. citizen or permanent resident alien within Iraq, after the effective date, other than transactions:*

- (a) Necessary to effect the departure of a U.S. citizen or permanent resident alien from Kuwait or Iraq;
- (b) Relating to travel and activities for the conduct of the official business of the United States Government or the United Nations; or
- (c) Relating to journalistic activity by persons regularly employed in such capacity by a newsgathering organization.

This section prohibits the unauthorized payment by a U.S. person of his or her own travel or living expenses to or within Iraq.

31 C.F.R. § 575.207 (emphasis added). The regulations were promulgated in January 1991 to implement the Iraq Sanctions Act of 1990 ("ISA"), which Congress enacted to punish the Government of Iraq financially for invading Kuwait and for ongoing and systematic violations of human rights within Iraq. *See* H.R. Conf. Rep. No. 101-968, § 586A (1990). They also purport

to have been promulgated pursuant to the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. §§ 1701 *et seq.*, and Executive Orders 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990), and 12,722, 55 Fed. Reg. 31803 (Aug. 2, 1990).

The travel ban contained in section 575.207 exceeds the scope of any statute authorizing sanctions against Iraq. Specifically, the regulation prohibits “the payment by a U.S. person of his or her own travel or living expenses to or within Iraq” *even if* those payments do not result in any economic benefit to the Government of Iraq or an Iraqi national. 31 C.F.R. § 575.207. The regulation thus imposes a flat ban on travel that is beyond the scope of the economic sanctions legislation pursuant to which it was purportedly promulgated. As such, the regulation on its face is *ultra vires* and invalid under the Administrative Procedures Act, 5 U.S.C. § 706(2)(C). *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”). Although the government (Mem. at 10-12) contends that the Iraqi Sanctions Regulations are authorized by IEEPA, the United Nations Participation Act (“UNPA”), and/or the ISA, none of those statutes enacts or supports the blanket ban on personal travel to Iraq that appears in section 575.207.

A. OFAC’s Travel Ban Exceeds Statutory Authority.

The International Emergency Economic Powers Act (“IEEPA”). IEEPA authorizes the President, during a national emergency, to investigate, regulate, and prohibit a range of transactions involving foreign countries and the United States.

- (a) (1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instruction, licenses, or otherwise --
 - (A) investigate, regulate, or prohibit --
 - (i) any transactions in foreign exchange,
 - (ii) transfer 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 a national thereof,
 - (iii) the importing or exporting of currency or securities. . .
 - (B) 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; and

- (C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, or any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

....

- (b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly--
 - (1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value;

50 U.S.C. § 1702(a) and (b). Subsection (A) pertains to financial matters, foreign exchange, payments involving a foreign country's interest, and currency or securities; subsection (B) pertains to activities involving property in which a foreign country is interested; and subsection (C) pertains to confiscation of property or foreign persons. All the activities subject to regulation result in economic benefit to the sanctioned nation or its nationals; nothing in IEEPA specifically pertains to travel.

The government's conclusory argument that IEEPA authorizes section 575.207 boils down to an assertion that "IEEPA grants extraordinarily broad authority to the President." Gov't Mem. at 10. But even a broad grant of authority is not "a blank check . . . when it comes to the rights of the Nation's citizens." *Hamdi*, 124 S. Ct. at 2650. And, the cases on which the government relies (Mem. at 10-12) -- *Paradissiotis v. Rubin*, 171 F.3d 983 (5th Cir. 1999); *Consarc Corp. v. United States Treasury Dep't*, 71 F.3d 909 (D.C. Cir. 1995); and *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) -- confirm that IEEPA grants the executive broad

powers but involve different regulations authorized by different parts of the statute. Those cases had nothing to do with travel to Iraq nor do they support the conclusion that IEEPA authorizes a ban on travel to Iraq. Indeed, the government does not -- and cannot -- identify any provision in IEEPA that permits an administrative agency to penalize a U.S citizen for traveling to Iraq.

Paradissiotis involved the Libyan Sanction Regulations, adopted pursuant to IEEPA, and their application to the assets of a Specially Designated National of Libya. Unlike the unauthorized travel ban the government attempts to enforce here, the OFAC regulation enforced in *Paradissiotis* was clearly authorized by statute. Specifically, 50 U.S.C. § 1702(a)(1)(B) expressly permitted the President to prohibit participation by any person in any transaction involving, or the exercise of rights regarding, “any property in which any foreign country ... has any interest.” *Paradissiotis*, 171 F.3d at 988 (internal quotation marks omitted). By Executive Order, the President froze Libyan-controlled assets in the United States and OFAC adopted rules that included individuals like *Paradissiotis* because he was the president of a Libyan-controlled subsidiary. *Id.* at 986. *Paradissiotis* did not, however, address the scope of IEEPA as it affects a U.S. citizen’s right to travel, to Iraq or elsewhere.

Consarc, too, had nothing to do with travel. Rather, it involved an attempt to recover purchase money and a down-payment paid by an Iraqi company for a furnace and placed in an account seized by OFAC. 71 F.3d at 911-12. The court concluded that OFAC’s regulations were consistent with IEEPA, 50 U.S.C. § 1702(a)(1), because the statute expressly authorized the President to freeze property or transactions involving any property in which the enemy country has an interest. *Id.* at 914. *Consarc* did not address the scope of IEEPA as it affects a U.S. citizen’s right to travel.

Finally, the *Lindh* court construed the language in 50 U.S.C. § 1702(a)(1)(A) and (B) (“use ..., or dealing in, or exercising any right, power, or privilege with respect to, ... any property in which any foreign country or a national thereof has an interest”) to authorize OFAC’s regulations prohibiting “the making or receiving of any contribution of funds, goods, or services

to or for the benefit of the Taliban,” or the supplying of “services” by a U.S. person to the Taliban on behalf of the Taliban. 212 F. Supp. 2d at 560-62. *Lindh*, thus, never concluded that IEEPA authorized a travel ban or the imposition of penalties for exercising the freedom to travel.

The United Nations Participation Act (“UNPA”). The government (Mem. at 4, 11) argues that OFAC’s regulations are authorized by UNPA, 22 U.S.C. § 287c(a). That legislation merely allows the President to restrict or prohibit certain *economic* relations or communications between foreign countries or their nationals in the United States and persons subject to U.S. jurisdiction. Furthermore, the President can act only after a United Nations Security Council resolution requests that action. Specifically, UNPA provides:

Economic and communication sanctions pursuant to United Nation Security Council Resolution.

(a) Enforcement measures.... Notwithstanding the provisions of any other law, *whenever the United States is called upon by the Security Council to apply measures which said Council has decided*, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President *may*, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or *prohibit*, in whole or in part, *economic relations or* rail, sea, air, postal, telegraphic, radio, and other means of *communication* between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States....

22 U.S.C. § 287c(a) (emphasis added).

The Security Council has adopted two resolutions setting forth sanctions against Iraq, but neither one calls upon the President to prohibit travel to or from Iraq or otherwise supports a travel ban. *See* S.C. Res. 661, U.N. SCOR, 2933rd mtg (1990) (“SCR 661”); S.C. Res. 670, U.N. SCOR, 2943rd mtg (1990) (“SCR 670”). SCR 661 requires all U.N. member states to “prevent” their nationals from: (i) importing Iraqi products and commodities; (ii) engaging in activities that would “promote” the export of products or commodities from Iraq; (iii) selling or supplying products or commodities to Iraq (except medical and humanitarian supplies); and (iv) providing funds or other economic resources to the Government of Iraq or remitting funds to individuals

within Iraq. SCR 661 ¶¶ 3-4. SCR 670 requires member states to “deny permission to any aircraft” bound for Iraq with prohibited commodities or products to take off from or to fly over their respective territory. SCR 770, ¶¶ 3-7. It thus clarifies that all *means* of delivering banned items are covered by the resolutions, but does not expand the range of prohibited activities.

Thus, the Security Council resolutions do not prohibit travel to Iraq. And, even if the resolutions, through UNPA, might support a restriction on transactions by U.S. citizens that confer a financial benefit on Iraq or Iraqi nationals, they do not support a *per se* ban on travel to that country, including travel which does not confer such a benefit.

The Executive Orders. The government also claims that the travel ban is authorized by Presidential Executive Orders. Indeed, two early Executive Orders prohibited certain transactions related to travel to Iraq. *See* Executive Order 12,724, § 2(d), 55 Fed. Reg. 33,089 (Aug. 9, 1990), (prohibiting “[a]ny transaction by a United States person relating to travel by any United States citizen . . . to Iraq”); Executive Order 12,722, § 2(g), 55 Fed. Reg. 31803 (Aug. 2, 1990) (same). Executive Order 12,724 was purportedly promulgated pursuant to “the authority vested in . . . [the] President” by IEEPA and UNPA. Similar Executive Orders have extended the presidential declaration of a national emergency with respect to Iraq, and also extended prior sanctions. *See, e.g.,* Continuation of the National Emergency with Respect to Iraq, 68 Fed. Reg. 45,739 (July 31, 2003).

But presidential power to issue an executive order “must stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co., v. Sawyer*, 343 U.S. 579, 585 (1952); *see also Minnesota v. Mille Lacs Band*, 526 U.S. 172, 188-90 (1999) (President Taylor lacked authority to order removal of Chippewa Tribe); *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) (Executive Order denying pay raise inconsistent with statutory mandate). “Consistency with the authorizing statute is as much a predicate for validity for an Executive Order as for an agency regulation.” *Levy v. Urbach*, 651 F.2d 1278, 1282 (9th Cir. 1981).

To the extent that the Executive Orders ban travel, separate from an economic benefit to Iraq, as contemplated by IEEPA and UNPA, they exceed and are inconsistent with those statutes. Accordingly, those orders do not authorize the *per se* ban on travel contained in section 575.207 of the regulations.

The Iraq Sanctions Act of 1990 (“ISA”). After Iraq’s invasion of Kuwait in 1990 and the promulgation of the Executive Orders, Congress enacted the ISA. The Act provides:

(a) Continuation of embargo. *Except as otherwise provided in this section*, the President shall continue to impose *the trade embargo and other economic sanctions* with respect to Iraq and Kuwait that the United States is imposing, in response to Iraq's invasion of Kuwait, pursuant to Executive Orders Numbered 12724 and 12725 (August 9, 1990) and, to the extent they are still in effect, Executive Orders Numbered 12722 and 12723 (August 2, 1990). Notwithstanding any other provision of law, *no funds, credits, guarantees, or insurance* appropriated or otherwise made available by this or any other Act for fiscal year 1991 or any fiscal year thereafter *shall be used* to support or administer any financial or commercial operation of any United States Government department, agency, or other entity, or of any person subject to the jurisdiction of the United States, *for the benefit of the Government of Iraq*, its agencies or instrumentalities, or any person working on behalf of the Government of Iraq, *contrary to the trade embargo and other economic sanctions* imposed in accordance with this section.

(b) Humanitarian assistance. To the extent that transactions involving foodstuffs or payments for foodstuffs are exempted ‘in humanitarian circumstances’ from the prohibitions established by the United States pursuant to United Nations Security Council Resolution 661 (1990), those exemptions shall be limited to foodstuffs that are to be provided consistent with United Nations Security Council Resolution 666 (1990) and other relevant Security Council resolutions.

Pub. L. No. 101-513, § 586C(a) and (b) (emphasis added).

Congress enacted the ISA to punish the Government of Iraq *financially* for invading Kuwait and for ongoing and systematic violations of human rights within Iraq. *See* H.R. Conf. Rep. No. 101-968, § 586A (1990). The ISA thus authorized the President to continue the “trade embargo and other *economic* sanctions” imposed pursuant to the Executive Orders. It also prohibited the use of federal money to benefit Iraq and authorized the President to impose sanctions on nations that failed to abide by the sanctions on Iraq.

The ISA did not ban -- as constitutionally it could not do -- travel to or from Iraq unless that travel provided a defined economic benefit to Iraq or to Iraqi nationals. The ISA contains no language authorizing the sweeping prohibition on travel to Iraq by U.S. citizens imposed by OFAC's regulations. Even in the ISA's reference to the existing trade embargo and economic sanctions, Congress did not expressly authorize the Executive to ban travel to Iraq but, instead, like IEEPA and UNPA, focused on particular *economic* benefits to the Government of Iraq.

The 1994 IEEPA Amendment. When Congress amended IEEPA in 1994 it made clear that “[i]t is the sense of the Congress that the President *should not restrict travel* or exchanges for informational, educational, religious, cultural, or humanitarian purposes ... between the United States and any other country.” Pub. L. No. 103-236, § 525(a), 108 Stat. 382, 474 (1994) (emphasis added). Thus, Congress amended IEEPA to specifically exempt from the Act:

(4) 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.

Id. § 525(c)(4), 108 Stat. 475 (amending IEEPA § 203(b) and codified at 50 U.S.C. § 1702(b)(4)). The purpose of the amendment was “to protect the constitutional rights of Americans to educate themselves about the world by communicating with peoples of other countries.” H.R. Rep. Conf. No. 103-482, at 238 (1994) .

Despite Congress's clear intent to protect the right of American citizens to travel abroad, the government claims that the following provision of the 1994 legislation constitutes an explicit retroactive authorization to continue restrictions on certain transactions:

Section 203(b)(4) of the [IEEPA] . . . shall not apply to restrictions on the transactions and activities described in section 203(b)(4) in force on the date of enactment of this Act, with respect to countries embargoed under the International Emergency Economic Powers Act on the date of enactment of this Act.

Pub. L. No. 103-236, § 525(c)(3), 108 Stat. 475 (1994). The government's reading of this so-called “grandfather” clause is too broad. That provision merely recognizes those “restrictions

on . . . transactions and activities” that were in force on April 30, 1994. Since IEEPA never permitted the President to prohibit activities separate from an economic benefit to the affected country -- much less authorize a ban on travel *per se* -- Congress did not thereby re-authorize a travel ban that had never been authorized, particularly in light of section 525(a) of the Amendment. Furthermore, *Haig v. Agee*, 453 U.S. 280 (1981), instructs the Court to review Congress’s response to Presidential and administrative enforcement of federal legislation in determining whether their enforcement action is consistent with the underlying statutory authority. There is no record here of congressional approval of OFAC’s travel ban. When Congress amended IEEPA in 1994, it can hardly be deemed to have been aware of and have acquiesced in the 1991 OFAC regulations because OFAC had, as of then, failed to submit those regulations to Congress as required by the ISA. Pub. L. No. 101-513, § 586(C)(c)(1) (“Any regulations issued after the date of enactment of this Act [in 1990] with respect to the economic sanctions imposed with respect to Iraq . . . shall be submitted to Congress before those regulations take effect.”); *see Sacks v. OFAC*, No. 04-0108, JORO, slip op. at 5 n.2 (W.D. Wash. Oct. 22, 2004) (noting OFAC’s failure to submit regulations to Congress), attached as Ex. A to O’Toole Decl.

In sum, OFAC’s travel ban exceeds statutory authority in violation of the APA.⁴ While Congress has permitted the President to restrict financial transactions and certain other activities that materially benefit Iraq or Iraqi nationals, it never authorized the sweeping ban on travel contained in the regulations. Accordingly, OFAC’s penalty against Reverend Boyle is invalid.⁵

⁴ While one court has upheld an OFAC enforcement action against an organization for shipping humanitarian supplies to Iraq, that case did not involve enforcement against travel. *See OFAC v. Voices in the Wilderness*, 329 F. Supp. 2d 71 (D.D.C. 2004). Moreover, the different regulatory provision at issue in that case was clearly authorized by statute. *Id.* at 78 n.2 (“UNPA clearly authorizes -- and, in light of U.N. Resolution 661, may command in some form -- licensing requirements of the kind at issue in this case . . .”). Only one case, *Sacks v. OFAC*, has construed the restriction as it limits travel to Iraq. But *Sacks* did not consider whether there was statutory authority to impose a *per se* ban on travel, and its analysis rested primarily on a separate provision of the regulations addressing humanitarian aid, which is not at issue here. *See* slip op. at 3-5 (travel to bring goods and services to Iraq). Moreover, that decision is on appeal and is not yet controlling law.

⁵ Even assuming *arguendo* that Congress has the constitutional authority to penalize travel *per se* and assuming further that Congress delegated that authority to OFAC under IEEPA, such delegation of that authority without a sufficiently intelligible guiding principle for its exercise violates the separation of powers. *Whitman v. American*

B. No Deference Is Due To OFAC's Interpretation Of These Statutes.

The government (Mem. at 9-10) argues, however, that OFAC's interpretation of the above statutes is entitled to deference. This is incorrect for two reasons. *First*, an agency's construction of a statute is not entitled to deference where the intent of Congress is clear. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Here, Congress has never authorized a ban on travel that does not result in an economic benefit to Iraq or Iraqi nationals. Since Congress's intent is clear, "that is the end of the matter." *Id.* at 842. *Second*, even assuming that Congress has not directly addressed the question at issue, an agency's interpretation is not entitled to deference where it would raise a serious constitutional problem; instead, the court must construe the statute to avoid such problems. *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988). Here, a *per se* ban on travel, as well as the failure to clearly provide for travel that does not result in an economic benefit to Iraq, would raise a serious constitutional problem, and, therefore, OFAC's interpretation of the relevant statutes is not entitled to deference. *See infra* Argument IV (discussing right to travel under the Fifth Amendment); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 331 (2000) (no deference to agency's interpretation of statute that "would intrude on the right to travel").

C. OFAC's Sanction Against Reverend Boyle Does Not Satisfy The APA.

The government (Mem. at 12-13) contends that OFAC's decision to impose a penalty against Reverend Boyle was neither arbitrary nor capricious because the "administrative record" supports its finding that he engaged in transactions related to travel and transportation in

Trucking Ass'n, 531 U.S. 457, 472 (2001) ("[W]hen Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'") (emphasis in original and citation omitted). Specifically, the President may exercise economic powers under IEEPA when he finds that there is "any usual and extraordinary threat," 50 U.S.C. § 1701(a), and declares a national emergency with respect to each threat that he seeks to address, *id.* § 1701(b). However, these criteria do not provide sufficient guidance to justify the sweeping delegation that OFAC claims under IEEPA. *American Trucking Ass'n*, 531 U.S. at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). Further, the lack of adequate procedural safeguards in the Iraqi Sanctions Regulations, together with the fundamental nature of the right to travel that OFAC seeks to penalize, underscore why the Constitution requires a more intelligible guiding principle for OFAC's restrictions.

violation of the regulations. The government, however, misconstrues Reverend Boyle's claim. He maintains that the regulations violate the APA because they exceed statutory authority in banning travel *per se*. See *supra* Argument III.A. And, in any event, the government is wrong. It relies solely on statements attributed to Reverend Boyle in several newspaper articles, A.R. 69, 74-75, that the government says are part of the "administrative record." But those documents were never identified or shown to Reverend Boyle, and he was thus denied a fair opportunity to respond to them.

The government (Mem. at 13) further asserts that Reverend Boyle "only challenged" the allegation that he provided services as a "human shield," but did not deny that he traveled to Iraq or engaged in travel-related transactions there. That is not accurate. Reverend Boyle did not address OFAC's contention that he traveled to Iraq or that he engaged in travel-related transactions because he feared exposing himself to the severe criminal penalties with which he had by then been threatened in a proceeding that violated the most basic requirements of due process. A.R. 7. Simply because Reverend Boyle specifically challenged one allegation (that he acted as a "human shield") does not mean he admitted any other allegations. Clearly, he did not, and the sanction against him based upon evidence that he did not have the opportunity to confront in a fair proceeding is thus arbitrary and capricious, in violation of the APA.⁶

IV. The Regulations Violate The Right To Travel Under The Fifth Amendment.

The right of American citizens to travel abroad is protected by the Fifth Amendment to the Constitution. See *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964); *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958). "Travel abroad . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. . . . [and] is basic in our scheme of values." *Aptheker*, 378 U.S. at 505-06. The right to travel internationally is a fundamental right,

⁶ Reverend Boyle separately maintains that OFAC's sanction violates the APA because it is based upon his public and outspoken opposition to U.S. military involvement in Iraq, and for that reason is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Compl. ¶ 57. The government has failed to submit or identify any evidence showing why that claim should be dismissed.

and restrictions on that right are subject to strict scrutiny. *Id.* at 508 (restrictions on right to travel cannot “sweep unnecessarily broadly and thereby invade the area of protected freedoms”) (citation omitted); *see also In re Aircrash in Bali*, 684 F.2d 1301, 1309 (9th Cir. 1982) (“[r]estrictions on international travel . . . must be carefully tailored to serve a substantial and legitimate government interest”). While the Supreme Court distinguished interstate and international travel in *Haig v. Agee*, 453 U.S. at 307, it nonetheless applied strict scrutiny to the restrictions there at issue. *Id.* at 307-08 (revoking passport was “only avenue open to the Government to limit [Agee’s dangerous] activities”).⁷ But even if restrictions on the right to travel are subject only to rational basis review, section 575.207 of the Iraqi Sanctions Regulations still must fall.

The government relies principally on cases upholding the constitutionality of restrictions on travel to Cuba, but those cases do not support the more sweeping ban on travel to Iraq under section 575.207 or OFAC’s penalty against Reverend Boyle. Gov’t Mem. at 13-14 (discussing *Regan v. Wald*, 468 U.S. 222 (1984), and *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996)). There are three important differences between those cases and this one. *First*, *Wald* and *Freedom to Travel* rested on the assumption that the Cuba travel restrictions effectively prevented the flow of hard currency to that country. *Wald*, 468 U.S. at 243 (“[W]e think there is an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President’s decision to curtail the flow of hard currency to Cuba -- currency that could then be used in support of Cuban adventurism -- by restricting travel.”); *Freedom to Travel*, 82 F.3d at 1439 (“The purpose of the [Cuba] travel ban is the same now as it has been since the ban was imposed almost 35 years ago -- to restrict the flow of hard currency into Cuba.”).

Second, the challenged restrictions in *Wald* did not impose a blanket ban on travel and, moreover, *expressly permitted* travel “which does not involve any economic benefit to Cuba.”

⁷ The government also cites *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999) (en banc); that case, however, did not involve restrictions on international travel but, rather, an assertion of an undifferentiated “right to free movement” in a challenge to a local juvenile curfew law, *id.* at 536.

468 U.S. at 229. OFAC's regulations, however, not only prohibit an American citizen from paying "his or her own travel or living expenses to or within Iraq" regardless of whether it confers an economic benefit on Iraq or Iraqis, 31 C.F.R. § 575.207, but also fail to provide for the so-called fully hosted travel exception that was available under the Cuba regulations at issue in *Wald*.

Third, neither *Wald* nor *Freedom to Travel* involved a claim that the travel restrictions were being enforced selectively based on political belief or expression. *Wald*, 468 U.S. at 241-42; *see also Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (refusal to validate passport regardless of individual's expression or affiliation). Here, by contrast, Reverend Boyle has specifically alleged that OFAC penalized him for his viewpoint -- *i.e.*, by sanctioning him based upon and/or in retaliation for his publicly expressed opposition to U.S. military policy in Iraq. Compl. ¶¶ 47-48, 60. Reverend Boyle has thus plainly stated a claim upon which relief may be granted and, therefore, dismissal under Federal Rule of Civil Procedure 12(b)(6) is not warranted. *See Wald*, 468 U.S. at 241-42 (selective enforcement of travel restrictions based upon exercise of First Amendment rights would violate Constitution).

Summary judgment is also unwarranted at this preliminary stage on Reverend Boyle's right to travel claim. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Here, there is a factual dispute over whether OFAC enforced section 575.207 against Reverend Boyle based upon and/or in retaliation for his publicly expressed opposition to U.S. military policy in Iraq. Moreover, summary judgment is particularly inappropriate here because that dispute is over OFAC's intent and motive. *See, e.g., Locurto v. Safir*, 264 F.3d 154, 167 (2d Cir. 2001); *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 78 (2001). Further, Rule 12(b) of the Federal Rules of Civil Procedure provides that when "matters outside the pleading are presented to and not excluded by the court, the motion [for failure to state a claim] shall be treated as one for

summary judgment . . . and all parties *shall be given reasonable opportunity* to present all material made pertinent to such a motion by Rule 56.” Fed. R. Civ. P. 12(b) (emphasis added). Reverend Boyle, however, has not been provided any opportunity to conduct discovery, either during the administrative proceeding before OFAC, *see supra* Argument I.A, or before this Court, *see, e.g., Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997) (“When a district court converts a Rule 12(b)(6) motion to one for summary judgment, it must allow all parties . . . a chance ‘to pursue reasonable discovery.’”) (citation omitted); *Gay v. Wall*, 761 F.2d 175, 178 (4th Cir. 1985) (failure to “afford[] an opportunity for reasonable discovery” precludes treatment of motion to dismiss as motion for summary judgment). Thus, the government’s motion for summary judgment should also be denied because Reverend Boyle has not been provided with a reasonable opportunity to flesh out his allegations of OFAC’s retaliatory and viewpoint-based enforcement of its regulations.

Further, while the judgments of the Executive are certainly entitled to “respect and consideration” in the areas of foreign policy and national security, the Constitution “most assuredly envisions a role for all three branches when individual liberties are at stake.” *Hamdi*, 124 S. Ct. 2649-50; *see also Campbell v. United States Dep’t of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) (“deference is not equivalent to acquiescence”). Thus, courts have always carefully considered challenges to restrictions on the right to travel, even where those restrictions were ultimately upheld. Here, OFAC’s sweeping ban on travel impermissibly infringes on this important constitutional right and has been selectively applied to Reverend Boyle for reasons that call for vigilance by the Judiciary, not deference.

V. OFAC’s Penalty Violates Reverend Boyle’s Right To Free Speech and Expression.

In addition to violating Reverend Boyle’s Fifth Amendment right to travel, OFAC’s sanctions violate his First Amendment right to free speech and expression. According to the information upon which the government relies, Reverend Boyle traveled to Iraq to protest U.S.

military action there. A.R. 72, 82-83; *see also* Compl. ¶¶ 16-19. His alleged travel “intend[ed] to express an idea,” and is thus entitled to First Amendment protection. *United States v. O’Brien*, 391 U.S. 367, 376 (1968); *see Spence v. Washington*, 418 U.S. 405, 409-10 (1974) (placing peace symbol on American flag to show “America stood for peace” is constitutionally protected expression). A government regulation that infringes on the right to engage in expressive conduct can be upheld only if: (i) it is within the government’s constitutional power; (ii) it furthers an important or substantial government interest; (iii) the government interest is unrelated to the suppression of free expression; and (iv) the incidental restriction on First Amendment freedoms is no greater than necessary to further that interest. *O’Brien*, 391 U.S. at 377. Section 575.207 of the Iraqi Sanctions Regulations, as applied here, fails that test.

Reverend Boyle does not deny that enacting and implementing appropriate sanctions against other nations is within the constitutional power of the federal government. Economic sanctions against Iraq, moreover, may further a substantial government interest. But penalizing Reverend Boyle for his expressed desire for peace and opposition to U.S. military action does not further that interest. Similarly, the regulations fail the third prong of the *O’Brien* test because the government seems to be pursuing an interest directly related to the suppression of free expression. 391 U.S. at 382-83; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992) (“expressive activity [cannot] be banned . . . because of the ideas it expresses”); *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) (invalidating statute punishing political opposition through expressive conduct). OFAC, apparently, has penalized only individuals who traveled to Iraq *and* publicly expressed opposition to the government’s war policies. Other U.S. citizens who traveled to Iraq before the U.S. military invasion and who support the government’s policies -- Ken Joseph, Jr., for example -- have not been penalized. *See* Larry Elder, “A Tale of Two American Anti-War Activists,” *Jewish World Rev.* (Apr. 30, 2003), *available at* <http://www.jewishworldreview.com/cols/elder/040303.asp>. Thus, OFAC’s enforcement pattern

and practices support Reverend Boyle's contention that it is intent on suppressing protected expression.⁸

The regulations also violate the fourth prong of *O'Brien*. A flat ban on travel to Iraq sweeps more broadly than necessary to accomplish the government's interest in punishing the government of Iraq for invading Kuwait and for violating its citizens' human rights or international law. So too does OFAC's failure to clearly allow for travel that does not confer an economic benefit on Iraq or Iraqis. Indeed, although OFAC sought to penalize Reverend Boyle after the current U.S. military action in Iraq commenced in March 2003, and although the government seeks to justify his penalty as necessary to wage the current war there, in fact, the statutory authority for the sanctions here at issue date to events occurring over fifteen years ago. The flat ban on travel imposed by OFAC's regulations -- one that precludes going to Iraq to express opposition to U.S. government policies -- is not justified by those events and unnecessarily restricts constitutionally protected expression.

The government (Mem. at 18) relies on *Zemel v. Rusk*, 381 U.S. 1 (1965), for the proposition that Reverend Boyle's claim "has, in essence, already been rejected by the Supreme Court." *Zemel*, however, did not involve conduct with expressive or communicative elements but, rather, *Zemel's* personal desire "to satisfy [his] curiosity about the state of affairs in Cuba and to make [him] a better informed citizen." *Id.* at 4. The other cases relied upon by the government (Mem. at 20-21) neither implicated the right to travel *per se* nor considered a claim that the restrictions were being selectively imposed based upon an individual's viewpoint; moreover, those cases all emphasized the need to restrict the flow of hard currency to the affected country in concluding that the challenged restrictions were not overly broad. *See Walsh v. Brady*, 927 F.2d 1229, 1235 (D.C. Cir. 1991) (travel to import posters); *Teague v. Regional Comm'r of Customs*, 404 F.2d 441, 445 (2d Cir. 1968) (licensing requirements to obtain foreign

⁸ Of course, Reverend Boyle was not provided with any opportunity for discovery or a hearing, and he was thus unfairly and severely prejudiced in presenting this defense. At a minimum, therefore, the Court should deny the government's motion to dismiss, or, in the alternative, for summary judgment, and allow Reverend Boyle to seek discovery on his well-pled claim under *O'Brien*.

publications); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 82 (D.D.C. 2002) (funding of terrorist organization); *Farrakhan v. Reagan*, 669 F. Supp. 506, 511-12 (D.D.C. 1987) (loan repayments and financial contributions); *American Documentary Films, Inc. v. Secretary of the Treasury*, 344 F. Supp. 703, 708 (S.D.N.Y. 1972) (importing foreign films). Those decisions, then, are not controlling here,⁹ and the government’s motion to dismiss, or, in the alternative, for summary judgment, should be denied with respect to Reverend Boyle’s claim that OFAC violated his right to freedom of speech and expression.

VI. OFAC’s Penalty Violates Reverend Boyle’s Right To Religious Freedom.

By sanctioning him for his alleged travel to Iraq, OFAC has violated Reverend Boyle’s right to the free exercise of religion under the Religious Freedom Restoration Act (“RFRA”) and the First Amendment. RFRA prohibits the government from substantially burdening the free exercise of religion, 42 U.S.C. § 2000bb-1(a), and it applies to “*all cases* where free exercise of religion is substantially burdened,” *id.* § 2000bb(b)(1) (emphasis added).¹⁰ To justify a substantial burden on Reverend Boyle’s exercise of religion, the government must show that the restriction “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that . . . interest.” *Id.* § 2000bb-1(b)(2). The government substantially burdens religious freedom whenever it significantly inhibits or impedes an individual’s free exercise of his religious beliefs. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *see also Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981) (substantial burden where government puts “substantial pressure on an adherent to modify his behavior and to violate his beliefs”).

⁹ The government also relies on *Wald and Agee*, but those cases did not involve a First Amendment claim under *O’Brien* and, in any event, do not support the government’s position for the reasons discussed previously. The government’s reliance on *Wayte v. United States*, 470 U.S. 598 (1985), is equally misplaced. Unlike this case, *Wayte* involved: the government’s interest in raising an army for military service, *id.* at 611-12; regulations that placed no greater restriction on speech than necessary to accomplish the government’s legitimate ends, *id.* at 613; and enforcement that concededly did not punish protected expression as such, *id.* at 610-11.

¹⁰ Although declared unconstitutional under the Fourteenth Amendment as applied to states and localities, *City of Boerne v. Flores*, 521 U.S. 507 (1997), RFRA still applies to the federal government, and encompasses every “branch, department, agency, instrumentality, and official . . . of the United States,” 42 U.S.C. § 2000bb-2(1).

According to the information upon which the government here relied, Reverend Boyle's alleged travel to Iraq was an exercise of his religious beliefs and ideals. A.R. 82-83. And, as Reverend Boyle has claimed, his opposition to U.S. military action in Iraq, and whatever actions he has taken with respect to that opposition, are "firmly rooted" in his religion and "inseparable" from his religious beliefs and mission as a minister and spiritual leader. Compl. ¶¶ 16-19. By sanctioning Reverend Boyle for this religiously motivated activity, OFAC has substantially burdened his free exercise of religion. 42 U.S.C. § 2000bb-1(a).

The government seeks to turn RFRA's expansive protection of religious freedom on its head. It argues (Mem. at 22) that Reverend Boyle's religious beliefs do "not require travel to Iraq" and that OFAC's regulations do not "prohibit him" from exercising his religious duties. But an exercise of religion need not be required to be protected; Congress has defined the "exercise of religion" broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *see also Kikumura v. Hurley*, 242 F.3d 950, 960-61 (10th Cir. 2001) (Congress expanded definition of "exercise of religion" in RFRA in enacting Religious Land Use and Institutionalized Person Act). "[C]ourts are not permitted to inquire into the centrality of a professed religious belief to the adherent's religion or to question its validity in determining whether a religious practice exists." *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002). Reverend Boyle's beliefs need only be -- and indisputably are -- "sincerely held" and, in his "own scheme of things, religious." *Id.* (citation omitted); *see also Stuart Circle Parish v. Board of Zoning Appeals of City of Richmond*, 946 F. Supp. 1225, 1237 (E.D. Va. 1996). His alleged travel to Iraq in opposition to U.S. military action, therefore, is no less an exercise of religion than a church's provision of services to the indigent. *Fifth Ave. Presbyterian Church*, 293 F.3d at 574-75. Moreover, merely because Reverend Boyle may have had available other means of exercising his religious beliefs does not mean that OFAC's restrictions are lawful. *Stuart Circle Parish*, 946 F. Supp. at 1239 (substantial burden on religious faith where zoning law makes more

difficult church's operation of meal program for homeless). RFRA does not impose a "least restrictive means" test on the individual seeking to exercise his religious freedom; rather, it imposes that burden on the government when it seeks to restrict that freedom. And, as described above, a flat ban on travel to Iraq sweeps more broadly than necessary to accomplish the government's interest in punishing the government of Iraq for invading Kuwait and for violating its citizens' human rights or international law.¹¹

OFAC's sanction also violates Reverend Boyle's rights under the Free Exercise Clause. While a "valid and neutral law of general applicability" that incidentally burdens a religious practice need not be justified by a compelling interest, *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 878-79 (1990), heightened scrutiny is required where that law threatens other constitutional rights, *id.* at 881-82. Reverend Boyle recognizes that the Second Circuit has declined to require heightened scrutiny for such "hybrid" free exercise claims that implicate other constitutional protections, *Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003), but maintains that such scrutiny is required under *Smith*. Here, section 575.207 of the Iraqi Sanctions Regulations restricts not only Reverend Boyle's right to the free exercise of religion but also his rights to free speech and travel; it thus violates his constitutional right to religious freedom, just as it violates RFRA. However, even if Reverend Boyle's Free Exercise Clause claim is subject only to rational basis review, OFAC's sweeping ban on travel still fails because even a compelling interest in imposing economic sanctions on Iraq does not justify either a *per se* ban that encompasses travel which does not result in any economic benefit to Iraq or Iraqi nationals or a ban that does not clearly permit such travel.

¹¹ The government incorrectly relies on *Holy Land Foundation*. There, the organization claimed a "free exercise right to fund terrorists," 333 F.3d at 167; Reverend Boyle has made no such claim. The government likewise places undue weight on *Farrakhan* where the plaintiff directly challenged a restriction prohibiting the transfer of funds into Libya based upon its participation in state-sponsored terrorism, and not a blanket ban on travel. 669 F. Supp. at 511-12. *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999), similarly fails to support the government's position since there the challenged regulation was narrowly tailored to achieve the government's legitimate goal of mandatory participation in the federal tax system, *id.* at 26; here, OFAC's sweeping restrictions on travel are not narrowly tailored. *United States v. Acevedo-Delgado*, 167 F. Supp. 2d 477 (D. P.R. 2001), is also a very different case -- it involved unauthorized entry onto a naval base, *id.* at 478-79; Reverend Boyle does not claim a free exercise right to interfere with U.S. military operations.

VII. The Iraqi Sanctions Regulations Violate International Law.

The Iraqi Sanctions Regulations also violate international law. The International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171 (“ICCPR”), guarantees the right to travel. Specifically, the ICCPR prohibits governments from curtailing freedom of movement except through restrictions that are lawfully imposed and necessary to protect “national security, public order, public health or morals or the rights and freedoms of others.” ICCPR ¶ 12(3). OFAC’s sweeping restriction on travel to Iraq is not lawfully imposed since, as demonstrated above, it violates fundamental constitutional and statutory rights and exceeds statutory authority. Further, there has been no showing that banning all travel pursuant to economic sanctions is necessary to protect national security, public order, public health or moral or the rights and freedom of others that would justify dismissal of Reverend Boyle’s international law claims. The government (Mem. at 33) contends that the ICCPR is not self-executing and thus not enforceable by federal courts, but all ratified treaties impose binding obligations on the United States under the Supremacy Clause. U.S. Const., art. VI, cl. 2. Moreover, even if a non-self-executing treaty does not create a private right of action to sue for damages, that treaty may still be invoked *defensively*, as the ICCPR has been invoked here. *See United States v. Duarte-Acero*, 132 F. Supp. 2d 1036, 1040 n.8 (S.D. Fla. 2001) (distinguishing use of “ICCPR claims defensively”).

The regulations also violate customary international law. Daniel Turack, *The Passport in International Law* 12 (1972) (freedom to travel abroad “comprises the right to leave one’s country, the right to gain ingress, travel within and egress from the country visited and the right to return to one’s country”); Kern Alexander & Jon Mills, *Resolving Property Claims in a Post-Socialist Cuba*, 27 *Law & Poly Int’l Bus.* 137, 166 (1995) (“[T]he International Covenant for Political and Civil Rights sets forth what has generally become accepted in state practice as a

right to travel under customary international law.”).¹² Customary international law is binding even in the absence of express legislative action. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (customary “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction”); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 2764 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”). The government asserts that customary international law is not binding where a controlling legislative or executive act exists. But, as discussed above, no legislation authorizes a *per se* ban on travel and any executive order authorizing such a ban is invalid. Moreover, while economic sanctions may be “a well-established practice of nations” (Gov’t Mem. at 34), their use presupposes that the proscribed activity would have resulted in an economic benefit to the affected nation and, conversely, that the sanction avoids that benefit. Congress, moreover, has further clarified that restrictions on travel are disfavored, Pub. L. No. 103-236, § 525(a), 108 Stat. 382, 474 (1994); its intent should be respected, and OFAC’s restrictions should not extend to personal travel that does not necessarily confer hard currency or any economic benefit on the targeted country.

VIII. Reverend Boyle States A Claim For Selective Prosecution.

The government argues (Mem. at 28-30) that Reverend Boyle has not properly alleged a claim of selective enforcement. Its argument should be rejected. Reverend Boyle has asserted that OFAC penalized him for alleged travel to Iraq based upon and/or in retaliation for his public opposition to U.S. military activity there. Compl. ¶¶ 47-48. Thus, Reverend Boyle’s claim is premised on his allegation that OFAC did not seek penalties against similarly situated individuals (*i.e.*, those who also traveled to Iraq) who did not publicly oppose U.S. military involvement in Iraq. That is sufficient to state a claim for selective enforcement. *St. German of Alaska E. Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1095 (2d Cir. 1988).

¹² In *Freedom to Travel*, the Ninth Circuit rejected the argument that the ICCPR established a “right to travel to a specific destination,” 82 F.3d at 1442, but its analysis rested solely on the text of Article 12, and did not consider how the protections of the ICCPR and the right to travel have been incorporated into customary international law.

Further, Reverend Boyle has identified at least one other similarly situated person who did not oppose U.S. policy in Iraq and was not penalized for traveling there. *See supra* at 28. To do more would require discovery.

This case thus differs significantly from *Voices in the Wilderness*. There, the court dismissed the selective prosecution claim (brought as a counterclaim for money damages) because the defendant had failed to allege that it was singled out for prosecution from others similarly situated and that its prosecution was improperly motivated. 329 F. Supp. 2d at 83. Reverend Boyle, however, has alleged precisely that here. Compl. ¶¶ 47-48. Moreover, the defendant in *Voices in the Wilderness* relied on the timing of the penalty (following anti-war protests) to show improper motivation, 329 F. Supp. 2d at 83, whereas Reverend Boyle has specifically alleged that the penalty was improperly motivated by the content and public nature of his exercise of First Amendment freedoms. *See St. German*, 840 F.2d at 1095 (enforcement cannot be based on “such impermissible considerations as . . . the desire to prevent [the] exercise of constitutional rights”). Accordingly, Reverend Boyle has presented a colorable claim for selective enforcement, and he should be provided an opportunity to conduct discovery into the breadth of OFAC’s imposition of sanctions for travel to Iraq. At a minimum, he should be given an opportunity to re-plead and flesh out this claim.

CONCLUSION

For the foregoing reasons, Defendants’ motion to dismiss, or, in the alternative, for summary judgment should be denied on Counts Four, Five, and Eight of the Complaint, and Plaintiff’s motion for judgment on the pleadings, or, in the alternative, for summary judgment, should be granted on Counts One, Two, Three, Six, Seven, Nine and Ten of the Complaint.

Respectfully submitted,

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