

CAUGHT IN THE ECONOMIC CROSSHAIRS: SECONDARY SANCTIONS, BLOCKING REGULATIONS, AND THE AMERICAN SANCTIONS REGIME

*Daniel Meagher**

Economic sanctions have a long tradition of use in American foreign policy. There are many benefits to using economic sanctions, particularly when policymakers employ them as alternatives to military action. Secondary sanctions developed as a relatively new tool intended to extend the reach and potency of economic sanctions. They function in much the same manner as traditional, or primary, sanctions. However, they target individuals and entities who conduct prohibited business with the targets of primary economic sanctions. Secondary sanctions are often accompanied by severe financial penalties and threats of exclusion from U.S. consumer and financial markets.

Through secondary sanctions, the United States can ensure the rest of the world complies with its foreign policy objectives even if they are not necessarily shared by the rest of the world. The Office of Foreign Assets Control, the agency that administers the American sanctions regime, has shown little regard for America's allies when punishing individuals or entities for noncompliance with secondary sanctions.

In response to American secondary sanctions, Europe has enacted a series of blocking regulations intended to punish any European individual or entity that alters an intended course of action in order to comply with American sanctions. These blocking regulations were intended to counteract American influence on European companies operating in the American markets. Ultimately, however, the conflicting regimes have left individuals and entities in a precarious legal position where dual compliance is impossible. Compounding the issue, the American sanctions regime is shrouded in a lack of transparency, with little allowance to appeal decisions made by the executive branch. This Note examines the various methods by which an adversely affected party can challenge U.S. secondary sanctions. Finding these available methods lacking in effectiveness, this Note argues that

* J.D. Candidate, 2021, Fordham University School of Law; M.A., 2017, University of St Andrews. Thank you to Professor Martin S. Flaherty and the editors and staff of the *Fordham Law Review* for their guidance and support. I also thank my friends and family, especially my parents, Chris and Ellen Meagher.

several avenues for reform should be taken to mitigate a potential freezing effect on international commerce, financing, and other international relations.

INTRODUCTION.....	1001
I. U.S. ECONOMIC SANCTIONS AND THEIR PLACE IN THE WORLD	1002
A. <i>The Development of the U.S. Sanctions Regime</i>	1003
1. Use in Diplomacy	1003
2. Secondary Sanctions and the Office of Foreign Assets Control	1004
B. <i>The Legal Authority Behind U.S. Sanctions</i>	1007
1. The NEA	1007
2. IEEPA	1008
3. Ukraine/Russia Case Study	1010
C. <i>History of Europe's Response</i>	1012
1. Genesis of EU Blocking Regulations.....	1012
2. Changing of the Winds	1013
a. <i>Falling into Line with America</i>	1013
b. <i>European Overcompliance</i>	1014
3. Reprisal of the Blocking Regulations	1015
4. Winter Is Coming.....	1016
a. <i>Impact on Global Commerce</i>	1016
b. <i>Case Study of Executive Order 13,846</i>	1017
II. THE LEGAL CONFLICT: RESPONDING TO SECONDARY SANCTIONS.....	1018
A. <i>The Defense of Foreign Sovereign Compulsion</i>	1019
B. <i>Challenging OFAC</i>	1020
1. Administrative Recourse.....	1021
2. Violation of Due Process	1022
3. The Nondelegation Doctrine.....	1023
C. <i>Limited Judicial Review</i>	1024
1. A Silent IEEPA	1024
2. What Is the Standard of Review?.....	1024
III. MOVING TOWARD A BETTER SYSTEM	1026
A. <i>Recommendations</i>	1026
1. Heightened Judicial Review.....	1027
2. Clearer Administrative Guidance and Heightened Transparency	1028
3. Alternative Solutions Under International Law	1028

B. <i>Weighing the Recommendations: What Is Most Viable?</i>	1029
CONCLUSION.....	1030

INTRODUCTION

In 2017, the French energy giant, Total, signed an agreement to form a partnership with an Iranian company, Petropars, and invest one billion dollars in the development of oil and gas facilities in Iran.¹ The companies made this investment agreement despite concerns that the Donald Trump administration would reimpose sanctions on Iran and companies doing business with Iran.² A year later, Total announced its decision to withdraw from the same deal following the reimposition of American sanctions on Iran.³ The sanctions not only targeted Iran and Iranian companies but also covered any individuals or entities doing business with these primary targets.⁴ As such, Total withdrew from its agreement with Petropars due to the fear that it would be sanctioned and excluded from the U.S. market.⁵ President Donald Trump articulated this threat in a sweeping tweet: “Anyone doing business with Iran will NOT be doing business with the United States.”⁶ Total is one of many European companies withdrawing previous investments and halting operations in Iran due to the threat of U.S. secondary sanctions.⁷

This trend of multinational businesses halting investment in Iran continues, despite the European Union’s (EU) attempts to hold together the Joint Comprehensive Plan of Action (JCPOA), also known as the Iran nuclear deal.⁸ The EU has, for example, imposed blocking regulations prohibiting European companies from changing their courses of action solely in order to comply with U.S. sanctions.⁹ The conflict between these two legal regimes on either side of the Atlantic leaves affected individuals and entities in a difficult position.¹⁰

1. See Stanley Reed, *Total Signs Deal with Iran, Exposing It to Big Risks and Rewards*, N.Y. TIMES (July 3, 2017), <https://www.nytimes.com/2017/07/03/business/energy-environment/iran-total-france-gas-energy.html> [<https://perma.cc/U2SW-AMMJ>].

2. See *id.*

3. See Michael Selby-Green, *French Oil Giant Total Pulls Out of \$4.8 Billion Iran Deal Under US Pressure*, BUS. INSIDER (Aug. 21, 2018, 6:23 AM), <https://www.businessinsider.com/total-pulls-out-of-48-billion-iranian-oil-project-under-us-pressure-2018-8> [<https://perma.cc/R3LU-T7GW>].

4. See *id.*

5. See *id.*

6. Donald Trump (@realDonaldTrump), TWITTER (Aug. 7, 2018, 5:31 AM), <https://twitter.com/realDonaldTrump/status/1026762818773757955> [<https://perma.cc/5DH7-WZ6E>].

7. See Selby-Green, *supra* note 3.

8. See Casper Wuite, *European Companies Driven Out of Iran*, INTERPRETER (Oct. 19, 2018, 3:30 PM), <https://www.lowyinstitute.org/the-interpreter/european-companies-driven-out-iran> [<https://perma.cc/C6ZU-ZT8Z>].

9. See *infra* note 96 and accompanying text.

10. See *infra* note 43 and accompanying text.

The United States has long utilized economic sanctions to achieve foreign policy objectives without the use of military force.¹¹ However, there has been a notable increase in the use of sanctions over the last several presidential administrations, particularly secondary sanctions.¹² The challenge presented by the increasing use of these sanctions and their apparent conflict with European law is compounded by the lack of clarity surrounding the U.S. sanctions regime and the limited ability of targeted parties to challenge sanctions once issued.¹³ Under current law, a party adversely affected by secondary sanctions faces hefty fines¹⁴ and has little recourse to challenge them.¹⁵

This Note examines the limited extent to which parties adversely affected by the application of secondary sanctions may dispute them and suggests reforms to the sanctions system. Part I provides relevant background regarding the historically broad U.S. sanctions regime and the increasingly conflicting international response. Part I explores this conflict and the resulting war of sanctions, in which multinational corporations face difficult decisions. Part I also outlines the legal authority behind the U.S. sanctions regime, which is integral to understanding how the regime may be challenged. Part II outlines the current state of the law regarding the U.S. sanctions regime and the tradition of judicial deference to the executive branch in international affairs, including its use of economic sanctions. Part III recommends increasing the transparency of the U.S. secondary sanctions regime through legislative action, allowing for heightened judicial review, in order to mitigate secondary sanctions' adverse effects on international commerce.

I. U.S. ECONOMIC SANCTIONS AND THEIR PLACE IN THE WORLD

Part I provides background regarding the use of international economic sanctions. Part I.A discusses the history and purpose of U.S. sanctions, including secondary sanctions. Part I.B outlines the relevant statutory and administrative authority behind the U.S. sanctions regime and analyzes the practical effects of these authorities through a case study. Part I.C examines Europe's historical responses to the U.S. sanctions regime and the increasing popularity of retaliatory sanctions within Europe.

11. See Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1163, 1170 (1987) (discussing the historical use of economic sanctions by the United States and the dominance of sanctions as a tool in American foreign policy).

12. See *infra* Part I.A.

13. SAMANTHA SULTOON & JUSTINE WALKER, ATL. COUNCIL, SECONDARY SANCTIONS' IMPLICATIONS AND THE TRANSATLANTIC RELATIONSHIP (2019), https://www.atlanticcouncil.org/wp-content/uploads/2019/09/SecondarySanctions_Final.pdf [https://perma.cc/5J8S-FVLH].

14. See *infra* note 113 and accompanying text.

15. See *infra* Part II.B.

A. *The Development of the U.S. Sanctions Regime*

Part I.A.1 introduces how the use of sanctions has generally been prioritized over the use of military force in American foreign policy. Part I.A.2 specifically addresses the use of secondary sanctions and the mechanics of their implementation.

1. Use in Diplomacy

The United States has historically maintained a broad sanctions regime.¹⁶ As early as the War of 1812, then secretary of the treasury, Albert Gallatin administered sanctions against Great Britain for the harassment of American sailors.¹⁷ In the throes of the Civil War, Congress enacted a law prohibiting transactions with the Confederate States of America, providing for the forfeiture of goods involved in any such transactions and structuring an exemption licensing regime under rules administered by the Department of the Treasury.¹⁸

Throughout the twentieth century, the United States began implementing economic sanctions as a means of exerting diplomatic influence on the international stage.¹⁹ American policymakers' frequent use of economic sanctions reflects a calculated choice to select sanctions from among a wide variety of tools available to them. Part of this choice is a recognition that a generally accepted norm within the post-World War international community is avoiding the use of armed force in foreign affairs.²⁰ This normative limitation, coupled with the large investment of economic and human resources necessary for use of force, makes economic sanctions a more palatable alternative means to exert international influence. Economic sanctions allow the administering country's leader to appear both decisive and effective in decision-making, while avoiding the death toll and destruction inherent in the use of force.²¹ Economic sanctions are thus more normatively acceptable than use of armed force, yet more material than diplomatic protests and entreaties.

The United States has often resorted to implementing unilateral sanctions to achieve foreign policy objectives that lack international consensus.²² For example, the unilateral decision of the United States to withdraw from the JCPOA angered many European allies who saw the accompanying increase in economic sanctions on Iran as counterproductive.²³ The Trump

16. See Carter, *supra* note 11, at 1170.

17. See Off. of Foreign Assets Control, *Frequently Asked Questions*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1501> [<https://perma.cc/5BQ5-YA4D>] (last visited Nov. 3, 2020).

18. See *id.*

19. See Carter, *supra* note 11, at 1164.

20. See FRANCIS A. BOYLE, FOUNDATIONS OF WORLD ORDER: THE LEGALIST APPROACH TO INTERNATIONAL RELATIONS 21 (1999).

21. See Carter, *supra* note 11, at 1163.

22. Gary Hufbauer, *Economic Sanctions*, 92 AM. SOC'Y INT'L L. PROC. 332, 335 (1998).

23. Ian Talley et al., *New U.S. Sanctions on Iran Set Back French Mediation Efforts*, WALL ST. J. (Sept. 4, 2019, 5:20 PM), <https://www.wsj.com/articles/u-s-sanctions-iranian-oil->

administration has overseen the most aggressive expansion of economic sanctions in modern U.S. history.²⁴ The increased use of economic sanctions corresponded with the administration's policy goals of strong-arming both North Korea and Iran into abandoning nuclear programs, compelling Venezuela's Nicolás Maduro to cede power, and responding to allegations of Russian interference in American elections.²⁵ The Trump administration's increased use of economic sanctions is consistent with the overall trend of increasing sanction use in recent American history.²⁶

2. Secondary Sanctions and the Office of Foreign Assets Control

Economic sanctions have been defined as “the deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations.”²⁷ Sanctions typically include a wide swath of economic measures, including: trade embargoes; restrictions on exports from or imports to the American market; cessation of aid to foreign countries, loans, and foreign direct investment; and control (i.e., freezing) of foreign assets and economic transactions that involve American citizens or businesses.²⁸ It would be an oversimplification to analyze the sanctions regime en masse, as it can be bifurcated into primary and secondary sanctions.

Primary sanctions prohibit companies and individuals in the sanctioning country from engaging with their counterparts in the sanctioned country.²⁹ These primary sanctions apply to persons, transactions, and goods over which the sanctioning country can assert its jurisdiction. For example, in the case of the United States, primary sanctions apply to American nationals, American business entities, and any transactions occurring within U.S. territory.

More controversially, the United States also employs secondary sanctions.³⁰ A secondary sanction is

any form of economic restriction imposed by a sanctioning or sending state (e.g., the United States) that is intended to deter a third-party country or its

shipping-network-allegedly-controlled-by-quds-force-11567612927 [https://perma.cc/K5LY-EQCT].

24. Ian Talley, *Top U.S. Sanctions Chief to Leave Trump Administration for Private Sector*, WALL ST. J. (Oct. 2, 2019, 5:16 PM), <https://www.wsj.com/articles/top-u-s-sanctions-chief-to-leave-trump-administration-for-private-sector-11570025888> [https://perma.cc/D8AL-KP5C].

25. *Id.*

26. ELLIE GERANMAYEH & MANUEL L. RAPNOUIL, EUR. COUNCIL ON FOREIGN RELS., MEETING THE CHALLENGE OF SECONDARY SANCTIONS (2019), https://ecfr.eu/wp-content/uploads/4_Meeting_the_challenge_of_secondary_sanctions.pdf [https://perma.cc/3W28-9DCH].

27. 1 GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 2 (2d ed. 1990).

28. DIANNE E. RENNACK & ROBERT D. SHUEY, CONG. RSCH. SERV., 97-949F, ECONOMIC SANCTIONS TO ACHIEVE U.S. FOREIGN POLICY GOALS 1, 2 (1998).

29. Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 926 (2009)

30. See SULTOON & WALKER, *supra* note 13.

citizens and companies (e.g., France, the French people and French companies) from transacting with a sanctions target (e.g., a rogue regime, its high government officials, or a non-state terrorist entity).³¹

The need for secondary sanctions presupposes that the home country of these third parties is neutral with regard to the target of the primary sanctions.³²

The controversial characteristic of these secondary sanctions is their extraterritoriality—they apply to foreign persons or entities over which the U.S. Treasury Department traditionally would not have jurisdiction.³³ Thus, secondary sanctions differ from primary sanctions in that they are not directed at the primary target but rather directed at the neutral third party. “The imposition of secondary sanctions presupposes that the affected third-party country is a neutral or an ally of the target state—that the third-party country has not itself instituted comparable sanctions to prohibit its own citizens and companies from doing business with the target regime.”³⁴

These secondary sanctions threaten to cut off foreign persons or entities from accessing the U.S. consumer and financial markets if they trade or otherwise transact with an entity or state subject to primary sanctions.³⁵ The use of these secondary sanctions is premised on the long-standing belief among American policymakers that, because the United States is one of the central figures of the global economy, any threat of restricting access to the American consumer and finance markets amplifies sanctions’ effects beyond the territorial limits inherent to primary sanctions.³⁶ Thus, secondary sanctions are able to achieve extraterritorial effect without necessarily requiring the aggressive overuse of primary sanctions.

Since the Korean War, the Office of Foreign Assets Control (OFAC) has headed the U.S. sanctions regime from within the Department of the Treasury.³⁷ OFAC’s primary mandate is to administer and enforce the entirety of the broad U.S. sanctions regime.³⁸ As an administrative agency, OFAC exercises its mandate pursuant to various statutory delegations, most importantly, the International Emergency Economic Powers Act³⁹ (IEEPA). However, as an agency within the Treasury Department under the executive branch, OFAC has traditionally been afforded wide discretion by Congress

31. Meyer, *supra* note 29, at 926 (2009).

32. *Id.*

33. See GERANMAYEH & RAPNOUIL, *supra* note 26.

34. Meyer, *supra* note 29, at 926.

35. *See id.*

36. See Rachel Barnes, *United States Sanctions: Delisting Applications, Judicial Review and Secret Evidence*, in *ECONOMIC SANCTIONS AND INTERNATIONAL LAW* 197, 197–98 (Matthew Happold & Paul Eden eds., 2016).

37. Off. of Foreign Assets Control, *supra* note 17.

38. Jill M. Troxel, *Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Relationship*, 24 *REV. LITIG.* 637, 639 (2005).

39. 50 U.S.C. §§ 1701–1708.

and the courts, which recognize that international affairs are firmly within the province of the executive.⁴⁰

While OFAC publicly holds itself out as primarily targeting sanctioned countries and terrorists,⁴¹ the agency also plays a key role in enforcing secondary sanctions that adversely impact allied and nonenemy entities outside of U.S. jurisdiction. Under the auspices of enforcing secondary sanctions, OFAC effectively employs a range of other measures to influence actions by non-U.S. nationals in non-U.S. territory.⁴² These measures range from inclusion on the Specially Designated Nationals and Blocked Persons list (“the SDN List”), resulting in a freezing of assets and restriction of physical and monetary movement, to prohibitions on obtaining financing provided by U.S. financial institutions.⁴³

There is a very real fear among European commentators that, as secondary sanctions continue to operate effectively under a cloudy legal framework, the United States will further expand their use.⁴⁴ OFAC is able to target an increasing number of European corporations by restricting European free choice in access to global markets.⁴⁵ Essentially, secondary sanctions bring European companies and firms squarely under the authority of OFAC.

In large part, secondary sanctions achieve this thanks to the critical role that the United States plays in global commerce. American banks and the U.S. dollar are enjoying unprecedented dominance in global capital markets and financial transactions.⁴⁶ Due to the international community’s dependence on American banks and the U.S. dollar, the threat of OFAC sanctioning—such as inclusion on the SDN List—has ripple effects, resulting in many international business entities overcomplying with existing sanctions regimes.⁴⁷ This has resulted in capital flowing less freely across borders and a major reputational hit to the EU concerning its autonomy and

40. James C. McMillin, *M. Malloy, Economic Sanctions and U.S. Trade*, 14 FORDHAM INT’L L. J., 867, 867 (1990) (articulating the long-held belief that “[l]ike war, however, economic sanctions are the province of the executive and legislative branches of the U.S. government: the judiciary, playing the supportive role, declares executive acts either constitutionally permissible or statutorily authorized”).

41. See Off. of Foreign Assets Control, *supra* note 17.

42. See generally JOHN J. FORRER, ATL. COUNCIL, SECONDARY ECONOMIC SANCTIONS: EFFECTIVE POLICY OR RISKY BUSINESS 3 (2018), https://www.atlanticcouncil.org/wp-content/uploads/2018/05/Secondary_Sanctions_WEB.pdf [<https://perma.cc/5TWV-73NZ>].

43. See Matthew Townsend et al., *Iran Sanctions and the EU Blocking Regulation: Navigating Legal Conflict*, LEGAL & REGUL. RISK NOTE, Oct. 2018, at 6, 7, <https://www.allenoverly.com/en-gb/global/news-and-insights/legal-and-regulatory-risks-for-the-finance-sector> [<https://perma.cc/BVB6-5MJY>].

44. See *id.*

45. See *id.*

46. See Liz Hoffman & Telis Demos, *How US Banks Took Over the World*, WALL ST. J. (Sept. 4, 2019, 5:58 AM), <https://www.wsj.com/articles/how-u-s-banks-took-over-the-world-11567589403> [<https://perma.cc/N9EB-AR73>].

47. See Townsend et al., *supra* note 43.

international influence.⁴⁸ European business entities are complying with American foreign policy over the policies of their own nations.⁴⁹

B. The Legal Authority Behind U.S. Sanctions

An amalgamation of legal authorities makes the broad U.S. sanctions regime, maintained and enforced by OFAC, possible. Part I.B.1 presents the National Emergencies Act⁵⁰ (NEA) and Part I.B.2 discusses IEEPA. Part I.B.3 analyzes the importance of executive orders to OFAC's authority. Finally, Part I.B.4 examines how the above three authorities mix in practice and result in a particular OFAC sanctions program.

1. The NEA

The NEA was enacted a year before IEEPA, in an effort by Congress to curtail many of the foreign relations powers it believed had been usurped by the executive.⁵¹ The NEA terminated all ongoing so-called “emergencies” in 1978—except those making use of section 5(b) of the Trading with the Enemy Act⁵² (TWEA)⁵³—and placed new curtailments on how the executive could declare an emergency in the future and the duration of such a declared state of emergency (e.g., the requirement that the president immediately notify Congress of the national emergency declaration).⁵⁴ Further, in enacting the NEA, Congress required a biannual review whereby “each House of Congress shall meet to consider a vote on a concurrent [joint] resolution to determine whether that emergency shall be terminated.”⁵⁵ The NEA also authorized Congress to terminate the executive's declared national emergency through a concurrent resolution.⁵⁶

The NEA has been criticized for its lack of teeth.⁵⁷ For example, while the NEA was intended to provide for congressional review of national emergencies declared by the president (and the associated powers granted to

48. See GERANMAYEH & RAPNOUIL, *supra* note 26.

49. See *id.*

50. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended in scattered sections of 8, 10, 16, and 50 U.S.C.).

51. See generally S. SPECIAL COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS, 93RD CONG., A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES (Comm. Print 1974) (including a study by Harold C. Relyea).

52. Pub. L. No. 65-91, § 5(b), 40 Stat. 411, 415 (1917) (current version at 50 U.S.C. § 4305(b)).

53. See *infra* note 66 and accompanying text.

54. See CHRISTOPHER A. CASEY ET AL., CONG. RSCH SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 10–11 (2020).

55. 50 U.S.C. § 1601.

56. See *id.*; see also *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding that legislative vetoes of the executive are unconstitutional). In response to the U.S. Supreme Court's holding in *Chadha*, Congress amended the NEA on August 16, 1985, changing the requirement of a “concurrent” resolution to one of “joint” resolution in an effort to make the so-called “legislative veto” more democratically fortified. See Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 405, 448 (1985) (codified as amended in scattered sections of the U.S.C.).

57. See CASEY ET AL., *supra* note 54, at 9.

the president during emergencies) and allow for efficient termination of such an “emergency,” those intentions were quickly nullified by a U.S. Supreme Court case that found such a provision unconstitutional.⁵⁸ Subsequent amendments by Congress requiring a joint resolution of both chambers to terminate a national emergency declared by the president made effective congressional review more difficult to achieve.

2. IEEPA

Congress enacted IEEPA in 1977.⁵⁹ IEEPA confers broad authority on the president to regulate a variety of economic transactions following a declaration of a national emergency.⁶⁰ IEEPA is the foundation of the modern American sanctions regime. IEEPA, like its progenitor, the TWEA, represents a delegation of emergency power to the executive branch.⁶¹ Like the TWEA, presidents have used IEEPA to: restrict a variety of international transactions, seize U.S.-based assets held by foreign nationals, restrict exports, modify regulations to deter the hoarding of gold, limit foreign direct investment in American companies, and impose tariffs on all imports into the United States.⁶² The targets of these regulations and restrictions, the frequency of use, and the duration of emergencies have broadened in scope over the decades since enactment.⁶³ Indeed, some scholars have argued—with nodding approval from many members of Congress—that IEEPA is still a source of unchecked and broad discretionary power for the president.⁶⁴

The original ambit of the TWEA was exclusive to wartime, but it has become normal for presidents to apply it long after a war concludes.⁶⁵ In fact, IEEPA was enacted out of an effort to curtail the seemingly limitless use of the TWEA by the president to exert control over international financial and trading transactions—even during peacetime.⁶⁶ Specifically, section 5(b) of the TWEA received much of the criticism because successive presidents interpreted it to confer on them unlimited international economic control powers, with full knowledge that once integrated into the American financial system during wartime, these economic regulations proved very

58. *Chadha*, 462 U.S. at 923.

59. 50 U.S.C. § 1701.

60. See CASEY ET AL., *supra* note 54, at 42 (discussing the expansive authority granted to the president).

61. 50 U.S.C. § 4305(b)(1).

62. *Id.* § 1702.

63. See CASEY ET AL., *supra* note 54, at 18–19 (observing that as of July 1, 2020, presidents had declared fifty-nine national emergencies invoking IEEPA, thirty-seven of which are still ongoing and that the United States had been in a “state of emergency” for more than forty years).

64. See, e.g., Patrick Thronson, *Toward Comprehensive Reform of America’s Emergency Law Regime*, 46 MICH. J. L. REFORM 737 (2013); Eric Sandberg-Zakian, *Counterterrorism, the Constitution, and the Civil-Criminal Divide: Evaluating the Designation of U.S. Persons Under the International Emergency Economic Powers Act*, 48 HARV. J. ON LEGIS. 95, 96–97 (2011).

65. See CASEY ET AL., *supra* note 54, at 6–9.

66. H.R. REP. NO. 95-459, at 9 (1977).

difficult to extricate postwar.⁶⁷ A review of the legislative history behind IEEPA reveals that Congress was concerned that executive power in both domestic and international economic affairs had become too discretionary without any congressional review.⁶⁸ For example, Professor Harold Maier testified before the House Committee on International Relations as to the TWEA:

Section 5(b)'s effect is no longer confined to "emergency situations" in the sense of existing imminent danger. The continuing retroactive approval, either explicit or implicit, by Congress of broad executive interpretations of the scope of powers which it confers has converted the section into a general grant of legislative authority to the President⁶⁹

Acting on these concerns, Congress enacted IEEPA to curtail the executive's authority under the TWEA. Among other measures, IEEPA conferred "upon the President a new set of authorities for use in time of national emergency which are both more limited in scope than those of section 5(b) and subject to various procedural limitations, including those of the National Emergencies Act."⁷⁰ Specifically, the House of Representatives aimed to limit the scope of section 5(b) by redefining "emergency" so as to disallow presidents to issue a state of emergency to last decades.⁷¹ The measures included within IEEPA intended to curtail the president's authority in this area include notice requirements to Congress, along with reassessment and reports to Congress according to a regular, consistent time line.⁷²

Ultimately, IEEPA, along with its umbrella statute, the NEA, has proven ineffective at curtailing presidential invocation of emergency economic

67. See Pub. L. No. 65-91, § 5(b), 40 Stat. 411, 415 (1917) (current version at 50 U.S.C. § 4305(b)).

68. H.R. REP. NO. 95-459, at 7.

69. *Id.* at 9 (quoting *Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on Int'l Econ. Pol'y & Trade of the H. Comm. on Int'l Rels.*, 95th Cong. 30 (1977) (statement of Harold G. Maier, Professor, Vanderbilt University School of Law)).

70. *Id.* at 2.

71. See CASEY ET AL., *supra* note 54, at 6–9. The House Committee on International Relations provided its interpretation of an emergency in its "new approach" to the president's international emergency economic powers:

[G]iven the breadth of the authorities and their availability at the President's discretion upon a declaration of a national emergency, their exercise should be subject to various substantive restrictions. The main one stems from a recognition that emergencies are by their nature rare and brief, and are not to be equated with normal, ongoing problems. A national emergency should be declared and emergency authorities employed only with respect to a specific set of circumstances which constitute a real emergency, and for no other purpose. The emergency should be terminated in a timely manner when the factual state of emergency is over and not continued in effect for use in other circumstances. A state of national emergency should not be a normal state of affairs.

H.R. REP. NO. 95-459, at 11.

72. See CASEY ET AL., *supra* note 54, at 10. When declaring a national emergency, the NEA requires that the president "immediately" transmit a proclamation declaring the emergency to Congress and publish it in the Federal Register. The president must also specify the provisions of law that the president intends to use. 50 U.S.C. § 1631.

powers. Since congressional debate and the subsequent enactment of IEEPA, presidents regularly declare national emergencies with regard to international economic sanctions and renew them for years or even decades.⁷³ Limiting IEEPA to transactions involving some foreign interest was intended to limit IEEPA's domestic application. However, globalization has eroded that distinction, as most transactions today involve some type of foreign interest.⁷⁴ Many of the TWEA's other shortcomings that IEEPA was supposed to address—consultation, time limits, congressional review, scope of power, and logical relationship to the emergency declared—are shortcomings of IEEPA that scholars still criticize today.⁷⁵

3. Ukraine/Russia Case Study

OFAC is an agency within the Department of the Treasury.⁷⁶ As an executive branch agency, OFAC manages the broad U.S. sanctions regime largely at the behest of the president.⁷⁷ Due to the large economic and social impact that sanctions can have on the American public, however, the modern American sanctions regime has its genesis in congressional action.⁷⁸ This mix of statutory delegation and executive mandate results in a unique blend of authority for OFAC.

The Ukraine/Russia-related sanctions program the Barack Obama administration implemented in 2014 is an example of the amalgamated authority under which OFAC administers sanctions programs. OFAC took initial steps toward building such a sanctions regime at the behest of the president.⁷⁹ On March 6, 2014, President Barack Obama issued Executive Order 13,660 (“EO 13,660”), which declared a national emergency to deal with the threat posed by persons or organizations undermining the democratic processes and institutions in the Ukraine.⁸⁰ President Obama subsequently issued three more executive orders broadening the scope of the emergency previously declared in EO 13,660.⁸¹ These subsequent executive

73. See CASEY ET AL., *supra* note 54, at 42.

74. See generally IMF, *Globalization: A Brief Overview*, Issues Brief (May 2008), <https://www.imf.org/external/np/exr/ib/2008/pdf/053008.pdf> [<https://perma.cc/43GF-CCGT>] (reporting that the value of trade (goods and services) as a percentage of world gross domestic product increased from 42.1 percent in 1980 to 62.1 percent in 2007).

75. See, e.g., Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1392 (1989); Jason Luong, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181, 1190 (2000).

76. See Off. of Foreign Assets Control, *supra* note 17.

77. See DIANNE E. RENNACK, CONG. RSCH. SERV., RL30384, ECONOMIC SANCTIONS: LEGISLATION IN THE 106TH CONGRESS 2 (2000).

78. See *id.*

79. See OFF. OF FOREIGN ASSETS CONTROL, DEP'T OF TREASURY, UKRAINE/RUSSIA-RELATED SANCTIONS PROGRAM 3 (2016) (explaining the legally binding provisions, found in Executive Orders 13,660, 13,661, 13,662, 13,685, applicable laws, and implementing regulations in 31 C.F.R. pt. 589, governing the sanctions program, intended to be punitive to Russia due to its involvement in the Ukraine).

80. See Exec. Order No. 13,660, 3 C.F.R. 226 (2015).

81. See Exec. Order No. 13,661, 3 C.F.R. 229 (2015); Exec. Order No. 13,662, 3 C.F.R. 233 (2015); Exec. Order No. 13,685, 3 C.F.R. 313 (2015).

orders were responses to the worsening situation in the Ukraine, linked to the actions and policies of the Russian Federation, including the allegedly illegal annexation of the Crimea region.⁸²

These executive orders authorized OFAC to impose sanctions against persons believed to have been involved in any illegal activities with respect to the Ukraine and its government, against persons involved with the Russian Federation in official capacities, and against industries and businesses operating in the Crimea region of the Ukraine. Specifically, Executive Order 13,685 (“EO 13,685”) placed a prohibition on the importing and exporting of goods and services to or from the Crimea region, while also forbidding new investment by any U.S. person or entity in the Crimea region.⁸³ Each of these executive orders was issued pursuant to the authority statutorily given to the president by IEEPA and the NEA.

Essentially, this series of executive orders outlined the policy directives OFAC was meant to achieve. In achieving these directives, OFAC issued a set of regulations intended to implement the policy directives outlined in the executive orders.⁸⁴ Accompanying these regulations, the secretary of the treasury issued determinations, akin to guidance documents, as to the scope of the executive orders and their corresponding sanctions, administered by OFAC.⁸⁵

In the specific case of the Ukraine/Russia-related sanctions, OFAC structured a comprehensive sanctions program. The program prohibited transactions in three broad categories.⁸⁶ First, the so-called “blocking sanctions” prohibited any transactions by U.S. persons or transactions in the United States if they involved transferring, exporting, withdrawing, or otherwise dealing in property or interests in property of an entity or individual listed on the OFAC’s SDN List.⁸⁷ Second, OFAC implemented sectoral sanctions, which prohibited extensions of debt or financing for entities operating in certain sectors of the Russian economy identified by the secretary of the treasury.⁸⁸ Third, any future investment in, trade with, or provision of financing to entities by OFAC was prohibited.⁸⁹

82. See OFF. OF FOREIGN ASSETS CONTROL, *supra* note 79.

83. Exec. Order No. 13,685, 3 C.F.R. 313. The president issued this executive order pursuant to IEEPA and the NEA to further economically constrict both the Crimea region and its Russian Federation associates as a means of showing disapproval of the allegedly illegal annexation of the region by the Russian Federation.

84. See 31 C.F.R. pt. 589 (2020).

85. See OFF. OF FOREIGN ASSETS CONTROL, *supra* note 79 (explaining that “the Secretary of the Treasury, after consultation with the Secretary of State, issued a determination that section 1(a)(i) of E.O. 13662 shall apply to the financial services and energy sectors of the Russian Federation economy”). Through these determinations, OFAC is able to expand the scope of a sanctions regime without the formal rulemaking or the informal notice-and-comment rulemaking processes outlined in the Administrative Procedure Act. See generally Cass R. Sunstein, “Practically Binding”: *General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491 (2016).

86. See OFF. OF FOREIGN ASSETS CONTROL, *supra* note 79, at 4–5.

87. See *id.* at 5.

88. See *id.*

89. See *id.* at 3.

Through this program, and specifically the future investment provision, OFAC effectively ensured that there would be limited, if any, future U.S. investment or trade within the Crimea region and with specifically designated Russian nationals (both corporations and natural persons). For example, if a European company with extensive sales in the American market had been in negotiations with a Crimea-based counterpart, this sanctions regime was intended to stop those negotiations or threaten exclusion from the American market.⁹⁰

C. *History of Europe's Response*

1. Genesis of EU Blocking Regulations

While the United States has historically maintained the broadest and most comprehensive sanctions regime, the EU and its member states have often implemented their own sanctions programs in coordination with those of the United States. At times, however, the EU has been faced with U.S. sanctions that do not match EU foreign policy or even those that go so far as to target EU businesses and individuals.

In the 1990s, Congress imposed a series of secondary sanctions on Cuba, Libya, and Iran with characteristically extraterritorial impact.⁹¹ Many of those impacted were European companies.⁹² For example, Europe understood the sanctions enacted against Cuba as

contain[ing] a number of provisions which have the intent and effect to restrain the liberty of the [European Community] to export to Cuba or to trade in Cuban origin goods, as well as to restrict the freedom of [European Community] registered vessels and their cargo to transit through US ports.⁹³

In response, European governments lodged a complaint with the World Trade Organization⁹⁴ (WTO) and conducted comprehensive, multilateral negotiations with the Bill Clinton administration to dissuade the United States from heavy-handed secondary sanctioning of European businesses.⁹⁵

The EU further responded with its own sanction-like apparatus: blocking regulations. Originally introduced by the EU in 1996, the blocking regulations prohibited European companies from complying with U.S. secondary sanctions.⁹⁶ Through the blocking regulations, coupled with

90. *See id.*

91. *See GERANMAYEH & RAPNOUIL, supra* note 26.

92. *See id.*

93. Request for Consultations by the European Communities, *United States—The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38/1 (May 13, 1996).

94. *See id.*

95. *See GERANMAYEH & RAPNOUIL, supra* note 26.

96. *See Townsend et al., supra* note 43, at 2 (defining blocking regulations).

WTO action and multilateral negotiations, the EU was able to avoid any adverse effects from the secondary sanctions.⁹⁷

2. Changing of the Winds

The above section illustrated an example of the EU asserting its own international influence in confronting secondary sanctions. However, that proactive response was lacking at critical times during the development of the U.S. sanctions regime.

a. *Falling into Line with America*

During the Obama administration, the United States took unprecedented steps toward strengthening its secondary sanctions through its response to the global financial crisis. The administration increased oversight and regulation of global financial institutions who were willed to comply through the importance of the American market.⁹⁸ According to one senior banking executive based in Europe: “When the United States began using its secondary sanctions, it didn’t know if it would work. There was trial and error involved. If, at that time, all of the European central banks resisted these measures, it is uncertain if the U.S. could target them.”⁹⁹ The United States would “target” these companies by either politically challenging these business entities¹⁰⁰ or utilizing OFAC’s authority to include them on its SDN List. Unfortunately for the EU, the various European central banks did not respond aggressively, and the United States’s reliance on secondary sanctions has only increased.¹⁰¹

While the United States found its footing regarding its utilization of secondary sanctions on multinational companies, European countries backed U.S. foreign policy against Iran. From 2010 to 2012, the EU and the United States introduced severe sanctions on Iran’s energy sector. The severity was, in large part, due to the multilateral nature of the sanctions¹⁰²—prohibiting Iranian oil from accessing the wealthy, gas-guzzling consumer markets of

97. See James Bennet, *To Clear Air with Europe, U.S. Waives Some Sanctions*, N.Y. TIMES (May 19, 1998), <https://www.nytimes.com/1998/05/19/world/to-clear-air-with-europe-us-waives-some-sanctions.html> [<https://perma.cc/FU82-RWCW>].

98. See GERANMAYEH & RAPNOUIL, *supra* note 26.

99. See *id.*

100. Fear of being targeted politically by the United States is a justified concern for multinational businesses. Indeed, business entities’ operations can be significantly impacted by public challenges from politicians. See Philip Bump, *Did Donald Trump Tank Boeing’s Stock Because He Was Mad About a News Article?* WASH. POST (Dec. 6, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/06/did-donald-trump-tank-boeings-stock-because-he-was-mad-about-a-news-article> [<https://perma.cc/8JKB-4UPR>]. See generally Sam Thielman, *Trump’s Tweet About Lockheed-Martin Cuts \$4bn in Value as Share Prices Fall*, GUARDIAN (Dec. 12, 2016), <https://www.theguardian.com/business/2016/dec/12/lockheed-martin-share-prices-donald-trump-tweet> [<https://perma.cc/BFU4-V9BV>].

101. See generally William H. Kaempfer & Anton D. Lowenberg, *Unilateral Versus Multilateral International Sanctions: A Public Choice Perspective*, 43 INT’L STUD. Q. 37 (1999) (examining and arguing for the increased use of unilateral sanctions).

102. See *id.* at 53–54.

both Europe and the United States packed a powerful punch against Iran.¹⁰³ There was no conflict at the time over these sanctions on Iran because the respective foreign policies on either side of the Atlantic aligned.¹⁰⁴ For example, in 2012, Congress introduced legislation to disconnect Iranian banks from the Belgium-based SWIFT—the financial messaging company that was used near universally for global payments.¹⁰⁵ Seeking to present a united front with the United States, the EU passed a similar regulation shortly thereafter.¹⁰⁶

It was significant that the EU joined the Obama administration in applying strong sanctions, including cutting off Iran from SWIFT, as it showed solidarity in coercing Iran into negotiations foreshadowing the landmark nuclear deal (the JCPOA). However, Europe also set a dangerous precedent for the United States by allowing American secondary sanctions to cut off business from a European business entity directly.¹⁰⁷ American lawmakers have followed this precedent by further sanctioning Iranian financial institutions—with the potential that the United States would follow the same path in targeting Venezuela or Russia in the future.¹⁰⁸ Despite protestation from some of its member states (e.g., Belgium), the EU fell into line with U.S. policy—essentially ratifying American use of secondary sanctions against a European banking system that has never before ousted a nation from its network.¹⁰⁹

b. European Overcompliance

Part of the effectiveness of U.S. secondary sanctions stems from the highly discretionary power of OFAC, which through its legislative delegation and executive mandates, can dedicate vast resources to sanctions designations, implementation, and enforcement.¹¹⁰ According to one former senior U.S. Treasury official, U.S. district and appeals court rulings imply that the executive branch has significant discretion in this area.¹¹¹ No Supreme Court case has directly addressed the scope of OFAC's authority, though it is likely

103. *Iran Sanctions*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/iran-sanctions> [https://perma.cc/52U4-59TN] (last visited Nov. 3, 2020).

104. See Rick Gladstone & Nicholas Kulish, *West Tightens Iran Sanctions After Embassy Attack*, N.Y. TIMES (Dec. 1, 2011), <https://www.nytimes.com/2011/12/02/world/middleeast/britain-closure-embassy-iran-expel-diplomats.html> [https://perma.cc/H8BD-3P87].

105. See Philip Blenkinsop & Rachele Younglai, *Banking's SWIFT Says Ready to Block Iran Transactions*, REUTERS (Feb. 17, 2012), <https://www.reuters.com/article/us-iran-sanctions-swift/bankings-swift-says-ready-to-block-iran-transactions-idUSTRE81G26820120217> [https://perma.cc/LCL8-7WMU].

106. *Id.* (“The United States has been pushing the European Union to force SWIFT to evict the Iranian firms but it was unclear whether the EU would reach an agreement . . . SWIFT's home country, Belgium, does not think the global banking firm should be the only company of its kind required to comply with sanctions.”).

107. See GERANMAYEH & RAPNOUIL, *supra* note 26.

108. See *id.*

109. See Blenkinsop & Younglai, *supra* note 105.

110. See *supra* notes 60–63 and accompanying text.

111. See GERANMAYEH & RAPNOUIL, *supra* note 26.

that the highest court would rule consistently with district courts, which have tended to show deference to the executive in matters of international affairs.¹¹²

The uncertainty surrounding the operation and procedure behind the designation, implementation, and enforcement of secondary sanctions has disproportionately amplified their impact. Such a lack of transparency and the difficulty of interpreting OFAC's measures and enforcement have led to high levels of *overcompliance* by Europe-based business entities, which find it preferable to abandon business ties and investments in Iran rather than risk inadvertently violating any sanctions.¹¹³ OFAC's response to continued requests from European governments for clarity on these issues has been slow, inadequate, and, some argue, deliberately oppositional.¹¹⁴

3. Reprisal of the Blocking Regulations

In the wake of the Trump administration's withdrawal from the JCPOA on May 8, 2018, the EU has once again faced secondary sanctions affecting European individuals and business entities.¹¹⁵ The EU has responded with a reprisal of the EU blocking regulations of the 1990s, which prohibit European business entities from altering their business operations for the sole reason of complying with U.S. sanctions.¹¹⁶

Indeed, the revamped and updated EU blocking regulations prohibit any EU person or entity from complying with secondary sanctions reimposed after the United States abandoned the JCPOA.¹¹⁷ Although the regulations provide for a licensing derogation, qualifying for a license requires the applying party to demonstrate that "serious damage" would result from noncompliance with the subject U.S. sanction, harming either the party or the EU.¹¹⁸ Such licensing has proven elusive because licenses are rarely ever

112. See Jonathan Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 805–06 (1989); see also *infra* notes 216–19 and accompanying text.

113. Mengqi Sun, *U.S. Sanctions Compliance Fines Hit Decade High*, WALL ST. J. (July 25, 2019), <https://www.wsj.com/articles/u-s-sanctions-compliance-fines-hit-decade-high-11564057920> [<https://perma.cc/8GXH-X3KG>].

114. See GERANMAYEH & RAPNOUIL, *supra* note 26 ("As demonstrated by the Trump administration's approach to waivers for continued purchase of Iranian oil, the limited and temporary exemptions the US may issue to European companies only add to the measures' aura of unpredictability."); see also Barnes, *supra* note 36, at 197–98 (discussing the differences between European and American jurisprudence on economic sanctions, which underscores the lack of European understanding of OFAC's procedures).

115. James McAuley, *After Trump Says U.S. Will Withdraw from Iran Deal, Allies Say They'll Try to Save It*, WASH. POST (May 8, 2018), https://www.washingtonpost.com/world/backers-of-iran-nuclear-deal-wage-last-ditch-blitz-seeking-to-sway-trump/2018/05/08/9b15e3f0-523e-11e8-a6d4-ca1d035642ce_story.html [<https://perma.cc/4EU3-4EXV>].

116. Robin Emmott & Alissa de Carbonnel, *In 1990s Redux, EU to Consider Blocking U.S. Sanctions over Iran*, REUTERS (May 9, 2018), <https://www.reuters.com/article/us-iran-nuclear-eu-business/in-1990s-redux-eu-to-consider-blocking-u-s-sanctions-over-iran-idUSKBN1IA2PV> [<https://perma.cc/T6DT-DQ7G>].

117. Council Regulation 2271/96, art. 5, 1996 O.J. (L 309) 1, 4 (EC).

118. Commission Delegated Regulation 2018/1100 of June 6, 2018, 2018 O.J. (L 199) 1 (EU).

granted.¹¹⁹ On the other hand, the blocking regulations do provide protections to EU persons and entities—assuring that any U.S. court judgment or administrative (i.e., OFAC) determination against an EU person or entity enforcing targeted U.S. secondary sanctions will not be enforced or given effect in an EU court.¹²⁰ Further, the blocking regulations provide the statutory right for any EU person or entity adversely impacted as a result of another person or entity complying with the targeted U.S. sanctions to recover damages from that person or entity.¹²¹

This break from the European norm of weak responses to U.S. sanctions is likely a result of the EU attempting not to lose its diplomatic gravitas, especially regarding the JCPOA.¹²² Significantly, however, this strong response has placed U.S. secondary sanctions and EU blocking regulations on a crash course, as compliance with both regimes is impossible.

4. Winter Is Coming

The consequence of U.S. secondary sanctions and their outsized influence is a chilling of the flow of capital, goods, and services.¹²³ These consequences are only amplified when the U.S. secondary sanctions are directly at odds with EU blocking regulations.¹²⁴ The following sections examine the potential impact of broad secondary sanctions and their conflict with EU blocking regulations.

a. Impact on Global Commerce

The direct consequence of the U.S. sanctions regime against Iran (particularly the secondary sanctions) and the EU's subsequent updating of the blocking regulations is that both legal regimes are now squarely in conflict with each other. This situation may be termed a "sanctions war." This conflict of laws largely results from posturing by both sides, as the United States is increasingly relying on secondary sanctions to exert an outsized influence on the global economy, and the EU is responding in an attempt to maintain some of its autonomy and diplomatic gravitas.¹²⁵ Whatever the political reasoning, these conflicting regimes have, of course, been registered by multinational business entities who may be targeted by the EU or the United States, acting through OFAC.¹²⁶

119. See Townsend et al., *supra* note 43, at 2.

120. Commission Delegated Regulation 2018/1100, *supra* note 118, at 1.

121. *Id.*

122. See *Guidance Note: Questions and Answers: Adoption of Update of the Blocking Statute*, 2018 O.J. (C 277) 1, 2.

123. See *infra* note 131 and accompanying text.

124. See *supra* Part I.C.3.

125. See Jacqueline Thomsen, *EU Issues Warning to European Companies That Comply with New US Sanctions on Iran*, HILL (Aug. 7, 2018), <https://thehill.com/policy/international/europe/400704-eu-threatens-to-sanction-european-companies-that-comply-with-new> [https://perma.cc/G9QA-C9ME].

126. See, e.g., *The "New" Iran E.O. and the "New" EU Blocking Sanctions—Navigating the Divide for International Business*, GIBSON DUNN (Aug. 9, 2018) [hereinafter *The "New"*

These business entities are left with two options.¹²⁷ First, they may choose noncompliance with U.S. secondary sanctions, which can lead to punishment at the hands of OFAC. Second, they may choose to comply with U.S. sanctions and face the resulting consequences of noncompliance with EU blocking regulations.

This conflict of laws leaves these multinational entities in a precarious legal position. Historically, the U.S. sanctions regime has set the standard of compliance.¹²⁸ Many multinational business entities have complied with OFAC's guidelines and sanctions programs as a matter of course because the U.S. sanctions regime was often consistent with those of European nations and access to U.S. markets is of paramount importance.¹²⁹ Legal advisors report that there is no obvious solution to this conflict of laws.¹³⁰ Multinational companies now show a reluctance to engage in deals and financing where a conflict of sanctions opens potential liability under one regime or the other.¹³¹

As the United States increasingly pursues secondary sanctions, both unilateral in nature and fraught with ever-increasing fines,¹³² multinational businesses face a false choice between halting operations or noncompliance with one regime of sanctions.

b. Case Study of Executive Order 13,846

On August 6, 2018, President Trump issued Executive Order 13,846 ("EO 13,846") announcing the reimposition of certain sanctions in relation to Iran.¹³³ This followed the president's declaration on May 8, 2018, in which he announced that the United States would withdraw from the JCPOA.¹³⁴ The announced reimposition of sanctions was largely a reimposition of secondary sanctions.¹³⁵

Iran E.O.], <https://www.gibsondunn.com/wp-content/uploads/2018/08/new-iran-e-o-and-new-eu-blocking-sanctions-navigating-the-divide-for-international-business.pdf> [<https://perma.cc/M8RV-TNMK>]; see also Townsend et al., *supra* note 43, at 2.

127. See Townsend et al., *supra* note 43, at 2.

128. See *id.*

129. See *id.* at 3.

130. See *id.*

131. See Bruce Love, *Companies Caught in EU–US Sanctions Crossfire*, FIN. TIMES (Jan. 29, 2020), <https://www.ft.com/content/97a75318-16a8-11ea-b869-0971bfffac109> [<https://perma.cc/4RR7-A5PM>]

132. See Sun, *supra* note 113.

133. Exec. Order No. 13,846, 83 Fed. Reg. 38,939 (Aug. 6, 2018).

134. See President Donald Trump, Remarks on the Joint Comprehensive Plan of Action (May 8, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action> [<https://perma.cc/8776-YX53>]; see also National Security Presidential Memorandum on Ceasing United States Participation in the Joint Comprehensive Plan of Action and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon, 2018 DAILY COMP. PRES. DOC. 311 (May 8, 2018).

135. See *The "New" Iran E.O.*, *supra* note 126 (explaining that the JCPOA provided for sanction relief largely only for non-U.S. entities or persons, such that a reimposition of those sanctions lifted under the plan was almost exclusively reimposing secondary sanctions).

EO 13,846 provided for three specific types of secondary sanctions that OFAC was to reimplement with regard to Iran.¹³⁶ First, the order provides for blocking sanctions, such as those imposed against entities or persons placed on the SDN List, allowing OFAC to freeze the assets of these entities or persons.¹³⁷ Second, the order provides for correspondent and payable-through account sanctions, which prohibit or restrict U.S. banks from opening or maintaining U.S.-based accounts for any foreign business entities designated by OFAC.¹³⁸ This amounts to cutting these foreign business entities or financial institutions off from the American financial system (and in some cases, ostracizing them from U.S. dollar-based trade, in general).¹³⁹ Finally, the order provides for a la carte sanctions, authorizing OFAC to select from a variety of possible sanctions—including visa limitations and asset-blocking sanctions—to impose against designated entities.¹⁴⁰ All three powers EO 13,846 endows upon OFAC are highly discretionary.

The EU promptly responded with the General Blocking Regulation and the reimposed Iran Sanctions Blocking Regulation designed to prohibit compliance by EU entities with the newly reimposed United States sanctions.¹⁴¹ The “two actions appear to place multinational companies in an impossible bind between the inconsistent demands (and rhetoric) of powerful regulators.”¹⁴²

How OFAC and its European counterparts choose to enforce these conflicting sanctions regimes remains to be seen. However, the actions have already had a chilling effect on international commerce.¹⁴³

II. THE LEGAL CONFLICT: RESPONDING TO SECONDARY SANCTIONS

In light of this legal conflict between the U.S. and European sanctions regimes, this Note proposes several potential courses of action to mitigate the freezing effect on international business in a highly globalized world of commerce. Part II.A examines the defense of foreign sovereign compulsion, which may be available to a party targeted with secondary sanctions and explains its futility in the context of secondary sanctions. Part II.B explains the limited case law challenging OFAC’s authority. Part II.C presents a picture of judicial timidity in reviewing matters of international sanctions and discusses the genesis of this deference to OFAC.

136. *See id.*

137. Exec. Order No. 13,846, § 1, 83 Fed. Reg. at 38,939–40.

138. *Id.*

139. *Id.*

140. *Id.*

141. Council Regulation 2271/96, *supra* note 117, at 4–6.

142. *The “New” Iran E.O.*, *supra* note 126.

143. *See* Babak Dehghanpisheh & Peter Graff, *Trump Says Firms Doing Business in Iran to Be Barred from U.S. as Sanctions Hit*, REUTERS (Aug. 7, 2018), <https://www.reuters.com/article/us-iran-nuclear/trump-says-firms-doing-business-in-iran-to-be-barred-from-u-s-as-sanctions-hit-idUSKBN1KS131> [https://perma.cc/7C3P-7RNX] (reporting that French oil company Total and car manufacturers Renault, PSA, and Daimler had all suspended investment plans in consideration of the reimposed secondary sanctions).

A. *The Defense of Foreign Sovereign Compulsion*

Where the EU's blocking regulations impose directly conflicting obligations on multinational entities facing liability from both European and American sanctions, these entities may "plead the defense of foreign sovereign compulsion to a foreign court in an effort not to comply with its extra-territorial laws."¹⁴⁴ Under U.S. case law the defense of foreign sovereign compulsion shields "the acts of parties carried out in obedience to the mandate of a foreign government" from civil liability.¹⁴⁵ To prevail on a foreign sovereign compulsion defense, "a party must show that: (1) the behavior violating American law was actually compelled by the foreign government; and (2) the foreign order was 'basic and fundamental' to the alleged behavior and not just peripheral to the illegal course of conduct."¹⁴⁶

The Supreme Court addressed the issue of foreign sovereign compulsion in *Société Nationale Industrielle Aérospatiale v. United States District Court*,¹⁴⁷ where a French blocking statute precluded French citizens from disclosing evidence to U.S. courts. The Supreme Court held that the U.S. court was not precluded from ordering a foreign party over whom the court exercised personal jurisdiction to produce evidence, even if such an order would cause the foreign party to violate French law.¹⁴⁸

The Court reasoned that the French blocking statute was almost completely irrelevant to its decision affirming the order to produce evidence.

It is clear that American courts are not required to adhere blindly to the directives of such a [foreign blocking] statute. Indeed, the language of the statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge¹⁴⁹

This prospect of extraterritorial reach by a foreign legislature was deemed insupportable by the Court.¹⁵⁰

Similarly, in another Supreme Court case, *Hartford Fire Insurance Co. v. California*,¹⁵¹ British reinsurers asserted that the American courts lacked jurisdiction under principles of comity¹⁵² as a defense to charges of violating the Sherman Act.¹⁵³ The British defendants claimed that applying the Sherman Act to their conduct would create a significant conflict with U.K. law.¹⁵⁴ Essentially, they pleaded a defense of foreign sovereign compulsion. The Court refused to give this defense much weight, instead holding that

144. SAMUEL KERN ALEXANDER III, *ECONOMIC SANCTIONS* 251 (1st ed. 2009).

145. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979).

146. *United States v. Brodie*, 174 F. Supp. 2d 294, 300 (E.D. Pa. 2001) (quoting *Mannington Mills*, 595 F.2d at 1293).

147. 482 U.S. 522 (1987).

148. *See id.* at 544.

149. *Id.* at 544 n.29.

150. *Id.* at 544.

151. 509 U.S. 764 (1993).

152. *Id.* at 799.

153. 15 U.S.C. §§ 1–7.

154. *Hartford Fire Ins.*, 509 U.S. at 799.

there was no true conflict in the laws: “Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law.”¹⁵⁵ The mere fact that the subject conduct is lawful in the foreign state will not, of itself, bar application of the U.S. laws.¹⁵⁶

The Supreme Court’s analysis in both *Aérospatiale* and *Hartford Fire Insurance* implies that it would address a foreign sovereign compulsion defense by a party targeted by secondary sanctions in much the same way. The Court would likely look to determine whether “there is in fact a true conflict between domestic and foreign law.”¹⁵⁷ In other words, the Court would look to whether the foreign party’s inconvenience in having to choose between penalties for violating a foreign blocking statute or penalties for not complying with U.S. secondary sanctions rises to “a true conflict between domestic and foreign law.”¹⁵⁸ Where U.S. fines administered by OFAC are increasingly harsh and an SDN listing can cut a company off from the American market altogether, a court may very well find this defense viable.¹⁵⁹

B. Challenging OFAC

The alternative to the defense of foreign sovereign compulsion would be an adversely affected party mounting a proactive challenge to an OFAC determination.¹⁶⁰ There is limited case law covering challenges to OFAC determinations. The jurisprudence addressing the authority of OFAC is largely limited to cases involving terrorist designation, a process in which OFAC lists an individual as a Specially Designated Global Terrorist (SDGT).¹⁶¹ However, whether an adversely affected party is designated on the SDN List (a common punishment for secondary sanction violations) or the SDGT list, the recourse available to that party is largely the same. If a party is designated on either list and thus has its assets frozen, there are several means by which it may challenge such a designation.¹⁶² First, the agency’s rules allow for administrative reconsideration.¹⁶³ Second, if the

155. *Id.* (citation omitted).

156. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 403 cmt. e (AM. L. INST. 1987). Subsection 3 of the Restatement (Third), calling for states to reconsider their laws out of the principle of comity, “does not apply merely because one state has a strong policy to permit or encourage an activity which another state prohibits, or one state exempts from regulation an activity which another regulates.” *Id.* Subsection 3 applies to exceptional circumstances. *Id.*

157. *Hartford Fire Ins.*, 509 U.S. at 798 (quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct.*, 482 U.S. at 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).

158. *Id.*

159. *See supra* note 113 and accompanying text.

160. *See Barnes, supra* note 36, at 202.

161. *See infra* Part II.B.2.

162. *See Barnes, supra* note 36, at 202.

163. *See id.* at 204.

adversely affected party is afforded constitutional protections, it may claim constitutional violations in court.¹⁶⁴ If a party does not qualify for constitutional protections, it may still be able to seek judicial review on other grounds.¹⁶⁵ Either way, judicial review is limited.

1. Administrative Recourse

The mechanisms by which parties can seek administrative reconsideration from OFAC are outlined in the Code of Federal Regulations.¹⁶⁶ These codified rules issued by OFAC provide limited administrative recourse to listed parties.¹⁶⁷ The recourse includes a mechanism for agency reconsideration of a party's designation, in which the designated party may either submit evidence that shows an insufficient basis for the designation or propose remedial steps that would negate the designation.¹⁶⁸

Importantly, however, the rules promulgated by OFAC require no transparency regarding what factors were taken into account prior to the designation or which may be taken into account on administrative reconsideration.¹⁶⁹ Therefore, any evidence submitted by the designated party is akin to a shot in the dark, hoping the evidence will satisfy OFAC's specific concerns.

The D.C. Court of Appeals has described the administrative reconsideration mechanisms provided by the OFAC regulations as "unlike the run-of-the-mill administrative proceeding," because "there is no adversary hearing, no presentation of what courts and agencies think of as evidence, [and] no advance notice to the entity affected by the Secretary's internal deliberations."¹⁷⁰ Further, there is no requirement for OFAC to provide proceedings akin to a trial or oral hearings.¹⁷¹ Under the limited procedural rights that the OFAC regulations provide, "listed persons are often in a position in which they are unable to refute rather than simply to deny the essential allegations made against them."¹⁷²

164. *See id.*

165. *See id.*

166. *See* 31 C.F.R. § 501 (2020).

167. *See id.* §§ 501.806, 501.807(a). The three grounds on which a request for administrative reconsideration by OFAC may be made are: (1) where a party to blocked transactions claims that the funds in question have been blocked due to mistaken identity, (2) where a person believes that a sufficient basis for the designation does not exist, or (3) where a person proposes to take remedial measures that they believe would negate the basis for the designation. *See Barnes, supra* note 36, at 197.

168. *See Filing a Petition for Removal from an OFAC List*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list> [<https://perma.cc/QDP4-ZPGM>] (last visited Nov. 3, 2020).

169. *See Barnes, supra* note 36, at 204.

170. *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 19 (D.C. Cir. 1999).

171. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003).

172. *Barnes, supra* note 36, at 206.

Moreover, it is unclear whether an individual must exhaust the administrative appeal process before seeking judicial review.¹⁷³ If a party is able to claim constitutional violations, however, any possible judicial review will be more substantive.

2. Violation of Due Process

If a listed party is able to avail itself of constitutional protections, the party may claim that the procedural inadequacies of the OFAC regulations violate its right to due process.¹⁷⁴ The due process clause of the Fifth Amendment to the U.S. Constitution provides that no person shall be deprived of property without the due process of law.¹⁷⁵ A court has held in a due process challenge that OFAC must provide notice of the nonclassified information underpinning the designation decision to a petitioner to whom the Constitution applies and must provide the designated party with an opportunity to present, in writing, evidence, or arguments to rebut the allegations made against them.¹⁷⁶ However, these requirements are subject to limitations in special circumstances. For example, the government may withhold unlimited evidence on which it has relied for designation purposes if the government determines the material is classified.¹⁷⁷

In *Al Haramain Islamic Foundation, Inc. v. United States Department of Treasury*,¹⁷⁸ plaintiff Al Haramain Islamic Foundation (“AHIF–Oregon”) was a nonprofit organization challenging OFAC’s determination to designate it an SDGT and the subsequent freezing of its assets (a process akin to SDN listing) due to allegations that the organization supported terrorists.¹⁷⁹ One of the main claims AHIF–Oregon made on appeal was that its constitutional right to due process had been violated by OFAC’s confidential designation process.¹⁸⁰ In *Al Haramain*, the Ninth Circuit analyzed the plaintiff’s due process claim under the *Mathews v. Eldridge*¹⁸¹ test, which is used for procedural due process claims.¹⁸² Under the *Mathews* balancing test, the court must weigh: “(1) [the person’s or entity’s] private property interest, (2) the risk of an erroneous deprivation of such interest through the procedures

173. James Killick et al., *Challenging Sanctions Designations: Politics and the Judiciary Collide*, in WHITE & CASE LLP, GLOBAL INVESTIGATIONS: READING THE SIGNALS 12, 15 (2014), https://www.whitecase.com/sites/whitecase/files/files/download/publications/whitecase_globalinvestigations_readingthesignals.pdf [https://perma.cc/M2CZ-7ESL].

174. See Barnes, *supra* note 36, at 206–07.

175. U.S. CONST. amend. V.

176. See *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 208–09 (D.C. Cir. 2001).

177. See *Al Haramain Islamic Found., Inc. v. Dep’t of Treasury*, 686 F.3d 965, 982 (9th Cir. 2012).

178. 686 F.3d 965 (9th Cir. 2012).

179. See *id.* at 971.

180. *Id.* at 970.

181. 424 U.S. 319 (1976).

182. *Al Haramain*, 686 F.3d at 979. The Supreme Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004), that the proper test for balancing national security interests with a person’s due process rights is the *Mathews* balancing test. *Id.*

used, as well as the value of additional safeguards, and (3) the Government's interest in maintaining its procedures, including the burdens of additional procedural requirements."¹⁸³

Pursuant to the *Mathews* test, the court recognized the substantial property interests of AHIF–Oregon, which OFAC's actions threatened.¹⁸⁴ Likewise, the court acknowledged the high risk of an erroneous deprivation where OFAC uses confidential information as a basis for an SDGT designation and asset freezing.¹⁸⁵ The court had previously held, with respect to undisclosed confidential information, that “the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error.”¹⁸⁶

AHIF–Oregon relied on this precedent in its argument that OFAC's use of confidential information in its designation was a *per se* violation of its right to due process.¹⁸⁷ The court disagreed with this interpretation.¹⁸⁸ Rather, the court found that using confidential information is only presumptively unconstitutional, with that presumption being rebuttable by the government in “the most extraordinary circumstances.”¹⁸⁹ Ultimately, the court found that the national security interests, provided for in the third factor of the *Mathews* balancing test, outweighed the countervailing concerns of the plaintiff's right to due process.¹⁹⁰

In *Al Haramain*, the Ninth Circuit found that the national security interests offered by OFAC were enough to outweigh the other *Mathews* factors. Essentially, the Ninth Circuit deferred to the executive's determination that AHIF–Oregon presented a national security risk.

3. The Nondelegation Doctrine

An alternate argument that an adversely affected party can make is that OFAC is exercising authority invalidly delegated by Congress to the executive branch.¹⁹¹ However, case law suggests this argument would likely fail.¹⁹² “U.S. courts have not been receptive to arguments that this Congressional oversight function is an insufficient control on delegated executive power and that the [IEEPA] is an unconstitutional delegation of

183. *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 589 (9th Cir. 1998) (citing *Mathews*, 424 U.S. at 334–35).

184. *Al Haramain*, 686 F.3d at 979–80 (“The private party's property interest is significant. By design, a designation by OFAC completely shuts all domestic operations of an entity. All assets are frozen. No person or organization may conduct any business whatsoever with the entity, other than a very narrow category of actions such as legal defense.”).

185. *See id.* at 980.

186. *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995).

187. *Al Haramain*, 686 F.3d at 982.

188. *Id.*

189. *Id.*

190. *See id.* at 982–83.

191. *See Barnes*, *supra* note 36, at 206.

192. *See, e.g., United States v. Mirza*, 454 F. App'x 249, 254 (5th Cir. 2011); *United States v. Amirmazmi*, 645 F.3d 564 (3d Cir. 2011), *cert. denied* 132 S. Ct. 347 (2011).

legislative authority to the Executive.”¹⁹³ Rather, courts find sufficient IEEPA’s envisaged congressional oversight of the executive through its reporting requirements.¹⁹⁴

C. Limited Judicial Review

If the adversely affected party is unsuccessful in its request for an administrative reconsideration of its case, the party may pursue judicial review of OFAC’s agency decision.¹⁹⁵

1. A Silent IEEPA

IEEPA does not explicitly provide for judicial review.¹⁹⁶ The law does not provide for or outline a clear standard by which courts should review OFAC regulations, policy statements, or enforcement, other than those provided for under the default standards of the Administrative Procedure Act (APA).¹⁹⁷ The APA does not explicitly furnish a cause of action, so any party seeking to challenge OFAC’s determination or enforcement would have to invoke another statute to challenge the action in court.¹⁹⁸ Significantly, IEEPA provides no such cause of action.¹⁹⁹ Therefore, a party can only challenge the procedure of the agency’s actions, rather than the merits of its decision.²⁰⁰

It has been argued that the omission of explicit judicial review provisions acts as a signpost to courts that the legislature did not contemplate extensive judicial review.²⁰¹ As such, courts may view the omission as further evidence that conducting a review of the merits of OFAC decisions is outside of their duty.²⁰²

2. What Is the Standard of Review?

Because IEEPA does not provide for judicial review independently, any action OFAC takes pursuant to IEEPA is reviewed according to the APA.²⁰³ Thus, courts review an OFAC designation or inclusion on the SDN List by examining whether the decision was arbitrary and capricious, an abuse of

193. Barnes, *supra* note 36, at 201.

194. *See supra* Part I.B.

195. *See* 5 U.S.C. § 706(2)(A).

196. *See* 50 U.S.C. § 1706.

197. *See* 5 U.S.C. § 706.

198. *See* *Califano v. Sanders*, 430 U.S. 99, 104 (1977).

199. *See* 50 U.S.C. § 4305.

200. *See* Louisa C. Slocum, Comment, *OFAC, The Department of State, and the Terrorist Designation Process: A Comparative Analysis of Agency Discretion*, 65 ADMIN. L. REV. 387, 406 (2013).

201. *See id.*

202. *See* *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 25 (D.C. Cir. 1999).

203. *See* Slocum, *supra* note 200, at 406.

discretion, or in violation of statutory authority.²⁰⁴ Moreover, any judicial review under this standard is circumscribed to a review of the administrative record.²⁰⁵ Indeed, the APA does not require agencies to hold a hearing or to make formal findings of fact when rendering any decisions.²⁰⁶ As such, unless some other applicable law would require it, courts must limit their review of OFAC actions to OFAC's administrative record and any contemporaneous addenda made by the agency.²⁰⁷

The D.C. Court of Appeals commented on this weak standard of review in *People's Mojahedin Organization of Iran v. United States Department of State*²⁰⁸: "We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. As we wrote earlier, the [administrative] record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected."²⁰⁹ Despite this recognition of the possible inadequacies of the administrative record, the court adhered to its limited function of review and deferred to the agency's determination in that case.²¹⁰

Similarly, the courts have been loath to substitute their judgment for the government's judgment as to what material should remain confidential in sanctions proceedings.²¹¹ The courts have accepted the argument that they are not best placed to determine which items of information should remain classified and which could be disclosed without risking national security.²¹²

In any review of agency action under the APA's arbitrary and capricious standard, courts need not find that the agency's decision is "the only reasonable one, or even that it is the result [the court] would have reached

204. See 5 U.S.C. § 706(2)(A)–(C). While the APA-outlined standards call for deference to all agencies in administrative law, agencies engaged in decisions about foreign affairs and national security receive an extremely deferential standard of review. See *Humanitarian L. Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000) (holding that where a "regulation involves the conduct of foreign affairs, we owe the executive branch even more latitude than in the domestic context"); see also *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 915 (N.D. Ohio 2009) ("Although arbitrary and capricious review is highly deferential to agencies, the government asserts an even higher degree of deference in the realm of foreign affairs.").

205. 8 U.S.C. § 1189(c)(2).

206. See *Camp v. Pitts*, 411 U.S. 138, 140–41 (1973).

207. See *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 606 F. Supp. 2d 59, 68 (D.D.C. 2009), *aff'd*, 638 F.3d 794 (D.C. Cir. 2011). The additional allowance permitting OFAC to amend the administrative record with an ex post justification for a listing essentially "allows the Executive to move the goalposts in response to a listed person's representations rather than presenting a clear case for the listed person to answer." Barnes, *supra* note 36, at 209.

208. 182 F.3d 17 (D.C. Cir. 1999).

209. *Id.* at 25.

210. *Id.* ("[The Secretary's] conclusion might be mistaken, but that depends on the quality of the information in the reports she received—something we have no way of judging.").

211. See, e.g., *Islamic Am. Relief Agency v. Gonzalez*, 477 F.3d 728, 738 (D.C. Cir. 2007); see also *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208–209 (D.C. Cir. 2001).

212. See cases cited *supra* note 211.

had the question arisen in the first instance in judicial proceedings.”²¹³ The reviewing court is not permitted to substitute its judgment for that of the presumably more expert agency.²¹⁴ In particular, courts reviewing OFAC determinations recognize a standard of high deference because OFAC acts “in an area at the intersection of national security, foreign policy, and administrative law.”²¹⁵

This deference to OFAC is consistent with a grander judicial tradition of truncating consideration of matters that implicate foreign affairs.²¹⁶ This judicial deference has been likened to a siren song to which federal judges are drawn when asked to rule on delicate or controversial matters.²¹⁷ However, this automatic deference may not always be justified.²¹⁸ Moreover, at least one scholar has argued that courts’ abdication of their responsibility to hear cases simply because the matter touches on foreign affairs is inconsistent with the Constitution.²¹⁹

III. MOVING TOWARD A BETTER SYSTEM

While the current system does not provide many options for recourse to individuals or companies caught in the crosshairs of conflicting secondary sanctions regimes, several solutions are possible that may change the current system for the better. Each of the possible solutions should not be viewed in isolation. A combination of efforts on the following fronts will be most successful in mitigating the confusion surrounding secondary sanctions.

A. Recommendations

The following recommendations are intended to improve the system of secondary sanctions. Through these recommendations for heightened

213. *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 422 (1983) (quoting *Unemployment Comp. Comm’n v. Aragon*, 329 U.S. 143, 153 (1946)).

214. *See Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep’t of Treasury*, 606 F. Supp. 2d 59, 68 (D.D.C. 2009), *aff’d*, 638 F.3d 794 (D.C. Cir. 2011).

215. *Islamic Am. Relief Agency*, 477 F.3d at 734; *see also* *Emergency Coal. to Defend Educ. Travel v. U.S. Dep’t of Treasury*, 498 F. Supp. 2d 150, 166 n.10 (D.D.C. 2007) (finding that “the regulations at issue here are entitled to an even greater measure of deference [than Chevron deference] because they relate to the exercise of the Executive’s authority in the realm of foreign affairs”).

216. MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS* 254 (2019). If a reprisal of the judiciary’s role is to occur, Professor Martin Flaherty outlines several regards in which the federal judiciary must recommit:

Such a recommitment first of all will mean hearing cases even though, or perhaps better, precisely because, they implicate foreign affairs. It will further require, once a case is taken up, “saying what the law is” without deferring to other parts of the government simply because the matter deals with foreign affairs.

Id.

217. *Id.* at 177.

218. *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

219. FLAHERTY, *supra* note 216, at 46 (observing that contrary to modern misunderstandings, the principle of separation of powers would apply to foreign affairs “as fully, if not more fully” than to domestic matters).

judicial review and increased agency transparency, individuals and business entities will have greater confidence in their operations around the world.

1. Heightened Judicial Review

While OFAC's actions may be challenged under an arbitrary and capricious review of the agency's determinations, such challenges have been largely unsuccessful.²²⁰ Similarly, the agency's lack of transparency in the sanctioning process may be alleged to violate either the constitutional protection of due process or the principle of nondelegation.²²¹ However, these challenges have also been largely unsuccessful.²²²

First, because IEEPA does not provide for judicial review,²²³ any challenge to OFAC's agency actions is reviewed pursuant to the APA.²²⁴ However, because the APA does not explicitly furnish a cause of action,²²⁵ and IEEPA does not provide one,²²⁶ the party seeking review can only challenge the procedure of the agency's actions, rather than the merits of its decision.²²⁷

While the APA acts as a fail-safe measure to ensure judicial review of agency actions where relevant statutes may not explicitly provide for such review, it is a weak fail-safe. Due to the minimal requirements within the APA for the agency record, any judicial review of an OFAC determination is based on a record that may be wholly unsatisfactory, lacking information to enable the adversely affected party to make arguments and present evidence.²²⁸

Moreover, IEEPA's omission of an explicit provision for judicial review signals to courts that the legislature may not have contemplated extensive judicial review because Congress would normally have provided for such in the relevant statute.²²⁹ Accordingly, courts may believe it is outside of their province to conduct reviews of the merits of OFAC decisions.²³⁰

Further, the lack of success in challenging OFAC's actions is partially due to the amount of deference afforded to the agency by the courts simply by virtue of OFAC operating in foreign affairs.²³¹ This high level of deference complicates and largely nullifies any legal challenges to OFAC's actions.²³²

220. *See supra* Part II.C.

221. *See supra* Part II.B.

222. *See supra* Parts II.B, II.C.

223. *See* 50 U.S.C. § 1706.

224. *See* 5 U.S.C. § 706(2)(A).

225. *See* *Califano v. Sanders*, 430 U.S. 99, 104 (1977).

226. 50 U.S.C. § 4305.

227. *See supra* note 204 and accompanying text.

228. *See supra* notes 204–05 and accompanying text.

229. *See supra* note 199 and accompanying text.

230. *See, e.g.,* *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 25 (D.C. Cir. 1999).

231. *See supra* note 215 and accompanying text.

232. *See supra* notes 215–16 and accompanying text.

The executive branch's assumption of the hegemonic role in American foreign relations should trigger the constitutional check of the other branches.²³³ Specifically, the federal judiciary can and should play a key role in balancing the power of the executive. The federal judiciary should halt its current trend of refusing to duly consider cases that implicate foreign affairs.²³⁴ Rather than automatic deference to the executive agency operating in foreign affairs, the federal judiciary should recognize the unique risk posed for adversely affected parties by an executive agency with unfettered discretion.²³⁵ It is incumbent upon the federal judiciary to reprise its role as a check on the executive branch's power in foreign affairs.²³⁶

To assist the federal judiciary in bucking its current trend of deference to agencies involved in foreign affairs, Congress could further amend IEEPA.²³⁷ In its current state, there is no explicit provision for judicial review and thus the default arbitrary and capricious review provided for in the APA applies.²³⁸ An amendment to IEEPA should provide explicitly for a searching judicial review of executive actions taken pursuant to the statute. With such an amendment, Congress would telegraph to the judiciary that OFAC's actions may warrant a more searching review, notwithstanding OFAC's role in foreign affairs.

2. Clearer Administrative Guidance and Heightened Transparency

In their current state, OFAC's procedures lack sufficient transparency, even under the APA, to allow for sufficient judicial review and appeal by materially harmed parties.²³⁹

Because OFAC has little incentive to self-adjust, as it continues operating unchecked by the courts, Congress may again assist in moving toward more transparency. In its current state, IEEPA allows the president a significant amount of discretion in economic sanctions.²⁴⁰ The president subsequently has delegated much of this power to OFAC.²⁴¹ A heightened standard of transparency could be exacted from OFAC if Congress were to recognize the delegation and explicitly provide for more transparent rulemaking procedures, including appeals processes for those targeted with secondary sanctions.

3. Alternative Solutions Under International Law

A possible alternative to domestic self-correction in the U.S. sanctions regime is one that utilizes the international institutions and treaties that the

233. *See supra* notes 218–19 and accompanying text.

234. *See id.*

235. *See supra* note 113 and accompanying text.

236. *See supra* note 218 and accompanying text.

237. *See supra* note 75 and accompanying text.

238. *See supra* Part II.C.

239. *See supra* note 168 and accompanying text.

240. *See supra* note 75 and accompanying text.

241. *See supra* note 79 and accompanying text.

United States was so critical in establishing. International treaties on trade and commerce may provide a viable path to avoiding a sanctions war. For example, Europe's complaint to the WTO and WTO-facilitated negotiations with the Clinton administration were successful in nullifying heavy-handed secondary sanctions.²⁴²

This multilateral approach is viable, but the alternative argument is that the United States is not actually engaging in reprehensible extraterritorial sanctioning but rather, simply benefiting from the indirect effect of businesses adhering to American foreign policy. Indeed, some argue that using economic sanctions is well within the sovereign authority of a nation and any indirect impact on international commerce is still preferable to the coercive use of force.²⁴³

B. Weighing the Recommendations: What Is Most Viable?

While international pressure and diplomacy have proven effective before,²⁴⁴ this Note argues that this is the least viable solution under the current circumstances. The United States is enjoying unprecedented domination of the global financial system and maintains its dominance in its rate of consumption of goods and services.²⁴⁵ This highly leveraged position allows the United States to confidently enact secondary sanctions that adversely impact its allies, without fear of damaging diplomatic retribution.²⁴⁶ It is unlikely the EU would successfully turn back the trend of increasingly common secondary sanctions while its businesses remain so heavily dependent on access to the U.S. markets.²⁴⁷

It is more likely that a combination of judicial, administrative, and legislative reform would be the most potent in improving the system of secondary sanctions. Mitigating the chilling effect that secondary sanctions and their conflict with European blocking regulations have had²⁴⁸ and threaten to have will involve proactive steps from within all three branches of the U.S. government. An explicit mandate for heightened judicial review of actions undertaken pursuant to IEEPA will require congressional amendment of the law. The judicial branch must follow suit and alter its tradition of automatic deference to the executive in matters of foreign affairs. Finally, the executive branch itself can alter its current procedures from within, increasing the transparency of OFAC's determinations and enforcement of secondary sanctions.

242. See GERANMAYEH & RAPNOUIL, *supra* note 26.

243. See Kaempfer & Lowenberg, *supra* note 101.

244. See *supra* notes 91–93 and accompanying text.

245. See *supra* note 46 and accompanying text.

246. See *supra* Part I.C.2.

247. See *supra* note 46 and accompanying text.

248. See *supra* note 126 and accompanying text.

CONCLUSION

Ultimately, the system surrounding secondary sanctions should be reformed. The system's lack of clarity and lack of sufficient judicial review is arguably unconstitutional. Moreover, parties with global operations face both uncertainty and potentially severe liability under the current state of the law. Recognizing that an increasing proportion of modern transactions involve myriad parties from many different countries, including those who may be affiliated with sanctioned nations, the United States should reform its current system to mitigate the confusion and risk associated with these transactions. The issue intensifies when this opaque system finds itself in direct conflict with European blocking regulations. This legal conflict with some of the United States's closest allies and trading partners should further motivate reform from within. Reform via heightened judicial review and clearer administrative procedures will encourage the flow of capital and goods and services, as well as improve relations with Europe.