The Blocking of Terrorist-Related Assets Under the International Emergency Economic Powers Act

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I. Introduction

In the wake of the terrorist attacks of September 11, 2001, the United States has embarked upon a vigorous, multifaceted campaign to eradicate the danger posed by Al Qaeda and other terrorist organizations.[1] The Bush administration has implemented a broad array of tactics to respond to the terrorist threat, including the aggressive investigation and arrests of those with suspected ties to terrorist groups,[2] heightened efforts to coordinate intelligence and policy with other nations,[3] and, of course, active military operations in Afghanistan.[4]

One important element of the campaign against terrorism has been the identification and freezing of money and other assets controlled by those connected with terrorist organizations.[5] On September 25, 2001, the United States announced an agreement with the other G-7 countries to implement "a coordinated campaign to freeze the assets of terrorist organizations."[6] Targeting terrorists' available sources of funding

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[1] *See generally* George W. Bush, Address to Congress of Sept. 21, 2001 (discussing the "comprehensive national strategy" being implemented to combat terrorism).

[2] *See, e.g.*, Don Van Natta, *A Nation Challenged: The Investigation*, N.Y. Times, Oct. 15, 2001, at A1.

[3] *See, e.g.*, Serge Schmemann, *A Nation Challenged: U.S. Realignment*, N.Y. Times, Oct. 5, 2001, at B3.

[4] *See, e.g.*, Patrick E. Tyler, *A Nation Challenged: The Attack*, N.Y. Times, Oct. 8, 2001, at A1.

[5] *See, e.g.*, Joseph Kahn & Judith Miller, *A Nation Challenged: The Assets*, N.Y. Times, Oct. 13, 2001, at A1

[6] *See* Martin Crutsinger, *United States Wins Support From Wealthy Allies for Coordinated Attack on Terrorist Assets*, A.P., Sept. 25, 2001.

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for further attacks and for other operations is thus an important component of the national defense after September 11 and part of an internationally coordinated effort to freeze terrorist assets worldwide.

President Bush launched the United States's current effort to block terrorist assets by issuing Executive Order 13,224 on September 23, 2001.[7] That order invoked the President's authority, *inter alia*, under the International Emergency Economic Powers Act (the "IEEPA")[8] by declaring a national emergency in light of "the continuing and immediate threat of further attacks on United States nationals or the United States."[9] To respond to this emergency, the President ordered the blocking of assets of twenty-seven designated entities,[10] and delegated to the Secretaries of Treasury and State the authority to block the assets of other individuals or organizations meeting stated criteria.[11]

While the government's use of the IEEPA during the current crisis has demonstrated that statute's enormous utility in responding to national emergencies, it has also highlighted the corresponding dangers associated with the breadth of the power to block assets. The substantive provisions of the IEEPA purport to grant the President very broad powers over the use of any property in which a foreign nation or national has any interest in times of emergency. At least one administration official has testified that Executive Order 13,224 "greatly expands the geographic scope of previous orders" targeting the assets of terrorists.[12] And section 106 of the landmark United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001[13] (the "USA PATRIOT Act"), enacted after the President signed Executive Order 13,224, has amended the IEEPA in ways that arguably expand the President's authority even further, allowing the blocking of assets "during the pendency of an investigation",[14] and providing that in court challenges to IEEPA asset

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[7] *See* 66 Fed. Reg. 49,079 (2001).

[8] 50 U.S.C. §§ 1701-06.

[9] 66 Fed. Reg. at 49,079.

[10] *See id.* § 1(a), Annex.

[11] *See id.* § 1(b), (c), (d).

[12] Jimmy Gurule, Treasury Undersecretary for Enforcement, testimony before the House Committee on Financial Services of Oct. 3, 2001.

[13] Pub. L. No. 107-56, § 106, 115 Stat. 272, 277 (2001).

[14] *Id.* § 106(1)(B)(i), 115 Stat. at 277.

blocking orders, records containing classified information "may be submitted to the reviewing court ex parte and in camera."[15] Unsurprisingly, the implementation of the administration's asset blocking policies has already spawned litigation and raised concerns about excessive executive power in this area.[16]

This paper surveys the constitutional issues surrounding the validity of executive asset freezes under the IEEPA, as amended by the USA PATRIOT Act. Section II sets out the legislative and regulatory framework surrounding the blocking of assets in times of national emergency under the IEEPA, and discusses President Bush's order respecting asset blocking in the campaign against terrorism. Section III discusses the various constitutional issues involved with the exercise of this power. The paper concludes that while the sweep of IEEPA authority is broad and not entirely untroubling, the President's powers to block assets are constitutional. While the scope of the President's powers in the national defense and foreign policy areas is murky, courts are unlikely to find that the IEEPA exceeds constitutional bounds.

II. Statutory and Regulatory Framework

The modern American regime of economic sanctions in response to national emergencies began with the passage of the Trading With the Enemy Act of 1917[17] (the "TWEA") shortly after the United States's entry into the first world war.[18] While the TWEA originally applied only in wartime,[19] it was later amended to apply either during wars or presidentially declared states of emergency. The statute authorized the President to "regulate, . . . prevent or prohibit" transactions involving property in which a foreign nation or a foreign national has an interest.[20]

The Congress in 1977 amended the TWEA so as to limit its prospective application to periods of declared war, but grandfathered certain existing sanctions

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[15] *Id.* § 106(c), 115 Stat. at 278.

[16] *See, e.g.*, *Global Relief Found. v. O'Neill*, Civ. A. No. 02C-0674, filed Jan. 28, 2002 (N.D. Ill.).

[17] *See* 40 Stat. 411 (codified as amended at 50 U.S.C. app. §§ 1-44).

[18] *See Regan v. Wald*, 468 U.S. 222, 226 n.2 (1984).

[19] *See id.* n.2.

[20] *See id.* n.2; 50 U.S.C. app § 5(b)(1)(B).

programs, such as the Cuban embargo.[21] At the same time, it enacted the IEEPA to address the President's powers in this area in future non-wartime emergencies. While the substantive delegations of power differ in certain details between the two statutes (*e.g.*, the President is not granted the authority in the IEEPA to tike title to foreign assets, to regulate wholly domestic transactions, to regulate gold, or to seize records),[22] as a general matter the powers conveyed by the statutes "are essentially the same."[23] Indeed, the original language of IEEPA section 203(a)(1)(B) tracked that of TWEA section 5(b)(1)(B) verbatim, authorizing the President to:

> investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States . . . .[24]

The Supreme Court has long recognized that this "sweeping statutory language"[25] authorizes the blocking or freezing of assets as a species of "regulat[ion of] . . . exercising any right . . . with respect to . . . property."[26] These powers may be exercised once the president declares a national emergency "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[27] Presidents have periodically exercised these conferred powers by blocking the assets of organizations and individuals in a variety of national emergencies since the enactment of the TWEA.[28]

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[21] *See Regan*, 468 U.S. at 227-29.

[22] *See id.* at 228 n.8.

[23] *Id.* at 228.

[24] 50 U.S.C. § 1702(a)(1)(B) (IEEPA); 50 U.S.C. app. § 5(b)(1)(B) (TWEA).

[25] *Regan*, 468 U.S. at 232 n.16.

[26] *See Orvis v. Brownell*, 345 U.S. 183, 187-88 (1953); *Propper v. Clark*, 337 U.S. 472, 483-84 (1949).

[27] 50 U.S.C. § 1701(a).

[28] *See Regan*, 468 U.S. at 245-46 (Blackmun, J., dissenting) (collecting declared TWEA emergencies).

For purposes of these broad powers, there is no statutory definition of the words "property" or "interest." The governing regulations, however, broadly construe "property" to include not only financial assets, but also "any other property, real, personal, or mixed, tangible or intangible."[29] And the regulations define "interest" to include any "interest of any nature whatsoever, direct or indirect."[30] In short, then, the IEEPA as construed by the executive branch effectively authorizes the President fully to control, during declared emergencies, any property in which a foreigner or foreign government has an interest.

In October 2001, the Congress, in the USA PATRIOT Act, amended IEEPA section 203(a)(1)(B), adding the phrase "block during the pendency of an investigation" to the enumeration of approved powers over property.[31] The statute thus provides for the President's emergency control over property even before a final determination has been made regarding the status of that property or its owner.[32] The USA PATRIOT Act also provides that the government may submit to courts reviewing IEEPA asset blocks classified agency records "ex parte and in camera."[33]

Executive Order 13,224 supplies the requisite declaration of emergency and sets the contours of asset blocking for purposes of the current struggle against terrorism. In that order, the President found "that because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions" were warranted to respond to the terrorist threat.[34] The President thus designated twenty-seven persons and other entities as terrorists or supporters of terrorism, and ordered that their property within the jurisdiction of the United States be blocked.[35] Executive Order 13,224 further delegated authority to the Secretaries of State and the Treasury to block the assets of

[29] *See* 31 C.F.R. §§ 500.311-12.

[30] 31 C.F.R. § 500.311.

[31] Pub. L. No. 107-56, § 106(1)(B)(i), 115 Stat. 272, 277 (2001).

[32] It is immaterial for purposes of this paper whether this modification enlarged or merely clarified the President's preexisting powers under the IEEPA.

[33] *Id.* § 106(1)(c), 115 Stat. at 278.

[34] 66 Fed. Reg. at 49079.

[35] *Id.* § 1(a).

other persons and entities upon making appropriate factual findings regarding them.[36] "[F]oreign persons" who "have committed or . . . pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States" may be designated for asset blocking,[37] as may be "persons," foreign or domestic, who "act for or on behalf of" or are "owned or controlled by" terrorists designated in the order, or who "assist in, sponsor, or provide . . . support for," or are "otherwise associated with" such designated terrorist entities.[38] The President authorized the Secretary of the Treasury to promulgate "rules and regulations" to implement the order, and "to employ all powers granted to the President by IEEPA."[39] Through its Office of Foreign Asset Control, the Treasury Department has implemented such general regulations,[40] and the administration has exercised its powers under the executive order to block the assets of a number of entities.

The Office of Foreign Asset Control has implemented a variety of regulations respecting IEEPA asset blocks.[41] The regulations set out procedures under which the owner of blocked assets can request a license to engage in transactions involving blocked property.[42] The regulations also allow such owners to petition for "administrative reconsideration" of a blocking order.[43]

III. The Constitutionality of the President's Asset Blocking Power Under the IEEPA

The question of the constitutionality of the President's asset blocking powers subsumes two inquiries. First, one must determine whether those powers are within the scope of his constitutional authority, either under Article II or under a constitutionally valid congressional conferral of power under the IEEPA. Second, if the first criterion is

[36] *See id.* at 49079-80, § 1(b), (c), (d).

[37] *Id.* at 49079, § 1(b).

[38] *Id.* at 49079-80, § 1(c), (d).

[39] *Id.* at 49081, § 7.

[40] *See* 31 C.F.R. pt. 500.

[41] *See id*.

[42] *See id.* §§ 501.801-802.

[43] *Id.* § 501.807.

satisfied, one must determine whether the exercise of that power violates any prohibitive provision of the Constitution.

A. The Scope of the President's Constitutional Authority

Because the allocation of the government's powers respecting foreign policy between the two political branches, and the scope of those powers in the aggregate, are notoriously ill-defined,[44] evaluating the constitutionality of the asset blocking power cannot be reduced solely to determining whether the relevant provisions of the IEEPA are constitutional. Rather, the inherent scope of the executive authority must be considered as a possible supplement to the congressionally delegated powers. While the precedents in this area do not allow for certain conclusions,[45] general principles that can be drawn from several Supreme Court cases strongly suggest that executive branch asset blocking in keeping with the IEEPA is a constitutional exercise. It is particularly useful to contrast the Court's analyses in two leading cases in this area, *Youngstown Sheet & Tube Co. v. Sawyer*[46] and *Dames & Moore v. Regan.*[47]

Youngstown involved a challenge to the constitutionality of President Truman's seizure of steel mills as an emergency measure during the Korean War.[48] The Court held that the President had exceeded his constitutionally enumerated powers and invaded the area of congressional responsibility.[49] While the opinion of the Court is terse, the concurring opinion of Justice Jackson in that case is particularly illuminating for present purposes, and has since been adopted by the Court as an "analytically useful" method of

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[44] *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."); H. Jefferson Powell, "The President's Authority Over Foreign Affairs: An Executive Branch Perspective," 67 Geo. Wash. L. Rev. 527-29 (1999) (noting widespread disagreement among commentators).

[45] *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) ("We attempt to law down no general 'guidelines' covering other situations . . . .").

[46] 343 U.S. 579 (1952).

[47] 453 U.S. 654 (1981).

[48] *See* 343 U.S. at 582.

[49] *See id.* at 585-89.

analysis.[50] Justice Jackson opined that the scope of presidential power is generally directly proportional to the degree of congressional acquiescence.[51] Thus, the President's "authority is at its maximum" where he acts pursuant to statute, or with the implied consent of the Congress.[52] Under such circumstances, any ruling that the President's action is *ultra vires* "usually means that the Federal Government as an undivided whole lacks power" to carry out the challenged measure.[53] Presidential power is at its most uncertain in the "zone of twilight" where the Congress is silent on the subject.[54] There, the outcome is — unhelpfully — "likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[55] Finally, where the President acts against the express desires of Congress, "his power is at its lowest ebb."[56] Justice Jackson concluded that President Truman's seizure of the mills fell into the third category,[57] and that it was unconstitutional.[58]

At the other pole of presidential authority is *Dames & Moore*, which rejected a challenge to President Carter's nullification of attachments and liens on Iranian property in the United States, and President Reagan's suspension of claims against Iran in the Claims Tribunal, pursuant to the IEEPA in the wake of the hostage crisis.[59] The Court upheld the constitutionality of both actions, finding the former to be expressly authorized by the Congress in the IEEPA,[60] and the latter to be within the discretion of the President

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[50] *Dames & Moore*, 453 U.S. at 669.

[51] *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

[52] *Id.* (Jackson, J., concurring).

[53] *Id.* at 636-37 (Jackson, J., concurring).

[54] *Id.* at 637 (Jackson, J., concurring).

[55] *Id.* (Jackson, J., concurring).

[56] *Id.* (Jackson, J., concurring).

[57] *See id.* at 639 (Jackson, J., concurring).

[58] *See id.* at 654-55 (Jackson, J., concurring).

[59] *See* 453 U.S. at 662-63, 666.

[60] *See id.* at 674.

in light of the general congressional approvals of "a broad scope for executive action in circumstances such as those presented in th[at] case."[61] The Court emphasized that "[t]hough the IEEPA was enacted to provide for some limitation on the President's emergency powers, Congress stressed that '[n]othing in this act is intended . . . to interfere with the authority of the President to [block assets].'"[62]

In light of these cases, the general executive power to block the assets of foreign terrorists within the jurisdiction of the United States is clearly constitutional. The power is directly conveyed by statute, bringing the power within the most expansive category of Justice Jackson's sliding scale.[63] *Dames & Moore* characterized such congressional approval as "[c]rucial,"[64] and used it as the central basis for distinguishing *Youngstown*.[65] Moreover, the presidential conduct at issue in an asset blocking order is substantially less intrusive than the physical seizure and occupation of property rejected by the Supreme Court in *Youngstown*. Unsurprisingly in light of these principles, courts have routinely approved the general asset blocking power as a legitimate exercise of presidential power.[66]

The constitutionality of the power to block assets during the mere pendency of an investigation, conferred in section 106 of the recent USA PATRIOT Act, is less certain. During the investigation of an entity, and before the executive has rendered any final decision with respect to the entity's coverage under the statute or the need for a blocking of assets, it is not entirely clear that there has yet been a sufficient determination of need

[61] *Id.* at 677.

[62] *Id.* at 681-82 (ellipsis and brackets in *Dames & Moore*) (quoting S. Rep. No. 95-466, at 6 (1977), U.S. Code Cong. & Admin. News, 1977, pp. 4540, 4544).

[63] *See Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring).

[64] 453 U.S. at 680.

[65] *See, e.g., id.* at 686 ("In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.").

[66] *See, e.g., Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 701-02 (D.C. Cir. 1994); *Miranda v. Sec'y of Treasury*, 766 F.2d 1, 3 (1st Cir. 1985); *IPT Co. v. United States Dep't of Treasury*, No. 92 Civ. 5542, 1992 WL 212437, at *1 (S.D.N.Y. Aug. 25, 1992).

to bring the case within the government's emergency powers. The specific presidential determination of actual exigency was a concern of *Dames & Moore*[67] and other cases.[68]

In the aggregate, however, the relevant factors in the constitutional analysis suggest that even the interim blocking of assets during the pendency of an investigation is likely within the proper scope of the President's constitutional authority. That the Congress expressly delegated this power to the President requires that the power be allowed unless it is wholly outside of the bounds of the government's powers to effectuate foreign policy, a determination courts are typically reluctant to make.[69] Moreover, the temporary character of the investigatory asset blocking further brings it within the presumptively acceptable limits of the President's powers.[70] And the obvious practical need to implement asset blocking measures in a timely way likely suffices to satisfy constitutional requirements.

In short, the President's authority, under the IEEPA and his own Article II powers, to block the assets of terrorist-related individuals and organizations is within the scope of his proper constitutional authority, both generally and with respect to entities subject to a pending investigation. Nonetheless, the power may still be unconstitutional if it violates one of the constitutional constraints on government action.

B. Possible Constitutional Limitations Upon the Asset-Blocking Power

1. Due Process Clause

The government's use of asset blocking in the war on terrorism has been challenged by property owners as purportedly violating the Due Process Clause[71] in several respects. As a general matter, however, and absent some case-specific wrongdoing on the part of the Office of Foreign Asset Control or the Federal Bureau of Investigation, the Due Process Clause does not present any systematic impediment to the ordinary exercise of the power.

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[67] *See* 453 U.S. at 688 (emphasizing that holding extends only to situations where the challenged conduct "has been determined to be a necessary incident" to foreign policy).

[68] *Regan*, 468 U.S. at 243 (requiring "adequate basis" for exigency determination).

[69] *See, e.g., Dames & Moore*, 453 U.S. at 674.

[70] *Youngstown*, for example, invalidated a permanent seizure of property. *See* 343 U.S. at 583.

[71] U.S. Const. amend. V.

a. Lack of Pre-Blocking Hearing

The government generally does not afford hearings to suspected terrorist-related individuals or entities before effecting a blocking of their assets. President Bush specifically authorized this practice in Executive Order 13,224, noting that "because of the ability to transfer funds or assets instantaneously, prior notice to [designated] persons of measures to be taken pursuant to this order would render these measures ineffectual."[72] Owners of blocked assets have occasionally raised due process challenges to this practice.

As a general matter, the Due Process Clause requires that a "hearing must be provided before the deprivation at issue takes effect"[73] except where exigent circumstances preclude such a pre-deprivation hearing.[74] The circumstances ordinarily surrounding IEEPA asset blocks, however, squarely fit the ordinary criteria for dispensing with a hearing before action is taken. For example, *Calero-Toledo v. Pearson Yacht Leasing Co.*,[75] which upheld the constitutionality of a Puerto Rican statute allowing the seizure of assets without a pre-seizure hearing,[76] held that the circumstances discussed in Executive Order 13,224 are sufficient to withhold a hearing until after assets are frozen. The Court noted that where a statute serves a significant public purpose and involves action initiated by government officials rather than private parties, "preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized . . . will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given."[77] These principles apply *a fortiori* in the context of a mere blocking, which is a weaker measure than seizure.[78]

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[72] Executive Order 13,224, 66 Fed. Reg. at 49081 § 10.

[73] *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972).

[74] *See, e.g., id.* at 90-91; *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993).

[75] 416 U.S. 663 (1974).

[76] *See id.* at 676-77.

[77] *Id.* at 679.

[78] *See also, e.g., Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240-41 (1988) ("An important government interest, accompanied by an assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.").

The validity of foregoing a hearing before blocking the assets of terrorist-affiliated organizations is further underscored by the fact that the national security of the United States is unquestionably at issue in this context. "[N]o governmental interest is more compelling than the security of the Nation,"[79] and this type of exigency supplies the strongest possible basis for allowing a hearing only after assets are blocked. In light of these principles, courts addressing due process challenges to this feature of asset blocks have approved the government's prerogative to dispense with pre-deprivation hearings.[80]

b. Due Process Constraints Against Blocking Itself

Apart from the timing of the hearing, litigants have sometimes challenged the constitutionality of asset freezes as themselves deprivations of property without due process of law under both "substantive" and procedural due process. Such challenges do not have merit.

On substantive due process challenges to asset blocking orders, courts properly require only that an IEEPA asset freeze be "rationally related to a legitimate government objective" in order to survive due process scrutiny.[81] This is a weak standard that is easily satisfied in these cases.[82]

Relatedly, the administrative review procedure prescribed by the regulations in IEEPA asset blocks does not violate the requirements of procedural due process. It is well settled that the initial administrative adjudication of charges "does not violate the Administrative Procedure Act, and . . . does not violate due process of law."[83] And there

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[79] *Haig v. Agee*, 453 U.S. 290, 307 (1981).

[80] *See, e.g.*, *Milena Ship Mgmt. Co. v. Newcomb*, 995 F.2d 620, 624 (5th Cir. 1993) ("OFAC had to act quickly following the issuance of the Executive Orders; delay would have allowed the assets to leave the United States, thereby thwarting the purpose of the Orders."); *Palestine Info. Office v. Shultz*, 853 F.2d 932, 942-43 (D.C. Cir. 1988); *IPT Co. v. United States Dep't of Treasury*, No. 92 Civ. 5542, 1994 WL 613371, at *6 (S.D.N.Y. Nov. 4, 1994).

[81] *E.g.*, *Miranda*, 766 F.2d at 6; *cf. United States v. Sperry Corp.*, 493 U.S. 52, 64 (1989) (applying rationality standard to due process challenge to assessment of fees against awards made by Iran-United States Claims Tribunal).

[82] *See Miranda*, 766 F.2d at 6.

[83] *Withrow v. Larkin*, 421 U.S. 35, 56 (1975); *see generally Eldridge v. Matthews*, 424 U.S. 319, 333-35 (1976); *Nat'l Council of Resistence of Iran v. Dep't of State*, 251 F.3d

is no question that owners of blocked property have full recourse to the courts to obtain judicial review of IEEPA blocking orders under the ordinary provisions of the Administrative Procedure Act.

c. Use of Ex Parte, In Camera Evidence

The USA PATRIOT Act provides that the government may submit classified record evidence in a court action challenging an IEEPA blocking order in camera and ex parte.[84] This procedure deprives the plaintiff of access to potentially key evidence in the case, and might implicate the Due Process Clause.

While the case law involving the foregoing statutory provision is scant, some instruction is available from decisions regarding the use of ex parte, in camera evidence in related contexts. For example, a number of cases have addressed the circumstances under which the suppression of electronic surveillance may be adjudicated without disclosing the materials to the private litigant.

As a general matter, the courts have agreed that ex parte in camera hearings are generally disfavored.[85] Nonetheless, the Supreme Court has indicated approval of such hearings on evidentiary suppression motions involving electronic surveillance where the court finds the surveillance to be lawful and where the excluded party's constitutional rights are otherwise adequately protected by the court's procedures.[86] Lower courts have

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192, 209 (D.C. Cir. 2001) (upholding Office of Foreign Asset Control administrative procedures); *Buttrey v. United States*, 690 F.2d 1170, 1179 (5th Cir. 1982) (holding that agency's procedures provided the plaintiff with "a great deal of 'process'").

[84] *See* 50 U.S.C. § 1702(c), *added by* Pub. L. 107-56, § 106(1)(c), 115 Stat. at 278.

[85] *See, e..g., United States v. Southard*, 700 F.2d 1, 11 (1st Cir. 1983) (noting that such procedures "should only be used when necessary"); *but see United States v. Butenko*, 494 F.2d 593, 607 (3d Cir. 1974) (holding that confidential evidence pertaining to foreign policy "counsels court-ordered disclosure only in the most compelling situations").

[86] *Compare Taglianetti v. United States*, 394 U.S. 316, 317 (1969) (per curiam) ("Nothing . . . requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance."), *and Giordano v. United States*, 394 U.S. 310, 314 (1969) (per curiam) (Stewart, J., concurring) ("We have nowhere indicated that th[e preliminary determination of constitutionality] cannot appropriately be made in ex parte, in camera proceedings."), *with Alderman v. United States*, 394 U.S. 165 (1969) (requiring disclosure of unlawful surveillance materials). *See generally Butenko*, 494 F.2d at 597-98.

permitted the use of such extraordinary procedures in suppression hearings in criminal cases where necessary to safeguard materials whose secrecy is required for purposes of national security.[87] In cases under the Foreign Intelligence Surveillance Act,[88] the courts have been similarly unanimous in approving nondisclosure of confidential government materials where necessary.[89] Moreover, several courts have authorized ex parte in camera hearings in the context of challenges to designations as terrorist organizations of entities under the Antiterrorism and Effective Death Penalty Act.[90] While these cases typically offer little in the way of legal analysis, their very unanimity powerfully demonstrates the courts' willingness to defer to the executive's need for secrecy in matters of foreign policy.[91]

2. Takings Clause

The Fifth Amendment prohibits the government from taking private property for public use without just compensation.[92] The President's blocking of private assets might

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[87] *See, e.g.*, *United States v. Ajlouny*, 629 F.2d 830, 839 (2d Cir. 1980); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593, 607 (3d Cir. 1974); *United States v. bin Laden*, 126 F. Supp. 2d 264, 286-87 (S.D.N.Y. 2000).

[88] 50 U.S.C. § 1801 *et seq.*

[89] *See, e.g.*, *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1601 (2001); *United States v. Johnson*, 952 F.2d 565 (1st Cir. 1991); *United States v. Isa*, 923 F.2d 1300 (8th Cir. 1991); *United States v. Hamide*, 914 F.2d 1147 (9th Cir. 1990); *United States Badia*, 827 F.2d 1458 (11th Cir. 1987); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984); *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982); *United States v. Nicholson*, 955 F. Supp. 588 (E.D. Va. 1997); *United States v. Spanjol*, 720 F. Supp. 55 (E.D. Pa. 1989).

[90] *See, e.g.*, *Nat'l Council of Resistance of Iran v. Dep't of State*. 251 F.3d 192, 208-09 (D.C. Cir. 2001) ("This is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect."); *accord People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17, 19 (D.C. Cir. 1999) ("Any classified information on which the Secretary relied in bringing about these consequences may continue to remain secret, except from certain members of Congress and this court.").

[91] *See also, e.g.*, *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) ("The Government has a compelling interest in protecting . . . the secrecy of information important to our national security . . . .").

[92] U.S. Const. amend. V.

be thought to implicate this compensation requirement. The cases to address this issue in the context of asset blocks under the TWEA or the IEEPA have rejected taking claims, usually relying primarily upon the temporary character of the deprivation of rights.[93] *Chang v. United States*[94] is typical in its handling of the issue. In *Chang*, the Federal Circuit observed that "a valid governmental exercise of its constitutional power to regulate commerce with foreign nations can have the consequential effect of altering the obligations of preexisting contracts without giving rise to a taking."[95] But the opinion offered little analysis to support its conclusion that this unexceptional fact precluded a finding of a taking in the case at hand. The cases are correct, however, in their conclusion that the Takings Clause does not apply to asset blocks under the IEEPA.

Several threshold issues could obviate the need for any Takings Clause analysis in particular types of cases. First, the Takings Clause by its terms is limited to the taking of "private property," and thus has no application to the blocking of the assets of a foreign government.[96] Thus, foreign sovereigns have no Takings Clause challenges to IEEPA asset blocks. Second, it is at least possible that property associated with foreign terrorists would be construed as "enemy property" pursuant to a doctrine generally invoked during wartime under which the property of military adversaries can be seized or destroyed without implicating the Takings Clause.[97] In either of these situations, there would be no compensation obligation under the Takings Clause regardless of the nature of the executive's action.

Even apart from these threshold issues, the blocking of property under the IEEPA is unlikely to constitute a taking. While the cases addressing the question have typically

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[93] *See Miranda*, 766 F.2d at 5 ("The mere fact that Miranda, in normal circumstances, may have been able to enjoy the use of this property does not transform the blocking of these assets into a taking without just compensation in violation of the fifth amendment."); *Tran Qui Than v. Regan*, 658 F.2d 1296, 1304 (9th Cir. 1981) ("We conclude that the blocking program with respect to the assets at issue does not constitute a constitutionally cognizable taking without just compensation."); *Nielsen v. Sec'y of Treasury*, 424 F.2d 833, 843-44 (D.C. Cir. 1970) ("The blocking of accounts is generally recognized as different from taking, though raising a problem of taking if continued indefinitely." (internal quotation marks omitted))

[94] 859 F.2d 893 (Fed. Cir. 1988).

[95] *Id.* at 897.

[96] *See, e.g., Phillips v. Washington Legal Found.*, 524 U.S. 156, 163-72 (1998).

[97] *See, e.g., Juragua Iron Co. v. United States*, 212 U.S. 297, 305-06 (1909).

not developed a full analysis of the issue, a Takings Clause challenge to an IEEPA asset blocking would presumably be treated under the rubric of alleged regulatory takings[98] as opposed to that of actual seizures. Such measures involve neither transfers of title to the United States nor physical occupations of property by the government, but rather regulatory use limitations imposed to further a public purpose — the national security.[99]

IEEPA asset blocks are unlikely to be deemed regulatory takings. Because such blocks are temporary,[100] they would fall outside of any per se taking rule even though they may wholly deprive the property of any useful value during the period of the blocking, as the Supreme Court recently held in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[101] And such measures would likely withstand review under the case-by-case standard prescribed in that case for the reasons articulated by the pre-*Lucas* cases in the IEEPA context. They do not involve a vesting of title in the government, and serve a vital function in effectuating foreign policy — an area where courts are often particularly reluctant to impose Takings Clause obligations upon the government.[102]

3. Bill of Attainder Clause

Finally, some owners of blocked property have argued that IEEPA sanctions constitute unconstitutional bills of attainder.[103] That argument has not met with success in the courts, and is unlikely to do so in the future.

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[98] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). "Prior to Justice Holmes's exposition" in that case," it was generally thought that the Takings Clause reached only a direct appropriation of property or the functional equivalent of a practical ouster of the owner's possession." *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (internal quotation marks, brackets, and citations omitted).

[99] It is not entirely clear that challenges to asset blocking measures would be treated under the ordinary regulatory taking analysis, however. Unlike in the case of an ordinary regulatory taking, the deprivation of property rights in an asset blocking order is not incidental to some broader regulatory measure, but is the entire purpose of the challenged action.

[100] *See, e.g.*, *Tran Qui Than*, 658 F.2d at 1304.

[101] 535 U.S. __, No. 00-1167, slip op. at 33 (April 23, 2002).

[102] *See, e.g.*, *United States v. Pac. R.R.*, 120 U.S. 227, 234 (1887) (recognizing military necessity defense to taking claims).

[103] *See* U.S. Const. art. I, § 9, cl. 3 ("No bill of attainder shall be passed.").

A bill of attainder is a statute "that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[104] Thus, any bill of attainder challenge faces the obvious hurdle that IEEPA blocking orders are implemented by the executive, not the legislature. The enactment by the Congress of the IEEPA did not itself cause the statute to be applied to any individual, but merely authorized presidential action in times of declared emergencies. And the executive branch application that does make such individual applications does not fall within the clause.[105]

A bill of attainder challenge would face the additional obstacle of having to demonstrate that an asset block is punitive. Generally, actions are more likely to be deemed punitive if they are of a type that has been historically understood as punishment for purposes of the clause,[106] or if its purpose is primarily punitive.[107] An asset block does not meet either of these criteria, and is unlikely to be deemed unconstitutional punishment under the Bill of Attainder Clause.

Finally, the few cases applying the Bill of Attainder Clause to IEEPA asset blocks have rejected that challenge.[108] The constitutional prohibition against bills of attainder has no application to presidential powers under the IEEPA, and such challenges are unlikely to be accepted by courts.

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[104] *Selective Serv. Sys. v. Minnesota PIRG*, 468 U.S. 841, 846-47 (1984).

[105] *See, e.g.*, *Walmer v. United States Dep't of Defense*, 52 F.3d 851, 855 (10th Cir. 1995) ("The bulk of authority suggests that the constitutional prohibition against bills of attainder applies to legislative acts, not to regulatory actions of administrative agencies." (citations omitted)); *Dehainaut v. Pena*, 32 F.3d 1066, 1070-71 (7th Cir. 1994). Indeed, as noted above in Part II, it is unclear the extent to which the President's actions are properly understood to rest upon the IEEPA in any event, as opposed to his powers as chief executive and commander-in-chief of the armed forces under Article II.

[106] *See, e.g.*, *Selective Service Sys.*, 468 U.S. at 852.

[107] *See, e.g.*, *id.* at 855 & n.15.

[108] *See Paradissiotis v. Rubin*, 171 F.3d 983, 988-89 (5th Cir. 1999); *Cooperativa Muliactiva de Empleados de Distribuidores de Drogas "Coopservir LTDA" v. Newcomb*, Civ. A. No. 98-0949, slip op. at 10-12 (D.D.C. Mar. 29, 1999), *aff'd mem.* 221 F.3d 195 (2000).

IV. Conclusion

While the President's power to order the blocking of private assets during times of declared national foreign policy emergencies is unquestionably broad, it is likely to withstand constitutional scrutiny by the courts. The power is within the affirmative power of the President in light of the IEEPA and his own Article II powers. And no constitutional limitation on government power precludes such action.

Two IEEPA provisions that raise some heightened danger of unconstitutionality — both added to the statute by the USA PATRIOT Act — are the extension of the blocking power to property during the pendency of an ongoing investigation of its owner and the allowance of ex parte, in camera evidence in judicial review proceedings. Nonetheless, even these provisions are likely to be sustained by the courts.

The power to block assets that might otherwise support terrorist attacks on American citizens and property is a vital weapon in the United States arsenal in the current campaign against terrorism. The President's use of the emergency powers conferred by the IEEPA is an appropriate and constitutional response to the grave dangers presently confronting the nation.

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