

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
FREDERICK BOYLE, :
 :
 Plaintiff, :
 :
 - against - : No. 05 Civ. 4995 (CBM)
 :
 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

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION
TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

DAVID N. KELLEY
United States Attorney for the
Southern District of New York
Attorney for Defendants
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2726

ANDREW D. O'TOOLE (AO-7714)
Assistant United States Attorney
- Of Counsel -

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
STATUTORY AND REGULATORY BACKGROUND	2
A. Statutory Law	2
1. The International Emergency Economic Powers Act	2
2. The United Nations Participation Act	4
3. The Iraq Sanctions Act	4
B. United Nations Security Council Resolution 661	4
C. Executive Orders	5
D. Iraqi Sanctions Regulations and the Iraq Travel-Related Ban	6
FACTUAL BACKGROUND	7
A. Plaintiff’s Violation of the Iraq Travel-Related Ban	7
B. Administrative Proceedings	7
ARGUMENT	9
I. Plaintiff’s APA Claim Has No Merit	9
A. A Deferential Standard of Review Applies to the Decision to Impose a Penalty	9
B. Statutory Law Plainly Authorizes the Iraq Travel-Related Ban	10
C. OFAC’s Decision to Impose a Civil Penalty Against Plaintiff for Violation of the Iraq Travel-Related Ban Was Neither Arbitrary Nor Capricious	12
II. The Iraq Travel-Related Ban Does Not Violate the Fifth Amendment Right to Travel	13

	Page
III. Plaintiff Was Afforded Procedural Due Process of Law	15
A. Written Submissions in Response to the Prepenalty Notice Are Constitutionally Adequate	16
B. Plaintiff Fails to Overcome the Presumption That the OFAC Director Is a Constitutionally Adequate, Neutral Decisionmaker	18
IV. Plaintiff’s Free Speech Claim Is Without Merit	18
V. The Travel-Related Ban Violates Neither the Free Exercise of Religion Under the Religion Freedom Restoration Act Nor the First Amendment	21
VI. Plaintiff Was Not Deprived of the Fifth Amendment Privilege Against Self-Incrimination	25
A. Simply Having to Choose Whether to Assert the Privilege Does Not Violate the Fifth Amendment	25
B. Plaintiff Was Not Entitled to a Stay of the Administrative Proceedings	27
VII. Plaintiff Fails to State a Claim for Selective Enforcement	28
VIII. IEEPA Does Not Violate the Separation of Powers Under the Constitution	30
IX. Plaintiff’s International Law Claims Lack Merit	32
A. Plaintiff Has No Claim Under ICCPR	32
B. Plaintiff Has No Claim Under Customary International Law	34
CONCLUSION	35

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>American Documentary Films, Inc. v. Sec’y of Treasury,</u> 344 F. Supp. 703 (S.D.N.Y. 1972)	21
<u>Attorney General of the United States v. Irish People, Inc.,</u> 684 F.2d 928 (D.C. Cir. 1982)	28
<u>Basciano v. Herkheimer,</u> 605 F.2d 605 (2d Cir. 1978)	16
<u>Baxter v. Palmigiano,</u> 425 U.S. 308 (1976)	25
<u>Beazley v. Johnson,</u> 242 F.3d 248 (5th Cir. 2001), <u>cert. denied sub nom.,</u> <u>Beazley v. Cockrell,</u> 534 U.S. 945 (2001)	33
<u>Browne v. United States,</u> 176 F.3d 25 (2d Cir. 1999)	24
<u>Califano v. Yamasaki,</u> 442 U.S. 682 (1979)	16
<u>Capital Cities/ABC, Inc. v. Brady,</u> 740 F. Supp. 1007 (S.D.N.Y. 1990)	19
<u>Chavez v. Martinez,</u> 538 U.S. 760 (2003)	25
<u>Citizens to Preserve Overton Park, Inc. v. Volpe,</u> 401 U.S. 402 (1971)	9
<u>Consarc Corp. v. OFAC,</u> 71 F.3d 909 (D.C. Cir. 1995)	10
<u>Cousin v. Office of Thrift Supervision,</u> 73 F.3d 1242 (2d Cir. 1996)	18
<u>DKT Mem’l Fund Ltd. v. Agency for International Development,</u> 887 F.2d 275 (D.C. Cir. 1989)	12
<u>Dalton v. Specter,</u> 511 U.S. 462 (1994)	12
<u>DeVita v. Sillis,</u> 422 F.2d 1172 (3rd Cir. 1970)	26, 27
<u>Donovan, et al. v. A.A. Beiro Construction Co., Inc.,</u> 746 F.2d 894 (D.C. Cir. 1984)	28
<u>Employment Division, Department of Human Resources v. Smith,</u> 494 U.S. 872 (1990)	23, 24
<u>Farrakhan v. Reagan,</u> 669 F. Supp. 506 (D.D.C. 1987), <u>aff’d,</u> 851 F.2d 1500 (D.C. Cir. 1988)	<u>passim</u>
<u>FDIC v. Mallen,</u> 486 U.S. 230 (1988)	16
<u>Flannelly v. Board of Trustees,</u> 6 F. Supp. 2d 266 (S.D.N.Y. 1998)	16, 17
<u>Flores v. Southern Peru Copper Corp.,</u> 343 F.3d 140 (2d Cir. 2003)	33, 34

	<u>Page</u>
<u>Franklin v. Massachusetts</u> , 505 U.S. 788 (1992)	12
<u>Freedom to Travel Campaign v. Newcomb</u> , 82 F.3d 1431 (9th Cir. 1996)	<u>passim</u>
<u>Friedman v. Perales</u> , 668 F. Supp. 216 (S.D.N.Y. 1987), <u>aff'd</u> , 841 F.2d 47 (2d Cir. 1988)	9
<u>Global Relief Foundation, Inc. v. O'Neill</u> , 207 F. Supp. 2d 779 (N.D. Ill. 2002), <u>aff'd</u> , 315 F.3d 748 (7th Cir. 2002)	<u>passim</u>
<u>Goldberg v. Kelly</u> , 397 U.S. 254 (1970)	17
<u>Haig v. Agee</u> , 453 U.S. 280 (1981)	<u>passim</u>
<u>Holy Land Found. for Relief and Dev. v. Ashcroft</u> , 219 F. Supp. 2d 57 (D.D.C. 2002)	9, 19
<u>Holy Land Found. for Relief and Dev. v. Ashcroft</u> , 333 F.3d 156 (D.C. Cir. 2003)	17, 22
<u>Hutchins v. District of Columbia</u> , 188 F.3d 531 (D.C. Cir. 1999)	15
<u>Illinois Frazee v. Department of Employment Security</u> , 489 U.S. 829 (1989)	22
<u>Immediato v. Rye Neck Sch. Dist.</u> , 73 F.3d 454 (2d Cir.), <u>cert. denied</u> , 519 U.S. 813 (1996)	15
<u>INS v. Abudu</u> , 485 U.S. 94 (1988)	10
<u>Interboro Inst., Inc. v. Foley</u> , 985 F.2d 90 (2d Cir. 1993)	16
<u>Intercommunity Center for Justice and Peace v. INS</u> , 910 F.2d 42 (2d Cir. 1990)	24, 25
<u>Keating v. Office of Thrift Supervision</u> , 45 F.3d 322 (9th Cir. 1994)	27
<u>Kleindienst v. Mandel</u> , 408 U.S. 753 (1972)	19, 20
<u>LaTrieste Restaurant v. Village of Port Chester</u> , 188 F.3d 65 (2d Cir. 1999)	30
<u>LeClair v. Saunders</u> , 627 F.2d 606 (2d Cir. 1980), <u>cert. denied</u> , 450 U.S. 909 (1981)	29, 30
<u>Loving v. United States</u> , 517 U.S. 748 (1996)	31
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976)	17
<u>McKune v. Lile</u> , 536 U.S. 24 (2002)	27
<u>Miranda v. Sec'y of Treasury</u> , 766 F.2d 1 (1st Cir. 1985)	10, 19
<u>Mistretta v. United States</u> , 488 U.S. 361 (1989)	31
<u>Narenji v. Civiletti</u> , 617 F.2d 745 (D.C. Cir. 1980)	12

	<u>Page</u>
<u>National Labor Relations Board v. Interboro Contractors, Inc.</u> , 432 F.2d 854 (2d Cir. 1970)	17
<u>NRDC v. Muszynski</u> , 268 F.3d 91 (2d Cir. 2001)	9
<u>Office of Foreign Assets Control v. Voices in the Wilderness</u> , 329 F. Supp. 2d 71 (D.D.C. 2004)	11, 30
<u>Paradissiotis v. Rubin</u> , 171 F.3d 983 (5th Cir. 1999)	10
<u>Regan v. Wald</u> , 468 U.S. 222 (1984)	<u>passim</u>
<u>Reno v. America-Arab Anti-Discrimination Comm.</u> , 525 U.S. 471 (1999)	29
<u>Sacks v. Office of Foreign Assets Control</u> , No. 04-0108 (JLR), (W.D. Wash. Oct. 22, 2004), <u>appeal pending</u> , Dkt Nos. 04-36136 and 05-35001 (9th Cir.)	11, 35
<u>Schweiker v. McClure</u> , 456 U.S. 188 (1982)	18
<u>SEC v. Dresser Indus., Inc.</u> , 628 F.2d 1368 (D.C. Cir. 1980)	27
<u>SEC v. Gilbert</u> , 79 F.R.D. 683 (S.D.N.Y. 1976)	27
<u>Sherbert v. Verner</u> , 374 U.S. 398 (1963)	23
<u>Silverman v. Commodity Futures Trading Comm'n</u> , 549 F.2d 28 (7th Cir. 1977)	17
<u>Sosa v. Alvarez-Machain</u> , 124 S. Ct. 2739 (2004)	33, 34
<u>St. German of Alaska E. Orthodox Catholic Church v. United States</u> , 840 F.2d 1087 (2d Cir. 1988)	28, 29
<u>TMR Energy Ltd. v. State Prop. Fund of Ukraine</u> , 411 F.3d 296 (D.C. Cir. 2005)	35
<u>Teague v. Regional Comm'r of Customs</u> , 404 F.2d 441 (2d Cir. 1968)	20
<u>United States v. Acevedo-Delgado</u> , 167 F. Supp. 2d 477 (D.P.R. 2001)	23
<u>United States v. Armstrong</u> , 517 U.S. 456 (1996)	28, 29
<u>United States v. Curtiss-Wright Exp. Corp.</u> , 299 U.S. 304 (1936)	31
<u>United States v. District Council of New York City</u> , 782 F. Supp. 920 (S.D.N.Y. 1992)	26, 27
<u>United States v. Fleetwood Enterprises, Inc.</u> , 702 F. Supp. 1082 (D. Del. 1988)	28
<u>United States v. International Brotherhood of Teamsters</u> , 247 F.3d 370 (2d Cir. 2001)	27
<u>United States v. Kordel</u> , 397 U.S. 1 (1970)	26, 27, 28

	<u>Page</u>
<u>United States v. Lindh</u> , 212 F. Supp. 2d 541 (E.D. Va. 2002)	10
<u>United States v. O'Brien</u> , 391 U.S. 367 (1968)	1, 19
<u>United States v. Pinto-Mejia</u> , 720 F.2d 248 (2d Cir. 1983)	34, 35
<u>United States v. Simon</u> , 373 F.2d 649 (2d Cir. 1967)	26
<u>United States v. Snepp</u> , 595 F.2d 926 (4th Cir. 1979), <u>rev'd on other grounds</u> , 444 U.S. 507 (1980)	28
<u>United States v. Yousef</u> , 327 F.3d 56 (2d Cir. 2003)	34, 35
<u>Walsh v. Brady</u> , 927 F.2d 1229 (D.C. Cir. 1991)	10, 20
<u>Wang v. Ashcroft</u> , 320 F.3d 130 (2d Cir. 2003)	35
<u>Wayte v. United States</u> , 470 U.S. 598 (1985)	20, 21, 30
<u>Whitman v. America Trucking Ass'ns, Inc.</u> , 531 U.S. 457 (2001)	31
<u>Williams v. Florida</u> , 399 U.S. 78 (1970)	26
<u>Withrow v. Larkin</u> , 421 U.S. 35 (1975)	18
<u>Wolkenstein v. Reville</u> , 694 F.2d 35 (2d Cir. 1982)	18
<u>Zemel v. Rusk</u> , 381 U.S. 1 (1965)	<u>passim</u>

Statutes:

3 U.S.C. § 301	5
5 U.S.C. §§ 554-557 <u>et. seq.</u>	16
5 U.S.C. §§ 701 <u>et. seq.</u>	1
5 U.S.C. § 706	9
5 U.S.C. § 706(2)(A)	9
22 U.S.C. § 287c(a)	<u>passim</u>
42 U.S.C. § 2000bb-1	21
42 U.S.C. §§ 2000bb-1(a), (b)	21, 22, 23
50 U.S.C. app. § 16(b)(3)	16

	<u>Page</u>
50 U.S.C. §§ 1601 <u>et seq.</u>	5
50 U.S.C. §§ 1701 <u>et seq.</u>	2
50 U.S.C. § 1701(a)	3, 32
50 U.S.C. § 1701(b)	32
50 U.S.C. § 1702	3
50 U.S.C. § 1702(b)(4)	3, 4
Iraq Sanctions Act of 1990, Pub. L. No. 101-513, § 586A(5), 104 Stat. 1979, 2047 (1990)	<u>passim</u>
Pub. L. No. 103-236, 108 Stat. 382 (1994)	3, 11
 <u>Regulations:</u>	
31 C.F.R. § 501.602	7
31 C.F.R. § 575.205	6
31 C.F.R. § 575.207	<u>passim</u>
31 C.F.R. § 575.207(c)	21
31 C.F.R. § 575.208	6, 12
31 C.F.R. § 575.210	6
31 C.F.R. § 575.211	6
31 C.F.R. § 575.321	7
31 C.F.R. § 575.402	6
31 C.F.R. § 575.533	6
31 C.F.R. § 575.701(a)(1)	6, 13
31 C.F.R. § 575.702	6, 13, 16
31 C.F.R. § 575.703	6, 16
31 C.F.R. § 575.704	6
31 C.F.R. § 575.704(b)	25
68 Fed. Reg. 38189 (Jun. 27, 2003)	6

	<u>Page</u>
69 Fed. Reg. 46092 (Jun. 27, 2003)	6
<u>United Nations Documents and International Treaties:</u>	
Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (1945)	4
International Covenant on Civil and Political Rights of 1996, S. Treaty Doc. 95-2, 999 U.N.T.S. 171 (1978)	2, 32, 33
S.C. Res. 661, U.N. SCOR, 2933rd mtg. (1990)	5, 11
S.C. Res. 1483, U.N. SCOR, 4761st mtg. (2003)	5
<u>Executive Orders and Presidential Papers:</u>	
Exec. Order 12,722, 55 Fed. Reg. 31,803 (Aug. 2, 1990)	<u>passim</u>
Exec. Order No. 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990)	<u>passim</u>
Exec. Order No. 13,350, 69 Fed. Reg. 46,055 (July 29, 2004)	5
27 Weekly Comp. Pres. Doc. 158 (Feb. 18, 1991)	34
39 Weekly Comp. Pres. Doc. 353 (Mar. 31, 2003)	21
<u>Miscellaneous:</u>	
138 Cong. Rec. S4783-84 (daily ed Apr. 8, 1992)	33
S. Exec. Rep. No. 102-23 (1992)	33

PRELIMINARY STATEMENT

The President's paramount authority to preserve the national security and foreign policy of the United States during times of national emergency depends, in large part, on his ability to use all the tools -- military, law enforcement, and economic -- that are placed at his disposal by the Constitution or Act of Congress. This case involves the President's use of economic sanctions against Iraq, implemented through the finding of a national emergency and the issuance of executive orders, which, among other things, restricted travel-related transactions with Iraq. Plaintiff Frederick Boyle ("Plaintiff") disagreed with the foreign policy decisions incorporated in executive orders and regulations imposing economic sanctions against Iraq, and in protest, traveled to Iraq from February to March of 2003, and engaged in travel-related transactions expressly prohibited by these sanctions. Plaintiff now asks this Court to insulate him from the civil monetary penalty imposed against him by Office of Foreign Assets Control within the Department of the Treasury ("OFAC") for violating the Iraqi Sanctions Regulations, 31 C.F.R. pt. 575, and, more specifically, 31 C.F.R. § 575.207 (the "Iraq Travel-Related Ban"). However, as outlined below, Plaintiff's claims lack merit in light of well-established case law.

Relying on the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, Plaintiff erroneously claims that the Iraq Travel-Related Ban exceeds the executive's statutory authority. Multiple statutes and executive orders authorize the Iraq Travel-Related Ban; and OFAC acted reasonably in imposing a civil penalty upon Plaintiff given the evidence in the Administrative Record. Plaintiff's challenge to the Iraq Travel-Related Ban under the constitutional right to travel claim already has been rejected by the Supreme Court. Plaintiff's procedural due process claim also must fail because it is clear that written submissions, as opposed to an oral hearing, are constitutionally adequate. Moreover, here, a neutral decisionmaker was provided, and the Constitution does not require discovery or the calling of witnesses in administrative proceedings.

Plaintiff's free speech claim fails because the Supreme Court already has found that a travel ban to a given country does not implicate the First Amendment, and even if it is implicated, the Iraq Travel-Related Ban satisfies the four-part test outlined in United States v. O'Brien, 391 U.S. 367, 376-77 (1968). Similarly, Plaintiff cannot sustain any claim under the Religious Freedom Restoration Act or

the free exercise clause of the Constitution because he cannot demonstrate that the Iraq Travel-Related Ban substantially burdened his exercise of religion, nor that the travel ban is not sufficiently narrowly tailored to further the government's compelling interest in conducting foreign relations. Nor was Plaintiff deprived of his Fifth Amendment privilege against self-incrimination because it is well established that simply having to choose whether to assert the privilege does not violate the Fifth Amendment, especially where, as here, OFAC did not penalize Plaintiff for an assertion of the privilege, and he was not entitled to a stay of the administrative proceedings.

Plaintiff's claim of selective enforcement fails to state a claim upon which relief can be granted, especially in light of the demanding standard for such a claim and the strong presumption in favor of the government. Plaintiff's challenge to the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1706, on separation of powers grounds likewise lacks merit because Congress has provided an intelligible principle, and the Supreme Court has found that Congress has broad authority to delegate, particularly in the area of foreign affairs. In any event, other statutes, in addition to IEEPA, authorize the Iraqi Sanctions Regulations here.

Finally, Plaintiff's claims under international law are devoid of merit. The International Covenant on Civil and Political Rights ("ICCPR") does not conflict with the Iraq Travel-Related Ban, and, in any event, the ICCPR is not enforceable by federal courts because it is not self-executing. Moreover, customary international law does not provide the right that Plaintiff seeks, especially in light of the widespread practice amongst nations of utilizing economic sanctions. Regardless, customary international law is not applicable here because of the multiple statutes and executive orders addressing the same subject.

STATUTORY AND REGULATORY BACKGROUND

A. Statutory Law

1. The International Emergency Economic Powers Act

Economic sanctions have long been used as a foreign policy tool of the United States. IEEPA, enacted in 1977, authorizes the President to exercise economic powers by declaring a national

emergency with respect to “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States” 50 U.S.C. § 1701(a). The economic powers granted to the President under IEEPA include, inter alia:

(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 instructions, licenses, or otherwise –

(A) investigate, regulate, or prohibit –

(i) any transactions in foreign exchange . . .

. . . .

(iii) the importing or exporting of currency . . .

by any person, or with respect to any property, subject to the jurisdiction of the United States;

(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

50 U.S.C. § 1702.

On April 30, 1994, Congress added the provision to IEEPA currently located in 50 U.S.C. § 1702(b)(4), which excludes from IEEPA’s grant of authority to the President the authority to regulate or prohibit transactions ordinarily incident to travel to or from a country. See Pub. L. No. 103-236, § 525(c)(1), 108 Stat. 382, 474-75 (1994). However, in doing so, Congress explicitly provided that 50 U.S.C. § 1702(b)(4) “shall not apply to restrictions on the transactions and activities described in section [1702(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. 382, 475 (1994). The restrictions in the Iraqi Sanctions Regulations on transactions relating to travel and transportation were issued in 1991, and therefore, were in force on the date of enactment of section 1702(b)(4), i.e., April 30, 1994. Accordingly, the Iraqi Sanctions

Regulations are not subject to the limitation set forth in 50 U.S.C. § 1702(b)(4).

2. The United Nations Participation Act

The United Nations Participation Act (“UNPA”), enacted in 1945, confers the following authority upon the President:

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).

3. The Iraq Sanctions Act

In the Iraq Sanctions Act of 1990 (“Iraq Sanctions Act”), enacted on November 5, 1990, Congress “condemn[ed] Iraq’s invasion of Kuwait on August 2, 1990,” Pub. L. No. 101-513, § 586A(1), 104 Stat. 1979, 2047 (1990); supported actions taken by the President and the United Nations Security Council in response to this invasion, Pub. L. No. 101-513, § 586A(2, 4), 104 Stat. 1979, 2047 (1990); and “support[ed] the imposition and enforcement of multilateral sanctions against Iraq,” Pub. L. No. 101-513, § 586A(5), 104 Stat. 1979, 2047. The Iraq Sanctions Act directed the President to:

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).

Pub. L. No. 101-513, § 586C(a), 104 Stat. 1979, 2048 (1990).

B. United Nations Security Council Resolution 661

On August 6, 1990, the United Nations Security Council, responding to Iraq’s invasion of Kuwait on August 2, 1990, adopted Resolution 661. In Paragraph 4 of Resolution 661, the Security Council, acting under Chapter VII of the Charter of the United Nations, decided, inter alia, the

following:

[A]ll States shall not make available to the Government of Iraq, or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait

S.C. Res. 661 ¶ 4, U.N. SCOR, 2933rd mtg. (1990) (emphasis added).¹

C. Executive Orders

In Executive Order 12,722, 55 Fed. Reg. 31,803 (Aug. 2, 1990), the President, pursuant to, inter alia, IEEPA, the National Emergencies Act (50 U.S.C. §§ 1601 et seq.), and 3 U.S.C. § 301, found “that the policies and actions of the Government of Iraq constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and . . . declare[d] a national emergency to deal with that threat.” Executive Order 12,722, effective immediately, specified economic sanctions imposed upon Iraq. Subsequently, in Executive Order 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990), pursuant to UNPA, in light of United Nations Security Council Resolution 661, and pursuant to the other laws also listed in Executive Order 12,722, the President took additional steps with respect to Iraq’s invasion of Kuwait.

Section 2 of Executive Order 12,724 contained, inter alia, prohibitions on the exportation of services to Iraq, transactions relating to travel to Iraq or activities within Iraq, transportation-related transactions involving Iraq, transfers of funds to the Government of Iraq or any person in Iraq, and transactions that evade the prohibitions.² Executive Order 12,724 was effective immediately. Regarding

¹ On May 22, 2003, in United Nations Security Council Resolution 1483, the Security Council revoked Resolution 661’s economic sanctions imposed upon Iraq. S.C. Res. 1483 ¶ 10, U.N. SCOR, 4761st mtg. (2003). For purposes of the present case, Resolution 661 was still in effect during Plaintiff’s travel to Iraq that resulted in the imposition of a civil penalty upon him.

² In Executive Order 13,350, 69 Fed. Reg. 46,055 (July 29, 2004), the President found that the situation in Iraq had been “significantly altered by the removal of the regime of Saddam Hussein and other developments,” and revoked Executive Orders 12,722 and 12,724. However, Executive Orders 12,722 and 12,724 were still in effect during Plaintiff’s travel to Iraq that resulted in the imposition of a civil penalty upon him.

implementation, section 5 of Executive Order 12,724 explicitly authorized the Secretary of the Treasury, in consultation with the Secretary of State, to promulgate regulations to implement the executive order and authorized the Secretary of the Treasury to redelegate such functions to other officers and agencies of the federal government.

D. Iraqi Sanctions Regulations and the Iraq Travel-Related Ban

On January 18, 1991, OFAC issued the Iraqi Sanctions Regulations (“Regulations”), 31 C.F.R. pt. 575, to implement, *inter alia*, Executive Orders 12,722 and 12,724. The Regulations include prohibitions on the exportation of services to Iraq, 31 C.F.R. § 575.205; transactions relating to travel to Iraq or activities within Iraq, 31 C.F.R. § 575.207; transportation-related transactions involving Iraq, 31 C.F.R. § 575.208; transfers of funds to the Government of Iraq or any person in Iraq, 31 C.F.R. § 575.210; and transactions that evade the prohibitions, 31 C.F.R. § 575.211, each of which overlap with prohibitions appearing in section 2 of Executive Order 12,724.³ The Iraq Travel-Related Ban concludes with a summary in plain terms of its principal effect: “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.

When the Director of OFAC has reasonable cause to believe that a violation of the Regulations has occurred, the Regulations provide for the issuance of a prepenalty notice, providing notification of an intent to impose a monetary penalty and of the recipient’s right to make a written presentation within thirty days of the mailing of the notice. 31 C.F.R. § 575.702. The written presentation provides an opportunity to respond to the prepenalty notice and set forth reasons why a penalty should be decreased or not be imposed at all. 31 C.F.R. § 575.703. After considering any written presentation, the Director then determines whether a violation has occurred, and issues a penalty notice with his determination of the imposition of a monetary penalty, if any. 31 C.F.R. § 575.704.⁴

³ Through regulations issued on June 27, 2003, 68 Fed. Reg. 38189-90, and July 30, 2004, 69 Fed. Reg. 46092-93, OFAC lifted nearly all prohibitions with respect to Iraq for transactions occurring on or after May 23, 2003. 31 C.F.R. § 575.533. The prohibited activities for which Plaintiff incurred a civil penalty occurred while the prohibitions were still in effect. *See* 31 C.F.R. § 575.402.

⁴ The maximum civil penalty that currently can be imposed per violation is \$325,000, which may be adjusted for inflation. 31 C.F.R. § 575.701(a)(1).

FACTUAL BACKGROUND

A. Plaintiff's Violation of the Iraq Travel-Related Ban

Plaintiff is a U.S. citizen (Compl. ¶ 16) residing in the United States (Compl. ¶ 6). As such, he is subject to Executive Order 12,724, see § 3(a) of Exec. Order No. 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990), and the Regulations, see 31 C.F.R. § 575.321. The Administrative Record contains reveals that Plaintiff departed from Amman, Jordan on February 19, 2003, with his ultimate destination being Iraq, and that on March 11, 2003, Plaintiff left Iraq and returned to the United States via Jordan. See, e.g., Administrative Record (“AR”) 0074 (“Boyle originally traveled to Iraq on Feb. 19 to join a ‘human shield’ movement hoping to forestall a U.S. attack. He left the region before the war began, fearing that he and other activists might become pawns of the Iraqi government, arriving home on March 11.”). The Administrative Record also reveals that Plaintiff engaged in travel-related transactions, expending currency for the purchase of food, lodging, transportation and souvenirs. See (AR 0069) (indicating that Plaintiff “spent \$900 in airfare and \$1,000 for lodging, food and transportation in Iraq. He also bought an oil painting for less than \$100 from an Iraqi woman And spent about \$50 for friends.”); (AR 0074) (Plaintiff stated: “I want to draw attention to the fact that the government is seeking to prosecute me and others for spending \$2,000 in Iraq in an effort for peace”), (AR 0075) (“Boyle estimated he spent \$2,000 on his trip to Iraq, including a \$1,000 airfare payment . . . [,] about \$1,000 to a Christian Peacemaker Team that helped provide him with food and lodging [, and] a nominal amount of money for other items”).

B. Administrative Proceedings

On June 2, 2003, OFAC sent Plaintiff a Requirement to Furnish Information (“RFI”) pursuant to 31 C.F.R. § 501.602, based upon the fact that “OFAC ha[d] received information from press accounts, indicating that [Plaintiff] traveled to Iraq during February/March 2003” and that Plaintiff had not been licensed to engage in travel transactions in Iraq. (AR 0077). The RFI requested that Plaintiff submit a written report indicating inter alia the dates and travel itinerary to, from, and within Iraq, reason for travel, an itemization of all travel-related transactions in which Plaintiff engaged in Iraq, and “any other

information Plaintiff wish[ed] OFAC to consider.” (AR 0078). On October 21, 2003, Plaintiff, through his counsel, responded that he was refusing to respond to the RFI based upon his rights guaranteed under the Fifth Amendment to the Constitution. (AR 0066).

On December 23, 2003, Plaintiff’s case was referred from OFAC’s Enforcement Division to the Civil Penalties Division. (AR 0039). By a Prepenalty Notice (“PPN”) dated June 22, 2004, OFAC notified Plaintiff that it intended to impose a civil penalty of \$10,000 against him for violating the Iraq Travel-Related Ban, by engaging in transactions related to travel and transportation, and for exporting services to Iraq by serving as a human shield.⁵ (AR 0060-61). The PPN informed Plaintiff of his right to make a written presentation. (AR 0061). On July 19, 2004, Plaintiff, through his counsel, informed OFAC that he would continue to assert his right against self-incrimination, and requested that “OFAC and the U.S. government grant him immunity from [potential criminal] prosecution (or waive prosecution) based upon his alleged travel to Iraq in February/March 2003. . . . or OFAC stay all proceedings in connection with the [Prepenalty Notice] until the applicable five-year statute of limitation for criminal prosecution has expired, i.e., until April 2008.” (AR 0052). On July 21, 2004, OFAC informed Plaintiff that it would not agree to stay the civil monetary penalty proceedings or be in a position to grant Plaintiff immunity from criminal prosecution. (AR 0050-0051). Thereafter, on August 5, 2004, Plaintiff submitted his fourteen-page response to the Prepenalty Notice contending that the regulations are unlawful, and no penalty or other sanction should be imposed. (AR 0035-49). Significantly, in his response, Plaintiff did not contest or otherwise dispute the Prepenalty Notice’s allegation that he had engaged in travel-related transactions during the time he traveled in Iraq, but

⁵ In particular, the PPN stated:

The specific violations are as follows:

On February 19, 2003, you departed Amman, Jordan for Baghdad, Iraq. While in Iraq, you planned to join a group shielding the Government of Iraq facilities from possible U.S. military action. You also engaged in travel-related transactions, expending currency for the purchase of food, lodging, transportation, and souvenirs. You departed Iraq, returning to Amman, Jordan, on March 11, 2003.
(AR 0060).

“categorically rejects” the allegation that he had served as a “human shield” in Iraq. (AR 0024; 0032 n.8).

By a Penalty Notice dated March 28, 2005, OFAC found that Plaintiff violated the Iraq Travel-Related Ban as set forth in the PPN, and imposed a civil penalty of \$6,700. (AR at 0002). No penalty was imposed against Plaintiff for having invoked his Fifth Amendment against self-incrimination. To date, no criminal action has been taken against Plaintiff.

ARGUMENT

I. Plaintiff’s APA Claim Has No Merit

A. A Deferential Standard of Review Applies to the Decision to Impose a Penalty

Under the APA, a court may set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “Review under this provision is narrow, limited to examining the administrative record to determine whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” NRDC v. Muszynski, 268 F.3d 91, 97 (2d Cir. 2001) (citation omitted). In making this determination, the “court is not empowered to substitute its judgment for that of the agency.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). “If the agency’s reasons and policy choices . . . conform to certain minimal standards of rationality . . . the rule is reasonable and must be upheld, even though the Court itself might have made different choices.” Holy Land Found. for Relief and Dev. v. Ashcroft, 219 F. Supp. 2d 57, 67 (D.D.C. 2002) (citation and internal quotation marks omitted). Moreover, “the Court does not undertake its own fact-finding. Instead, the Court must review the administrative record assembled by the agency to determine whether its decision was supported by a rational basis.” Id. at 67 (citing Camp v. Pitts, 411 U.S. 138, 142 (1973)). See also 5 U.S.C. § 706. The agency’s decision is presumed valid, particularly when the agency makes a considered decision based upon the administrative record, and the burden of proof to demonstrate otherwise lies with the party challenging the agency’s action. See Friedman v. Perales, 668 F. Supp. 216, 221 (S.D.N.Y. 1987), aff’d, 841 F.2d 47 (2d Cir. 1988).

The need to defer to agency action is particularly compelling in circumstances involving foreign relations. See INS v. Abudu, 485 U.S. 94, 110 (1988). OFAC regulations imposing economic sanctions against a foreign country have been found to involve “weighty concerns of foreign policy.” Regan v. Wald, 468 U.S. 222, 242 (1984) (involving the Cuban Assets Control Regulations); Walsh v. Brady, 927 F.2d 1229, 1235 (D.C. Cir. 1991) (same). In the area of foreign policy, the Supreme Court has recognized that special deference is owed to the executive branch. “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 (citation omitted). See also Miranda v. Sec’y of Treasury, 766 F.2d 1, 3 (1st Cir. 1985) (“[T]he role of the judiciary in foreign affairs is limited.”). Courts have recognized “the President’s constitutionally vested role as the nation’s authority in the field of foreign affairs. . . . [W]hen acting pursuant to Congressional authorization in the field of foreign affairs, the President commands all the political authority of the United States.” Miranda, 766 F.2d at 3 (citation omitted).

B. Statutory Law Plainly Authorizes the Iraq Travel-Related Ban

Contrary to Plaintiff’s assertion that the government acted “in excess of statutory jurisdiction, authority, or limitation” in imposing “a sweeping ban on travel” (Compl. ¶ 56), the actions taken by the President in Executive Order 12,724, and the regulations issued thereunder by the Treasury Department, have been authorized by multiple, separate Congressional authorizations, including those located in IEEPA, UNPA, the Iraq Sanctions Act, and even in the 1994 amendment to IEEPA which grandfathered travel-related transaction restrictions in earlier embargoes, including the Iraqi Sanctions Regulations.

As economic sanctions jurisprudence unequivocally shows, IEEPA grants extraordinarily broad authority to the President. See, e.g., Paradissiotis v. Rubin, 171 F.3d 983, 988 (5th Cir. 1999) (finding IEEPA to grant the President “sweeping powers” and “broad authority” to impose economic sanctions); Consarc Corp. v. OFAC, 71 F.3d 909, 914 (D.C. Cir. 1995) (finding IEEPA to be an “extensive statutory grant of power”); United States v. Lindh, 212 F. Supp. 2d 541, 561 (E.D. Va. 2002) (finding that IEEPA’s “language manifestly sweeps broadly”).

UNPA provides an additional basis for executive action. UNPA authorizes the President, through any agency which he may designate and under such orders and regulations as he may prescribe, to give effect to resolutions of the United Nations Security Council regarding economic relations, notwithstanding the provisions of any other law. 22 U.S.C. § 287c(a). United Nations Security Council Resolution 661 called upon all nations to prevent persons from remitting funds to persons or bodies within Iraq. S.C. Res. 661 ¶ 4, U.N. SCOR, 2933rd mtg. (1990). Three days after the passage of Resolution 661, the President issued Executive Order 12,724 pursuant to UNPA “in view of United Nations Security Council Resolution No. 661.” 55 Fed. Reg. 33,089 (Aug. 9, 1990).

In addition to IEEPA and UNPA, Congress enacted the Iraq Sanctions Act, directing the President to “continue to impose the trade embargo and other economic sanctions with respect to Iraq . . . that the United States is imposing, . . . pursuant to Executive Order[] Numbered 12724 . . . , and, to the extent [it is] still in effect, Executive Order[] Numbered 12722” Pub. L. No. 101-513, § 586C(a), 104 Stat. 1979, 2048 (1990). Accordingly, Congress has authorized explicitly the travel-related restrictions imposed by Executive Order 12,724. In 1994, as noted above, Congress explicitly authorized the travel-related restrictions in Executive Order 12,724 and the Iraqi Sanctions Regulations by continuing such restrictions under IEEPA for countries, including Iraq, that were embargoed under IEEPA on April 30, 1994. Pub. L. No. 103-236, § 525(c)(3), 108 Stat. 382, 475 (1994).

Two federal courts have upheld the Iraqi Sanctions Regulations against similar challenge by persons who exported or traveled to Iraq in violation of the sanctions. See Sacks v. Office of Foreign Assets Control, No. 04-0108 (JLR), slip op. at 3-5 (W.D. Wash. Oct. 22, 2004) (on appeal) (attached as Exhibit A to the Declaration of Andrew D. O’Toole); Office of Foreign Assets Control v. Voices in the Wilderness, 329 F. Supp. 2d 71, 76-78 (D.D.C. 2004). In Voices, the court upheld the validity of exportation restrictions in the Iraqi Sanctions Regulations finding that Executive Order 12,724 and the Iraqi Sanctions Regulations “clearly fall within the purview of UNPA.” Voices, 329 F. Supp. 2d at 78. Similarly, in Sacks, the court found that the analysis in Voices is “equally applicable” to the Iraq Travel-Related Ban, Sacks, slip op. at 4, and ruled that Congress, through the Iraq Sanctions Act, “ratif[ied]

the Iraqi sanctions regime,” *id.* at 5.

In cases involving executive action pursuant to a grant of Congressional authority, particularly in the area of foreign affairs such as in the present case, courts typically refrain from disturbing presidential foreign policymaking. *DKT Mem’l Fund Ltd. v. Agency for Int’l Dev.*, 887 F.2d 275, 281-82 (D.C. Cir. 1989). “The 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.*, 887 F.2d at 281. As stated by the court in *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1980):

[I]t is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy. Judges are not expert in that field and they lack the information necessary for the formation of an opinion. The President on the other hand has the opportunity of knowing the conditions which prevail in foreign countries, he has his confidential sources of information and his agents in the form of diplomatic, consular and other officials.

Moreover, to the extent that Plaintiff attempts to bring an APA challenge to section 2 of Executive Order 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990), which contains the same restrictions on travel-related and transportation-related transactions that are located in the implementing Iraqi Sanctions Regulations, 31 C.F.R. §§ 575.207, 575.208, the executive order is not subject to review under the APA. “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.”). OFAC issued the Iraqi Sanctions Regulations to implement Executive Order 12,724, which explicitly authorizes the Secretary of the Treasury to promulgate implementing regulations.

In sum, Congress has enacted multiple, independent statutory authorizations for the travel-related restrictions in Executive Order 12,724 and the Iraqi Sanctions Regulations.

C. OFAC’s Decision to Impose a Civil Penalty Against Plaintiff for Violation of the Iraq Travel-Related Ban Was Neither Arbitrary Nor Capricious

OFAC’s decision to impose the \$6,700 penalty against Plaintiff was neither arbitrary nor capricious. The Administrative Record contains ample evidence that Plaintiff violated the Iraq Travel-

Related Ban by engaging in transactions related to travel and transportation, and that he did not have the requisite authorization or license from OFAC to engage in such activities. Plaintiff's repeated statements in the press support OFAC's finding that he traveled to Iraq, and engaged in unauthorized transactions relating to travel and transportation. See, e.g., (AR 0069) (indicating that Plaintiff "spent \$900 in airfare and \$1,000 for lodging, food and transportation in Iraq. He also bought an oil painting for less than \$100 from an Iraqi woman And he spent about \$50 on souvenirs for friends."); (AR 0074) (Plaintiff stated "I want to draw attention to the fact that the government is seeking to prosecute me and others for spending \$2,000 in Iraq in an effort for peace"); (AR 0075) ("Boyle estimated he spent more than \$2,000 on his trip to Iraq, including a \$1,000 airfare payment[,] about \$1,000 to a Christian Peacemaker Team that helped provide him with food and lodging [, and] a nominal amount of money for other items....").

The evidence in the Administrative Record concerning Plaintiff's travel-related transactions provided OFAC's Director with the requisite "reasonable cause" required for issuing a PPN, pursuant to 31 C.F.R. § 575.702. In his written response, Plaintiff only challenged the fact that he provided services as a "human shield," but did not rebut or otherwise refute that he traveled to Iraq and engaged in travel-related transactions. (AR 0024; 0032 n.8). Given the evidence in the Administrative Record, OFAC's Director reasonably determined that Plaintiff violated the Iraq Travel-Related Ban and imposed a civil penalty.⁶ Accordingly, OFAC's imposition of a civil penalty satisfies the narrow standard of review under the APA.

II. The Iraq Travel-Related Ban Does Not Violate the Fifth Amendment Right to Travel

Plaintiff's substantive due process challenge to the economic sanctions is based on an alleged fundamental right to international travel which was rejected under similar circumstances twenty years ago in Regan, 468 U.S. at 240-244. The Supreme Court in Regan relied on its ruling in Zemel v. Rusk,

⁶ The \$6,700 penalty imposed against Plaintiff was far less than the full amount that could have been imposed (see 31 C.F.R. § 575.701(a) (1)), and less than the \$10,000 proposed in the PPN.

381 U.S. 1, 13-16 (1965), in which a travel ban to Cuba was upheld against constitutional attack:

We see no reason to differentiate between the travel restrictions imposed by the President in the present case and the passport restrictions imposed by the Secretary of State in *Zemel*. Both have the practical effect of preventing travel to Cuba by most American citizens, and both are justified by weighty concerns of foreign policy.

468 U.S. at 242. The *Regan* Court noted that while “the constitutional right to travel within the United States and the right to travel abroad” had been treated “indiscriminately” in an earlier case, “[t]hat position has been rejected in subsequent cases,” including *Haig v. Agee*, 453 U.S. 280, 306 (1981) (“the freedom to travel outside the United States must be distinguished from the right to travel within the United States”). 468 U.S. at 241 n.25. The *Regan* Court found that the travel-related restrictions in the Cuban Assets Control Regulations (“CACR”) “do not violate the freedom to travel protected by the Due Process Clause” 468 U.S. at 244.

Similarly, the Ninth Circuit held in *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439 (9th Cir. 1996), that “[r]estrictions on international travel are usually granted much greater deference. Given the lesser importance of this freedom to travel abroad, the Government need only advance a rational, or at most an important, reason for imposing the ban.” Regarding the travel-related restrictions in the CACR, the Ninth Circuit found that the “purpose of the 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.” *Id.* It said that “[t]hat goal has been found ‘important,’ ‘substantial,’ and even ‘vital.’” *Id.* As was the case in *Regan*, the Ninth Circuit declined plaintiff’s attempt to have the court “evaluate the foreign policy underlying the embargo,” explaining that “[i]t is well-settled 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.’” *Id.*

Plaintiff’s attempt to ignore or evade decades of law upholding restrictions like those imposed in the Iraqi Sanctions Regulations must be rejected. The right to international travel, although a protected liberty interest, is not a “fundamental right” subject to heightened judicial protection; the

United States therefore may restrict international travel when the restriction imposed is reasonably related to a legitimate state purpose. See Hutchins v. District of Columbia, 188 F.3d 531, 537 (D.C. Cir. 1999) (en banc) (“international travel is no more than an aspect of liberty that is subject to reasonable government regulation within the bounds of due process, whereas interstate travel is a fundamental right subject to a more exacting standard”); Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461 (2d Cir.) (citing Reno v. Flores, 507 U.S. 292, 303-06 (1993)) (where the allegedly infringed right is not fundamental, “the governmental regulation need only be reasonably related to a legitimate state objective”), cert. denied, 519 U.S. 813 (1996).

The preclusion of travel-related transactions that could benefit the Iraqi economy and the actions and policies of Saddam Hussein were directly related to the national emergency, national security, and in furtherance of the Government’s foreign policy interests. Indeed, the foreign policy rationale underlying the travel-related restrictions had been set forth by the President in a finding of a national emergency and the implementation of executive orders, and there existed an escalation of tensions which led to the decision by the President to use military force against Iraq only two weeks after Plaintiff’s trip. Like the Cuban embargo and accompanying restrictions on travel to Cuba, the restrictions on travel-related transactions at issue here were imposed to “restrict the flow of hard currency” into Iraq and to isolate Saddam Hussein, among other reasons. Accordingly, Plaintiff’s claim that the Iraq Travel-Related Ban violates his Fifth Amendment right to travel is without merit.

III. Plaintiff Was Afforded Procedural Due Process of Law

Plaintiff’s procedural due process rights were satisfied by the procedures provided to him under the Iraqi Sanctions Regulations. Plaintiff was informed of the factual and legal allegations against him, provided an opportunity to make a written submission through his counsel responding to those allegations, and, as evidenced by the instant action, able to seek judicial review of the agency’s final decision in this Court under the APA. Nonetheless, Plaintiff now complains that those procedures are deficient on the grounds that he was not provided: (1) a neutral decision-maker, (2) the opportunity to

take any discovery during the administrative proceedings, and (3) an oral hearing (including the right to appear and cross-examine witnesses). (Compl. ¶ 51). However, Supreme Court and Second Circuit precedent clearly demonstrate that none of Plaintiff's alleged deficiencies with the procedures violates due process.

A. Written Submissions in Response to the Prepenalty Notice Are Constitutionally Adequate

As a preliminary matter, the IEEPA, UNPA, the Iraq Sanctions Act, applicable executive orders, and the Iraqi Sanctions Regulations do not require an oral hearing. The Iraqi Sanctions Regulations simply require a prepenalty notice, 31 C.F.R. § 575.702, which was provided to Plaintiff, and an opportunity to make a written presentation in response to the prepenalty notice, 31 C.F.R. § 575.703, which Plaintiff provided through his counsel by letter dated August 5, 2004. To the extent that Plaintiff may seek to rely on procedures set forth in statutes and regulations governing economic sanctions against other countries such as Cuba, it should be noted that the Cuban Assets Control Regulations, 31 C.F.R. pt. 515, are governed by the Trading With the Enemy Act ("TWEA"), not IEEPA, and that in 1992 TWEA was amended to explicitly provide an "opportunity for an agency hearing in accordance with [5 U.S.C. §§ 554-557]" 50 U.S.C. app. § 16(b)(3). IEEPA has not been similarly amended. Where, as here a "statute does not require that [an agency] decision involve a prior oral hearing, the Supreme Court has "reject[ed] [the] contention that the Constitution does so." Califano v. Yamasaki, 442 U.S. 682, 693 (1979). See also FDIC v. Mallen, 486 U.S. 230, 247-48 (1988) ("There is no inexorable requirement that oral testimony must be heard in every administrative proceeding in which it is tendered."). Thus, the Supreme Court has found that oral hearings are not a necessary requirement under the Due Process Clause.

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. See 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). As this court held in Flannelly v. Board of Trustees, 6

F. Supp. 2d 266, 268 (S.D.N.Y. 1998), “appearance at a hearing is not necessary for an opportunity to be heard.” Given that OFAC invited and fully considered Plaintiff’s submission before imposing the penalty, Plaintiff cannot maintain that he was denied any constitutional right to be heard.

In the particular context of economic sanctions pursuant to IEEPA and executive orders, the opportunity to present written submissions has been found to be constitutionally sufficient.⁷ Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003). See also Global Relief Found., Inc. v. O’Neill, 207 F. Supp. 2d 779, 804 (N.D. Ill. 2002), aff’d, 315 F.3d 748 (7th Cir. 2002). In Holy Land, the Department of the Treasury had designated the Holy Land Foundation for Relief and Development (“HLF”), the largest Muslim charitable organization in the United States, as a terrorist supporter for purposes of blocking its assets and shutting down the organization. HLF was given an opportunity to respond through written submissions to both its initial designation and its redesignation, but it was not given an opportunity for an oral hearing. The court determined that due process requirements were satisfied, noting “we do not require an agency 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).

Similarly, “[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), cert. denied, 402 U.S. 915 (1971). See also Silverman v. Commodity Futures Trading Comm’n, 549 F.2d 28, 33 (7th Cir. 1977) (Federal Rules of Civil Procedure do not apply to administrative proceedings, nor does the APA contain any provision for discovery in the administrative process). In sum, the opportunity for written presentation provided to

⁷ Even outside of the economic sanctions context, the Supreme Court has held that an evidentiary hearing is not required prior to the termination of Social Security disability benefit payments. Mathews v. Eldridge, 424 U.S. 319 (1976). Mathews distinguishes itself from 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, and Mathews largely relegates the holding in Goldberg to the welfare context.

Plaintiff is constitutionally adequate for procedural due process.

B. Plaintiff Fails to Overcome the Presumption That the OFAC Director Is a Constitutionally Adequate, Neutral Decisionmaker

Notwithstanding Plaintiff's conclusory allegation that he was denied a neutral decisionmaker (Compl. ¶ 51), there is a "presumption of honesty and integrity in those serving as adjudicators," Withrow v. Larkin, 421 U.S. 35, 47 (1975), and Plaintiff bears the burden of rebutting this presumption by demonstrating a disqualifying interest. See Wolkenstein v. Reville, 694 F.2d 35, 42 (2d Cir. 1982); Schweiker v. McClure, 456 U.S. 188, 196 (1982). As the Supreme Court has stated, "[t]he initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation." Withrow, 421 U.S. at 58. See also 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."); American Tel. and Tel. Co. v. FCC, 449 F.2d 439, 455 (2d Cir. 1971) (noting that "case law generally rejects the proposition that the combination of judicial and adversary functions in one agency is a denial of due process"). Accordingly, the OFAC Director has previously been found to constitute a constitutionally adequate, neutral decisionmaker. See, e.g., Global Relief Found., Inc. v. O'Neill, 207 F. Supp. 2d 779, 804-05 (N.D. Ill. 2002) ("[T]he director of OFAC is an appropriate person to consider administrative appeals."), aff'd, 315 F.3d 748 (7th Cir. 2002). Plaintiff has not made any allegation that would counter this strong presumption. Thus, Plaintiff's due process challenge to the agency decisionmaker clearly must fail.

IV. Plaintiff's Free Speech Claim Is Without Merit

Plaintiff's claim of a First Amendment violation is not unique and has, in essence, already been rejected by the Supreme Court. In Zemel, 381 U.S. at 16, the appellant challenged a travel ban to Cuba and the Secretary of State's refusal to validate U.S. passports for travel to Cuba. Although the travel ban

impeded the free flow of information, the Supreme Court stated:

[W]e cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition . . . , it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. . . . The right to speak and publish does not carry with it the unrestrained right to gather information.

Zemel, 381 U.S. at 16-17. The Ninth Circuit later applied Zemel to economic sanctions under the CACR, and ruled that the CACR does not implicate the First Amendment. Freedom to Travel, 82 F.3d at 1441. Similarly, in Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1012-13 (S.D.N.Y. 1990), this court rejected "the assumption that the congressional or executive power to regulate speech when dealing with foreign affairs is subject to the same scrutiny and limitations that the First Amendment would impose in the domestic context."

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." O'Brien, 391 U.S. at 376. Based on O'Brien, a governmental regulation is sufficiently justified if:

(1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Holy Land Found. for Relief and Dev. v. Ashcroft, 219 F. Supp. 2d 57, 82 (D.D.C. 2002) (citing O'Brien, 391 U.S. at 376-77). The Iraq Travel-Related Ban satisfies these requirements.

First, as noted above, courts have recognized "the President's constitutionally vested role as the nation's authority in the field of foreign affairs. . . . [W]hen acting pursuant to Congressional authorization in the field of foreign affairs, the President commands all the political authority of the United States." Miranda, 766 F.2d at 3. Moreover, the Supreme Court has not allowed First Amendment challenges to alter the deference it affords government actions affecting foreign policy interests. See Haig, 453 U.S. at 308-09 (1981); Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972).

In the present case, the actions of the President taken in Executive Order 12,724 have been authorized by IEEPA, UNPA, and the Iraq Sanctions Act. Executive Order 12,724 specifies prohibitions, including those on travel and exports, and explicitly authorizes the Secretary of the Treasury to promulgate implementing regulations. The Iraqi Sanctions Regulations implement Executive Order 12,724. Accordingly, the Regulations fall within the constitutional power of the government.

Second, the Regulations promote an important and substantial governmental interest. Indeed, the Second Circuit has expressly resolved this question, holding that OFAC's regulations have "the proper general purpose" of "restricting the dollar flow to hostile nations," and indeed "contribute to the furtherance of a vital interest of the government." Teague v. Regional Comm'r of Customs, 404 F.2d at 445. See also Haig, 453 U.S. at 307 ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."). 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, one in 1991 and the other in 2003. 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 "an unusual and extraordinary threat to the national security and foreign policy of the United States."

To the extent that Plaintiff attempts to argue that the First Amendment prevents the United States from utilizing economic sanctions in support of its governmental interests and United Nations Security Council Resolutions, such an argument is simply unfounded. In Regan, 468 U.S. at 242, the Supreme Court found that travel-related restrictions imposed by economic sanctions regulations are "justified by weighty concerns of foreign policy." Accord Wayte v. United States, 470 U.S. 598, 611 (1985) ("[f]ew interests can be more compelling than a nation's need to ensure its own security"). See also Walsh, 927 F.2d at 1234-35 (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), aff'd, 851 F.2d 1500 (D.C. Cir. 1988) (Table).

Third, the governmental interest in enforcing the Regulations is unrelated to the suppression of free expression. Indeed, one of the aims of U.S. policy in Iraq is to “free the Iraqi people,” The President’s Radio Address of March 22, 2003, 39 Weekly Comp. Pres. Doc. 353, 353 (Mar. 31, 2003), to facilitate greater freedom of expression. Moreover, Section 2(d)(iii) of Executive Order 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990), and the corresponding provision in the Regulations, 31 C.F.R. § 575.207(c), both provide exceptions to the Iraq Travel-Related Ban for transactions relating to “journalistic activity by persons regularly employed in such capacity by a newsgathering organization.” This exception permits free expression to the extent possible without undermining U.S. foreign policy. See American Documentary Films, Inc. v. Sec’y of Treasury, 344 F. Supp. 703, 711 (S.D.N.Y. 1972) (infringement on First Amendment freedoms posed by restriction of importation of goods from Cuba is permissible as incidental to proper purpose of regulations).

Fourth, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest. Any less restrictive sanctions would not ensure that United States dollars did not end up supporting Iraq. As noted above, Executive Order 12,724 and the Iraq Travel-Related Ban permit travel-related transactions for journalistic activity. In addition, the Supreme Court has ruled that “protesting” under the First Amendment does not automatically exempt an individual from legal requirements. Wayte, 470 U.S. at 613-14 (1985). Accordingly, Plaintiff cannot avoid the legal consequences of violating the Iraq Travel-Related Ban by labeling such activity as “protest”; this does not “confer . . . immunity from prosecution,” or, as here, from civil penalties. Wayte, 470 U.S. at 614.

V. The Travel-Related Ban Violates Neither the Free Exercise of Religion Under the Religious Freedom Restoration Act Nor the First Amendment

The Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb-1, prevents the federal government from placing a “substantial burden” on a person’s exercise of religion “even if the burden results from a rule of general applicability,” unless the government demonstrates a “compelling governmental interest” and it has used the “least restrictive means” of furthering that interest. 42 U.S.C.

§§ 2000bb-1(a), (b). Plaintiff bears the initial burden to establish that his exercise of religion is substantially burdened by the enforcement of the regulations. Plaintiff's allegations that his defiance of the Iraq Travel-Related Ban was motivated by his opposition to the United States' military action in Iraq and that his "opposition to the war is firmly rooted in religious, moral, and political beliefs" (Compl. ¶¶ 16-17) fails to satisfy this burden. Even if such self-serving allegations were sufficient (which they are not), the regulations are justified by a compelling government interest and sufficiently tailored to further that interest.

As a threshold matter, Plaintiff fails to demonstrate that any exercise of his religion has been substantially burdened by the Iraq Travel-Related Ban. Put simply, Plaintiff has failed to identify any exercise of religion that could serve as a basis for a RFRA claim. In essence, Plaintiff claims that his travel to Iraq was motivated by his opposition to the war, and that in turn, his opposition to the war is based upon his religious convictions as a Methodist minister. However, the mere fact that Plaintiff's opposition to military action in Iraq can be described as consistent with his beliefs as a Methodist, is beside the point if Plaintiff's religious exercise does not require travel to Iraq. See Holy Land, 333 F.3d at 167 (rejecting RFRA challenge to the Treasury Department's decision to block HLF's assets finding "there is no free exercise right to fund terrorists" given such conduct was not mandated by HLF's religion). Conduct driven by ethical or moral views is not religious exercise. See Illinois Frazee v. Dep't of Employment Sec., 489 U.S. 829, 833 (1989). Such allegations do not suffice to satisfy Plaintiff's threshold burden under RFRA.

Moreover, Plaintiff cannot contend that the regulations prohibit him from exercising his alleged moral, ethical or religious duty to oppose the United States' foreign policy in Iraq. Plaintiff fails to demonstrate how the regulations interfere with other legal means by which he could express his opposition without traveling to Iraq. Moreover, Plaintiff did not apply or otherwise seek a license from OFAC permitting him to travel to Iraq. Having never even applied for a license, Plaintiff is not in a position to challenge the sufficiency of this process.

Even assuming, arguendo, that Plaintiff raises a threshold RFRA claim (which he does not), the

Iraq Travel-Related Ban is plainly justified by the federal government’s unparalleled interest in national security and sufficiently tailored to further that interest. See 42 U.S.C. § 2000bb-1(b). “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” Haig, 453 U.S. at 307. See also Zemel, 381 U.S. at 17. Courts have unanimously ruled that comparable economic sanctions programs further a compelling government interest. See, e.g., Farrakhan, 669 F. Supp. at 512 (Libyan sanctions regulations upheld under strict scrutiny analysis); Regan, 468 U.S. at 242 (Cuban sanctions regulations justified by significant foreign policy concerns). Unquestionably, the United States’ national security and foreign policy interests in cooperating with multilateral efforts to sanction Iraq for violations of UN Security Resolutions are compelling. See United States v. Acevedo-Delgado, 167 F. Supp. 2d 477, 481 (D.P.R. 2001) (“the ability to effectively carry out national security needs” to be a compelling governmental interest under RFRA).

The government’s compelling interest in national security was appropriately recognized in Farrakhan, 669 F. Supp. at 512. There, the court rejected a claim by a muslim mosque that the Libyan Sanction Regulations violated its rights under the Free Exercise Clause.⁸ The mosque’s claim was based on the fact that the sanctions prohibited it from repaying a loan made by an agency of the Libyan government and from providing monetary aid to Muslims within Libya. Id. at 510. In rejecting the plaintiff’s free exercise claim, the court recognized the presence of a “compelling interest in national security and the end of Libya’s alleged participation in ‘state-sponsored’ terrorism.” Id.

Moreover, the government’s interest cannot be served through less restrictive means. The regulations are precisely tailored to implementing the collective mandates of the UN, Congress, and the President. In the context of the comprehensive multilateral sanctions that existed with respect to Iraq, a less restrictive process is difficult to conceive. See Farrakhan, 669 F. Supp. at 511 (finding no less

⁸ Although Farrakhan is a free exercise 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 test imposed under RFRA, the Farrakhan decision is particularly instructive.

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.”). Because the uniform travel-related regulations are justified by compelling concerns of national and international security during a time of national emergency, and sufficiently tailored to further these interests, Plaintiff’s RFRA claim should be rejected. See Browne v. United States, 176 F.3d 25, 26 (2d Cir. 1999) (rejecting RFRA claim by taxpayer who based upon his religious beliefs as a Quaker, sought to withhold that portion of his federal income tax which he computed would be allocated to the Department of Defense, finding that “voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in uniform, mandatory participation in the federal tax system”).

As Plaintiff cannot demonstrate that the Iraq Travel-Related Ban violates RFRA (which imposes a higher standard than under the First Amendment), a fortiori his free exercise claim under the First Amendment also must fail. Under binding Supreme Court and Second Circuit precedent, a neutral law of general applicability does not offend the Free Exercise Clause, even if it has an incidental effect on religious practice. See Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990) (“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. As the Second Circuit has previously noted, the “legislative power . . . may reach people’s actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one’s religion.” Intercommunity Center for Justice and Peace v. INS, 910 F.2d 42, 44 (2d Cir. 1990) (quoting Braunfeld v. Brown, 366 U.S. 599, 603-04 (1961)). Here, the Iraq Travel-Related Ban imposes a uniform sanction preventing all persons regardless of their religious beliefs from engaging in certain travel-related transactions in Iraq. Accordingly, where, as here, a statute “neither regulates religious beliefs nor burdens acts because of their religious expression or motivation,” even if such “valid, neutral law of general application . . . happens to compel action contrary to certain religious beliefs,” that statute does not violate an

individual's right to the free exercise of religion. Intercommunity Center, 910 F.2d at 44.

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

A. Simply Having to Choose Whether to Assert the Privilege Does Not Violate the Fifth Amendment

Contrary to Plaintiff's allegation in his second cause of action, it is well established that simply having to "choose" whether to assert the privilege (Compl. ¶ 54) does not violate the Fifth Amendment. In the present case, OFAC imposed no penalty for Plaintiff's decision to raise his Fifth Amendment right in his written presentation, and in fact, OFAC considered Plaintiff's provision of the written presentation as a mitigating factor. Indeed, a plurality of the Supreme Court has found that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." Chavez v. Martinez, 538 U.S. 760, 769 (2003).

As an initial matter, it should be noted that no penalty was ever automatically imposed against Plaintiff based upon his invocation of his Fifth Amendment right against self-incrimination. Rather, a civil penalty was imposed against him based upon a finding that the Iraqi Sanctions Regulations had been violated, but not based upon an assertion of the privilege. See 31 C.F.R. § 575.704(b). The choice faced by Plaintiff in this case is even less severe than the choice upheld as constitutional in Baxter v. Palmigiano, 425 U.S. 308, 318 (1976), 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. Id. at 317. In Baxter, however, the choice to invoke the privilege had even more severe consequences than in the present case because, in that case, the claimant was forewarned that his silence could be used against him. Id. at 320. By contrast, in the present case, OFAC not only accepted Plaintiff's decision to raise his Fifth Amendment right in response to the PPN, but considered the provision of a response as a mitigating factor. The civil penalty against Plaintiff was imposed for violations of the Iraq Travel-Related Ban based upon

“consideration of the entire record” (AR at 0001), not for an assertion of a self-incrimination privilege, similar to the case of a criminal defendant who still can be found guilty of a crime even if he or she asserts the Fifth Amendment privilege to not testify during trial. See 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.”).

Moreover, the strategic dilemma of which Plaintiff complains in this action that by invoking his Fifth Amendment right he was unable to effectively oppose the proposed penalty is common to all parties facing simultaneous civil and criminal proceedings. See United States v. Kordel, 397 U.S. 1, 11 (1970) (finding no “violation of due process or departure from standards” where civil and criminal actions proceeded simultaneously). Unlike those cases where a criminal case has already been filed, no criminal case has ever been initiated against Plaintiff. Cf. United States v. District Council of New York City, 782 F. Supp. 920, 925 (S.D.N.Y. 1992) (“[C]ourts in this district will deny a stay of civil proceeding where no indictment has issued.”) (internal citation omitted). However, even in those circumstances where a party faces simultaneous civil and criminal proceedings, 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. 1967), vacated as moot, 389 U.S. 425 (1967). See also DeVita v. Sillis, 422 F.2d 1172, 1178-81 (3d Cir. 1970) (noting that “similar prejudice, if it be prejudice, may occur respecting civil and criminal tax liability, civil and criminal antitrust violations, liability for civil and criminal fraud, and many other cases.”). Thus, the fact that Plaintiff chose to

invoke his Fifth Amendment right, and now complains that he was unable to fully defend himself in the administrative proceedings is without consequence. A claimant “has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege.” Keating v. Office of Thrift Supervision, 45 F.3d 322, 326 (9th Cir. 1994). See also McKune v. Lile, 536 U.S. 24, 41 (2002) (“Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.”). Accordingly, the choice between exercising his privilege and putting forth the most effective defense in the civil administrative proceedings is not constitutionally coercive.

B. Plaintiff Was Not Entitled to a Stay of the Administrative Proceedings

Plaintiff also cannot demonstrate that OFAC’s denial of his request for a stay of the enforcement action against him violated the Fifth Amendment nor rendered the administrative proceedings fundamentally unfair. As the Supreme Court has noted, “[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.” Kordel, 397 U.S. at 11. 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. Keating, 45 F.3d at 324-26 (Office of Thrift Supervision disciplinary hearing need not be stayed pending related criminal proceedings); SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980) (en banc) (“The Constitution . . . does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings.”); District Council of New York City, 782 F. Supp. at 924 (denying motion to stay government civil RICO action based upon potential criminal investigation); SEC v. Gilbert, 79 F.R.D. 683, 687 (S.D.N.Y. 1976) (SEC enforcement action need not be stayed pending ongoing 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. Given the paramount importance of economics sanctions to the President’s ability to conduct and carry out foreign affairs, it is essential that civil enforcement of violators not be stayed indefinitely as Plaintiff suggests.

VII. Plaintiff Fails to State a Claim for Selective Enforcement

While selective prosecution or enforcement has been recognized as a viable defense to a criminal prosecution, it is not entirely clear “that ‘selective enforcement’ is an equally applicable defense to a civil action to recover civil penalties by the Federal Government.” United States v. Fleetwood Enters., Inc., 702 F. Supp. 1082, 1091 (D. Del. 1988). Although the Second Circuit has previously assumed that such a defense could be asserted in investigations conducted by the IRS, and that the applicable test would be the one applied to discriminatory criminal prosecutions, see e.g., St. German of Alaska E. Orthodox Catholic Church v. United States, 840 F.2d 1087, 1095 (2d Cir. 1988), several courts have questioned the availability of a selective enforcement claim as a defense to a civil enforcement action brought by the Federal Government, see, e.g., Donovan, et al. v. A.A. Beiro Constr. Co., Inc., 746 F.2d 894, 905-06 (D.C. Cir. 1984) (leaving open whether selective prosecution is available as a defense in a civil context); United States v. Snapp, 595 F.2d 926, 933 (4th Cir. 1979) (same), rev’d on other grounds, 444 U.S. 507 (1980).

However, even assuming arguendo that selective enforcement is a viable defense against a civil enforcement action brought by a federal governmental agency, Plaintiff’s allegations here plainly fail to state a claim upon which relief can be granted. See, e.g., Attorney General of the United States v. Irish People, Inc., 684 F.2d 928, 932 n.8 (D.C. Cir. 1982) (declining to reach the issue of whether selective prosecution defense is available in civil suit because, to the extent it is appropriate, defendant failed to meet the heightened burden to plead the defense). Under United States v. Armstrong, 517 U.S. 456, 465 (1996), “[t]he requirements for a selective-prosecution claim draw on ordinary equal protection

standards. The claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.” Id. (citation and quotation marks omitted). The standard for a claim of selective prosecution is a “demanding one,” and there is a strong presumption in favor of the government. Id. at 463-64. The “presumption of regularity” supports prosecutorial decisions, and “in the absence of clear evidence to the contrary, courts presume that [the executive] ha[s] properly discharged [its] official duties.” Id. at 464. Particular deference to enforcement decisions is due in cases, such as this one, in which “foreign-policy objectives” are involved. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 490-91 (1999).

In St. German of Alaska, the Second Circuit assumed that a claim of selective investigation or enforcement by the IRS was “subject to the same test as a discriminatory prosecution.” 840 F.2d at 1095. Therefore, to establish a claim of selective enforcement, Plaintiff bears the heavy burden of establishing that (1) he has been singled out for prosecution while other similarly situated individuals have not been prosecuted for the same conduct, and (2) the selective treatment was based on “impermissible considerations” such as “race, religion, or the desire to prevent [the] exercise of constitutional rights.” 840 F.2d at 1095 (internal quotation marks and citation omitted); accord LeClair v. Saunders, 627 F.2d 606, 609 (2d Cir. 1980), cert. denied, 450 U.S. 909 (1981). Plaintiff satisfies neither element required to state a prima facie case of selective enforcement.

Although Plaintiff asserts that the Iraq Travel-Related Ban was enforced against three other individuals such as himself who “actively and publicly opposed U.S. military action in Iraq” (Compl. ¶ 47), he fails to make a colorable claim or even allege that the Regulations were not enforced against other similarly situated violators who did not oppose U.S. military action in Iraq. In order for an individual to be similarly situated for such purposes, Plaintiff would need to allege the existence of other persons who engaged in the same conduct as him under comparable circumstances, i.e., individuals who violated the Iraq Travel-Related Ban, but were not subject to any penalty. Plaintiff must also allege that OFAC was aware of such parties since “[m]ere failure to prosecute other offenders is not a basis for a finding of denial of equal protection.” LeClair, 627 F.2d at 608. “Absent a showing that [defendants]

knew of other violations, but declined to prosecute them, [plaintiff] would ordinarily be unable to show that it was treated selectively.” LaTrieste Restaurant v. Village of Port Chester, 188 F.3d 65, 70 (2d Cir. 1999). Here, Plaintiff fails to allege the existence of any such comparator, or that OFAC was aware of such comparator but did not seek to enforce Iraq Travel-Related Ban against them.

The court’s decision in Voices, 329 F. Supp. 2d at 83 is instructive. There, the defendant brought a selective prosecution claim to challenge OFAC’s enforcement of the Iraqi Sanctions Regulations. Id. The court dismissed the claim because the defendant had failed 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.” Voices, 329 F. Supp. 2d at 83 (internal quotation marks omitted). As in Voices, Plaintiff’s claim must be dismissed because he has made no allegation that he was “selected for prosecution from among other similarly situated violators” Id.

Likewise, Plaintiff has failed to make a colorable claim that OFAC imposed a civil penalty against him because of his public opposition to U.S. military action. As explained by the Supreme Court in Wayte v. United States, “[d]iscriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.” 470 U.S. at 610 (1985) (internal quotation marks omitted). Here, the Penalty Notice specifies that the civil penalties were imposed for Plaintiff’s violations of the Regulations (AR 0001-02), not for any protests, and the Administrative Record contains evidence of Plaintiff’s violation. Accordingly, Plaintiff’s claim of selective enforcement -- and his attempt to carve out a special exception to the Regulations for protestors like himself-- should be rejected. See Wayte, 470 U.S. at 510 (rejecting claim of selective prosecution because petitioner had not shown that the government prosecuted him because of his protest activities).

VIII. IEEPA Does Not Violate the Separation of Powers Under the Constitution

Plaintiff’s challenge to IEEPA as an impermissible delegation of legislative power in violation of the Constitution’s separation of powers (Compl. ¶ 73) is meritless, and ignores decades of clearly established case law. The non-delegation doctrine, which is rooted in the principle of separation of

powers, does not prevent Congress from “obtaining the assistance of its coordinate Branches. . . . So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.” Mistretta v. United States, 488 U.S. 361, 372 (1989) (internal quotation marks omitted). Given an “increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” Id. See also Loving v. United States, 517 U.S. 748, 758 (1996) (The non-delegation doctrine “does not mean . . . that only Congress can make a rule of prospective force. To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers’ design of a workable National Government.”). Evidencing the breadth of delegation authorized by courts, the Supreme Court has noted:

In the history of the Court we have found the requisite “intelligible principle” lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring “fair competition.”

Whitman v. Am. Trucking Ass’ns, Inc., 531 U.S. 457, 474 (2001).

Moreover, in the area of foreign affairs, courts grant even greater deference than the already substantial deference granted in domestic affairs. “It is well settled that ‘Congress -- in giving the Executive authority over matters of foreign affairs -- must of necessity paint with a brush broader than it customarily wields in domestic areas.’ The level of deference is so much greater here that a delegation improper domestically may be valid in the foreign arena.” Freedom to Travel, 82 F.3d at 1438 (internal citation omitted) (quoting Zemel, 381 U.S. at 17). In United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936), the Supreme Court upheld Congress’s ability to delegate to the President the power to restrict certain transactions in the foreign affairs area, emphasizing that “[i]t is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations -- a power which does

not require as a basis for its exercise an act of Congress.” 299 U.S. at 319-24 (internal quotation marks omitted). See also Global Relief Found., 207 F. Supp. 2d at 807 (“[T]he provisions of IEEPA and its delegation of authority to OFAC is not likely to violate the separation of powers.”).

In the present case, Congress’s delegation to the President under IEEPA is entitled to the very broad deference afforded in the area of foreign affairs. Moreover, Congress has provided an intelligible principle for the exercise of authority under IEEPA. For example, before the President may exercise economic powers under IEEPA, the President must find a specific type of “unusual and extraordinary threat.” 50 U.S.C. § 1701(a). The threat must have “its source in whole or substantial part outside the United States,” and it must constitute a threat to the “national security, foreign policy, or economy of the United States.” Id. In addition, in order to exercise authority under IEEPA, the President must declare a national emergency with respect to each “unusual and extraordinary” threat that he seeks to address. 50 U.S.C. § 1701(b). Given IEEPA’s provision of an intelligible principle and the broad discretion granted to the President in the area of foreign affairs, Plaintiff’s non-delegation claim lacks any support.

In any event, Executive Order 12,724 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). Moreover, Congress expressly directed the President to continue the Iraq embargo and other economic sanctions with respect to Iraq when it added section 1702(b)(4) to IEEPA in 1994. See Pub. L. No. 101-513, § 586C(a), 104 Stat. 1979, codified at 50 U.S.C. § 1701 note. Accordingly, Plaintiff’s claim that there has been any violation of the separation of powers clause is nonsensical.

IX. Plaintiff’s International Law Claims Lack Merit

A. Plaintiff Has No Claim Under ICCPR

Plaintiff’s claim under article 12 of the ICCPR is devoid of merit because there is no conflict between ICCPR and the Regulations, and, in any event, the ICCPR is not enforceable here because it is non-self-executing.

As the Ninth Circuit held in Freedom to Travel, 82 F.3d at 1441-42, economic sanctions regulations restricting travel to a particular country do not conflict with article 12 of the ICCPR because article 12 “says nothing about the right to travel to a specific destination.” Id. at 1442.⁹ Further, the regulations do not restrict Plaintiff’s movement within the United States (as covered by section 1 of article 12), his freedom to leave the United States (as covered by section 2), nor, a right to enter the United States (as covered by section 4). “Because the Regulations do not trigger either section 1 or 2, . . . section 3 . . . requirement[s] do[] not apply.” Id. at 1442.

In any event, the ICCPR is not self-executing, and therefore, it is not enforceable by federal courts. See 138 Cong. Rec. S4783-84 (daily ed. Apr. 2, 1992); see also, Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004) (“[T]he United States ratified [ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”); Flores v. Southern Peru Copper Corp., 414 F.3d 233, 258 n.35 (2d Cir. 2003) (“[T]he treaty was ratified with numerous reservations . . . , and with the declaration that the ICCPR is not self-executing.”); Beazley v. Johnson, 242 F.3d 248, 267-68 (5th Cir.), cert. denied sub nom., Beazley v. Cockrell, 534 U.S. 945 (2001). Article 12 of ICCPR therefore establishes no right that Plaintiff may enforce. See S. Exec. Rep. No. 102-23, 9, 19, 23 (1992) (clarifying that “the Covenant will not create a private cause of action in U.S. courts,” and that “implementing legislation is not contemplated”).

⁹ Article 12 of ICCPR provides:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

ICCPR, art. 12, 999 U.N.T.S. 171, 6 I.L.M. 368, 372 (1967).

B. Plaintiff Has No Claim Under Customary International Law

Plaintiff's claim under customary international law is equally devoid of merit. It is far from clear that the right to travel to a particular country even exists under customary international law, and, in any event, statutory law trumps any contrary customary international law.

As explained by the Second Circuit, "customary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." Flores, 414 F.3d at 248. In determining whether a rule is part of customary international law, the court must "look primarily to the formal lawmaking and official actions of States." United States v. Yousef, 327 F.3d 56, 103 (2d Cir. 2003). As evidenced by United Nations Security Council Resolution 661, the use of economic sanctions is a well-established practice of nations, and courts, and as cited above, have upheld the use of economic sanctions. With regard to the economic sanctions imposed against Iraq, the President recognized their widespread international usage against Iraq. See 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) ("Worldwide outrage over the invasion of Kuwait by Saddam Hussein has resulted in the imposition of sanctions by nearly every country of the world. To an extent unprecedented in the history of peacetime economic sanctions, the community of nations has worked together to make the sanctions effective in isolating Saddam Hussein and in cutting him off from the support he needs in order to continue his illegal occupation of Kuwait"). Moreover, "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," especially in light of "collateral consequences" for the foreign relations of the United States. Sosa, 124 S. Ct. at 2762-63. In light of widespread international usage of economic sanctions, judicial decisions upholding such sanctions, and judicial reluctance to create a private right of action, Plaintiff has failed to establish a claim under customary international law.

In any event, where a controlling act of legislation exists, customary international law is inapplicable. See Yousef, 327 F.3d at 93 ("If a statute makes plain Congress's intent . . . then Article III courts, which can overrule Congressional enactments only when such enactments conflict with the

Constitution . . . must enforce the intent of Congress irrespective of whether the statute conforms to customary international law.”) (citations omitted); United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1983) (“in enacting statutes, Congress is not bound by international law”), modified on other grounds, 728 F.2d 142 (2d Cir. 1984). “It has long been established that customary international law is part of the law of the United States to the limited extent that ‘where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.’” Yousef, 327 F.3d at 92 (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)). Thus, “[n]ever does customary international law prevail over a contrary federal statute.” TMR Energy Ltd. v. State Prop. Fund of Ukraine, 411 F.3d 296, 302 (D.C. Cir. 2005). See also Wang v. Ashcroft, 320 F.3d 130, 142 n.18 (2d Cir. 2003) (refusing to consider whether customary international law was violated because the issue was governed by legislative and regulatory enactments of the United States).

The district court decision in Sacks, No. 04-0108(JLR), Order at 7 (O’Toole Decl., Ex. A) is on point. There, in rejecting a challenge to the Iraqi Sanctions Regulations under customary international law, the court held that it “cannot overlook the executive and legislative acts that expressly address sanctions against Iraq. Customary international law is not binding where there is a controlling legislative or executive act addressing the same subject.” Likewise, in the present case, 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’s claim under customary international law must fail.

CONCLUSION

For the foregoing reasons, Defendants’ motion to dismiss, or, in the alternative, for summary judgment should be granted, and the Complaint in this action should be dismissed in its entirety.

Dated: August 25, 2005
New York, New York

Respectfully submitted,

DAVID N. KELLEY
United States Attorney

By: /s/ Andrew D. O’Toole
ANDREW D. O’TOOLE (AO-7714)
86 Chambers Street, 3rd Floor
New York, New York 10007