
**BLOCKING ACCESS TO ASSETS:
COMPROMISING CIVIL RIGHTS TO
PROTECT NATIONAL SECURITY OR
UNCONSTITUTIONAL INFRINGEMENT ON
DUE PROCESS AND THE RIGHT TO HIRE
AN ATTORNEY?**

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INTRODUCTION

No one has a constitutional right to fund terrorism,¹ but American courts have long recognized and protected the constitutional right to due process,² even in the face of accusations of dire wrongdoing.³ Since the terrorist attacks of September 11, 2001 ("9/11"), an

1. See *Holy Land Found. for Relief & Dev. v. Ashcroft (Holy Land II)*, 333 F.3d 156, 159, 165 (D.C. Cir. 2003) (reviewing First and Fifth Amendment challenges to organization's designation as "Specially Designated Global Terrorist" and blocking of assets).

2. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (describing due process as constraining governmental decisions that work deprivations of constitutionally-recognized liberty or property interests); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (establishing that due process requires opportunity to be heard in a meaningful time and a meaningful manner); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 167 (1951) (recognizing the right to be heard before suffering a loss as a "principle basic to our society"); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (asserting that the right to a hearing includes the right to the aid of counsel when requested).

3. See, e.g., *Powell*, 287 U.S. at 57 (charging defendants with rape); *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 195-96 (D.C. Cir. 2001) (designating organizations as foreign terrorists).

increasing number of domestically-operated charitable organizations⁴ have been accused of the grave offense of funding terrorism.⁵ Such an accusation carries serious consequences that correspond to the serious nature of the offense and can take effect as soon as the government begins investigating an organization.⁶ These investigations can result in swiftly imposed economic sanctions⁷ that freeze all of an organization's assets, usually without notice.⁸

Investigating and sanctioning organizations suspected of terrorism fundraising are tools in the post-9/11 "War on Terror"⁹ that are designed to identify and incapacitate any organization or individual who provides financial support to terrorists.¹⁰ President Bush spearheaded this effort on September 23, 2001, when he issued Executive Order 13,224,¹¹ which declared a national emergency. In response to this emergency, President Bush authorized the Secretary

4. See Montgomery E. Engel, Note, *Donating "Blood Money": Fundraising for International Terrorism by United States Charities and the Government's Effort to Constrict the Flow*, 12 CARDOZO J. INT'L & COMP. L. 251, 251-54 (2004) (introducing investigations of three Muslim charities); see also David Ashenfelter, *A Supporter or Scapegoat? A Detroit Faces Terrorism Trial*, DETROIT FREE PRESS, Apr. 13, 2007, at 1; Neil MacFarquhar, *Muslim Group Stirs Suspicion; CAIR Denies Critics' Claims It's a Front for Terror Organizations*, CHI. TRIB., Mar. 14, 2007, at 4; Farah Stockman, *Sri Lanka Official Accuses US Groups: Says Charities Provided Aid to Tamil Tigers*, BOSTON GLOBE, Mar. 17, 2007, at A3.

5. See Rudolph Lehrer, Comment, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333, 334 (2002) (listing six government raids related to investigations of terrorism financing); see also *supra* text accompanying note 4.

6. See Peter L. Fitzgerald, "If Property Rights Were Treated Like Human Rights, They Could Never Get Away With This:" *Blacklisting and Due Process in U.S. Economic Sanctions Programs*, 51 HASTINGS L.J. 73, 75-77 (1999) (quoting notice of OFAC designation and describing consequence as immediately putting organization out of business and prohibiting it from moving its property or accessing funds without OFAC permission); see also Pamela M. Keeney, Comment, *Frozen Assets of Terrorists and Terrorist Supporters: A Proposed Solution to the Creditor Collection Problem*, 21 EMORY BANKR. DEV. J. 301, 302 (2004) (noting that asset freezes leave organizations unable to pay their debts, such as rent or credit card companies).

7. See, e.g., Engel, *supra* note 4, at 253-55 (introducing use of economic sanctions as one method of working to eliminate domestic fundraising for terrorism but suggesting that criminal prosecution is "key to a prospective strategy for preventing domestic fundraising for international terrorism").

8. See, e.g., Fitzgerald, *supra* note 6, at 75 (quoting sanctions notice that demanded that the company close the premises and informed it that its assets were frozen, effective immediately).

9. See Lehrer, *supra* note 5, at 334-35 (describing Bush Administration as waging "economic war" on fundraisers for terrorist groups).

10. See Engel, *supra* note 4, at 256-58 (discussing Bush Administration efforts to implement policy that would allow the government to halt monetary transactions with suspected terrorists); Keeney, *supra* note 6, at 301 ("We will starve the terrorists of funding . . . and bring them to justice." (quoting President Bush, Remarks on United States Financial Sanctions Against Foreign Terrorists and Their Supporters and an Exchange with Reporters; Transcript, 37 WEEKLY COMP. PRES. DOC. 1364 (Oct. 1, 2001))).

11. 66 Fed. Reg. 49,079 (Sept. 23, 2001).

of State, in consultation with the Secretary of the Treasury and the Attorney General, to block the assets of any person listed in the Annex to Executive Order 13,224,¹² any person later determined to have committed or to pose a risk of committing terrorism,¹³ and any person acting to support terrorism.¹⁴ Persons later identified as subject to the sanctions imposed by the order are designated as “Specially Designated Global Terrorists” (“SDGTs”).¹⁵

Since 2001, the U.S. Treasury Department, mainly through the efforts of its Office of Foreign Assets Control (“OFAC”),¹⁶ has been responsible for substantially increasing the number of “persons” listed as SDGTs.¹⁷ As a result, scores of domestically-operated charitable organizations are unable to access their assets¹⁸ and conduct business transactions of any kind without special government-issued licenses.¹⁹ The Treasury may impose these

12. *Id.* § 1(a).

13. *Id.* § 1(b).

14. *Id.* § 1(d). Section 3(a) of the order defines “person” as “an individual or entity” and section 3(b) defines “entity” as a “partnership, association, corporation, or other organization, group or subgroup.” *Id.* § 3(a)–(b).

15. 31 C.F.R. § 594.310 (2005) (classifying “any foreign person or person listed in the Annex or designated pursuant to Executive Order 13224” as an SDGT); *see* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 § 1(b), (d)(i) (Sept. 23, 2001) (permitting, respectively, the designation of “foreign persons determined . . . to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy, of the United States,” and the designation of persons deemed “to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex . . . or determined to be subject to this order”).

16. The Office of Foreign Assets Control (“OFAC”) is a subdivision of the U.S. Treasury that is responsible for promulgating and enforcing economic sanctions stemming from foreign policy and national security interests. *See* U.S. Dep’t of the Treasury, Office of Foreign Assets Control, <http://www.treas.gov/offices/enforcement/ofac/mission.shtml> (last visited Nov. 10, 2007).

17. *See* Lehrer, *supra* note 5, at 335 (describing the list as tripling in length since President Bush issued the order).

18. *See* Eric Broxmeyer, Note and Comment, *The Problems of Security and Freedom: Procedural Due Process and The Designation of Foreign Terrorist Organizations Under the Anti-Terrorism and Effective Death Penalty Act*, 22 BERKELEY J. INT’L L. 439, 444 (2004) (explaining that OFAC can freeze any assets held in American financial institutions); Engel, *supra* note 4, at 251–54 (comparing government position that charitable organizations have supported terrorist activity with their funds with organizations’ position that they provide legitimate functions and are subject to sanctions based on questionable evidence); Fitzgerald, *supra* note 6, at 79–80 (asserting that OFAC’s power to block assets is the most significant of the sanctions it imposes).

19. Executive Order 13,224 prohibits, unless allowed by a license issued pursuant to the order:

[A]ny transaction or dealing by United States persons or within the United States in property or interests in property blocked . . . including but not limited to the making or receiving or any contribution of funds, goods, or services to or for the benefit of those person listed in the Annex . . . or determined to be subject to this order.

Exec. Order No. 13,224, 66 Fed. Reg. 49,079 § 2(a).

sanctions for an indefinite period of time²⁰ and may even block an organization's assets before its name has been officially added to the list.²¹ Although national security and combating terrorism are important government interests, the process of imposing these financial sanctions on such organizations raises serious civil rights issues. One important issue relates to a sanctioned organization's right to use frozen funds to pay an attorney to represent it when challenging OFAC sanctions. OFAC's current procedures permit an organization to apply for the release of funds to pay attorneys' fees,²² but they do not adequately protect the organization's interest in obtaining legal representation because they fail to provide a hearing for the organization immediately after the freeze takes effect.²³

This Comment considers the due process issues associated with the practice of freezing and regulating the release of the assets of domestic charitable organizations. Part I examines the relevant laws that focus on preventing terrorism fundraising, including the Treasury licensing process for the limited release of frozen funds. Such laws typically provide for broad exercise of executive power—justified by concerns about furthering foreign policy and national security goals.

Part II surveys constitutional due process jurisprudence to establish what due process classes guarantee and then examines cases related to the use of financial sanctions and criminal forfeiture proceedings to determine what due process courts have required in these analogous situations. Specifically, Part II focuses on what notice and hearing requirements due process imposes when individuals are subject to punitive financial actions that interfere with the right to obtain legal representation.

Part III analyzes the due process afforded to organizations subject to financial sanctions and the Treasury licensing process. The analysis compares the due process protections afforded to defendants in criminal forfeiture with those afforded to sanctioned organizations and determines that the government's interest in furthering foreign policy and national security goals justifies some of the distinction between the procedural protections afforded in criminal forfeiture

20. See Lehrer, *supra* note 5, at 335 (criticizing OFAC's ability to keep assets restrained for indefinite periods of time as an unproven deterrent against terrorist activity).

21. See, e.g., *Global Relief Found., Inc. v. O'Neill (Global Relief I)*, 207 F. Supp. 2d 779, 785 (N.D. Ill. 2002) (considering claims of organization where OFAC froze assets pending investigation), *aff'd*, 315 F.3d 748 (7th Cir. 2002).

22. 31 C.F.R. § 585.506 (2007).

23. See discussion *infra* Part III.B.

and those afforded to sanctioned organizations. However, the analysis also reveals the important common interests shared among individuals subject to criminal forfeiture proceedings, other acts of government deprivation, and economic sanctions. The comparison of these interests and the procedures in place to protect them suggest that the government has too severely limited the due process afforded to sanctioned organizations seeking the release of funds to pay attorneys' fees.

Part IV recommends that the Treasury provide organizations subject to financial sanctions with a timely adversarial hearing as a matter of course in order to ensure the proper release of any funds necessary to pay attorneys' fees, or alternatively, that OFAC automatically offer to release reasonable attorneys' fees contingent on the sanctioned organization providing specific information about the costs and type of legal services provided. Additionally, Part IV explores the possibility of imposing a higher standard of review for organizations that challenge an OFAC decision not to release attorneys' fees.

Part V argues that the current process of imposing financial sanctions on organizations, whether under investigation or already designated as terrorist organizations, impermissibly denies those organizations due process by depriving them of the assets necessary to hire an attorney without providing a meaningful hearing to justify preventing the use of assets to pay an attorney. Finally, Part V concludes that due process requires OFAC to either provide sanctioned organizations with a timely adversarial administrative hearing to consider the release of frozen funds to pay attorneys' fees or implement a process for automatically releasing funds for this same purpose.

I. STATUTORY AND ADMINISTRATIVE AUTHORITY FOR THE FREEZING AND LICENSING OF ASSETS

A. *The International Emergency Economic Powers Act*

For many years, the U.S. government has used economic sanctions to serve a number of foreign policy objectives.²⁴ In 1977, Congress enacted the International Emergency Economic Powers Act

24. See Fitzgerald, *supra* note 6, at 89 & nn. 63–71 (discussing use of sanctions to oppose communism, the drug trade, and terrorism and to promote democracy and human rights).

(“IEEPA”)²⁵ to amend the Trading with the Enemy Act (“TWEA”) that Congress enacted in 1917.²⁶ Both statutes give the President the authority to impose economic sanctions, but the IEEPA restricts the use of the TWEA to wartime only and provides a separate authority for the presidential use of economic sanctions during peacetime.²⁷

To invoke the authority granted under the IEEPA, the President must declare a national emergency,²⁸ which requires a showing that an “unusual and extraordinary” threat to national security, foreign policy, or the U.S. economy exists wholly or substantially outside the United States.²⁹ After satisfying these criteria, the President, or a designated agency, has the power to sanction foreign nations, organizations, or persons that are identified as contributing to the threat.³⁰ The President may even impose sanctions on entities that are under investigation but have yet to be identified as threats.³¹ The

25. Pub. L. No. 95-m223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701–1717 (2000)).

26. Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1–44 (2000)); see Stanley J. Marcuss, *Grist for the Litigation Mill in U.S. Economic Sanctions Programs*, 30 LAW & POL’Y INT’L BUS. 501, 501–02 (1999) (explaining that, before the IEEPA, the TWEA authorized the President to regulate economic transactions involving property in which a foreign country or national had an interest during war and peacetime).

27. See Michael P. Malloy, *Economic Sanctions and Retention of Counsel*, 9 ADMIN. L.J. AM. U. 515, 532 (1995) (“[I]n less than twenty years, IEEPA has been invoked more often than TWEA has been in the almost eighty years since its enactment.”); see also Marcuss, *supra* note 26, at 502–03 (noting that after declaring a national emergency, the President can rely on the IEEPA to impose economic sanctions to address threats related to the emergency).

28. 50 U.S.C. § 1701(a) (2000); see JOHN ROTH ET AL., STAFF REPORT TO THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 76 (2004), available at http://www.911commission.gov/staff_statements/911_TerrFin_Monograph.pdf (identifying the President’s declaration of a national emergency as the source of OFAC’s authority to impose sanctions).

29. 50 U.S.C. § 1701(a).

30. See generally Lehrer, *supra* note 5, at 336–40 (outlining process by which the President identifies entities with which financial transactions should be proscribed based on foreign policy and national security goals, and describing how OFAC imposes the sanctions).

31. See Engel, *supra* note 4, at 255 (referring to the government’s ability to block assets “pending investigation” as a new post-9/11 tactic). The sanctions essentially give the President the power to control any property in which any sanctioned foreign entity has an interest. Specifically, The IEEPA grants the President the power to:

investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property

50 U.S.C. § 1702(a)(1)(B) (Supp. IV 2000). This power extends to property within the United States and includes the ability to regulate the provision of legal services to an organization and an organization’s ability to pay for legal services. See *Holy Land Found. for Relief & Dev. v. Ashcroft (Holy Land II)*, 333 F.3d 159, 160–61 (D.C. Cir. 2003) (rejecting interpretation of IEEPA as only contemplating the imposition of economic sanctions on legally enforceable interests in property and interpreting the

IEEPA provides the foundation for the designation and sanctioning of organizations, but Executive Order 13,224³² explicitly provides for the designation of SDGTs.

B. The Administrative Authority for the Designation of Specially Designated Global Terrorists—Executive Order 13,224

1. Designating specially designated global terrorists

As discussed above, Executive Order 13,224 issued a list of SDGTs and provided for the future designation of additional SDGTs by authorizing the Secretary of Treasury, in consultation with the Secretary of State and the Attorney General, to designate as an SDGT any individual or entity suspected of committing or supporting terrorist acts.³³ The provision of Executive Order 13,224 that most often results in the designation of domestic charities is section 1(d)(i), which authorizes the designation of any individual or entity determined to assist, sponsor, or provide financial, material, or technological support for terrorist acts or to any other SDGT.³⁴ When adjudicating due process challenges to the designation process, courts have determined that OFAC may postpone notice and hearing until after the designation is issued and economic sanctions are in place because an important government interest—national security—is at stake.³⁵

phrase “any interest” to include direct and indirect interests); *see also* Engel, *supra* note 4, at 251–52 (detailing raids and asset freezes of three charitable organizations in the United States); Malloy, *supra* note 27, at 538–40 (introducing two economic sanctions programs that regulated the provision of legal services to entities subject to sanctions issued under the IEEPA).

32. 66 Fed. Reg. 49,080 § 1(d) (Sept. 23, 2001).

33. *Id.*

34. *See id.* The level of evidence supporting SDGT designations may vary, and the exact criteria that the executive requires before issuing a designation or imposing sanctions during an investigation pending designation is uncertain because the executive has not issued detailed evidentiary requirements. *See* Roth et al., *supra* note 28, at 82–84 (noting that Treasury officials have admitted that immediately after 9/11 the demand for numerous designations resulted in some designations with weak evidentiary bases). This is unlike the practice in other countries where designations are considered judicial or quasi-judicial acts and where the accused organization would be permitted to confront the evidence against it and the evidentiary standard is at least that required for U.S. civil trials. *See id.* at 84.

35. *See Holy Land II*, 219 F. Supp. 2d at 76–77 (recognizing combating terrorism by cutting off its funding as an important government interest), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003); *see also* Global Relief Found., Inc. v. O’Neill (*Global Relief II*), 315 F.3d 748, 754 (7th Cir. 2002) (claiming that prior notice and a hearing would allow an organization to “spirit [its] assets out of the United States”).

2. *Imposing economic sanctions*

Once the government has issued its designation or has decided to investigate an organization as a potential SDGT, the Treasury has the power to freeze that organization's assets and prohibit it from engaging in any transactions.³⁶ The majority of responsibility for implementing these sanctions is delegated to OFAC,³⁷ which manages the prohibition of transactions with SDGTs and the freezing, or blocking, of assets.³⁸ OFAC controls these organizations' assets by collaborating with financial institutions.³⁹ After OFAC determines that an organization will be subject to sanctions, it issues a notice to financial institutions of the designation or pending investigation that initiates the freezing of the organization's assets.⁴⁰

Although delaying notification of an SDGT's designation and asset freeze prevents such organizations from transferring assets prior to a freeze,⁴¹ it also takes organizations by surprise and leaves them unable to pay any outstanding debts, employee salaries, rent, or other necessities without obtaining prior OFAC authorization.⁴² The

36. See Engel, *supra* note 4, at 256–58 (comparing Executive Order 13,224 to Executive Order 12,947 and noting that both orders authorize the blocking of funds and the regulation of contribution of funds, goods, or services to persons subject to the order).

37. See *Holy Land II*, 333 F.3d at 159 (“In December 2001, OFAC . . . designated HLF as . . . an SDGT and blocked all of its assets.”); see also *Havana Club Holding, S.A. v. Galleon, S.A.*, 961 F. Supp. 498, 500 (S.D.N.Y. 1997) (indicating that OFAC has considerable authority to regulate the transactions of sanctioned organizations and to authorize otherwise prohibited transactions); Lehrer, *supra* note 5, at 336 (characterizing OFAC as responsible for carrying out the majority of the administrative work related to carrying out the Executive Order).

38. See Lehrer, *supra* note 5, at 337 (“[F]reezing occur[s] after OFAC has determined that: (1) targeted nations and/or individuals have an interest in these assets, and (2) these assets are subject to U.S. jurisdiction, or are in the possession or control of U.S. persons.”); see also Fitzgerald, *supra* note 6, at 79–80 n.26 (observing that OFAC uses the terms freezing and blocking interchangeably but does not clearly define either term).

39. See 31 C.F.R. § 597.201(a), (b) (2007) (explaining that once an organization is listed as a foreign terrorist organization in the Federal Registrar, any financial institution possessing or controlling the organization's funds must “block all financial transactions” involving those assets, unless otherwise notified by the Secretary of the Treasury).

40. See *id.*; see also Fitzgerald, *supra* note 6, at 115 (describing uncertainty created by OFAC's slow implementation of new rules and regulations and OFAC's exemption from the prior notice and comment requirements of the Administrative Procedure Act).

41. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (denying prior notice of designation and of freezing of assets to protect effectiveness of the order); *Global Relief I*, 207 F. Supp. 2d 779, 786 (N.D. Ill. 2002) (describing notification of designation and restraint of assets as simultaneous), *aff'd*, 315 F.3d 748 (7th Cir. 2002).

42. See Fitzgerald, *supra* note 6, at 75–77 (quoting notice to designated organization that immediately seized all of the organization's property and froze all of its assets, essentially putting it out of business); Keeney, *supra* note 6, at 302–03

sanctions also regulate non-monetary transactions, such as consulting an attorney, by prohibiting payment to attorneys without first obtaining a license to do so.⁴³

To obtain permission to access frozen funds or to pay for the services of an attorney, a sanctioned organization may apply to OFAC for licenses.⁴⁴ If OFAC denies an organization's license application, the organization may request an explanation in writing or in person, but OFAC does not automatically provide one.⁴⁵ The organization may then challenge the denial in court, but the chances of success are slim because a court may refuse to review the decision or,⁴⁶ if a court reviews the decision, it will grant substantial deference to OFAC's authority.⁴⁷ Courts defer to SDGT designations as administrative decisions governed by the judicial review provisions of the Administrative Procedure Act ("APA"),⁴⁸ which establish that OFAC's actions may only be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the]

(arguing that sanctions prevent creditors from collecting debts); Lehrer, *supra* note 5, at 347 (describing seizure of assets as sudden and potentially unconstitutional).

43. See 31 C.F.R. § 585.506 (2007) (authorizing provision of legal services to a SDGT as long as all payments to attorneys are licensed, and restricting payment to legal services provided by U.S. persons related to U.S. legal issues); see also Fitzgerald, *supra* note 6, at 111-16 (criticizing delay in OFAC's publication of new rules and regulations, and noting that OFAC has no time limits on how long it may take to respond to a request for a license).

44. See 31 C.F.R. § 501.801 (2007) (authorizing applications for general or specific licenses); 31 C.F.R. § 585.506 (requiring license approval before a SDGT may pay attorneys' fees even out of unblocked assets). The *Code of Federal Regulations* ("CFR") lists the types of licenses that an organization may apply for and briefly explains the application procedures, but OFAC provides little meaningful information about what criteria must be met in order to receive a license. See 31 C.F.R. § 501.802 (2007) (stating that OFAC will inform applicants of its decision, which constitutes final agency action, but failing to include information as to how OFAC arrives at its decision); see also Fitzgerald, *supra* note 6, at 136 (criticizing OFAC's failure to provide detailed information about how to challenge its actions and describing OFAC's administrative practices as lackadaisical). Essentially, to apply for a license to transfer funds for any reason, OFAC requires a SDGT to submit an application that includes detailed financial information and states the amount and the beneficiary of the transfer. See 31 C.F.R. § 501.801(b)(2)–(3) (adding that OFAC may require applicants to supply additional information as necessary).

45. See 31 C.F.R. § 501.801(b)(4) (permitting additional license applications if OFAC denies an organization's application and its requests for OFAC's explanation of denial).

46. See, e.g., *Havana Club Holding, S.A. v. Galleon, S.A.*, 961 F. Supp. 498, 503 (S.D.N.Y. 1997) (designating the OFAC licensing process as resting upon foreign policy considerations and judgments of the Executive Branch that the judiciary should not disturb), *aff'd*, 203 F.3d 116 (2d Cir. 2000).

47. See, e.g., *Milena Ship Mgmt. Co. v. Newcomb*, 995 F.2d 620, 623–25 (5th Cir. 1993) (deferring to OFAC judgment in determining that OFAC reasonably refused to lift a block on vessels seized pursuant to an executive order).

48. 5 U.S.C. § 706 (2000).

law.”⁴⁹ This standard presents a substantial obstacle for organizations challenging the adequacy of the procedural safeguards afforded by the sanctioning process.

II. DUE PROCESS JURISPRUDENCE

Although the designation and economic sanctioning process that OFAC applies to SDGTs raises multiple constitutional concerns,⁵⁰ this Comment focuses specifically on the due process issues associated with a sanctioned organization’s right to hire an attorney and examines whether the procedures in place adequately protect this right.⁵¹ Before determining what process is due to organizations subject to OFAC sanctions, a review of relevant due process jurisprudence related to the freezing of assets is necessary. Because few cases address OFAC freezes under Executive Order 13,224, an examination of civil and criminal cases involving the freezing and forfeiture of assets under other laws provides a useful framework for comparison.

A. *Due Process: Who, When, What, and How*

The Fifth Amendment provides that no person shall be “deprived of life, liberty, or property, without due process of law.”⁵² However, in truth, the Fifth Amendment does not protect everyone who suffers an injury due to U.S. government action.

1. *Who can seek protection under the Due Process Clause*

The Fifth Amendment guarantees due process to every U.S. citizen and to foreign nationals who have significant ties to the United

49. *Id.* § 706(2)(A); see *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 731 (D.C. Cir. 2007) (declining to “substitute [its] judgment for OFAC’s” and requiring only a rational connection between the facts OFAC presents and its decision), *cert. denied*, 128 S. Ct. 92 (2007); *Holy Land II*, 333 F.3d 156, 162 (D.C. Cir. 2003) (acknowledging that actions related to the designation of terrorist organizations are subject to the “arbitrary and capricious” standard of review (quoting 5 U.S.C. § 706(2)(A) (2000)) (internal quotations omitted).

50. See Eric J. Gouvin, *Bringing Out the Big Guns: The USA PATRIOT Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955, 959 (2003) (characterizing the power of Executive Order 13,224 as unconventional because its authority is based, in part, on the idea of guilt by association); Roth et al., *supra* note 28, at 87–88 (questioning aggressive use of IEEPA to prosecute potential terrorism fundraisers because of civil liberties concerns).

51. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1006–07 (Aspen Publishers 2002) (describing the difference between procedural and substantive due process by explaining that procedural due process requires certain safeguards to protect a specific right and that substantive due process demands sufficient justification for government deprivation).

52. U.S. CONST. amend. V.

States.⁵³ In *People's Mojahedin Organization of Iran v. United States Department of State*,⁵⁴ the court quickly dismissed the plaintiffs' procedural due process challenges to their designations as foreign terrorist organizations under the Antiterrorism and Effective Death Penalty Act⁵⁵ because the plaintiffs did not have sufficient property or presence in the United States to establish significant ties to the United States.⁵⁶ Therefore, the plaintiffs had no constitutional right to due process to protect them against government deprivation.⁵⁷ The first hurdle that an organization has to overcome when making a due process challenge is proving that it is subject to constitutional protection. The next step is determining whether the government has done something to trigger due process protection and determining what protections due process provides.

2. *When due process applies and what due process guarantees*

Procedural due process imposes constraints on government actions that deprive individuals and organizations of liberty or property interests.⁵⁸ Even a temporary deprivation of access to assets is subject to the constraints imposed by due process,⁵⁹ and this temporary deprivation can result in a permanent deprivation of the right to a fair hearing if it impedes the ability to obtain legal representation.⁶⁰

53. See *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 201-03 (D.C. Cir. 2001) (recognizing that the National Council of Resistance of Iran had a presence and property within the United States, which brought it under the protection of the Fifth Amendment); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.")

54. 182 F.3d 17 (D.C. Cir. 1999).

55. 8 U.S.C. § 1189 (2000) (authorizing designations similar to those authorized under Executive Order 13,224).

56. *People's Mojahedin*, 182 F.3d at 22.

57. *Id.*; see *Nat'l Council of Resistance*, 251 F.3d at 201-03 (rejecting the government's argument that an interest in a small bank account and an overt presence in the National Press Building in Washington, D.C., did not constitute substantial connections); see also *People's Mojahedin*, 182 F.3d at 22 ("No one would suppose that a foreign nation had a due process right to notice and a hearing before the Executive imposed an embargo on it for the purpose of coercing a change in policy.")

58. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (acknowledging that continued receipt of Social Security benefits is a property interest protected by the Due Process clause).

59. See *United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991) (recognizing that restraining a defendant's assets pending conviction is a deprivation subject to due process even though the nature of such restriction is "temporary and nonfinal" (citing *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 84-86 (1972))).

60. See *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (emphasizing that when the government takes action that results in injury to an individual, the right to be heard implies the right to be heard by counsel), *superseded by statute*, 42 U.S.C. § 601

Due process traditionally requires the government to provide an organization with notice and a hearing before the government deprives the organization of a property interest.⁶¹ The notice component of due process requires that injured parties have adequate information to understand and to defend against the charges they face.⁶² The hearing component of due process ensures fairness and protects against error by providing a forum for consideration of both parties' evidence and arguments.⁶³ Due process also requires that the government provide the hearing in a meaningful time and manner.⁶⁴ Whether a defendant has received adequate notice and a meaningful opportunity for a hearing ultimately depends on the circumstances of the case.⁶⁵

3. *How to determine what procedures the Constitution requires*

When evaluating a case to determine whether due process requires notice and a hearing prior to government deprivation, courts apply a

(1996); *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 945 (5th Cir. Unit A Jan. 1981) (recognizing that representation by counsel in civil or administrative matters is essential to due process and inherent in an adversarial system of justice).

61. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993) (explaining that precedent has established a general rule that individuals must have notice and hearing before the government deprives them of property); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (insisting that due process requires notice and an opportunity for a hearing prior to government deprivation of property).

62. See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985) (characterizing due process as necessary to ensure fairness and to guard against erroneous deprivation); *James Daniel Good Real Prop.*, 510 U.S. at 52 (citing *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972)) (recognizing that prior notice and a hearing are essential to ensure fair play and to prevent arbitrary or mistaken deprivations of property); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.").

63. See *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 171-72 (Frankfurter, J., concurring) (asserting that a one-sided determination of facts is unlikely to be fair); *Morgan v. United States*, 304 U.S. 1, 18-19 (1938) ("Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals . . .").

64. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *United States v. Moya-Gomez*, 860 F.2d 706, 727 (7th Cir. 1988); see *Armstrong v. Manzo*, 380 U.S. 545, 551-52 (1965) (concluding that a subsequent hearing was not meaningful where the defendant had to overcome a prior adverse ruling made while he was absent because he had not received timely notice).

65. See *Walters*, 473 U.S. at 320 (stating that the requirements of due process will vary based on the importance of the interest and the circumstances under which deprivation occurs); *James Daniel Good Real Prop.*, 510 U.S. at 53 (weighing competing interests of the individual and the government to determine whether proceedings provide adequate due process); see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (conceding that seizure of a property interest without prior notice or hearing is constitutionally permissible under limited circumstances).

three-part balancing test established in *Mathews v. Eldridge*.⁶⁶ The test weighs: (1) the private interest at stake, (2) the risk of an erroneous deprivation through the procedures used and the likely value of additional procedural safeguards, and (3) the government's interest, which includes the function involved and any fiscal and administrative burdens that additional procedural safeguards would impose.⁶⁷ The test has not led to the creation of bright-line rules for due process protections because it balances the competing interests involved and thus, requires case-by-case analysis of the facts. Therefore, conclusions about what due process a petitioner deserves depend on a comparison of multiple applications of the test.

B. Survey of Due Process Prior Notice and Hearing Case Law

Few cases challenging the procedures involved in foreign terrorist designations reach the issue of due process as related to access to attorneys' fees.⁶⁸ However, courts have considered such due process challenges in criminal cases involving the forfeiture and freezing of assets⁶⁹ and in civil cases involving other forms of government-wrought deprivation of private interests.⁷⁰ These cases provide valuable guidance in a constitutional analysis of OFAC procedures because they consider private interests analogous to those of sanctioned organizations and discuss the procedures necessary to protect those interests.

66. 424 U.S. 319, 335 (1976); accord *James Daniel Good Real Prop.*, 510 U.S. at 53-62 (applying *Mathews* test to determine that seizure of real property requires prior notice and a hearing where the private interest at risk is important, and there is no countervailing government interest); *United States v. Monsanto*, 924 F.2d 1186, 1193-1203 (2d Cir. 1991) (considering whether due process requires a pre-trial hearing after the government restrains assets based on the *Mathews* factors).

67. *Mathews*, 424 U.S. at 335.

68. See, e.g., *United States v. Afshari*, 426 F.3d 1150, 1162 (9th Cir. 2005) (concluding that the analysis required to determine whether an organization is a terrorist threat to the United States is especially within the expertise of the Executive Branch); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) ("[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch.").

69. See, e.g., *Monsanto*, 924 F.2d at 1189-90 (reviewing the due process claims of appellant charged with RICO, narcotics, continuing criminal enterprise, and firearms violations); *Moya-Gomez*, 860 F.2d at 715 (considering the due process claims of defendants charged with conspiracy to distribute cocaine).

70. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (holding that due process requires an evidentiary hearing and opportunity to confront witnesses before termination of welfare benefits and citing representation by counsel as the best way to safeguard the interests of the welfare recipient at such a hearing), *superseded by statute*, 42 U.S.C. § 601 (1996); *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 866-67 (D.C. Cir. 1984) (holding that OFAC lacked the authority to interfere with the formation of the attorney-client relationship with a sanctioned organization in a civil matter by requiring advance government approval).

In cases in which challenges to the designation process have been specifically reviewed, courts have held that due process does not require that SDGTs designated under Executive Order 13,224 receive pre-designation notice and a hearing because before issuing the order, the President declared a national emergency that justified post-designation notice.⁷¹ Under these decisions, the courts have also held that due process does not require a post-designation adversarial hearing to consider the validity of the SDGT designation.⁷² Instead, the courts have concluded that as long as sanctioned organizations are permitted to submit written responses after receiving notice of their designations, due process is satisfied.⁷³ However, due process challenges to the seizure of assets in criminal cases have emphasized the importance of an adversarial hearing.

In criminal cases considering the forfeiture of assets or property, courts have based decisions about the timing of notice and a hearing on two main factors: (1) the importance of the private interest at stake⁷⁴ and (2) the risk that the property owner could prevent the government from seizing the property if the property owner had prior notice.⁷⁵ The importance of the interest at stake depends on the historical importance of the property at issue⁷⁶ as well as the likely

71. *Holy Land II*, 333 F.3d 156, 163–64 (D.C. Cir. 2003); see *Global Relief II*, 315 F.3d 748, 754 (7th Cir. 2002) (rejecting charitable corporation’s claim that due process required pre-seizure notice and a hearing because the interest in preventing the use of assets from financing violent acts outweighed the risk of erroneous deprivation). *But see* Nat’l Resistance Council of Iran v. U.S. Dep’t of State, 251 F.3d 192, 209 (D.C. Cir. 2001) (holding that due process requires prior notice and a hearing before OFAC can impose sanctions on an organization pursuant to the Antiterrorism and Effective Death Penalty Act).

72. See, e.g., *Holy Land II*, 333 F.3d at 163–64 (determining that the Treasury satisfied due process by providing the Holy Land Foundation with notice of pending re-designation as a SDGT, thirty-one days to respond, and by considering the Foundation’s response before re-designation).

73. See *id.* at 164 (stating that the Holy Land Foundation “ha[d] no right” to procedures approximating a judicial trial or to review classified information that OFAC had presented for *in camera* and *ex parte* review).

74. See, e.g., *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54 (1993) (requiring pre-deprivation hearing where defendant’s home was the subject of forfeiture proceedings because deprivation of one’s home “gives the Government not only the right to prohibit sale, but also the right to evict occupants, to modify the property, to condition occupancy, to receive rents, and to supersede the owner in all rights pertaining to the use, possession, and enjoyment of the property”).

75. Compare *id.* at 62 (noting the low level of risk involved, where the property at issue was defendant’s home, because of the absence of any exigent circumstances—such as the potential sale, destruction, or further use in illegal activities—that might justify postponing a hearing until after the deprivation), with *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678–79 (1974) (permitting post-seizure notice and hearing where the property at issue was a yacht that could be easily transported or destroyed to avoid government seizure).

76. See *James Daniel Good*, 510 U.S. at 53–54 (noting that one’s right to maintain control over his home is a private interest “of historic and continuing importance”).

consequences of deprivation of such an interest.⁷⁷ The level of risk that a property owner would be able to prevent the government from seizing the property primarily depends on the nature of the property.⁷⁸

In cases where the property could easily be placed outside the government's reach, postponing notice and a hearing is constitutionally permissible if: (1) it is necessary to secure an important governmental or public interest, (2) prompt action is necessary, and (3) a narrowly-drawn statute closely controls the government's discretion in exercising its seizure power.⁷⁹ Although the timing of notice and a hearing are important elements of due process protection, courts are clearly flexible when it comes to demanding that the government provide pre-deprivation notice and a hearing.⁸⁰ However, courts that allow post-deprivation notice and a hearing are likely to take this into consideration and impose additional procedural safeguards when determining what kind of hearing due process requires once the deprived individual receives notice.⁸¹

77. See *id.* at 54 (considering the deprivation of the use and benefit of the value of one's home to be a far greater deprivation than the loss of kitchen appliances and furniture, which was sufficient to warrant a pre-deprivation hearing in *Fuentes v. Shevin*, 407 U.S. 67, 70-71 (1972)).

78. Compare *id.* (evaluating the government's seizure of an immobile home), with *Calero-Toledo*, 416 U.S. at 678-79 (reviewing the government's seizure of a vessel capable of mobility and allegedly used to transport controlled substances).

79. *Calero-Toledo*, 416 U.S. at 678 (citing *Fuentes*, 407 U.S. at 91). Here, the government had important interests in preventing the continued use of the property for illicit activity, and in enforcing the criminal sanctions. Prior notice could have subverted these interests by providing time for the claimants to relocate, destroy, or hide the yacht. *Id.* at 679. It is important to note that the statute in this case provided an immediate post-seizure hearing that allowed the property owners to challenge the seizure. *Id.* at 665-68.

80. See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985) (pointing out that due process is a "flexible concept" and that "the processes required by the [Due Process] Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur").

81. See *Calero-Toledo*, 416 U.S. at 679-80 (suggesting that postponement of notice and a hearing until after individuals have been deprived of their property is only constitutionally permissible in extraordinary circumstances). But see *Fuentes*, 407 U.S. at 83-84 ("While the existence of . . . other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.").

C. *The Right to a Meaningful Hearing*

1. *A meaningful hearing includes the right to hire an attorney*

Although the timing and form of a hearing may vary depending on the circumstances of the case,⁸² the hearing component of due process is always aimed at providing the injured party with an adequate opportunity to defend its rights.⁸³ To this end, the courts have determined that due process guarantees the injured party's right to hire an attorney to represent its interests at the hearing.⁸⁴ However, unlike a criminal defendant whose assets are frozen and who has a right to appointed counsel,⁸⁵ an organization subject to OFAC sanctions has no right to appointed counsel because OFAC sanctions do not constitute criminal prosecution.⁸⁶

Without the right to appointed counsel, an organization subject to OFAC sanctions must rely on due process to guarantee its access to counsel as part of its right to a meaningful hearing.⁸⁷ Few cases directly address access to counsel in administrative hearings, but many cases address the issue in criminal proceedings. Although the two settings differ, representation by counsel serves similar interests in both, and examining both types of cases establishes how courts value these interests.

82. See *Goldberg v. Kelly*, 397 U.S. 254, 266–67 (1970) (determining that a pre-termination hearing of welfare benefits need not be judicial or quasi-judicial in form), *superseded by statute*, 42 U.S.C. § 601 (1996); see also *Greene v. McElroy*, 360 U.S. 474, 497–98 (1959) (reasoning that an adversarial administrative hearing with the opportunity for cross-examination was the best way to protect the employee's interests when the government decided to revoke a private employee's security clearance based solely on factual determinations by an administrative agency).

83. See *Goldberg*, 397 U.S. at 268–69 (stating that a written submission to a decision maker arguing against termination of welfare benefits did not adequately protect the recipient's rights, and that the recipient should have been entitled to orally present his case).

84. See *id.* at 270 (asserting that the right to be heard in cases where the reasonableness of government action depends on findings of fact is meaningless without guaranteeing the deprived party the right to hire an attorney); see also *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 946 (5th Cir. Unit A Jan. 1981) (finding that the presence of an Equal Employment Opportunity Commission Specialist during an administrative settlement proceeding did not eliminate the claimant's need for access to retained counsel in an employment discrimination case).

85. See *United States v. Moya-Gomez*, 860 F.2d 706, 725 (7th Cir. 1988) (citing *United States v. Ray*, 731 F.2d 1361, 1366 (9th Cir. 1984)) (acknowledging that the government must appoint counsel for a criminal defendant who is indigent as a result of a government restraint on his assets).

86. See *Engel*, *supra* note 4, at 254 (observing that OFAC sanctions are not criminal in nature, but some sanctions have preceded related criminal charges).

87. See *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”); *Moya-Gomez*, 860 F.2d at 728–29 (noting that a meaningful opportunity to challenge complex criminal charges requires immediate assistance from counsel in order for legal counsel to benefit the defendant).

2. *Access to counsel in administrative and criminal proceedings*

Even in administrative proceedings, courts have recognized the importance of legal representation as part of a meaningful hearing. For example, when OFAC tried to directly control a sanctioned organization's access to counsel by requiring the organization apply for and receive approval for a license for legal representation, the D.C. Circuit Court of Appeals determined that OFAC had exceeded its authority.⁸⁸ The court emphasized that attempts to deny a corporation access to counsel, even in civil matters, raised due process concerns.⁸⁹

Although the interests at stake in criminal proceedings differ from those at risk in a civil or administrative proceeding,⁹⁰ discussions of access to counsel and its importance to due process can serve as guideposts for assessing the value of legal representation in other circumstances.⁹¹ For example, in criminal cases where defendants challenged *ex parte* proceedings that authorized the forfeiture of any funds allegedly obtained through criminal activities, courts have held that pre-trial, post-indictment restraint of a defendant's assets without an immediate post-restraint hearing violated due process because it deprived a defendant of his right to counsel of choice as long as the defendant had no other assets with which he could hire an attorney.⁹²

Even though extraordinary circumstances justified the absence of pre-restraint hearings in these cases,⁹³ the courts determined that a

88. See *Am. Airways Charters v. Regan*, 746 F.2d 865, 866–67 (D.C. Cir. 1984) (questioning whether OFAC's authority under TWEA included the power to regulate the "bare formation of an attorney-client relationship").

89. *Accord Mosley*, 634 F.2d at 945 (describing access to and representation by counsel as essential to effective protection of individual rights); see *Am. Airways Charters*, 746 F.2d at 872–73 ("[I]n our complex, highly adversarial legal system, an individual or entity may in fact be denied the most fundamental elements of justice without prompt access to counsel.").

90. See *Powell*, 287 U.S. at 72 (reasoning that failure to appoint counsel for an indigent criminal defendant and convicting and sentencing the defendant to death would be the equivalent of judicial murder and in violation of due process).

91. Even though a criminal defendant has the right to appointed counsel when he cannot afford private counsel, the Seventh Circuit has noted that deprivation of a defendant's assets that would otherwise be accessible to him can result in an artificial deprivation of his right to "join issue with the government as he chooses." *Moya-Gomez*, 860 F.2d at 729.

92. See, e.g., *United States v. Monsanto*, 924 F.2d 1186, 1191 (2d Cir. 1991) (reviewing the issue after the Supreme Court held in *United States v. Monsanto*, 491 U.S. 600, 616 (1989), that the government may restrain a defendant's property after the government, in a hearing, established that it had probable cause to believe the assets were subject to forfeiture); *Moya-Gomez*, 860 F.2d at 715–16, 731 (considering a challenge to the Comprehensive Abuse Prevention and Control Act of 1970 that allowed *ex parte* proceeding authorizing forfeiture of funds purportedly obtained through trafficking controlled substances).

93. See *Monsanto*, 924 F.2d at 1192 (recognizing the important governmental interests in separating a criminal from "ill-gotten" gains, obtaining funds for

pretrial adversarial hearing was necessary to establish that the government had probable cause to believe that the defendant's property was forfeitable.⁹⁴ This conclusion was based on: (1) a defendant's significant liberty interest in using the restrained assets to obtain counsel of choice,⁹⁵ (2) the inherent risk of erroneous deprivation when an *ex parte* proceeding restrains a defendant's assets and the irreparable harm that results from depriving the defendant of assets needed to retain counsel,⁹⁶ and (3) the negligible impact that a pretrial probable cause hearing would have on the government's interest.⁹⁷ The significance of the defendant's interest in obtaining counsel is such that one court has held that if the government is unwilling to provide the necessary hearing, then the government must exempt reasonable attorneys' fees from the frozen assets.⁹⁸

Based on the courts' recognition of the importance of an individual's private interest in hiring an attorney in the civil and criminal settings, the interest will carry significant weight when analyzing what due process should be provided to protect it. However, conclusions about the adequacy of the due process afforded to sanctioned organizations that seek to hire attorneys cannot be drawn without a further and more detailed discussion of these decisions.

furtherance of law enforcement, permitting recovery of assets by rightful owners, and decreasing the economic power of organized crime and drug enterprises); *Moya-Gomez*, 860 F.2d at 721–22 (admitting that failure of forfeiture statutes to prevent removal, transfer, or concealment of assets prior to government seizure is a serious problem).

94. *Monsanto*, 924 F.2d at 1197; accord *United States v. Farmer*, 274 F.3d 800, 805 (4th Cir. 2001) (holding that due process required a pre-trial adversarial hearing establishing probable cause as to the forfeitability of the defendant's assets where the government restrained the assets two years before issuing an indictment for violations of illegal counterfeiting and trademark violations). *But see* *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–33 (1989) (determining that the Sixth Amendment right to counsel does not extend beyond the individual's right to spend his own legitimate assets and does not guarantee a defendant the right to use proceeds from a crime to finance his defense).

95. *See Monsanto*, 924 F.2d at 1197 (identifying a defendant's "strong and legitimate" interest in a pre-trial hearing establishing probable cause before being deprived of counsel of choice due to pre-trial restraint of assets).

96. *See id.* at 1195–96 (emphasizing the value of the additional procedural safeguards that a pre-trial hearing would provide).

97. *See id.* at 1197–98 (allowing the government to conduct the pre-trial probable cause hearing without conforming to the Federal Rules of Evidence in order to prevent premature disclosure of its case).

98. *Moya-Gomez*, 860 F.2d at 731.

III. ANALYSIS OF THE CONSTITUTIONALITY OF TREASURY ASSET
BLOCKING AND LICENSING PROCEDURES BASED ON THE PROCEDURES'
EFFECT ON A SANCTIONED ORGANIZATION'S RIGHT TO HIRE AN
ATTORNEY

Sanctioned organizations are subject to government action at multiple stages of the designation process. First, the government freezes an organization's assets. If an organization had notice of a pending freeze, it would be able to hire an attorney prior to the freeze without interference. However, the analysis in Part A of this section demonstrates that other overriding interests justify postponing notice until after the freeze is in place.

Second, after the government freezes an organization's funds, it regulates the organization's ability to hire an attorney by requiring it to apply for and receive approval for a specific license to pay attorneys' fees from the frozen funds. However, after sanctions are in place, the considerations that justified postponing notice and a hearing are insufficient to justify preventing an organization from obtaining a meaningful hearing on the issue of attorneys' fees. Part B of this section weighs these interests to show that the current process inadequately protects the organization's interest in hiring an attorney and determines that due process requires a more meaningful hearing once an organization's assets are frozen and are no longer available to be used for illegitimate purposes.

A. *Due Process Does Not Require Prior Notice or Hearing Before Freezing an Organization's Assets*

Although the constitutional norm is to provide prior notice and a hearing before seizing private assets,⁹⁹ an application of the *Mathews* test to the OFAC sanctioning process shows that the extraordinary circumstances present in cases involving the designation and investigation of SDGTs warrant postponement of notice and a hearing.¹⁰⁰

First, the test considers the private interest at stake.¹⁰¹ Here, a sanctioned organization has a private property interest in accessing its assets similar to that of the property owner in *United States v. James*

99. *Global Relief II*, 315 F.3d 748, 754 (7th Cir. 2002); *see also* *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) ("We tolerate some exceptions to the general rule requiring pre-deprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake . . .").

100. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (allowing postponement of notice and hearing under extraordinary circumstances).

101. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

Daniel Good Real Property,¹⁰² who had an interest in accessing and exerting control over his home,¹⁰³ or the yacht owner in *Calero-Toledo v. Pearson Yacht Leasing Co.*,¹⁰⁴ who had an interest in retaining his yacht.¹⁰⁵ Although the organization's assets are arguably temporarily restrained, the private interest in accessing such assets is enough to require due process protection,¹⁰⁶ and even a temporary deprivation of access may result in a permanent deprivation of an organization's right to timely access to counsel, which is essential to due process.¹⁰⁷ Yet, the interest in accessing property, and even the important interest in hiring legal representation, are easily distinguished from the more significant liberty interests of the defendants in *United States v. Moya-Gomez*¹⁰⁸ or *United States v. Monsanto*,¹⁰⁹ where the courts permitted post-seizure notice and hearings even though the defendants faced possible imprisonment and sought the release of their assets to finance their criminal defense.¹¹⁰

Second, the *Mathews* test considers the likelihood of erroneous deprivation.¹¹¹ Here, the use of classified information and lack of judicial oversight of OFAC's decision to impose sanctions on an organization introduce a substantial risk of erroneous deprivation similar to the risk inherent in *ex parte* proceedings authorizing the restraint of criminal defendants' assets, such as in *Moya-Gomez*¹¹² and *Monsanto*.¹¹³ In *Moya-Gomez*, the court expressly criticized the use of *ex*

102. *James Daniel Good Real Prop.*, 510 U.S. at 43 (1993).

103. *See id.* at 53–54 (arguing that the right to maintain control over the home and to be free of governmental interference is a private interest of historic importance).

104. *Calero-Toledo*, 416 U.S. at 663.

105. *See id.* at 677 n.12 (debating whether the yacht owner had a property interest in receiving rent from yacht or in possession of yacht).

106. *See United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991) (stating that even though a defendant's property may be returned to him at a later time, a deprivation has occurred).

107. *See Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 872–73 (D.C. Cir. 1984) (stressing that in the American legal system, which is complex and highly adversarial, the denial of prompt access to counsel equates to the denial of the most fundamental elements of justice); *see also Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 945 (5th Cir. 1981) (“The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process . . .”).

108. 860 F.2d 706 (7th Cir. 1988).

109. *Monsanto*, 924 F.2d at 1186.

110. *See id.* at 1194, 1197 (acknowledging criminal defendant's important liberty interest in obtaining his counsel of choice and the negative impact of restraining assets necessary to obtain legal counsel); *Moya-Gomez*, 860 F.2d at 726 (recognizing criminal defendant's important interest in retaining counsel in a timely manner and the difficulty in staging a criminal defense without the benefit of counsel).

111. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

112. *See* 860 F.2d at 727–28 (describing forfeiture statute as authorizing a court to issue a restraining order for a defendant's property based on an *ex parte* indictment).

113. *See* 924 F.2d at 1195 (arguing that the inherent risk in allowing the deprivation in *ex parte* proceedings accounts for the general rule that a prior

parte proceedings to issue restraining orders based on the potential for government abuse and their failure to allow the defendant an opportunity to challenge the government's allegation that the assets are subject to forfeiture.¹¹⁴ Despite these flaws, the courts determined that the post-seizure notice did not violate the defendants' due process.¹¹⁵ In contrast, the court in *James Daniel Good* determined that this high risk of erroneous deprivation in an *ex parte* proceeding was too great to justify postponing notice and a hearing until after seizing the defendant's real property.¹¹⁶ Here, the use of classified evidence and the lack of judicial oversight for the imposition of sanctions create additional risks above those present in any of those cases.¹¹⁷ However, this risk alone does not determine whether the process is constitutional; all three *Mathews* factors must be considered before drawing a conclusion.¹¹⁸

The third factor weighing in the *Mathews* analysis is government interest.¹¹⁹ In the criminal forfeiture cases, the government interests were similar—enforcing drug laws, preventing criminals from benefiting from illegal acts, and decreasing the economic power of organized crime.¹²⁰ Although those interests are valid and important, the government interests in preventing organizations from funding terrorism and minimizing transactions with SDGTs carry far more weight.¹²¹ In *Holy Land Foundation for Relief and Development v.*

adversary hearing is required before depriving a defendant of property when no special circumstances justify postponing the hearing).

114. See 860 F.2d at 728–29 (7th Cir. 1988) (insisting that the validity of a statutory scheme cannot depend on the expectation that the government would not abuse its statutory authority).

115. See, e.g., *Monsanto*, 924 F.2d at 1192 (conceding that extraordinary circumstances justified the absence of a pre-restraining order hearing); *Moya-Gomez*, 860 F.2d at 731 (postponing notice and hearing until after seizure contingent on immediate, post-restraint hearing).

116. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 57 (1993) (contending that immediate seizure was unnecessary because real property cannot be absconded and the court's jurisdiction can be preserved without prior seizure).

117. See *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 196–97 (D.C. Cir. 2001) (pointing out that the Antiterrorism and Effective Death Penalty Act does not forbid the use of third-hand accounts, press stories, Internet sources, or other hearsay from being included as part of the foundation for an organization's designation and that the organization is not allowed to see or comment on any classified information used against it); see also Fitzgerald, *supra* note 6, at 137 (criticizing OFAC procedure for its reliance on informal distribution of notices and regulations); Roth et al., *supra* note 28, at 78 (describing designation of organization based on one-page memo and decision by Treasury officials).

118. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

119. *Id.*

120. See *James Daniel Good*, 510 U.S. at 54–55 (enforcing laws); *Monsanto*, 924 F.2d at 1192 (decreasing the power of organized crime); *Moya-Gomez*, 860 F.2d at 726, 729 (protecting the government's case in racketeering and narcotics trafficking cases).

121. See *Global Relief II*, 315 F.3d 748, 754 (7th Cir. 2002) (equating government interest with preventing use of funds for violent acts that would lead to loss of life);

*Ashcroft*¹²² and *Global Relief Foundation v. O'Neill*,¹²³ the courts specifically emphasized the importance of these interests and permitted OFAC to issue post-designation notice and opportunity for written response.¹²⁴

The consequences of providing prior notice and a hearing to a sanctioned organization are analogous to those in the *Calero-Toledo* yacht forfeiture case where the Court determined that post-seizure notice and hearing were permissible based on three factors: (1) the seizure was necessary to secure an important government or general public interest, (2) the important government interest necessitated prompt action, and (3) the state exercised strict control over the government's monopoly of legitimate force by restricting who may authorize seizure and the circumstances under which seizure may occur.¹²⁵ First, the Court reasoned that the government's interests in asserting *in rem* jurisdiction over the property and beginning forfeiture proceedings were important in protecting the public's interest in preventing continued use of the property for illicit activities and in enforcing criminal sanctions.¹²⁶ Here, the government has a similar interest in preventing assets from contributing to the continued perpetration of terrorist acts.¹²⁷ Second, prompt action in *Calero-Toledo* was necessary because the yacht easily could have been transferred, destroyed, or sequestered before the government could seize it.¹²⁸ Similarly, financial assets are easily transferred or destroyed and prior notice of a freeze would give an organization the opportunity to take such action.¹²⁹ Third, the Court reasoned that the government had sufficiently limited the use of its seizure authority because the officials making seizure decisions were not self-interested private parties and Puerto Rico law limited

Nat'l Council of Resistance of Iran, 251 F.3d at 208 (conceding that national security and carrying out foreign policy are important government interests); see generally Broxmeyer, *supra* note 18, at 471 (discussing government interest in combating terrorism through the use of economic sanctions).

122. 333 F.3d 156 (D.C. Cir. 2003).

123. 315 F.3d 748 (7th Cir. 2002).

124. See *Holy Land II*, 333 F.3d at 163 (affirming district court decision approving process allowing for written response to OFAC designation and not requiring judicial hearing); *Global Relief II*, 315 F.3d at 754 (permitting post-designation notice despite the increased risk of erroneous deprivation).

125. 416 U.S. 663, 678–79 (1974).

126. *Id.* at 679.

127. See Gouvin, *supra* note 50, at 962 (comparing previous money-laundering laws designed to trace proceeds of crime with terrorism laws geared toward preventing the financing of terrorist acts).

128. 416 U.S. at 679.

129. See Broxmeyer, *supra* note 18, at 474–75 (arguing that pre-designation notice would thwart the government interests and that exigent circumstances justify postponing notice).

the government's authority to make such seizures.¹³⁰ Similarly, OFAC officials do not personally benefit from the asset freezes they implement, and the scope of the freezes is limited.¹³¹

Finally, if the extraordinary circumstances in *Calero-Toledo* justified postponing notice and a hearing,¹³² then the national emergency preceding OFAC's authority to impose sanctions provides more than sufficient justification for postponing notice and a hearing until after sanctions are in place.¹³³ Although a sanctioned organization has a substantial interest in accessing its assets, and post-sanction notice and an opportunity to respond creates a high risk of erroneous deprivation—especially in light of the use of classified evidence—the government interest in preventing the transfer of funds before sanctions are in place outweighs these considerations and justifies the use of post-seizure notice.¹³⁴

B. After Freezing an Organization's Assets, Due Process Requires a Timely and Adversarial Hearing

Although due process does not require pre-sanction notice and a hearing, due process does require OFAC to provide sanctioned organizations with a prompt and adversarial post-sanction hearing.¹³⁵ Current OFAC regulations allow an organization to submit a written response to the designation decision and to provide evidence in its defense.¹³⁶ Similarly, the regulations allow an organization to submit a written request for a license authorizing the release of assets to pay for attorneys' fees.¹³⁷ However, a *Mathews* analysis demonstrates that

130. *Calero-Toledo*, 416 U.S. at 679.

131. See Exec. Order No. 13,244, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (vesting power to impose financial sanctions in Secretary of Treasury, Secretary of State, and Attorney General); Keeney, *supra* note 6, at 302–07 (arguing that asset freezes keep assets untouched in accounts and make frozen funds virtually inaccessible to any entity making claim to the funds). *But see* Lehrer, *supra* note 5, at 335 (criticizing the asset freezing process for placing too much discretion in the executive to keep funds frozen indefinitely).

132. 416 U.S. at 679.

133. See *Holy Land II*, 333 F.3d 163, 164 (D.C. Cir. 2003) (claiming that a national emergency justifies post-designation notice even though the court had not allowed post-designation notice in instances where the President had not declared a national emergency).

134. See *Armstrong v. Manzo*, 380 U.S. 545, 550–52 (1965) (establishing that due process notice requirements depend on the circumstances at hand).

135. See *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important.”), *superseded by statute*, 42 U.S.C. § 601 (1996).

136. See *Holy Land II*, 333 F.3d at 164 (reiterating that due process does not require OFAC to provide a designated organization post-designation judicial trial on merits of decision).

137. 31 C.F.R. § 501.801(b)(2)–(3) (2007).

such procedures cannot adequately protect an organization's interest in securing the release of portions of its assets for the purpose of hiring an attorney.¹³⁸

First, a sanctioned organization not only has an interest in access to its resources for the purpose of paying rent, salaries, and other daily expenses, but also it must hire an attorney to assist the organization in determining what rights it has while sanctioned and to represent the organization in its dealings with OFAC.¹³⁹ A sanctioned organization's interest in obtaining legal counsel exceeds the mere property interest of the defendant in *Calero-Toledo*, where the Court noted that the post-seizure notice did not violate due process where the statute provided the injured party with an opportunity to challenge the seizure in an immediate post-seizure hearing.¹⁴⁰ The interest in timely access to counsel is more analogous to the defendants' qualified right to obtain their counsel of choice in *Moya-Gomez* and *Monsanto*, where the courts required an immediate post-restraint adversary hearing to establish that the government had probable cause to believe that the defendants' assets were subject to forfeiture.¹⁴¹ Although a criminal defendant's interest in obtaining counsel is arguably more compelling than that of a sanctioned organization not subject to criminal charges, in both cases the consequences of being unable to obtain counsel are permanent and more severe than the simple deprivation of property in *Calero-Toledo*.¹⁴² Deprivation of the right to obtain counsel is also more permanent than the deprivation of a home, such as in *James Daniel Good*, where the Court determined that the property interest at stake was so important that due process required an adversarial hearing prior to seizing the defendant's home.¹⁴³

138. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). *But see Broxmeyer, supra* note 18, at 479–81 (claiming that a designated organization requires only limited arguments and evidence to rebut evidence supporting a designation and that face-to-face confrontation is unnecessary in most cases).

139. *See Goldberg*, 397 U.S. at 270–71 (recognizing that an attorney may best protect a party's interests); *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 (D.C. Cir. 1984) (emphasizing the importance of legal counsel in helping a party ascertain its rights).

140. *See* 416 U.S. 663, 665–66 (1974) (explaining that the statute authorizing the seizure provided for a challenge to the action within fifteen days).

141. *United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991) (stating that without a pretrial hearing to contest the restraint of assets needed to hire counsel, the defendant is irrevocably deprived of that counsel); *United States v. Moya-Gomez*, 860 F.2d 706, 726 (7th Cir. 1988) (“The defendant needs the attorney *now* if the attorney is to do him any good.”).

142. *See* 416 U.S. at 679 (analyzing whether circumstances justified depriving owner of property interest without prior notice).

143. *See* 510 U.S. 43, 58, 61–63 (1993) (rejecting the argument that a seizure is valid because the claimant was convicted of the crime in question at the time of the

Second, the license application process, through which an organization may request access to its assets in order to pay an attorney, does not provide an organization with a meaningful opportunity to be heard and subjects the organization to an unacceptable level of risk of erroneous deprivation.¹⁴⁴ Like the risks created by the *ex parte* proceedings that the Court criticized as providing little or no protection to the claimant in *James Daniel Good*,¹⁴⁵ the license application process fails to protect an organization's right to obtain counsel because it does not provide the organization with an opportunity to respond to OFAC's objections to its request and does not submit the application to a judicial officer for review.¹⁴⁶ In *Moya-Gomez*,¹⁴⁷ the court even noted that a statutory scheme permitting the government to seize assets on the basis of an *ex parte* application to a grand jury presented a great opportunity for government abuse of its power and significantly impeded the defendant's ability to participate in the adversary process.¹⁴⁸

Not only does the application process introduce an unacceptable risk of error because OFAC is the sole reviewer and decision maker, the process also increases the risk of error because OFAC regulations fail to provide organizations with information on how to successfully obtain a license.¹⁴⁹ OFAC's use of classified information in making the decision to impose sanctions on an organization, and likely in deciding whether to approve license requests, further increases the risk of erroneous deprivation.¹⁵⁰ The little available guidance on the

seizure and had adequate opportunity to challenge the seizure). Here, the organization has not even been subjected to criminal charges.

144. See 31 C.F.R. § 501.801(b)(2)–(3) (2007) (outlining procedures for license applications, but not delineating criteria by which licenses are approved or timeframe in which decision will be made); see also *Goldberg*, 397 U.S. at 269 (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”), *superseded by statute*, 42 U.S.C. § 601 (1996).

145. See 510 U.S. at 55–56 (scrutinizing the seizure procedures that allow a magistrate judge to issue a warrant of seizure without considering defenses to the government's position).

146. See 31 C.F.R. § 501.801(b)(2)–(3) (establishing that an organization may request a license and, upon denial, request an explanation, not reconsideration of the same request).

147. 860 F.2d 706, 728 (7th Cir. 1988).

148. See *id.* (reiterating the importance of the adversary process in ensuring the integrity of the truth-finding process).

149. See generally Fitzgerald, *supra* note 6, at 131 (observing that OFAC has a habit of providing little guidance on how to challenge decisions or how to obtain a license).

150. See Broxmeyer, *supra* note 18, at 484 (examining the use of classified evidence in making designations without disclosing that information to designated organizations and the insurmountable obstacle that the use of such information creates for a party attempting to prove its innocence).

issue nevertheless establishes that designations may rely on less reliable evidence than is required in criminal or civil trials because the power to impose these economic sanctions is derived from the Executive's war and foreign policy powers, to which courts give great deference.¹⁵¹ For example, designations may be based on intelligence data, but they may also be based on hearsay, which is not admissible as evidence in civil or criminal cases.¹⁵² No matter how important the government interest at stake is, an organization is guaranteed a meaningful hearing before being deprived of a liberty or property interest.¹⁵³

The third factor in the *Mathews* test considers the government interest at stake and the increased burden of imposing additional procedural safeguards.¹⁵⁴ Here, not only is OFAC working to control assets and prevent enemy aliens from using them to commit acts of terrorism, but it is also responding to a national emergency declared in response to a terrorism threat.¹⁵⁵ The government interest in this instance is more important than the government interests in recovering assets from a suspected or convicted criminal for the purpose of preventing a criminal from continuing to control "ill-gotten" assets, obtaining funds for law enforcement, restoring ownership to the rightful owners, and minimizing the power of organized crime.¹⁵⁶

But unlike criminal defendants subject to asset restraints, sanctioned organizations are requesting access to legitimate funds, such as those used to purchase items for charitable programs.¹⁵⁷ The

151. See *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007) (referring to OFAC decisions as an intersection of national security, foreign policy, and administrative law and acknowledging an extremely deferential standard of review).

152. See *Holy Land II*, 333 F.3d 156, 162 (D.C. Cir. 2003) (observing that the government may make designations based on a broad range of evidence, including hearsay); see also Peter Whoriskey, *Mistrial Declared in Islamic Charity Case*, WASH. POST, Oct. 23, 2007, at A3 (quoting juror as saying he thought all of the defendants were innocent because the prosecution had so little evidence).

153. See *United States v. Robel*, 389 U.S. 258, 264 (1967) ("Even the war power does not remove constitutional limitations safeguarding essential liberties."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) (insisting that due process protects aliens as well as citizens in times of peace as well as in times of trouble).

154. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

155. See *Holy Land II*, 333 F.3d at 163–64 (describing the interests under consideration as encompassing more than traditional "legal interests") (quoting *Global Relief II*, 315 F.3d 748, 753 (7th Cir. 2002)).

156. See *United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991) (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629–30 (1989)) (listing the government interests that may be served by seizing assets).

157. See *id.* (noting that the government interest in removing the defendant's assets from his control is based on a claim that the government has a higher right to

organizations are requesting access to funds that were not obtained through illegal means, such as drug trafficking or selling counterfeit wares,¹⁵⁸ and depriving organizations of assets compiled through legitimate means for a potentially illegitimate purpose does not serve the government's interest in teaching criminals that "crime doesn't pay."¹⁵⁹

Further distinguishing sanctioned organizations from the parties in *Calero-Toledo* or *Monsanto*, where the courts recognized that notice prior to freezing the parties' assets would likely prevent the government from recovering the assets,¹⁶⁰ additional procedural safeguards are unlikely to subvert the government's ability to control and regulate an organization's assets.¹⁶¹

OFAC currently orchestrates the release of assets upon grant of a license to a sanctioned organization.¹⁶² Substituting an adversarial hearing for the written license application and approval process would increase OFAC's administrative burden, but the sanctioned organization's interest in a meaningful opportunity to be heard and in obtaining timely legal representation justifies imposing such a burden.¹⁶³ In *United States v. Farmer*,¹⁶⁴ the court determined that any additional administrative burdens would be justified because they

those assets because they were obtained through illegal means); *see also Caplin & Drysdale*, 491 U.S. at 629–30 (illustrating the government's various superior claims to assets procured through criminal action, such as to use the assets for law enforcement efforts and to return the assets to the rightful owners who lost the assets due to the illegal acts).

158. *See United States v. Farmer*, 274 F.3d 800, 801–02 (4th Cir. 2001) (reviewing claim of defendant who claimed that the government seized legitimate assets as well as those obtained through trademark and money laundering violations); *Monsanto*, 924 F.2d at 1189–90 (conceding strong government interest in recovering all forfeitable assets allegedly obtained through narcotics trafficking and other illegal activities).

159. If assets are not used for illegitimate purpose or procured through illegitimate or fraudulent activities, then the government has no superior claim to such assets. *See Caplin & Drysdale*, 491 U.S. at 626 (citing the rule that constitutional right to counsel only affords criminal defendants the right to use legitimate funds to hire an attorney); *Monsanto*, 924 F.2d at 1192 (arguing that the government has a higher claim to the assets because they were illegally obtained).

160. *See Monsanto*, 924 F.2d at 1192 (determining that postponing notice and hearing was necessary to protect government interest in preventing disposal of assets in anticipation of forfeiture); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (observing that advance warning would likely result in destruction, concealment, or transfer of the property).

161. *See discussion supra* Part III.B (addressing OFAC control of sanctioned organization's assets).

162. *See* 31 C.F.R. § 501.801 (2007) (establishing application process for licenses); 31 C.F.R. § 585.506 (2007) (authorizing payment of attorneys' fees after grant of license).

163. *See Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 872–73 (D.C. Cir. 1984) (referring to prompt access to counsel as essential to obtaining justice).

164. 274 F.3d 800 (4th Cir. 2001).

would be based on genuine need and would not be frivolous claims.¹⁶⁵ Similarly, in *Moya-Gomez* the court determined that an additional administrative burden was justified as long as those who sought adversarial hearings had no other assets with which to hire counsel.¹⁶⁶ Here, where OFAC has the power to control all of a sanctioned organization's assets and financial transactions, such an organization has a bona fide need for access to a portion of its assets and approval to use them to pay an attorney.¹⁶⁷

Similar to a criminal defendant who suffers a permanent deprivation of the right to counsel if not permitted a meaningful opportunity to contest the restraint of assets necessary to obtain counsel,¹⁶⁸ a sanctioned organization suffers a permanent deprivation of its right to obtain counsel and is likely to suffer other permanent losses, such as closing its business and incurring debt as a result.¹⁶⁹ In *Moya-Gomez*, the court went so far as to say that if the government was unwilling to provide an adversarial hearing to a defendant in order to establish the likelihood that the defendant's assets were subject to forfeiture, then the government had to consent to the exemption of reasonable attorneys' fees if the defendant had no other assets with which to hire an attorney.¹⁷⁰ Although a sanctioned organization is not confronting the possibility of imprisonment, the organization is likely to lose its business and its reputation, and multiple individuals are likely to lose their source of income.¹⁷¹ An organization has a right to challenge the process responsible for inflicting such injuries

165. See *id.* at 805 (reasoning that the court's holding would not result in numerous hearings based on flimsy or insubstantial grounds and that government admitted it did not oppose hearing for Farmer if he demonstrated that he was unable to hire an attorney).

166. See 860 F.2d 706, 730 (7th Cir. 1988) (limiting the holding to require the government to prove the likelihood that the restrained assets are subject to forfeiture in cases where defendant demonstrates bona fide need for restrained assets to conduct defense).

167. See Lehrer, *supra* note 5, at 337 (describing OFAC control over frozen assets as prohibiting payment, withdrawal, or transfer of financial property without a treasury license).

168. See *United States v. Monsanto*, 924 F.2d 1186, 1195 (2d Cir. 1991) (stating that a pre-trial adversary hearing can play an important role in ensuring that the deprivation has sufficient factual foundation).

169. See Engel, *supra* note 4, at 283 (summarizing effect of OFAC sanctions as shutting down three charitable organizations and potentially confiscating good-faith donations).

170. *Moya-Gomez*, 860 F.2d at 731.

171. See *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 731 (D.C. Cir. 2007) (reviewing challenge by organization that OFAC designated and sanctioned in 2004 where OFAC refused to release funds for the payment of attorneys' fees and organization was forced to challenge designation and seek release of funds without paying an attorney), *cert. denied*, 128 S. Ct. 92 (2007); see also Fitzgerald, *supra* note 6, at 77 ("After twenty five years of operations as a U.S. company, producing annual revenues of up to \$50 million dollars, IPT was out of business.").

and can only do so in a meaningful manner if permitted to hire an attorney.¹⁷² Such an important interest warrants the additional burden of allowing a sanctioned organization a post-deprivation adversary hearing to determine whether it has a right to the release of funds to pay attorneys' fees.

IV. RECOMMENDATIONS

A. *Amending the Process to Include an Administrative Hearing on the Issue of Attorneys' Fees*

The inadequacies in the current OFAC licensing process could be solved by implementing an automatic administrative hearing to determine whether an organization should be permitted to access funds for the purpose of paying reasonable attorneys' fees. Although courts have held that due process does not require OFAC to provide a sanctioned organization with procedures approximating a judicial trial when the organization challenges its designation,¹⁷³ those courts did not discuss the issue of attorneys' fees. In criminal cases involving restraints on assets, such as *Moya-Gomez* and *Monsanto*, the courts have determined that the defendant's interest in obtaining counsel in a timely manner is so great that it requires a pre-trial adversary hearing to establish probable cause for the forfeiture of the defendant's assets.¹⁷⁴ These cases restrict the need for an adversary hearing to situations where the defendant has demonstrated a bona fide need to use restrained assets to hire an attorney—in other words, the restraint has rendered the defendant indigent.¹⁷⁵ Sanctioned organizations are essentially rendered indigent by OFAC sanctions.¹⁷⁶ Although OFAC provides sanctioned organizations with the option of requesting licenses to conduct certain transactions, such a slow and complex

172. See *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 (D.C. Cir. 1984) (construing due process law as requiring access to counsel to meaningfully participate in administrative proceedings because of the complex nature of the American legal system); see also Fitzgerald, *supra* note 6, at 111–16 (describing OFAC as fostering an adversarial relationship with the trading community, being unconcerned about customer service, implementing regulations after long delays, and adhering to informal procedures).

173. See, e.g., *Holy Land II*, 333 F.3d 156, 164 (D.C. Cir. 2003) (arguing that a designated organization has no right to confront and cross-examine witnesses where designation is based on Executive Order 13,224).

174. *Moya-Gomez*, 860 F.2d at 730; see *United States v. Monsanto*, 924 F.2d 1186, 1196 (2d Cir. 1991) (equating deprivation of a pre-trial adversary hearing allowing defendant to challenge restraint of assets needed to retain counsel with deprivation of counsel).

175. *Monsanto*, 924 F.2d at 1193; *Moya-Gomez*, 860 F.2d at 730.

176. See discussion *supra* Part III.B (addressing OFAC control of sanctioned organization's assets).

process does not sufficiently address the organizations' immediate need to hire counsel.¹⁷⁷ However, the differences in circumstances between a criminal defendant and a sanctioned organization do justify providing sanctioned organizations with less than a full judicial adversary hearing.¹⁷⁸

A sanctioned organization's need to hire an attorney to protect its legal rights while subject to sanctions is arguably less imperative than that of a criminal defendant faced with trial.¹⁷⁹ However, a sanctioned organization has more at stake than a simple property interest, which is what courts have focused on when determining what type of hearing due process requires the government to provide to sanctioned organizations challenging the designation process.¹⁸⁰ In reaching its decision that a written opportunity to challenge the administrative record prior to designation would satisfy due process, the D.C. Circuit Court of Appeals focused the majority of its consideration on when OFAC must provide a hearing rather than what form the hearing must take.¹⁸¹ In light of the potential for an organization to lose its capacity to operate its business and suffer financial hardship, such cursory consideration seems insufficient when compared to the serious consideration courts have given to other similar, but perhaps less substantial, losses, such as employment or utility services.¹⁸²

177. See *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 731 (D.C. Cir. 2007) (requesting release of funds for attorneys' fees after more than two years of litigating without access to funds), *cert. denied*, 128 S. Ct. 92 (2007); see also Fitzgerald, *supra* note 6, at 116 (citing one occasion where OFAC took two years to respond to a license request).

178. *Monsanto*, 924 F.2d at 1192; see Broxmeyer, *supra* note 18, at 477–80 (arguing that a written response to OFAC designation would suffice under normal circumstances, but an oral hearing could be necessary to provide additional testimony where determination hinges on credibility).

179. See generally *Powell v. Alabama*, 287 U.S. 45 (1932) (recognizing that due process requires a criminal defendant to have legal representation because requiring a defendant to face trial without representation would be inherently unjust).

180. See *Holy Land II*, 333 F.3d 156, 164 (D.C. Cir. 2003) (reasoning that opportunity to present written opposition to designation prior to restraint of funds satisfied due process); see also *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 204–05 (D.C. Cir. 2001) (declining to consider violation of Fifth Amendment right of liberty because Fifth Amendment provided due process protection of property rights).

181. See *Holy Land II*, 333 F.3d at 163 (allowing post-designation notice and written opportunity to respond based on reasoning from *Nat'l Council of Resistance*); *Nat'l Council of Resistance*, 251 F.3d at 196, 208–09 (reasoning that due process required at least prior opportunity to respond where statute provided for judicial review by request if organization made request within thirty days of publication of designation under AEDPA).

182. See *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (affording a face-to-face hearing where a recipient faced termination of utilities); *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (holding that due process required an

For example, when the government revokes a private employee's security clearance, and the deprivation results in that employee's inability to secure subsequent similar employment, the government may not deprive the employee of his security clearance in a proceeding that does not provide the safeguards of confrontation and cross-examination.¹⁸³ Similarly, the government may not deprive a government employee of his employment without a post-termination administrative hearing.¹⁸⁴ Even when a petitioner suffers deprivation of utility services, due process requires the utility to meet with the petitioner in person before cutting off services.¹⁸⁵ Here, OFAC is not only depriving a sanctioned organization of its liberty to operate its business, but also, is depriving the organization of its more important right to hire legal counsel.¹⁸⁶ If due process requires a utility to meet in person with a customer before terminating the customer's service, due process certainly requires OFAC to provide more substantial proceedings to an organization unable to access any of its assets, unable to operate its business, and, therefore, unable to hire an attorney.¹⁸⁷

In fact, a sanctioned organization's losses are more analogous to those of the employee who loses his security clearance.¹⁸⁸ In both cases, the information used in the decision-making process includes classified information and raises issues of national security.¹⁸⁹ The D.C. Circuit Court of Appeals has determined that due process does not require the government to reveal to a designated organization

adversarial hearing where a private employee was deprived of a security clearance necessary to obtain his employment of choice).

183. See *Greene*, 360 U.S. at 508 (reasoning that when the type of hearing is determined by administrative decision and not explicitly authorized by the President or Congress, the Court assumes that Congress or the President would have intended to provide the petitioner with the traditional safeguards of due process).

184. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546-47 (1985) (holding that an Ohio statute afforded due process because it required that termination procedures provide employees with pre-termination opportunity for written response and post-termination administrative hearing).

185. See *Memphis Light*, 436 U.S. at 18 (recognizing utility service as a necessity of modern life).

186. See *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 (D.C. Cir. 1984) (describing as "undeniable" the right of private parties to hire an attorney in order to determine their legal rights (citing *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982))). In *Martin*, the court considered the right to hire an attorney to be connected to the fundamental right of meaningful access to courts. 686 F.2d at 32.

187. *Memphis Light*, 436 U.S. at 18.

188. See *Greene*, 360 U.S. at 492 (noting the use of classified information and testimony of witnesses not present at a proceeding to determine whether to revoke security clearance privileges).

189. See *id.* at 494 (describing hearing procedures as designed to protect national security); *Holy Land II*, 333 F.3d 156, 163 (D.C. Cir. 2003) (referring to risk that foreign terrorists would have an interest in frozen assets).

the classified information used in making its designation, but a judge may review such information *in camera* during a judicial designation challenge.¹⁹⁰ It follows that any hearing on the release of assets for the purpose of hiring an attorney would not require the government to disclose classified information.¹⁹¹

However, due process does require a hearing before a third-party reviewer during which a sanctioned organization has the opportunity to present evidence supporting its need for access to its funds and to rebut in person any opposing unclassified information or testimony.¹⁹² In the administrative proceeding determining whether the government could properly revoke an employee's security clearance, the Court determined that traditional due process safeguards applied.¹⁹³ And in criminal cases where the defendant has the benefit of the Rules of Evidence,¹⁹⁴ courts have insisted that due process requires a pre-trial adversary hearing for defendants who need to access restrained assets in order to hire their attorney of choice.¹⁹⁵ Although a sanctioned organization is not facing imminent imprisonment, the use of classified information and the non-conformity with the Rules of Evidence when compiling evidence against an organization raise additional issues of fairness that demand additional procedural safeguards to protect an organization's right to hire an attorney.¹⁹⁶ An impartial administrative hearing during which

190. See *Holy Land II*, 333 F.3d at 164 ("The IEEPA expressly authorizes *ex parte* and *in camera* review of classified information in 'any judicial review of a determination made under this section [that] was based on classified information.'" (citing 50 U.S.C. § 1702(c)); see also *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 207 (D.C. Cir. 2001) (admitting that the United States has a privilege in classified information such that even a criminal defendant cannot seek disclosure of the information for his defense without a specific showing of materiality).

191. See *Greene*, 360 U.S. at 508 (implying that with specific authorization from the President or Congress, administrative hearings that do not require the government to disclose the classified information upon which it made its decision may be lawful).

192. See *Nat'l Council of Resistance*, 251 F.3d at 208 (questioning the ability of various members of the Executive Branch to substitute their judgment for the requirements of due process).

193. *Greene*, 360 U.S. at 508.

194. Designations may rely on less evidence than is required in criminal or civil trials because the power to impose economic sanctions is derived from the Executive's war and foreign policy powers, to which courts give great deference. See *Holy Land II*, 333 F.3d at 162 (observing that the government may make designations based on a broad range of evidence, including hearsay); see also Fitzgerald, *supra* note 6, at 139 (including judicial deference to executive and legislative foreign policy decisions in the list of challenges organizations face when attempting to challenge OFAC decisions).

195. *United States v. Monsanto*, 924 F.2d 1186, 1203 (2d Cir. 1991); *United States v. Moya-Gomez*, 860 F.2d 706, 731 (7th Cir. 1988).

196. See *Nat'l Council of Resistance*, 251 F.3d at 196–200 (illustrating court's inability to provide facts of case in opinion because of substantial use of classified information and pointing out sanctioned organization's inability to review or comment on

the organization may submit evidence supporting its need for immediate release of funds for the purpose of hiring an attorney would provide sufficient safeguards without imposing the administrative burden of a full judicial inquiry.¹⁹⁷

B. Providing Access to Assets for Payment of Attorneys' Fees as a Matter of Course

In the likely event that OFAC prefers not to provide sanctioned organizations with an administrative hearing, the court's decision in *Moya-Gomez* suggests an alternative.¹⁹⁸ The court stated that if, in the future, the government sought to restrain a defendant's assets without providing a post-restraint adversarial hearing, then the court would order the release of reasonable attorneys' fees without a hearing.¹⁹⁹ Similarly, if OFAC does not provide sanctioned organizations with an automatic hearing to allow an organization to request the release of assets to pay attorneys' fees, then OFAC should automatically allow sanctioned organizations to access reasonable attorneys' fees.²⁰⁰ Just as due process requires a timely hearing on the release of funds to pay attorneys' fees in criminal forfeiture proceedings,²⁰¹ due process would require OFAC to release the funds in a timely manner. Timing is of the essence because delays in access to counsel delay the organization's ability to assess its rights and to defend against OFAC sanctions.²⁰²

Of course, OFAC could not automatically release funds to sanctioned organizations without monitoring the use of the funds.²⁰³

classified evidence); *see also* *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972) (elaborating on the purpose of due process as to prevent arbitrary deprivation and ensure fair play).

197. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (considering administrative burden when determining what safeguards due process requires); *see also* *Broxmeyer*, *supra* note 18, at 481 (evaluating utility of providing oral hearing to organization challenging designation based on government interest in conserving fiscal and administrative resources).

198. *See* 860 F.2d at 731 (assuming implied government consent to release of reasonable attorneys' fees when government has failed to provide adversary hearing and defendant has no other assets with which to hire an attorney).

199. *Id.*

200. *See id.* at 730–31 (agreeing with district court's order to make available to defendant, from defendant's seized funds, an amount the district court deemed necessary to hire a satisfactory attorney and leaving open the possibility of releasing further funds if the original estimate proved inadequate).

201. *See id.* at 726 (noting that, for a defendant, a temporary seizure of funds constitutes a permanent withholding as regards attorneys' fees).

202. *See* discussion *supra* Part III.B (evaluating organization's need for timely access to counsel).

203. The purpose of Executive Order 13,224 is to prevent terrorist financing, and the release of funds without monitoring would likely be contrary to this purpose because it would not ensure that the released funds were not transferred to terrorist

As discussed earlier, the government has a significant interest in preventing organizations from using assets to fund terrorist activities, and allowing an organization unconditional access to any amount of money could subvert this interest.²⁰⁴ Therefore, before releasing the funds, the organization would have to provide OFAC with information about who would provide legal services to the organization and what type of legal services the attorneys would provide.²⁰⁵ OFAC currently keeps records of such information and monitors attorney payments under its licensing program,²⁰⁶ so the process would not inflict any substantial additional burden on OFAC.²⁰⁷ The main distinctions between this automatic process and the current licensing process would be the strict timeline for release of the funds, and the underlying presumption that OFAC would release assets to pay reasonable attorneys' fees to all organizations that provided OFAC with the information necessary to facilitate the monitoring of the use of the funds.²⁰⁸

Another important distinction between the current licensing process and an automatic approval process would be the procedures that OFAC would have to follow in order to deny access to funds.²⁰⁹ Currently, if OFAC denies a license request for access to funds to pay attorneys' fees, OFAC does not have to provide the organization with an explanation for its decision.²¹⁰ However, under the automatic approval process, OFAC would have to participate in an administrative hearing to review its decision to deny access to funds

organizations rather than attorneys. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (deeming financial sanctions appropriate means to attack financial foundation of foreign terrorists).

204. See discussion *supra* Part III.A (surmising that risk of transfer or sequestration of funds justifies postponing notice of asset freeze).

205. See discussion *supra* Part I.B.2 (detailing current license application process with similar requirements).

206. See 31 C.F.R. § 585.506 (2007) (restricting provision of attorneys' fees to sanctioned organizations that are licensed).

207. See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (recognizing importance of minimizing additional administrative burdens when implementing additional procedural safeguards).

208. See, e.g., *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 730 (D.C. Cir. 2007) (requesting organization denied access to funds for purpose of paying attorneys' fees), *cert. denied*, 128 S. Ct. 92 (2007).

209. The important national security issues and foreign policy goals at stake mandate that OFAC have the power to deny access to funds under appropriate circumstances. See *Havana Club Holding, S.A. v. Galleon, S.A.*, 961 F. Supp. 498, 505 (S.D.N.Y. 1997) (deferring to OFAC's licensing decision because interference would result in judicial interference in diplomacy); see also *Lehrer*, *supra* note 5, at 344 (indicating that national security interests and foreign policy goals are primary considerations in OFAC regulations and that courts are hesitant to interfere with OFAC's expertise in the area).

210. See 31 C.F.R. § 501.801(b)(4) (2007) (permitting organization to request explanation for license application denial).

because OFAC's decision would prevent an organization from obtaining legal representation and due process requires that the deprived party have an opportunity to challenge such a decision.²¹¹ An independent reviewer could permit OFAC to deny access to funds if OFAC provided sufficient evidence of national security risks or interference with foreign policy goals, similar to the evidence necessary to justify postponing notice of designation as a foreign terrorist until after the designation is in place.²¹² In adopting this option, OFAC avoids the burden of an automatic administrative hearing to consider the release of attorneys' fees, ensures access to counsel for sanctioned organizations, and still protects important national security and foreign policy interests.²¹³

C. Evaluating the Standard of Review when Denial of Access to Funds for Payment of Attorneys' Fees Is at Issue

Currently, if an organization is unable to obtain access to its assets for the purpose of paying attorneys' fees, it must seek judicial review.²¹⁴ However, judicial review of OFAC decisions is extremely deferential and OFAC decisions are overturned only when a court determines that the decision was arbitrary or capricious.²¹⁵ Such a standard of review is essentially equivalent to the rational basis test that courts apply when considering the constitutionality of state action that infringes on non-fundamental rights.²¹⁶ Under this standard the challenger has the burden of demonstrating that the

211. See discussion *supra* Part III.B (concluding that due process requires OFAC to provide a sanctioned organization with an administrative hearing to determine whether funds should be released to pay attorneys' fees).

212. See *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 208 (D.C. Cir. 2001) (allowing postponement of notice of designation where early notification would interfere with national security or foreign policy goals).

213. See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (recognizing significance of curtailing additional administrative burdens when implementing added procedural safeguards).

214. See *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 730 (D.C. Cir. 2007) (challenging district court decision upholding blocking of assets and refusing to allow amendment to complaint to request release of funds to pay attorneys' fees), *cert. denied*, 128 S. Ct. 92 (2007).

215. *Holy Land II*, 333 F.3d 156, 162 (D.C. Cir. 2003).

216. See *id.* at 162 (affirming district court review of OFAC decision that turned on whether agency's decision was supported by a rational basis). The traditional rational basis standard of review upholds government action if the action serves a legitimate governmental purpose and is rationally related to that purpose. See, e.g., *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (striking down Colorado amendment on the ground that its purpose was discriminatory in nature, illegitimate, and violative of equal protection).

government has acted in an arbitrary and capricious manner, and few parties successfully meet this burden.²¹⁷

Yet, courts apply essentially this same level of review when considering the constitutionality of OFAC decisions, even those that would interfere with an organization's ability to hire an attorney.²¹⁸ Moreover, this deferential standard applies even though access to legal representation is inherently related to the organization's right of access to the courts, which is a fundamental right.²¹⁹ Actions that infringe on fundamental rights typically merit the highest standard of review—strict scrutiny—which permits government interference only when necessary to further a compelling governmental interest.²²⁰

The contrast between these two standards simply shows that in a setting not governed by the APA standard, interference with a sanctioned organization's right to hire an attorney might merit a more critical review.²²¹ For example, if the government carried the burden of proof or the government's actions were scrutinized more carefully, then a sanctioned organization's right to hire an attorney would be more adequately protected.²²² Instead, despite the important interest at stake, the current standard of review demands that the challenging organization prove that such a deprivation is

217. See CHEMERINSKY, *supra* note 51, at 620 (describing the rational basis test as deferential to the government and rarely the basis for holding laws unconstitutional).

218. See Lehrer, *supra* note 5, at 342–44 (commenting that OFAC licensing has instigated a good amount of litigation and that OFAC decisions garner even more deference than other administrative agencies).

219. The Supreme Court has recognized the fundamental right of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 828 (1977). In *Martin v. Lauer*, the court determined that governmental interference with the attorney-client relationship implicated the plaintiffs' right of access to the courts. 686 F.2d 24, 32 n.36 (D.C. Cir. 1982). A similar argument could be made for sanctioned organizations based on OFAC's interference with an organization's ability to pay an attorney, which inherently interferes with an organization's ability to hire an attorney and adequately represent itself in court.

220. See *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (requiring the government to demonstrate that a governmental interest of overriding significance justifies denial of due process to people who are forced to settle claims in judicial proceedings); see also CHEMERINSKY, *supra* note 51, at 622, 815 (listing voting, access to the judicial process, and interstate travel as fundamental rights). However, the Court has limited the right to counsel to non-discretionary proceedings. Compare *Douglas v. California*, 372 U.S. 353, 355–56 (1963) (holding that the government must provide an attorney to indigent defendants for initial appeals), with *Ross v. Moffit*, 417 U.S. 600, 610–11 (1974) (limiting government responsibility to appoint counsel only to appeals that the state is obligated to review).

221. See CHEMERINSKY, *supra* note 51, at 620 (noting that critics of the inflexible levels of review advocate a sliding scale of review that takes into account factors such as constitutional and societal importance of the right negatively affected).

222. See Fitzgerald, *supra* note 6, at 141 (addressing the heavy burden of persuasion that challengers bear when contesting OFAC decisions); Lehrer *supra* note 5, at 348 (describing challenging OFAC under current standards as an “insurmountable obstacle”).

unjustified.²²³ This burden, combined with the deference that courts grant to executive actions related to national security interests and foreign policy goals, makes challenging OFAC decisions essentially futile.²²⁴

Implementation of a higher standard of review is unprecedented and likely to meet substantial resistance,²²⁵ especially in light of the well-settled administrative case law establishing the arbitrary and capricious standard.²²⁶ However, as increasing numbers of domestic charities face the challenge of hiring legal counsel while unable to access their assets, the courts will likely see more challenges to OFAC decisions and be forced to address the many due process issues that OFAC sanctions raise.²²⁷ Imposing a more critical standard of review in cases where attorneys' fees are implicated could help reduce the number of due process challenges to OFAC decisions by serving as an incentive for OFAC to carefully manage the release and regulation of funds to pay attorneys' fees, and by minimizing any undue interference with sanctioned organizations' access to counsel.

CONCLUSION

OFAC's current regulations do not adequately protect an organization's right to hire an attorney because they allow OFAC to deprive an organization of its assets without providing a meaningful hearing to review requests for the release of funds to pay attorneys' fees. Although due process does not require pre-sanction notice and a hearing when considering government actions that restrict access to assets needed to pay attorneys' fees, due process does require OFAC to provide sanctioned organizations with a timely administrative

223. An organization is unlikely to succeed under such a burden, especially considering the limited information an organization has. *See Broxmeyer, supra* note 18, at 481–84 (evaluating the fairness of using classified information in making designations without disclosing the information to sanctioned organizations and observing that even the innocent would have difficulty obtaining justice when faced with confidential evidence); *see also* Lehrer, *supra* note 5, at 342 (suggesting that courts will decline to review OFAC licensing decisions unless OFAC has acted egregiously).

224. *See Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 207 (D.C. Cir. 2001) (“[N]o governmental interest is more compelling than the security of the nation.”).

225. *See* CHEMERINSKY, *supra* note 51, at 620 (noting that the Supreme Court has been unwilling during recent years to impose strict or intermediate scrutiny review on additional classifications).

226. *See, e.g., Holy Land II*, 333 F.3d 156, 162 (D.C. Cir. 2003) (acknowledging proper application of APA standard to Treasury Department decisions); *Nat'l Council of Resistance*, 251 F.3d at 199 (applying arbitrary and capricious standard to decision to designate National Council of Resistance as alias of another organization).

227. *See* Lehrer, *supra* note 5, at 360 (predicting increase in challenges to OFAC promulgations).

hearing after sanctions are in place. Once sanctions are in place, the governmental interest in protecting national security and serving foreign policy objectives that justifies postponing notice and a hearing are less imperative, and the private interest in access to legal representation outweighs those concerns that would support denying sanctioned organizations an adversarial hearing.

Access to legal counsel is essential for an organization attempting to determine its rights while subject to sanctions. Implementing an automatic administrative hearing to determine an organization's eligibility for access to funds would better safeguard its right to hire an attorney. During the administrative hearing, an organization would not be allowed to view classified information, but would be permitted to submit evidence in favor of releasing funds for the purpose of hiring an attorney. More importantly, a neutral decisionmaker would consider the evidence from both sides and determine whether reasonable attorneys' fees should be released. *In camera* and *ex parte* review of classified information, as well as public review of the administrative record, should be sufficient to support a decision to deny access to funds, and such a proceeding is unlikely to jeopardize foreign policy objectives.

Alternatively, automatically releasing funds for the purpose of paying attorneys' fees would provide better protection for a sanctioned organization's right to hire an attorney. This process would minimize additional administrative burden while ensuring that all sanctioned organizations have a fair opportunity to hire an attorney. Under this procedure, OFAC would only have to provide the organization with a hearing related to the issue of releasing funds for attorneys' fees if OFAC refused to automatically release the funds.

Lastly, imposing a heightened standard of review or simply reviewing the government's case more closely when considering decisions affecting an organization's ability to hire an attorney would be a potential, though imperfect, way to ensure that an organization's right to hire an attorney received the necessary due process protection. Other alternatives are more practical and more likely to serve both governmental and private interests, but even this change would be an improvement on the current process.

Although none of these alternatives is likely to be implemented in the near future, a change must be made. The status quo is an unsatisfactory approach that allows the government to deprive a domestic organization of its business and property with very little due process. The government imposes these penalties without filing criminal charges and without ever having a trial. In order to

effectively challenge these actions, organizations, at the very least, need the ability to hire private attorneys. Even though the current regulations provide a process through which organizations can attempt to gain access to funds for this purpose, this process fails to ensure that every organization that should be allowed to hire an attorney is able to do so and should be reformed.