

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
FREDERICK BOYLE, :
 :
 Plaintiff, :
 :
 - against - : No. 05 Civ. 4995 (LTS)
 :
 ROBERT W. WERNER, Director of :
 Foreign Assets Control of the United States :
 Department of the Treasury, in his official : ECF CASE
 capacity, JOHN W. SNOW, Secretary, :
 United States Department of the Treasury, :
 in his official capacity, UNITED STATES :
 TREASURY DEPARTMENT, OFFICE :
 OF FOREIGN ASSETS CONTROL, and :
 ALBERTO R. GONZALES, Attorney :
 General, United States Department of :
 Justice, in his official capacity, :
 :
 Defendants. :
-----X

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

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PRELIMINARY STATEMENT

Plaintiff violated the Iraqi Sanctions Regulations as authorized by IEEPA, UNPA, the Iraq Sanctions Act, and Executive Orders 12,722 and 12,724, when he engaged in certain transactions relating to his travel to Iraq in February and March of 2003.¹ As a result, OFAC imposed a civil penalty against him in the amount of \$6,700. Unwilling to accept the consequence of having violated the law, Plaintiff now asks this Court to excuse his conduct and, in so doing, to limit the President's authority under IEEPA, UNPA, and the Iraq Sanctions Act in a manner that would substantially undermine the intent and scope of those laws and would be inconsistent with both decades of economic sanctions law and the great deference afforded by the courts to the executive branch in the realm of foreign policy and national security. As shown in Defendants' Memorandum, Plaintiff's attempt to shield himself from the consequences of his actions is unavailing. His attempts in his opposition brief to distinguish or ignore applicable caselaw and statutory authority do not provide the basis for overturning the civil penalty. Indeed, Judge Colleen McMahon's recent decision in a case raising similar challenges to the Iraqi Sanctions Regulations significantly undermines Plaintiff's position.

In Karpova v. Snow, ___ F. Supp. 2d ___, 2005 WL 2897389 (S.D.N.Y. Oct. 28, 2005), Judge McMahon squarely rejected many of the same claims pressed by Plaintiff here. For instance, in Karpova, the Court rejected plaintiff's claim that the Iraqi Sanctions Regulations "unconstitutionally restrict[ed] her First Amendment right of free speech and her Fifth Amendment right to travel, and that the penalty was imposed without affording her an adequate opportunity to be heard, in violation of her right to Due Process under the Fifth Amendment." Id. The Court also rejected her "claims that she was penalized arbitrarily and capriciously, either because the activity for which she was cited did not violate the Regulations or because the Regulations are not authorized under the law." Id. Karpova also failed to convince the Court that her conclusory claim

¹ References to the Defendants' Memorandum are denoted as "Def. Mem. at ___," references to Defendants' Local Rule 56.1 Statement are denoted as "Def. Rule 56.1 Stmt. ¶ __," and references to Plaintiff's brief are denoted as "Pl. Mem. at ___," and Plaintiff's Local Rule 56.1 Statement as "Pl. Rule 56.1 Stmt. ¶ ___." All other abbreviations are identical to those found in the Defendants' Memorandum.

of selective enforcement based on conjecture stated a claim as a matter of law.

As in Karpova, the Administrative Record here amply evidences that Plaintiff violated the Iraq Sanctions Regulations, and the relevant caselaw provides no basis for shielding Plaintiff from “paying the price.” Karpova, 2005 WL 2897389, at *1. Accordingly, this Court should grant Defendants’ Motion, deny Plaintiff’s Cross-Motion, and dismiss the Complaint in its entirety.

ARGUMENT

I. The Complaint Should Be Dismissed in Its Entirety Under Rule 12(b)(6) and Under Rule 56 of the Federal Rules of Civil Procedure

As set forth in Defendants’ Memorandum, the Complaint should be dismissed in its entirety pursuant to Rule 12(b)(6), and Rule 56 of the Federal Rules of Civil Procedure. Plaintiff does not dispute that summary judgment is appropriate to resolve Counts One, Two, Three, Six, Seven, Nine and Ten of his Complaint, see Pl. Mem. at 1, but unavailingly seeks to avoid summary judgment on the three other counts by stating that “Plaintiff believes there is a genuine issue of material fact with respect to the Fourth, Fifth, and Eight [sic] causes of action of the Complaint.”² See Pl. Loc. R. Stmt. ¶ 2. Specifically, Plaintiff claims, without citation to any evidence, that “there is a genuine issue of material fact as to whether Defendants enforced the Iraqi Sanctions Regulations against him and imposed a monetary penalty against him for his alleged travel to Iraq based upon and/or in retaliation for his public opposition to the U.S. military activity there.” Id. at ¶ 2. However, as set forth in Defendants’ Memorandum and outlined herein, Counts Four, Five, and Eight of the Complaint should be dismissed for failure to state a claim. Alternatively, summary judgment can also be granted with respect to Counts Four, Five and Eight given Plaintiff’s failure to demonstrate through admissible evidence the existence of any dispute of material fact.

The Administrative Record filed by Defendants in support of their motion constitutes the

² Count Four sets forth Plaintiff’s claim that his right to travel under the Fifth Amendment was violated (Compl. ¶¶ 58-60); Count Five sets forth Plaintiff’s claim that his right to free speech under the First Amendment was violated (Compl. ¶¶ 61-65); and Count Eight sets forth Plaintiff’s claim of selective enforcement in violation of the Fifth Amendment’s equal protection clause (Compl. ¶¶ 70-71).

record relied upon by the agency in imposing a civil monetary penalty against Plaintiff. Plaintiff correctly recognizes that under the APA, the Court should neither undertake its own fact-finding nor substitute its judgment for that of the agency. See, e.g., Camp v. Pitts, 411 U.S. 138, 142 (1973); Karpova, 2005 WL 2897389, at *6. Moreover, agency action is entitled to a “presumption of regularity,” Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), and agencies are owed particularly high deference in applying their own regulations. See Auer v. Robbins, 519 U.S. 452, 461 (1997), Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). In opposition, Plaintiff submits no evidence in support of his belief that the penalty was imposed because of Plaintiff’s opposition to the war. Plaintiff’s vague and unsupported “belief” that Defendants imposed the penalty against him in retaliation for or based upon his opposition to the war (Pl. Loc. R. 56.1 Stmt. at ¶ 2), is insufficient to defeat Defendants’ well-supported motion for summary judgment. Instead, Plaintiff has the burden of providing “concrete evidence” sufficient to raise a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 212, 252, 256 (1986); see also Allen v. St. Cabrini Nursing Home, Inc., 198 F. Supp. 2d 442, 448 (S.D.N.Y. 2002) (“Speculation, conclusory allegations, unsupported assertions, and mere denials are not enough to raise genuine issues of fact.”); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980) (noting that it is well established that facts stated in legal memoranda are insufficient to defeat summary judgment); S.D.N.Y. Loc. R. 56.1(d) (requiring that any statement made by a party opposing a motion for summary judgment “must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e)”); Individual Practices of Judge Laura Taylor Swain, dated Aug. 25, 2005 at 2.E (“Evidentiary support, in admissible form, of all factual assertions, relied in support of or in opposition to a motion shall be filed and served with moving or opposing papers.”).³ Because Plaintiff’s claim that OFAC acted with a nefarious motive in imposing the penalty against him is raised solely in his brief and Local

³ In his Local Rule 56.1 Statement, Plaintiff expressly admits that the Administrative Record is what the final agency decision was based upon (see Pl. Rule 56.1 Stmt. ¶ 1), and fails to demonstrate through citation to any evidence the existence of any material fact in dispute.

Rule 56.1 Statement, is unsworn and is not supported by the record or any admissible evidence, summary judgment is proper. See Tuff-N-Rumble Management, Inc. v. Sugarhill Music Publishing Inc., 75 F. Supp. 2d 242, 248 (S.D.N.Y. 1999) (“bare statements lacking any evidentiary support” provide no basis for denying summary judgment); see also Santiago v. City of New York, No. 98 Civ. 6543 (RPP), 2000 WL 1532950, at *6 (S.D.N.Y. Oct. 17, 2000) (granting summary judgment where plaintiff provided no support for bald assertion made in Local Rule 56.1 Statement).

Finally, to the extent Plaintiff seeks to resist Defendants’ motion for summary judgment on Counts Four, Five and Eight on the ground that he wants unspecified discovery, see, e.g., Pl. Mem. at 29 n.8, 34, his request should also be denied. First, in all but exceptional circumstances, discovery is generally not permitted in APA cases. See National Law Center on Homelessness & Poverty v. United States Dep’t of Veterans Affairs, 736 F. Supp. 1148, 1152 (D.D.C. 1990) (“[T]he general rule is that discovery is not permitted prior to a court’s review of the legality of agency action under 706(2)(A) of the APA.”); see also Saratoga Development Corp. v. United States, 21 F.3d 445, 458 (D.C. Cir. 1994). Discovery is particularly inappropriate in cases such as this one involving challenges to economic sanctions regulations. See, e.g., Karpova, 2005 WL 2897389, at *5 (resolving similar challenges to civil penalty imposed under Iraqi Sanctions Regulations based upon the administrative record); Def. Mem. at 9, 17 (collecting cases). Second, under Rule 56(f) of the Federal Rules of Civil Procedure, “a party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must submit an affidavit showing (1) what facts are sought to resist the motion and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts.” Gurary v. Winehouse, 190 F.3d 37, 43 (2d Cir. 1999) (citing cases) (internal quotation marks and citations omitted). Problematically, Plaintiff fails to submit any affidavit establishing what discovery he needs, what information could be unearthed by discovery, and why he has been unable to obtain that information. Plaintiff’s failure to comply with Rule 56(f) is itself sufficient grounds to deny Plaintiff’s request for

discovery. See Gurary, 190 F.3d at 43-44; Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir. 1994). Finally, Plaintiff's general request for unspecified discovery is tantamount to a fishing expedition to discover additional facts to support his speculative belief that Defendants' imposed the penalty against him based upon his opposition to the war, and cannot justify denial of Defendants' motion for summary judgment. See Nat'l Union Fire Ins. Co. v. Stroh Co., 265 F.3d 917, 117 (2d Cir. 2001) ("Even where a Rule 56(f) motion is properly supported, a district court may refuse to allow additional discovery if it deems the request to be based on speculation as to what potentially could be discovered."). Accordingly, Plaintiff's request in his brief for discovery should be denied.

The Court's resolution of the Defendants' motion in Karpova resolving an analogous challenge to a civil penalty imposed under the Iraq Sanctions Regulations is highly instructive. In Karpova, as here, the Defendants submitted an administrative record. The court, ruling on the Defendants' motion to dismiss or, in the alternative, for summary judgment, dismissed the plaintiff's Fifth Amendment travel claim, selective prosecution claim, and First Amendment claim under Fed. R. Civ. P. 12(b)(6), Karpova, 2005 WL 2897389, at *5, 11-14, and granted summary judgment as to the plaintiff's APA claim and Fifth Amendment due process claim, Karpova, 2005 WL 2897389, at *5-11. As the Court aptly noted, "[b]ecause defendants made this motion in the alternative, under both Rules 12(b) and 56, plaintiff has always been on notice that the Court has been asked to grant summary judgment should that be appropriate. Thus, no issue of motion conversion and notice is presented." Karpova, 2005 WL 2897389, at *5. Likewise, the Complaint in this action should be dismissed in its entirety.

II. OFAC's Penalty Decision Satisfies the APA and the Deferential Standard of Review

As the Karpova Court recently noted, a "highly deferential standard" applies to OFAC's civil penalty determination. Karpova, 2005 WL 2897389, at *6. Moreover, "[a]gency determinations in the area of foreign relations are owed particularly great deference." Id. (citing Immigration & Naturalization Serv. v. Abudu, 485 U.S. 94, 110 (1988)). "Matters relating 'to the

conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” Regan v. Wald, 468 U.S. 222, 242 (1984). (See also Def. Mem. at 10.)

In Karpova, 2005 WL 2897389, at *9 (citation omitted), in which the plaintiff, as here, was found to have engaged, inter alia, in prohibited travel-related transactions, the court held that the Iraqi Sanctions Regulations “are supported by the IEEPA, UNPA and Iraq Sanctions Act, as well as Executive Orders 12,722 and 12,724. Moreover, IEEPA grants the President ‘sweeping powers’ and ‘broad authority,’ which would make it, in and of itself, a lawful basis for the sort of regulations applied to plaintiff.” Plaintiff acknowledges that “IEEPA grants the executive ‘broad powers.’” (Pl. Mem. at 16-17.) The statutory law and executive orders authorizing the Iraqi Sanctions Regulations are fully set forth in Defendants’ Memorandum. (See, e.g., Def. Mem. at 2-7, 13-15.)

The Karpova Court’s holding that the Iraq Travel-Related Ban is supported by statutory law and executive orders is consistent with every other court that has considered such challenges. See, e.g., Sacks v. Office of Foreign Assets Control, No. 04-0108 (JLR), slip op. at 3-5 (W.D. Wash. Oct. 22, 2004) (O’Toole Decl., Ex. A); Office of Foreign Assets Control v. Voices in the Wilderness, 329 F. Supp. 2d 71, 76-78 (D.D.C. 2004). In Voices in the Wilderness, the district court, in upholding the validity of exportation restrictions in the Iraqi Sanctions Regulations, found that Executive Order 12,724, and the regulations “clearly fall within the purview of UNPA.” Voices in the Wilderness, 329 F. Supp. 2d at 78. In Sacks, the court, upheld the validity of the travel-related restrictions reflected in the Iraqi Sanctions Regulations, finding that the analysis in Voices in the Wilderness is “equally applicable” to the travel-related restrictions, Sacks, Order at 4, and held that Congress, through the Iraq Sanctions Act, “ratif[ied] the Iraqi sanctions regime.” Id. at 5.

Plaintiff raises a number of meritless arguments.⁴ First, Plaintiff incorrectly suggests that the Iraq Travel-Related Ban prohibits “travel per se” or constitutes a “blanket travel ban.” (See, e.g., Pl. Mem. at 14, 15.) However, the Iraqi Sanctions Regulations do not ban travel per se. Rather, the regulatory provision at issue in this case prohibits U.S. persons from engaging in transactions relating to their travel to Iraq. See 31 C.F.R. § 575.207.

Second, Plaintiff inaccurately argues that Congress was not aware of the Iraq Sanctions Regulations in 1994 when it explicitly continued the travel-related restrictions under IEEPA for countries, including Iraq, that were embargoed under IEEPA on April 30, 1994. See Pub. L. No. 103-236, § 525(c)(3), 108 Stat. 382, 475 (1994). For example, the Iraq Sanctions Regulations were published in the Federal Register, 56 Fed. Reg. 2112, on January 18, 1991. Congress also was aware of the Iraqi Sanctions Regulations through regular written communications from the President. See, e.g., President’s Message to the Congress on the Continuation of the National Emergency with Respect to Iraq, 28 Weekly Comp. Pres. Doc. 246, 246-47 (Feb. 11, 1992); President’s Letter to Congressional Leaders Reporting on the National Emergency with Respect to Iraq, 27 Weekly Comp. Pres. Doc. 158, 159-60 (Feb. 18, 1991). In any event, the 1994 amendment to IEEPA authorized the travel-related restrictions in Executive Order 12,724 and the Regulations, and Congress is presumed to be aware of the implementation of statutes. See, e.g., Saxbe v. Bustos, 419 U.S. 65, 74 (1974); Shapiro v. United States, 335 U.S. 1, 16 (1948). Moreover, Plaintiff incorrectly states that the government describes the 1994 amendment as a “retroactive authorization.” Pl. Mem. at 21. The 1994 amendment did not constitute a retroactive authorization; rather, the 1994 amendment provided an express endorsement or a continuation of previously authorized travel-related restrictions with respect to Iraq.

⁴ To the extent that Plaintiff relies on Hamdi v. Rumsfeld, 542 U.S. 507 (2004), see Pl. Mem. at 5, this decision was a plurality opinion involving a completely different situation. Hamdi involved the rights of an alleged enemy combatant who had been imprisoned without charge or hearing for more than two years. See Hamdi, 524 U.S. at 527. This case, by contrast, involves a violator of economic sanctions regulations who was afforded both notice and an opportunity to provide a written response before the civil penalty was imposed.

Third, Plaintiff attempts to challenge section 2 of Executive Order 12,724, which explicitly prohibits travel-related transactions, by speculating that there is some unspecified legal provision requiring “a demonstrable economic benefit to the Government of Iraq.” (Pl. Mem. at 21 (emphasis omitted).) Neither IEEPA, UNPA, nor the Iraq Sanctions Act contains such a requirement; rather, those statutes provide broad authority for the President to regulate a wide variety of transactions. Indeed, the Iraq Sanctions Act explicitly directs the President to continue the economic sanctions provided in, inter alia, Executive Order 12,724. Pub. L. No. 101-513, § 586C(a), 104 Stat. 1979, 2048 (1990). See also United States v. Lindh, 212 F. Supp. 2d 541, 558-63, 567 (E.D. Va. 2002) (rejecting argument that IEEPA solely covers commercial or economic conduct). In any event, Plaintiff fails to recognize that the evidence in the Administrative Record suggesting that the money Plaintiff spent in Iraq does provide an economic benefit to Iraq.

As the Karpova court correctly recognized a “highly deferential standard” applies to OFAC’s civil penalty determination. Karpova, 2005 WL 2897389, at *6. “Matters relating ‘to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.’” Regan, 468 U.S. at 242. (See also Def. Mem. at 12-13.) “As a general principle, . . . this Court should avoid impairment of decisions made by the Congress or the President in matters involving foreign affairs or national security.” Global Relief Found., Inc. v. O’Neill, 207 F. Supp. 2d 779, 788 (N.D. Ill.), aff’d, 315 F.3d 748 (7th Cir. 2002). See also Regan, 468 U.S. at 242; Haig v. Agee, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”); Islamic Am. Relief Agency v. Unidentified FBI Agents, No. Civ. A. 04-2264 (RBW), 2005 U.S. Dist. LEXIS 21570, at *19 (D.D.C. Sept. 15, 2005). Moreover, “[t]he APA has never been construed to grant to . . . any . . . court the power to review the wisdom of policy decisions of the President.” DKT Mem’l Fund Ltd. v. Agency for Int’l Dev., 887 F.2d 275, 281 (D.C. Cir. 1989). “The actions of the President . . . are not reviewable under the APA because . . . the President is not an ‘agency.’” Dalton v. Specter, 511 U.S. 462, 470 (1994). See also Franklin v.

Massachusetts, 505 U.S. 788, 801 (1992) (“As the APA does not expressly allow review of the President’s actions, we must presume that his actions are not subject to its requirements.”).

In sum, given the evidence in the Administrative Record (see Def. Mem at 12-13), there can be no reasonable dispute that OFAC rationally found that Plaintiff had engaged in “transactions related to travel” in Iraq and activities within Iraq, in violation of 31 C.F.R. § 575.207.⁵ Even now, Plaintiff does not rebut or otherwise dispute the evidence in the Administrative Record demonstrating his violation of the Iraq Travel-Related Ban. See Pl. Mem. at 24 (conceding that Plaintiff only challenged the allegation that he acted as a “human shield”).

III. The Iraqi Sanctions Regulations Do Not Violate a “Right” to Travel Abroad

As this Court recently held in Karpova, 2005 WL 2897389, at *11, Plaintiff’s right to travel claim is “baseless and contrary to well-established law.” (See also Def. Mem. at 13-15.) Indeed, the Supreme Court has recognized that “the freedom to travel outside the United States must be distinguished from the right to travel within the United States.” Haig, 453 U.S. at 306 (emphasis in original). See also Regan, 468 U.S. at 241 n.25; Karpova, 2005 WL 2897389, at *11. Plaintiff’s attempt to rely on Aptheker v. Sec’y of State, 378 U.S. 500 (1964), and Kent v. Dulles, 357 U.S. 116 (1958), see Pl. Mem. at 24, was rejected by the Supreme Court decades ago. See Regan, 468 U.S. at 241, 244. Kent and Aptheker involved restricting the ability of particular persons -- Communists -- from obtaining passports based on their political belief or affiliation, as opposed to travel-related restrictions specific to a particular country and applicable to people regardless of their political belief or affiliation. In Regan, the Supreme Court upheld economic sanctions regulations against Cuba, and held that the travel-related restrictions in such regulations “do not violate the freedom to travel protected by the Due Process Clause” 468 U.S. at 244. In so holding, the Supreme Court explicitly distinguished Kent and Aptheker, and stated the following:

⁵ To the extent Plaintiff seeks to include his claim of selective enforcement under his APA challenge (see Pl. Mem. at 24 n.6), such claim fails for the same reasons his selective enforcement claim fails (see Point IV infra at pp. 11-16). There is no evidence in the Administrative Record or the record on summary judgment demonstrating that OFAC imposed the penalty against him based upon his opposition to the war.

Both Kent and Aptheker . . . were qualified the following Term in Zemel v. Rusk, 381 U.S. 1 . . . (1965). In that case, the Court sustained against constitutional attack a refusal by the Secretary of State to validate the passports of United States citizens for travel to Cuba. The Secretary of State in Zemel, as here, made no effort selectively to deny passports on the basis of political belief or affiliation, but simply imposed a general ban on travel to Cuba The Court in Zemel distinguished Kent on grounds equally applicable to Aptheker.

“It must be remembered . . . that the issue involved in Kent was whether a citizen could be denied a passport because of his political beliefs or associations In this case, however, the Secretary has refused to validate appellant’s passport not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.” 381 U.S., at 13

Regan, 468 U.S. at 241.

Plaintiff’s claim that this case differs from Regan and its progeny lacks merit. (See Pl. Mem. at 25-26). As in Regan, the Iraqi Sanctions Regulations at issue here involve travel-related restrictions against a country that apply because of foreign policy considerations affecting all U.S. persons; accordingly, they likewise should be upheld. Contrary to Plaintiff’s suggestion (Pl. Mem. at 25), the Iraq Travel-Related Ban does not preclude all travel to Iraq, but merely precludes U.S. persons from engaging in or making payment of their travel related expenses. Like those travel restrictions imposed against travel to Cuba, one of the purposes of the Iraq Travel-Related Ban is to curtail or limit the flow of hard currency to Iraq and its former regime. Accordingly, Plaintiff’s attempt to distinguish Regan, and its progeny, is unavailing.

Finally, the applicability of the Iraqi Sanctions Regulations does not depend on a person’s political beliefs or associations, and accordingly, the analyses of Kent and Aptheker do not apply here. The restrictions on transactions related to travel or transportation in the Iraqi Sanctions Regulations apply generally to “U.S. person[s].” 31 C.F.R. §§ 575.207, 575.208. Far from targeting particular political beliefs or associations, the Iraqi Sanctions Regulations define a U.S. person as “any United States citizen; permanent resident alien; juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches; or any person in the United States.” 31 C.F.R. § 575.321.

IV. Plaintiff's Selective Enforcement Claim Fails

Plaintiff not only has failed to state a claim for selective enforcement as a matter of law, but he also fails to submit any evidence to support his speculative claim that the civil penalty was imposed against him because of his opposition to the war. At most, Plaintiff's attempt to uncover persons who have violated the Iraqi Sanctions Regulations and not been penalized has turned up only one possible name. See Pl. Mem at 28. However, there is no evidence that this individual violated the Iraq Travel-Related Ban by having engaged in travel-related transactions, is subject to the Iraqi Sanctions Regulations, or that OFAC was aware of such individual and his purported violation. Tellingly, Plaintiff concedes that he would have to conduct discovery or re-plead his Complaint to flesh out his selective enforcement claim. See Pl. Mem at 35. Thus, Plaintiff's own brief evidences that he has failed utterly to meet the "particularly demanding" standard set by the courts to derail even criminal prosecutions on selective enforcement grounds.

As noted in Defendants' Memorandum, it is far from clear that claims of selective enforcement apply in civil enforcement cases (see Def. Mem. at 31). Nor does the law allow Plaintiff to engage in a classic fishing expedition in order to meet his heavy burden.⁶ As the Supreme Court has noted,

Even in the criminal-law field, a selective prosecution claim is a rara avis. Because such claims invade a special province of the Executive -- its prosecutorial discretion -- we have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce "clear evidence" displacing the presumption that a prosecutor has acted lawfully.

⁶ The Supreme Court has established a "rigorous standard for discovery" on selective prosecution claims. See United States v. Armstrong, 517 U.S. 456, 468 (1996). Discovery is unwarranted in this case, especially in light of Plaintiff's scant showing. To satisfy this rigorous standard for discovery, Plaintiff must produce some evidence that similarly situated violators of the Iraqi Sanctions Regulations who did not oppose U.S. military action in Iraq were not penalized. Armstrong, 517 U.S. at 469, 470. Moreover, Plaintiff must show "some evidence of both discriminatory effect and discriminatory intent." United States v. Bass, 536 U.S. 862, 863 (2002); see also Karpova, 2005 WL 2897389, at *12. Plaintiff has failed to produce such evidence. See Armstrong, 517 U.S. at 470 (finding the claimant failed to provide requisite "credible showing of different treatment of similarly situated persons").

Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999) (emphases added).

Added to that burden here is the fact that cases involving foreign relations and national security, such as the present one, are accorded much greater deference to agency action than typical criminal cases in which selective enforcement claims are raised. The Supreme Court’s admonition that “[m]atters relating ‘to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference,’” Regan, 468 U.S. at 242, applies in this context as well. The courts should therefore look with great skepticism at a party’s attempt to escape a civil monetary penalty by raising a conclusory claim of “selective enforcement.”

Assuming, arguendo, that claims of selective enforcement apply in civil cases, the Complaint fails to state a claim upon which relief can be granted. Plaintiff in this case, as in Voices in the Wilderness, 329 F. Supp. 2d at 83 (internal quotation marks omitted), fails to offer “at least a colorable claim that (1) he or she was singled out for prosecution from among others similarly situated, and (2) that his or her prosecution was improperly motivated.” Indeed, the Court in Karpova, 2005 WL 2897389, at *12, likewise rejected a selective prosecution claim because the plaintiff failed to individuals who were similarly situated “in all material respects” and were not sanctioned for violations of the Iraqi Sanctions Regulations. Although Plaintiff baldly asserts that the Iraqi Sanctions Regulations were enforced against individuals such as himself who “actively and publicly opposed U.S. military action in Iraq” (Compl. ¶ 47), the Complaint fails to make a colorable claim or even allege that the Iraqi Sanctions Regulations were not enforced against others who violated the sanctions in the same manner, but did not oppose the U.S. military action in Iraq.

As Judge Posner aptly observed, the Constitution does not require that laws be enforced “with Prussian thoroughness as the price of being allowed to enforce them at all. Otherwise few speeders would have to pay traffic tickets.” Tuffendsam v. Dearborn County Bd. of Health, 385 F.3d 1124, 1128 (7th Cir. 2004). A claim of selective enforcement involves the “special province” of the executive, and the executive retains “broad discretion” in enforcing laws. Armstrong, 517

U.S. at 464. “[I]n the absence of clear evidence to the contrary, courts presume that [the executive] ha[s] properly discharged [its] official duties.” Armstrong, 517 U.S. at 464. Plaintiff here has failed to allege or present clear evidence to the contrary. Rather, Plaintiff’s brief simply refers to an article identifying the name of a single individual whom Plaintiff alleges has violated the Iraqi Sanctions Regulations but has not been penalized. See Pl. Mem. at 28-29. Moreover, the article referenced in Plaintiff’s brief, Laurence A. Elder, “A tale of two American anti-war activists,”⁷ cites to another article, Ken Joseph, Jr., “I Was Wrong!,” AssyrianChristians.Com, at http://assyrianchristians.com/i_was_wrong_mar_26_03.htm (Mar. 26, 2003), stating at the end that Mr. Joseph is “an Assyrian . . . and was born, raised and resides in Japan,” which raises the question of whether he was even subject to the Iraqi Sanctions Regulations.

Plaintiff thus cannot “demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.” Armstrong, 517 U.S. at 465 (internal quotation marks omitted); see also Lindh, 212 F. Supp. 2d at 567 (rejecting selective prosecution claim for failure to establish discriminatory effect and discriminatory purpose). To establish discriminatory effect, the claimant must demonstrate that similarly situated individuals were not prosecuted. Armstrong, 517 U.S. at 465. See also United States v. Bass, 536 U.S. 862, 863-64 (2002). Plaintiff fails to submit any evidence demonstrating that anyone who similarly violated the Iraqi Sanctions Regulations by having engaged in travel-related transactions has not been prosecuted. Notably, the article referenced by Plaintiff in his brief (but not submitted to the Court) fails to even establish that Mr. Joseph violated the Iraqi Sanctions Regulations, that Mr. Joseph is a proper comparator, that Mr. Joseph was subject to the Iraqi Sanctions Regulations, or that OFAC was aware of Mr. Joseph. By contrast, the Administrative Record contains a host of evidence that Plaintiff is subject to the Iraqi Sanctions Regulations, that Plaintiff violated the Iraq Travel-Related

⁷ Plaintiff fails to submit a copy of the article in his opposition. Although Plaintiff’s Memorandum provides an internet address (see Pl. Mem. at 28), the internet site provided by Plaintiff cannot be accessed. However, a copy of the article can be found at World Net Daily, at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=31860 (Apr. 3, 2003).

Ban, and that OFAC became aware of Plaintiff's violations. Plaintiff's reliance on allegations regarding one individual, who may not even be a U.S. person subject to or violated the Iraqi Sanctions Regulations, fails to satisfy the requisite demanding standard or provide clear evidence.

Plaintiff also cannot demonstrate that he was treated differently based upon an impermissible consideration. To establish a discriminatory purpose, Plaintiff must demonstrate that OFAC imposed a civil penalty "at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." Wayte v. United States, 470 U.S. 598, 610 (1985) (internal quotation marks omitted). The newspaper article referenced in Plaintiff's brief does not provide any evidence that OFAC imposed a civil penalty upon Plaintiff "because of" his public opposition to U.S. military action in Iraq, as opposed to his having engaged in prohibited travel-related transactions. Indeed, the article does not even mention Plaintiff. Moreover, the article does not demonstrate that OFAC was even aware of Mr. Joseph for enforcement, let alone that OFAC purposely did not select Mr. Joseph or had any discriminatory motive in its enforcement of the Iraqi Sanctions Regulations. Even assuming arguendo that there was evidence that Mr. Joseph engaged in travel-related transactions comparable to Plaintiff and that Mr. Joseph was subject to the Iraqi Sanctions Regulations, there is no evidence that OFAC was aware of such violation and failed to pursue him. See La Trieste Restaurant v. Village of Port Chester, 188 F.3d 65, 70 (2d Cir. 1999).

Plaintiff's claim that the issue is whether Plaintiff was treated differently from others similarly situated due to impermissible considerations such as an intent to inhibit or punish the exercise of constitutional rights (see Pl. Mem. at 34-35), both assumes too much and fails to recognize the reality of economic sanctions and the purposes for imposing penalties for violations. The issue as framed by Plaintiff assumes that Plaintiff's claimed constitutional rights are unique to Plaintiff and that others who violate the sanctions, albeit without OFAC's knowledge, would not also claim that those same constitutional rights apply to them. While an individual's reasons for violating the economic sanctions may vary, the harms to the United States apply not just in cases in which violators act publicly to protest the sanctions, but also in cases in which violators for

whatever reason ignore them: among other things, such actions provide funds and support to the sanctioned regime, person or entity during a time of national emergency where the President has found a threat to the national security, foreign policy, or economy of the United States. The government enforces a wide variety of economic sanctions and enforces violations regardless of views on the particular sanctions program at issue. See, e.g., United States v. Arch Trading Co., 987 F.2d 1087 (4th Cir. 1993); Lindh, 212 F. Supp. 2d at 558-63, 567.

Unable to ignore the deficiencies in his selective enforcement claim, Plaintiff suggests in his brief that he be permitted to amend his selective prosecution claim in some unspecified manner or conduct discovery to learn facts that would support such a claim. (Pl. Mem. at 35.) As discussed supra at pp. 3-5, Plaintiff's request for discovery should be denied given this Court's review under the APA is necessarily limited to the agency record, his failure to satisfy the requirements of Rule 56(f), and to specify what discovery would be necessary. Likewise, Plaintiff's request in his brief to amend the selective prosecution claim should be denied. First, Plaintiff did not file a separate motion to amend, and did not annex a copy of the proposed amended complaint to his motion papers. See Smith v. Planas, 151 F.R.D. 547, 550 (S.D.N.Y. 1993). "In order to satisfy the prerequisite of particularity in a motion to amend, a complete copy of the proposed amended complaint must accompany the motion so that both the Court and opposing parties can understand the exact changes made." Smith, 151 F.R.D. at 550; see also AT&T Corp. v. American Cash Card Corp., 184 F.R.D. 515, 521 (S.D.N.Y. 1999) (same). As the Second Circuit recently noted: "[i]t is well within this Court's discretion to deny leave to amend implicitly by not addressing the request when leave is requested informally in a brief filed in opposition to a motion to dismiss." In re Tamoxifen Antitrust Litigation, ___ F.3d ___, 2005 WL 2864654, at *27 (2d Cir. Nov. 2, 2005).

Moreover, Plaintiff's request for leave to amend his selective prosecution claim should be denied as "futile." See Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993). An amendment is futile "if the proposed amended complaint would be subject to 'immediate dismissal' for failure to state a claim or on some other ground." Jones v. New York Div. of Military & Naval

Affairs, 166 F.3d 45, 55 (2d Cir. 1999). Because Plaintiff's proposed amendment of his selective prosecution claim would still not cure the deficiencies outlined herein, his request to amend this claim should be denied. See Pangburn v. Culbertson, 200 F.3d 65, 70-71 (2d Cir. 1999).

The bottom line is that absent any allegation or showing of discriminatory effect and purpose -- which Plaintiff has not shown and cannot show -- Plaintiff cannot evade having to pay the price for his conduct in violation of the Iraqi Sanctions Regulations by invoking the mantra of "selective enforcement."

V. Plaintiff Was Afforded Procedural Due Process of Law

In Karpova, 2005 WL 2897389, at *9, this Court recently rejected as "frivolous" an identical due process challenge to the procedure under which civil penalties are imposed under the Iraqi Sanctions Regulations. As the Karpova court explained, "[t]he [Pre-penalty Notice]. . . satisfies the Due Process Clause's notice requirement. The opportunity to controvert the charge in writing gives a person in plaintiff's position a meaningful opportunity to be heard." Id. at 10. "The [Iraqi Sanctions] Regulations do not call for a testimonial hearing. However, they do not have to in order to satisfy due process." Id. As the Supreme Court has ruled, "[t]here is no inexorable requirement that oral testimony must be heard in every administrative proceeding in which it is tendered." Fed. Deposit Insur. Corp. v. Mallen, 486 U.S. 230, 247-48 (1988). Likewise, the Second Circuit has "declin[ed] to attach talismanic significance to the availability" of an oral hearing, and held that administrative hearings conducted on written submissions satisfy due process. Interboro Inst., Inc. v. Foley, 985 F.2d 90, 93 (2d Cir. 1993); see also Basciano v. Herkheimer, 605 F.2d 605, 610 (2d Cir. 1978). Given that OFAC invited and fully considered Plaintiff's written submission before imposing the penalty, Plaintiff cannot seriously maintain that he was denied any constitutional right to be heard.

Plaintiff's attempt to rely on the balancing analysis in Mathews v. Eldridge, 424 U.S. 319 (1976), to claim lack of due process falls flat, especially given the plethora of economic sanctions

cases finding that OFAC's procedures do not violate due process. See Pl. Mem. at 9-11.⁸ In the particular context of economic sanctions pursuant to IEEPA and executive orders, as in the present case, the opportunity to present written submissions has been found to be constitutionally sufficient. Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003). See also Global Relief Found., Inc., 207 F. Supp. 2d at 804; Islamic Am. Relief Agency, 2005 U.S. Dist. LEXIS 21570, at **31-35. The court in Karpova found Holy Land to be "remarkably similar" to cases such as this one. Karpova, 2005 WL 2897389, at *11. (See also Def. Mem. at 22-23.) In Holy Land, the court determined that due process requirements were satisfied by the opportunity to present written submissions, emphasizing that "we do not require an agency to provide procedures which approximate a judicial trial . . ." Holy Land, 333 F.3d at 164; see also Karpova, 2005 WL 2897389, at *11 (rejecting plaintiff's attempt to distinguish Holy Land).

⁸ In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court held that an evidentiary hearing is not required prior to the termination of Social Security disability benefit payments, and applied three factors. As for the first factor, regarding the private interest, the Court found that the private interests were not sufficiently compelling because eligibility for disability benefits is "not based upon financial need," Mathews, 424 U.S. at 340, and accordingly, distinguished its ruling in Goldberg v. Kelly, 397 U.S. 254 (1970), in which the Court held that an evidentiary hearing was required prior to termination of welfare benefits. In the present case, as in Mathews, financial need is not a factor in determining an imposition of a civil penalty, and accordingly, the private interest here is not sufficiently compelling. With respect to the second factor, regarding the risk of erroneous deprivation, in the present case, as in Mathews, written documentation is sufficient in general for determining whether violations of the Iraqi Sanctions Regulations have occurred. As demonstrated by the Administrative Record in this case, such violations generally can be evident from documentation. Indeed, the documentation in this case contains a significant amount of information provided by Plaintiff himself. Moreover, written submissions constitute a realistic option. In the present case, Plaintiff had sufficient resources to travel to Iraq, and was well-represented by his present attorney who prepared the written presentation in response to a request for information, and the Pre-penalty Notice. Even at this juncture, Plaintiff does not identify a single erroneous determination made by OFAC due to its reliance on written presentations, nor how alternative procedures would reduce such risk of an erroneous determination. As for the final factor, involving the government's interest, "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." Mathews, 424 U.S. at 348. Moreover, "substantial weight must be given to the good-faith judgments of the individuals charged" to administer the applicable programs. Mathews, 424 U.S. at 349. "All that is necessary is that the procedures be tailored, in light of the decision to be made, to the 'capacities and circumstances of those who are to be heard' to insure that they are given a meaningful opportunity to present their case." Mathews, 424 U.S. at 349 (citation omitted) (quoting Goldberg, 397 U.S. at 268-69).

Plaintiff's attempts to find deficiencies in the administrative record afforded him do not rely on any supporting legal authority. (Pl. Mem. at 8.) The Constitution neither requires discovery in administrative proceedings nor an opportunity to call or cross-examine witnesses. Indeed, "[i]t is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right." Nat'l Labor Relations Bd. v. Interboro Contractors, Inc., 432 F.2d 854, 857-58 (2d Cir. 1970). See also Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 (7th Cir. 1977). See also Miner v. Atlass, 363 U.S. 641, 646-52 (1960). Likewise, agencies are not required to "provide procedures which approximate a judicial trial; therefore, [there is] no right to confront and cross-examine witnesses." Holy Land, 333 F.3d at 164 (citation omitted). Accord Karpova, 2005 WL 2897389, at *10.

Lastly, Plaintiff was provided with a constitutionally adequate neutral decisionmaker. (See Def. Mem. at 23-25.) As stated in Karpova, "there is a presumption of honesty and integrity in those serving as adjudicators,' and neither the Complaint nor the Administrative Record suggests in any way that the Director of OFAC had a disqualifying interest in this matter or otherwise lacked neutrality." Karpova, 2005 WL 2897389, at *10 (citing Withrow v. Larkin, 421 U.S. 35, 47 (1975)). See, e.g., Cousin v. Office of Thrift Supervision, 73 F.3d 1242, 1250 (2d Cir. 1996) (finding that the combination of functions of an agency's Acting Director, including investigative, prosecutorial, and adjudicative functions, "fall well within the mandates of the Fifth Amendment."). Finally, as this Court observed in Karpova, "Plaintiff has sought and obtained judicial review in this court of OFAC's final determination. 5 U.S.C. § 706(2)(A)." Karpova, 2005 WL 2897389 at *9. Accordingly, Plaintiff's due process claim lacks merit.

VI. Plaintiff Was Not Deprived of First Amendment Rights

As in Karpova, 2005 WL 2897389, at *12-14, rejecting a practically identical First Amendment claim, Plaintiff's First Amendment claim fails. "[T]he [Iraqi Sanctions] Regulations and penalties at issue reach only plaintiff's actions -- not [plaintiff's] speech. Therefore, plaintiff has suffered no violation of [plaintiff's] First Amendment rights." Karpova, 2005 WL 2897389, at

*13 (citing Zemel, 381 U.S. at 16-17 (1965)). See also Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1441 (9th Cir. 1996). The First Amendment is not implicated here, and even if were, the Iraqi Sanctions Regulations satisfy the four-part test outlined in United States v. O'Brien. See Walsh v. Brady, 927 F.2d 1229, 1234-35 (D.C. Cir. 1991) (rejecting First Amendment challenge to economic sanctions regulations imposed against Cuba); Farrakhan v. Reagan, 669 F. Supp. 506, 512 (D.D.C. 1987) (rejecting First Amendment challenge to economic sanctions against Libya). See also Palestine Info. Office v. Schultz, 853 F.2d 932, 939-40 (D.C. Cir. 1988); Global Relief Found., Inc., 207 F. Supp. 2d at 805-06.

Even assuming, arguendo, that travel to Iraq does implicate both speech and nonspeech elements, “a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” United States v. O'Brien, 391 U.S. 367, 376 (1968). The court in Karpova found that the Iraqi Sanctions Regulations satisfy the four O'Brien factors. (See also Def. Mem. at 18-21.) “First, the [Iraqi Sanctions] Regulations clearly fall within the constitutional power of the government, as they were implemented pursuant to the authority granted by Executive Orders 12,722 and 12,724, and the IEEPA, UNPA and the Iraqi Sanction Act.” Karpova, 2005 WL 2897389, at *13. Plaintiff does not dispute that “enacting and implementing appropriate sanctions against other nations is within the constitutional power of our federal government.” (Pl. Mem. at 28.) Second, “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” Karpova, 2005 WL 2897389, at *14 (quoting Haig, 453 U.S. at 307). Even Plaintiff acknowledges that “[e]conomic sanctions against Iraq . . . may further a substantial government interest.” (Pl. Mem. at 28.) As stated in Executive Order 12,722, 55 Fed. Reg. 31,803 (Aug. 2, 1990), the President declared a national emergency with respect to Iraq and imposed sanctions to deal with “the unusual and extraordinary threat to the national security and foreign policy of the United States.” The importance of the governmental interest regarding Iraq is evidenced by no less than the United States’s involvement in two separate military campaigns in Iraq within the last fifteen years. “Third,

the governmental interest at issue -- imposing economic sanctions on Iraq in an effort to alleviate the perceived threat posed by Iraq to our national security -- is clearly unrelated to the suppression of free expression.” Karpova, 2005 WL 2897389, at *14.⁹ “Fourth, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest in national security. . . . [T]he [Iraqi Sanctions] Regulations contain an explicit exception permitting journalists to engage in travel-related transactions” Id. (citing 31 C.F.R. § 575.207(c)).

VII. Plaintiff Was Not Deprived of the Fifth Amendment Privilege Against Self-Incrimination

Plaintiff’s argument that failure to accommodate the Fifth Amendment privilege violated the privilege assumes away the very principal at issue -- i.e., that there was a privilege that even needed to be accommodated in the first place. See Pl. Mem. at 28. The tenor of Plaintiff’s argument is that everyone who violates economic sanctions should get a free pass -- either a guarantee that he or she will not be prosecuted or a years-long delay in imposition of civil penalties -- even if there is no parallel criminal proceedings or any showing of intent to prosecute. Indeed, by the time actual criminal proceedings or the possibility for potential criminal proceedings against an individual have ended, the statute of limitations for the civil proceedings may have run. However, the Supreme Court has made clear: “[i]t would stultify enforcement of federal law to require a governmental agency . . . invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.” United States v. Kordel, 397 U.S. 1, 11 (1970). See also SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980) (“The Constitution . . . does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings.”).

⁹ Plaintiff’s attempt to interject his selective enforcement claim through the third factor of this First Amendment analysis is unavailing. See Pl. Mem. at 28. The selective enforcement claim and any request for discovery related thereto should be rejected for the reasons discussed at Point IV, infra at pp. 11-16.

Simply because no immunity or stay was granted does not mean that the Fifth Amendment privilege was violated. The Constitution does not require grants of immunity to be broader than the scope of the self-incrimination privilege itself. See Kastigar v. United States, 406 U.S. 441, 453 (1972) (finding that a grant of immunity “need not be broader” than the protection afforded by the privilege). “Asking at the outset whether [the defendants] can or should offer immunity skips the constitutional inquiry altogether.” McKune v. Lile, 536 U.S. 24, 35 (2002). Indeed, OFAC cannot grant immunity. Likewise, OFAC’s denial of his request for an indefinite stay of the civil enforcement proceedings does not violate the privilege, particularly when there was (and still has been) no indictment.

Indeed, the Second Circuit has squarely held that a witness “did not have a due process right to have the [administrative] proceedings delayed” until the outcome of a pending criminal investigation and his subsequent indictment. United States v. International Brotherhood of Teamsters, 247 F.3d 370, 388 (2d Cir. 2001). Similarly, courts have repeatedly and consistently held that civil enforcement matters need not be stayed pending the conclusion of related criminal proceedings. See Keating v. Office of Thrift Supervision, 45 F.3d 322, 324-26 (9th Cir. 1994); Dresser Indus., Inc., 628 F.2d at 1375; United States v. District Council of New York City, 782 F. Supp. 920, 924 (S.D.N.Y. 1992) (denying motion to stay government civil RICO action based upon potential criminal investigation). Furthermore, the President determined that the nation has a strong interest in the enforcement of the Iraq Travel-Related Ban, and any indefinite delay of civil enforcement by OFAC would undermine the efficacy of the Iraqi Sanctions Regulations, and, more generally, the other sanctions regulations, administered by OFAC, on behalf of the President. See Kordel, 397 U.S. at 11. Plaintiff’s suggestion that OFAC stay civil proceedings during the time that criminal action could be mounted is completely inconsistent with the executive branch’s authority to implement and enforce foreign policy and national security objectives. Congress does not require the government to subordinate civil sanctions to criminal ones, or to choose one over the other.

Cases in which the Supreme Court found no violation of the Fifth Amendment privilege

when no immunity or stay was granted include Baxter v. Palmigiano, 425 U.S. 308 (1976), and Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998). As discussed in Defendants' Memorandum at 25, this case falls well within constitutional boundaries. The choice faced by Plaintiff is even less severe than the choice upheld as constitutional in Baxter, in which the Supreme Court ruled that the Fifth Amendment does not forbid adverse inferences against parties who refuse to testify in civil proceedings. In Baxter, as here, no parallel criminal proceedings were pending, the claimant was freely permitted to assert the Fifth Amendment privilege, and a decision to remain silent did not automatically mean that the claimant would be found to have violated an applicable rule or regulation. Similarly, in Ohio Adult Parole Auth., the Supreme Court held that adverse inferences can be drawn from a claimant's silence. By contrast, in the present case, OFAC not only accepted Plaintiff's decision to raise a Fifth Amendment issue in response to the PPN, but considered the provision of the response as a mitigating factor. (Def. Mem. at 25-26.) Thus, the Iraqi Sanctions Regulations do not impose a penalty for the assertion of the Fifth Amendment privilege, and Plaintiff's silence was not construed against him.

Plaintiff's having to choose whether to assert the privilege does not violate the privilege. Even when the choice is more pronounced because a parallel criminal proceeding exists, which is not the case here, the Second Circuit has rejected any suggestion that such a dilemma violates the Fifth Amendment:

[T]he same dilemma is faced by any witness in a civil or criminal trial who is himself under investigation or indictment for other crimes. Such a witness must either invoke his privilege against self-incrimination, or assume the general duty to give what testimony one is capable of giving.

* * *

We cannot agree that civilized standards of procedure and evidence require that a witness under indictment be given the option of nonappearance in related civil or criminal proceedings until his own trial is concluded.

United States v. Simon, 373 F.2d 649, 653 (2d Cir.), vacated as moot, 389 U.S. 425 (1967). See also Williams v. Florida, 399 U.S. 78, 84 (1970) ("That the defendant faces . . . a dilemma

demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.”); Keating, 45 F.3d at 326 (finding that a claimant “has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege.”). Accordingly, Plaintiff’s self-incrimination claim lacks merit.

VIII. IEEPA Clearly Satisfies the Non-Delegation Doctrine

Defendants’ Memorandum sets forth decades of established caselaw demonstrating that Plaintiff’s challenge to IEEPA, based on the non-delegation doctrine, is meritless, particularly given its involvement with the area of foreign affairs. (Def. Mem. at 30-32). Plaintiff fails to address this caselaw with supporting legal authority. In the history of the Supreme Court, only two cases, both from 1935, have been found to involve the lack of the requisite intelligible principle. See Whitman v. Am. Trucking Ass’ns, Inc., 531 U.S. 457, 474 (2001). In any event, Executive Order 12,724, which authorizes OFAC to promulgate the Iraqi Sanctions Regulations, does not rest upon IEEPA alone. As explained above, Executive Order 12,724 is authorized by multiple statutes, including UNPA and the Iraq Sanctions Act. Indeed, the Iraq Sanctions Act explicitly directed the President to continue the economic sanctions against Iraq pursuant to Executive Order 12,724. Pub. L. No. 101-513, § 586C(a), 104 Stat. 1979, 2048 (1990).

IX. The Iraq Travel-Related Ban Does Not Violate RFRA or the Free Exercise Clause

The Iraqi Sanctions Regulations’ prohibition on engaging in certain travel-related transactions to or within Iraq does not violate Plaintiff’s free exercise rights under RFRA, or the Free Exercise Clause. As set forth in Defendants’ Memorandum, Plaintiff fails to demonstrate that the imposition of the civil monetary penalty substantially burdens his free exercise of his religion. (Def. Mem. 21-25). Plaintiff is free to express his claimed opposition to the war based upon his religious beliefs through a myriad of alternative avenues; he may not, however, do so by engaging in travel-related transactions to or within Iraq.

In opposing Defendants’ Motion, Plaintiff struggles to describe how his right to free exercise

of religion has been purportedly substantially burdened. (Pl. Mem. 30.) Plaintiff agrees that a substantial burden is one that “puts pressure on an adherent to modify his behavior and to violate his beliefs.” Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996). Contrary to Plaintiff’s characterization, Defendants did not in their moving brief seek to challenge the sincerity of Plaintiff’s opposition to the war based upon his claimed religious beliefs, rather Defendants’ threshold argument is that Plaintiff fails to demonstrate how the restriction on his ability to engage in travel-related transactions in Iraq substantially burdens his exercise of his religion. As indicated in Defendants’ Memorandum, Plaintiff fails to demonstrate how the Iraqi Sanctions Regulations interfere with other legal means by which he could have expressed his opposition to the war based upon his religious beliefs without needing to engage in travel-related transactions in Iraq, or why he did not otherwise apply for or otherwise seek a license from OFAC permitting him to travel Iraq. Accordingly, Plaintiff fails to sustain his threshold burden under RFRA.

However, even assuming arguendo that Plaintiff were able to sustain his threshold showing, Plaintiff fails to address Defendants’ argument that the Iraq Travel-Related Ban is justified by the government’s unparalleled interest in national security and sufficiently tailored to further that interest. (See Def. Mem. at 23.) Plaintiff does not mention the government’s compelling interest in national security and use of economic sanctions, including the Iraq Travel-Related Ban, as a means of furthering that compelling interest. See Def. Mem. at 23. Plaintiff also fails to rebut Defendants’ showing that the uniform Iraq Travel-Related Ban, which prohibits any U.S. person from engaging in travel-related transactions in order to, inter alia, curtail the flow of hard currency to Iraq’s former regime, furthers the government’s compelling interest in national and international security during a time of national emergency, and is the least restrictive means of doing so. See Farrakhan, 669 F. Supp. at 511 (finding no less restrictive means were available to effectuate the government’s compelling interest in national security than an outright ban on all contributions to Libya: “[a]n accommodation toward all religious groups exempting them from the limitations of the sanctions

would intolerably limit the President's power to deal with international emergencies.”).¹⁰ See also Browne v. United States, 176 F.3d 25, 25 (2d Cir. 1999). As set forth more completely in the Defendants' Memorandum, the Iraq Travel-Related Ban imposes a uniform sanction preventing all persons regardless of religious beliefs from engaging in certain travel-related transactions in Iraq. See Smith, 494 U.S. at 878-79 (“We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law”); Browne, 176 F.3d at 26; Intercommunity Center for Justice and Peace v. INS, 910 F.2d 42, 44 (2d Cir. 1990). Accordingly, Plaintiff's RFRA and Free Exercise clause claims also fail.

X. Plaintiff's Claims Under International Law Lack Merit

A. Plaintiff Has No Claim Under ICCPR

As discussed in Defendants' Memorandum, there is no conflict between article 12 of ICCPR and the Iraqi Sanctions Regulations. See Freedom to Travel, 82 F.3d at 1441-42; (see also Def. Mem. at 32-33.) In any event, ICCPR is not self-executing, and therefore, it does not provide Plaintiff with an enforceable right in this case. (See Def. Mem. at 33.)

B. Plaintiff Has No Claim Under Customary International Law

Plaintiff's claim under customary international law is equally devoid of merit. (Def. Mem. at 34-35). Plaintiff has failed to establish a right to travel to a particular country under customary international law, and in any event, statutory law trumps any contrary customary international law. (See Def. Mem. at 34-35.) Given the multiple acts (e.g., IEEPA, UNPA and United Nations Security Council Resolution 661, and the Iraq Sanctions Act) and executive orders (e.g., Exec. Orders 12,722 and 12,724) authorizing the restrictions implemented by the Iraqi Sanctions Regulations, Plaintiff has no claim under customary international law. See, e.g., Sacks, Order at 7.

¹⁰ Although Farrakhan is a free exercise clause case, because it was decided prior to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), the court applied the standard set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and inquired whether the law “substantially burdened” a religious practice and, if so, whether the burden was justified by a compelling governmental interest. Because this is the precise test imposed by Congress under RFRA, the Farrakhan decision is particularly instructive.

CONCLUSION

For the reasons set forth above as well as those in Defendants' Memorandum, Defendants' motion should be granted, Plaintiff's cross-motion should be denied, and the Complaint should be dismissed in its entirety.

Dated: November 28, 2005
New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew D. O'Toole, an Assistant United States Attorney for the Southern District of New York, hereby certify that on November 28, 2005, I caused a copy of the foregoing: Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment, and In Opposition to Plaintiff's Cross-Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment, and Defendants' Objections and Response to Plaintiff's Statement Pursuant to Local Civil Rule 56.1(b), to be served, via ECF and by either Federal Express or Express Mail, upon the following:

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November 28, 2005

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